**BEFORE THE INDEPENDENT COMMISSIONER**
**HEARING PANEL**

| | |
|---|---|
| **UNDER** | the Resource Management Act 1991 (RMA) |
| **IN THE MATTER** | an application by Dunedin City Council for various permits for the purpose of the construction and operation of a landfill at Smooth Hill, Dunedin (RM20.280). |

# CASEBOOK ON BEHALF OF OTAGO REGIONAL COUNCIL
**24 May 2022**

Canterbury Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: M A Mehlhopt
(michelle.mehlhopt@wynnwilliams.co.nz)

WYNNWILLIAMS

**CASEBOOK**

**BEFORE THE ENVIRONMENT COURT**
**I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2019] NZEnvC 42**

| | |
|---|---|
| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of appeals pursuant to clause 14 of the First Schedule to the Act |
| BETWEEN | ALLIANCE GROUP LIMTIED |
| | (ENV-2016-CHC-112) |
| | and other appeals listed in the schedule on the last page |
| | Appellants |
| AND | OTAGO REGIONAL COUNCIL |
| | Respondent |

| | |
|---|---|
| Court: | Environment Judge J R Jackson |
| Hearing: | In Chambers at Christchurch |
| Date of Decision: | 15 March 2019 |
| Date of Issue: | 15 March 2019 |

---

**PROCEDURAL DECISION**

---

A: Subject to Order [C], under section 279(1) and section 290 of the Resource Management Act I direct that unless an application is made under [C] by **5 April 2019**, the Otago Regional Council should by consent amend:

(1) Chapter 3 of the proposed Otago Regional Policy Statement as set out in Schedule "A" to this decision; and

(2) The "Implementation and Glossary" as set out in Schedule "B".

B: I rule that:

(1) the parties have not responded to all the matters raised in the Minute of 31 August 2018; and

(2) *prima facie* the purpose of the Act is not achieved by the proposed Otago Regional Policy Statement when read as a whole with the partly operative RPS.

C: The court reserves leave for any party to apply to remedy any possible defects, incompleteness or uncertainty in the pORPS identified in the Minute of 31 August 2018 or raised in the Reasons below either by:

(1) amending proposed Chapter 3; or

(2) by directions under section 293 of the Act.

D: I direct that by **Friday 29 March 2019** the Council must lodge a memorandum advising whether there are any outstanding matters in relation to the proposed Otago Regional Policy Statement.

## REASONS

### Introduction

[1] On 6 July 2018 the Otago Regional Council ("ORC") lodged a consent memorandum with the Registrar about Chapter 3 of the proposed Otago Regional Policy Statement.

[2] In June and July 2018 the court issued consent orders in respect of Chapters 4 and 5 (subject to outstanding, unresolved appeals on Chapter 5).

[3] In a Minute dated 31 August 2018, I asked parties to consider (amongst other matters) issues in relation to objectives 3.1 and 3.2 as well as policies 3.1.7 and 3.2.12(a).

[4] The ORC has responded on some matters (and raised a further issue) in memoranda dated 28 September 2018, 19 November 2018 and 11 January 2019 but has simply omitted to act on others in the Minute of 31 August 2018.

[5] Despite that, it seems that the ORC has slightly jumped the gun. On 12 December 2018, the ORC approved part of the proposed Regional Policy Statement to become operative from 14 January 2019. From this point I will refer to the partly operative regional policy statement as "the PORPS" and the proposed regional policy statement as "the pORPS", and both together as "the RPS". I emphasise that a Regional Council is entitled to do that, but wish to record that it may have created other problems for itself.

**Unresolved issues**

Relationship between the chapters of the RPS

[6] The main issue is the relationship between the chapters of the pORPS as raised in [23] and [24] of the court's Minute of 31 August 2018 and not responded to.

[7] The issue is of some importance given that (operative) objective OS 3 is that "sufficient land is managed and protected for economic production". To achieve the purpose of the RMA this would at first sight need to be subject (I tentatively assume) to the "bottom lines" required by (*inter alia*) section 6 RMA as particularised in Chapter 3 of the PORPS. The court suggested, in [5] of the 31 August 2018 Minute, an answer to this issue (but it is not a very robust solution since it relies on an explanation rather than an amended objective).

[8] The court is aware of the two sentences in Part A (page 9 of the partly operative ORPS) which state: "All provisions of the RPS must be considered together. The outcomes interrelate, and no hierarchy exists between them". However, "considering" provisions together is not the same as "achieving objectives at the same time", which is what (it appears) is required under section 5 of the Act and under the NZCPS. The difficulty is that an objective or policy which merely needs to be considered may be rejected whereas the "bottom-lines" in section 52(b) and section 66(c) for example need to be achieved. It seems to me that on its face the RPS does not achieve the purpose of the Act.

[9] Also, Chapter 3 seems to equate all values in sections 5 and 6 (except for section 6(e) which has its own chapter). The various differences in approach in section 6 RMA

– having regard to appropriateness in some cases, significance in others – is not reflected in the policies of the RPS.

Other issues raised in the Minute of 31 August 2018

[10] The parties do not appear to have answered the court's other queries in its Minute of 31 August 2018. In particular (referring to the relevant paragraphs of that Minute):

- [7] soil values (policy 3.1.7); and
- [8] to [11] surf breaks.

The explanation in the ORC memorandum of 11 January 2019

[11] In its 11 January 2019 memorandum the ORC spent about nine pages explaining policy 5.4.8(2).

[12] I do not understand the explanation and I still do not understand the policy. However, my current intention is to approve the policy, noting my concern that uncertainty in the policy may need to allow resort to Part 2 of the Act in difficult cases.

Outstanding values of ONLs

[13] I raise a question about the *vires* of these policies. The most relevant policies in the proposed RPS are contained in the consent memorandum ("cm") of the parties to appeals on that document. I quote the marked-up version along with the decisions version ("dv") policies that were appealed but eventually unchanged from the dv. The policies are:

> **(dv) Policy 3.2.3 Identifying outstanding natural features, landscapes and seascapes**
> Identify areas and values of outstanding natural features, landscapes and seascapes, using the attributes in Schedule 3.
>
> **(cm) Policy 3.2.4 Managing outstanding natural features, landscapes and seascapes**
>
> Protect, enhance ~~and~~ or restore outstanding natural features, landscapes and seascapes, by all of the following:
>
> a) In the coastal environment, avoiding adverse effects on the outstanding values of the natural feature, landscape or seascape;

ba) ~~Avoiding adverse effects on~~ Beyond the coastal environment, maintaining ~~those~~ the outstanding values ~~which contribute to the significance~~ of the natural feature, landscape or seascape;

c~~b~~) Avoiding, remedying or mitigating other adverse effects;

~~c) Recognising and providing for the positive contributions of existing introduced species to those values;~~

~~d) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;~~

d~~e~~) Encouraging enhancement of those areas and values ~~which~~ that contribute to the significance of the natural feature, landscape or seascape.

**(dv) Policy 3.2.5 Identifying highly valued natural features, landscapes and seascapes**

Identify natural features, landscapes and seascapes, which are highly valued for their contribution to the amenity or quality of the environment but which are not outstanding, using the attributes in Schedule 3.

**(cm) Policy 3.2.6 Managing highly valued natural features, landscapes and seascapes**

~~Protect~~ Maintain or enhance highly valued natural features, landscapes and seascapes by all of the following:

a) Avoiding significant adverse effects on those values ~~which~~ that contribute to the high value of the natural feature, landscape or seascape ;

b) Avoiding, remedying or mitigating other adverse effects ;

~~c) Recognising and providing for positive contributions of existing introduced species to those values;~~

~~d) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;~~

c~~e~~) Encouraging enhancement of those values ~~which~~ that contribute to the high value of the natural feature, landscape or seascape.

The issue relates to policy 3.2.4 on outstanding natural landscapes ("ONLs") and features. This policy does not protect ONLs in themselves but their "outstanding values". That immediately raises a question[1] about how the "outstanding values" of an ONL can be isolated and whether they should be. I would have preferred submissions on the legality and/or completeness/certainty of this policy. It seems to me that an outstanding … "landscape" under the RMA may be more than the sum of its values.

Are there other outstanding issues?

[1] I am indebted to my colleague Judge Hassan for asking this question (in proceedings on the proposed Queenstown Lakes District Plan).

[14] Finally, the outstanding consent memoranda that were on hold and are now being (provisionally) resolved by the court are 'Chapter 3' and 'Implementation and Glossary'. The Council needs to advise the court if there are further outstanding topics (other than those awaiting decisions). For example an asterisk to the PORPS refers to various methods still being subject to challenge.

[15] I also note that, the Council's 11 January 2019 memorandum confirmed the final wording of objective 3.1. This memorandum was not, however, signed by all the parties. The Council confirmed that all parties who had an interest in Chapter 3 were consulted but I will reserve leave for any party to advise the court if they have any issues with the final wording.

**Reservation of leave**

[16] I will reserve leave for any party to apply further if they wish to resolve any one or more of the issues raised above.

[17] I should add that I do not wish to be seen as encouraging (or discouraging) applications under the leave reserved in Order [C]. Even if parties consider after reading this decision that the RPS is incomplete, or uncertain (or possibly illegal) in parts, they may prefer to raise these issues in the future in more focused cases where the alleged defect is squarely before the relevant local authority or the courts. Indeed that may be a preferable course of action. However fairness to parties who have not had the time to think about these issues, or the expertise to guide them, requires that I reserve such leave.

For the court:


**J R Jackson**
**Environment Judge**

**Schedule**

AYRBURN FARM DEVELOPMENT LIMITED AND BRIDESDALE FARM DEVELOPMENTS LIMITED

(ENV-2016-CHC-108)

CLUTHA DISTRICT COUNCIL

(ENV-2016-CHC-105)

DARBY PLANNING LP

(ENV-2016-CHC-110)

DUNEDIN CITY COUNCIL

(ENV-2016-CHC-084)

ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

(ENV-2016-CHC-122)

FEDERATED FARMERS OF NEW ZEALAND INCORPORATED

(ENV-2016-CHC-120)

HENLEY DOWNS LAND HOLDINGS LIMITED

(ENV-2016-CHC-111)

HORTICULTURE NEW ZEALAND

(ENV-2016-CHC-114)

OCEANA GOLD NEW ZEALAND LIMITED

(ENV-2016-CHC-103)

OTAGO WATER RESOURCE USERS GROUP

(ENV-2016-CHC-124)

PIONEER ENERGY LIMITED

(ENV-2016-CHC-121)

PORT OTAGO LIMITED

(ENV-2016-CHC-86)

QUEENSTOWN AIRPORT CORPORATION LIMITED

(ENV-2016-CHC-117)

RAVENSDOWN LIMITED

(ENV-2016-CHC-85)

REAL JOURNEYS LIMITED

(ENV-2016-CHC-109)

REMARKABLES PARK LIMITED AND QUEENSTOWN PARK LIMITED

(ENV-2016-CHC-119)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

(ENV-2016-CHC-102)

TRANSPOWER NEW ZEALAND LIMITED

(ENV-2016-CHC-113)

TRUSTPOWER LIMITED

(ENV-2016-CHC-82)

WISE RESPONSE INCORPORATED

(ENV-2016-CHC-106)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

## SCHEDULE A

### *PART B Chapter 3 Otago has high quality natural resources and ecosystems*

*People and communities need to sustainably ~~The sustainable~~ manage~~ment of~~ the environment~~:~~ ~~including safeguarding~~ Safeguarding the life-supporting capacity of natural resources and recognising the intrinsic values of ecosystems~~, is~~ are essential to provide for the current and future wellbeing of people and communities.*

*The economy, particularly primary production, tourism, and mineral and petroleum exploration and extraction, strongly relies on the quantity and quality of natural resources and the ecosystem services they provide.*

*This chapter begins with the recognition and maintenance of all natural resources. The second part focuses on the identification, protection, and enhancement of natural resources that are nationally or regionally important. This chapter is not concerned with sustaining mineral resources for future generations.*

#### *Objective 3.1 The values (including intrinsic values) of ecosystems and natural resources are recognised~~,~~ and maintained, ~~and~~/or enhanced where degraded*

#### *Policy 3.1.1 Fresh water*

*Safeguard the life-supporting capacity of fresh water and manage fresh water to:*

*a) Maintain good quality water and enhance water quality where it is degraded, including for:*

*i. Important recreation values, including contact recreation; and,*

*ii. Existing drinking and stock water supplies;*

*b) Maintain or enhance aquatic:*

*i. Ecosystem health;*

*ii. Indigenous habitats; and,*

*iii. Indigenous species and their migratory patterns.*

*c) Avoid aquifer compaction and seawater intrusion;*

*d) Maintain or enhance, as far as practicable:*

*i. Natural functioning of rivers, lakes, and wetlands, their riparian margins, and aquifers;*

*ii. Coastal values supported by fresh water;*

*iii. The habitat of trout and salmon unless detrimental to indigenous biological diversity; and*

*iv. Amenity and landscape values of rivers, lakes, and wetlands;*

*e) Control the adverse effects of pest species, prevent their introduction and reduce their spread;*

*f) Avoid, remedy or mitigate the adverse effects of natural hazards, including flooding and erosion; and,*

*g) Avoid, remedy or mitigate adverse effects on existing infrastructure that is reliant on fresh water.*

~~*Manage fresh water to achieve all of the following:*~~

~~*a) Maintain or enhance ecosystem health in all Otago aquifers, and rivers, lakes, wetlands, and their margins;*~~

~~*b) Maintain or enhance the range and extent of habitats provided by fresh water, including the habitat of trout and salmon;*~~

~~*c) Recognise and provide for the migratory patterns of freshwater species, unless detrimental to indigenous biological diversity;*~~

~~*d) Avoid aquifer compaction and seawater intrusion in aquifers;*~~

~~*e) Maintain good water quality, including in the coastal marine area, or enhance it where it has been degraded;*~~

~~*f) Maintain or enhance coastal values;*~~

~~*g) Maintain or enhance the natural functioning of rivers, lakes, and wetlands, their riparian margins, and aquifers;*~~

~~*h) Maintain or enhance the quality and reliability of existing drinking and stock water supplies;*~~

~~*i) Recognise and provide for important recreation values;*~~

~~*j) Maintain or enhance the amenity and landscape values of rivers, lakes, and wetlands;*~~

~~*k) Control the adverse effects of pest species, prevent their introduction and reduce their spread;*~~

~~*l) Avoid, remedy or mitigate the adverse effects of natural hazards, including flooding and erosion;*~~

~~*m) Avoid, remedy, or mitigate adverse effects on existing infrastructure that is reliant on fresh water.*~~

***Policy 3.1.2 Beds of rivers, lakes, wetlands, and their margins***

*Manage the beds of rivers, lakes, wetlands, their margins, and riparian vegetation to:*

*a) Safeguard the life supporting capacity of fresh water;*

*b) Maintain good quality water, or enhance it where it has been degraded;*

*c) Maintain or enhance bank stability;*

*d) Maintain or enhance ecosystem health and indigenous biological diversity*

*e) Maintain or enhance, as far as practicable:*

*i. Their natural functioning and character; and*

*ii. Amenity values;*

*f) Control the adverse effects of pest species, prevent their introduction and reduce their spread; and,*

*g) Avoid, remedy or mitigate the adverse effects of natural hazards, including flooding and erosion.*

~~*Manage the beds of rivers, lakes, wetlands, their margins, and riparian vegetation to achieve all of the following:*~~

~~*a) Maintain or enhance their natural functioning;*~~

~~*b) Maintain good water quality, or enhance it where it has been degraded;*~~

~~*c) Maintain or enhance ecosystem health and indigenous biological diversity;*~~

~~*d) Maintain or enhance natural character;*~~

~~*e) Maintain or enhance amenity values;*~~

~~f) Control the adverse effects of pest species, prevent their introduction and reduce their spread;~~

~~g) Avoid, remedy or mitigate the adverse effects of natural hazards, including flooding and erosion;~~

~~h) Maintain or enhance bank stability.~~

***Method 3:*** ***Regional Plans***

*Method 3.1.3, Method 3.1.13*

***Method 4:*** ***City and District Plans***

*Method 4.1.3, Method 4.1.15*

***Method 6 :*** ***Non RMA Strategies and Plans***

*Method 6.7*

***Policy 3.1.3 Water allocation and use***

*Manage the allocation and use of fresh water by undertaking all of the following:*

*a) Recognising and providing for the social and economic benefits of sustainable water use;*

*b) Avoiding over-allocation, and phasing out existing over-allocation, resulting from takes and discharges;*

*c) ~~Ensure~~ Ensuring the efficient allocation and use of water by ~~undertaking all of the following~~:*

*~~a~~i) Requiring that the ~~volume of~~ water allocated does not exceed what is necessary for its efficient use;*

*~~b~~ii) Encouraging the development or upgrade of infrastructure that increases ~~use~~ efficiency; ~~.~~*

*iii. Providing for temporary dewatering activities necessary for construction or maintenance.*

***Policy 3.1.4 Water shortage***

*Manage for water shortage by undertaking all of the following:*

*a) Encouraging land management that improves moisture capture, infiltration, and soil moisture holding capacity.*

*b~~a~~) Encouraging collective coordination and rationing of the take and use of water when river flows or aquifer levels are lowering, to avoid breaching any minimum flow or aquifer level restriction to optimise use of water available for taking;*

*c~~b~~) Providing for~~Encouraging~~ water harvesting and storage, subject to allocation limits and flow management, to reduce demand on water bodies during periods of low flows.*

***Policy 3.1.5 Coastal water***

*Manage coastal water to:*

*a) Maintain coastal water quality or enhance it where it has been degraded;*

*b) Maintain healthy coastal ecosystems, the range of indigenous habitats provided by the coastal marine area, and the migratory patterns of indigenous coastal water species or enhance these values where they have been degraded;*

*c) Maintain or enhance important recreation values;*

d) Maintain or enhance, as far as practicable:

i. Coastal values; and

ii. The habitats provided by the coastal marine area for trout and salmon unless detrimental to indigenous biological diversity.

e) Control the adverse effects of pest species, prevent their introduction and reduce their spread.

~~Manage coastal water to achieve all of the following:~~

~~a) Maintain or enhance healthy coastal ecosystems;~~

~~b) Maintain or enhance the range of habitats provided by the coastal marine area, including the habitat of trout and salmon;~~

~~c) Recognise and provide for the migratory patterns of coastal water species unless detrimental to indigenous biological diversity;~~

~~d) Maintain coastal water quality or enhance it where it has been degraded;~~

~~e) Maintain or enhance coastal values;~~

~~f) Recognise and provide for important recreation values;~~

~~g) Control the adverse effects of pest species, prevent their introduction and reduce their spread.~~

***Policy 3.1.7 Soil values***

Safeguard the life-supporting capacity of soil and manage soil to:

a) Maintain or enhance as far as practicable

i. Soil biological diversity;

ii. Biological activity in soils;

iii. Soil function in the storage and cycling of water, nutrients, and other elements through the biosphere;

iv. Soil function as a buffer or filter for contaminants resulting from human activities, including aquifers at risk of leachate contamination;

v. Soil fertility where soil is used for primary production;

b) Where a) is not practicable, minimise adverse effects;

c) Recognise that urban and infrastructure development may result in loss of soil values.

d) Control the adverse effects of pest species, prevent their introduction and reduce their spread;

e) Retain the soil mantle where it acts as a repository of historic heritage objects unless an archaeological authority has been obtained.

~~Manage soils to achieve all of the following:~~

~~Maintain or enhance their life-supporting capacity;~~

~~a) Maintain or enhance soil biological diversity;~~

~~b) Maintain or enhance biological activity in soils;~~

~~c) Maintain or enhance soil function in the storage and cycling of water, nutrients, and other elements through the biosphere;~~

~~d) Maintain or enhance soil function as a buffer or filter for contaminants resulting from human activities, including aquifers at risk of leachate contamination;~~

~~e) Maintain or enhance soil resources for primary production;~~

~~g) Maintain the soil mantle where it acts as a repository of historic heritage objects unless an archaeological authority has been obtained;~~

~~h) Avoid the creation of contaminated land;~~

~~i) Control the adverse effects of pest species, prevent their introduction and reduce their spread.~~

***Policy 3.1.8 Soil erosion***

*Minimise soil erosion resulting from activities, by undertaking all of the following:*

*a) Using appropriate erosion controls and soil conservation methods;*

*b) Maintaining vegetative cover on erosion prone land;*

*c) Remediating land where significant soil erosion has occurred;*

*d) Encouraging activities that enhance soil retention.*

***Policy 3.1.9 Ecosystems and indigenous biological diversity***

*Manage ecosystems and indigenous biological diversity in terrestrial, freshwater and marine environments to:*

*a) Maintain or enhance:*

*i. Ecosystem health and indigenous biological diversity including habitats of indigenous fauna;*

*ii. Biological diversity where the presence of exotic flora and fauna supports indigenous biological diversity;*

*b) Maintain or enhance as far as practicable:*

*i. Areas of predominantly indigenous vegetation;*

*ii. Habitats of trout and salmon unless detrimental to indigenous biological diversity;*

*iii. Areas buffering or linking ecosystems;*

*c) Recognise and provide for:*

*i. Hydrological services, including the services provided by tall tussock grassland;*

*ii. Natural resources and processes that support indigenous biological diversity;*

*d) Control the adverse effects of pest species, prevent their introduction and reduce their spread.*

~~*Manage ecosystems and indigenous biological diversity in terrestrial, freshwater and marine environments to achieve all of the following:*~~

~~*a) Maintain or enhance ecosystem health and indigenous biological diversity;*~~

~~*b) Maintain or enhance biological diversity where the presence of exotic flora and fauna supports indigenous biological diversity;*~~

~~*c) Maintain or enhance areas of predominantly indigenous vegetation;*~~

~~*d) Recognise and provide for important hydrological services, including the services provided by tussock grassland;*~~

~~*e) Recognise and provide for natural resources and processes that support indigenous biological diversity;*~~

~~f) Maintain or enhance habitats of indigenous species and the habitat of trout and salmon that are important for recreational, commercial, cultural or customary purposes;~~

~~g) Control the adverse effects of pest species, prevent their introduction and reduce their spread.~~

***Policy 3.1.10 Biodiversity in the coastal environment***

*Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:*

*a) Areas of predominantly indigenous vegetation in the coastal environment;*

*b) Habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;*

*c) Indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;*

*d) Habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;*

*e) Habitats, including areas and routes, important to migratory species; and*

*f) Ecological corridors, and areas important for linking or maintaining biological values identified under this policy.*

***Policy 3.1.1312 Environmental enhancement***

*Encourage, facilitate and support activities ~~which~~ that contribute to ~~enhancing~~ the resilience and enhancement of the natural environment, by ~~one or more of the following~~ where applicable:*

*a) Improving water quality and quantity;*

*b) Protecting or restoring habitat for indigenous species;*

*c) Regenerating indigenous species;*

*d) Mitigating natural hazards;*

*e) Protecting or restoring wetlands;*

*f) Improving the health and resilience of:*

*i. Ecosystems supporting indigenous biological diversity ;*

*ii. Important ecosystem services, including pollination;*

*g) Improving access to rivers, lakes, wetlands and their margins, and the coast;*

*h) Buffering or linking ecosystems, habitats and areas of significance that contribute to ecological corridors;*

*i) Controlling pest species.*

***Objective 3.2 Otago's significant and highly-valued natural resources are identified, and protected, or enhanced where degraded***

***Issue:***

*Otago has significant and highly-valued natural resources. These include outstanding natural features, landscapes, seascapes, indigenous biological diversity , water bodies and soil, which all have intrinsic value and help to create the region's identity and support the region's wellbeing.*

*These highly valued resources can become degraded if they are not adequately protected from inappropriate subdivision, use and development, and so deserve a greater degree of recognition.*

*Resource degradation can adversely affect the social, cultural and economic wellbeing of people and communities.*

***Policy 3.2.1 Identifying significant indigenous vegetation and habitats***

*Identify areas and values of significant indigenous vegetation and significant habitats of indigenous fauna, using the attributes detailed in Schedule 4.*

***Policy 3.2.2 Managing significant indigenous vegetation and habitats***

*Protect and enhance areas of significant indigenous vegetation and significant habitats of indigenous fauna, by all of the following:*

*a) In the coastal environment, avoiding adverse effects on:*

- *i. The values that contribute to the area or habitat being significant;*
- *ii. Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;*
- *iii. Taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;*
- *iv. Indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;*
- *v. Habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;*
- *vi. Areas containing nationally significant examples of indigenous community types; and*
- *vii. Areas set aside for full or partial protection of indigenous biological diversity under other legislation;*

*~~a~~b) ~~Avoiding adverse effects on~~ Beyond the coastal environment, and in the coastal environment in significant areas not captured by a) above, maintaining those values that contribute to the area or habitat being significant;*

*~~b~~c) Avoiding significant adverse effects on other values of the area or habitat;*

*dc) Remedying when other adverse effects cannot be avoided;*

*~~c~~ed) Mitigating when other adverse effects cannot be avoided or remedied ;*

*fe) Encouraging enhancement of those areas and values ~~which~~ that contribute to the area or habitat being significant;*

*~~d~~gf) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread.*

***Policy 3.2.4 Managing outstanding natural features, landscapes and seascapes***

*Protect, enhance ~~and~~ or restore outstanding natural features, landscapes and seascapes, by all of the following:*

*a) In the coastal environment, avoiding adverse effects on the outstanding values of the natural feature, landscape or seascape;*

*~~a~~b) ~~Avoiding adverse effects on~~ Beyond the coastal environment, maintaining ~~those~~ the outstanding values ~~which contribute to the significance~~ of the natural feature, landscape or seascape;*

*c~~b~~) Avoiding, remedying or mitigating other adverse effects ;*

*~~c) Recognising and providing for the positive contributions of existing introduced species to those values;~~*

*~~d) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;~~*

*d~~e~~) Encouraging enhancement of those areas and values ~~which~~ that contribute to the significance of the natural feature, landscape or seascape.*

***Policy 3.2.6 Managing highly valued natural features, landscapes and seascapes***

*~~Protect~~ Maintain or enhance highly valued natural features, landscapes and seascapes by all of the following:*

*a) Avoiding significant adverse effects on those values ~~which~~ that contribute to the high value of the natural feature, landscape or seascape ;*

*b) Avoiding, remedying or mitigating other adverse effects ;*

*~~c) Recognising and providing for positive contributions of existing introduced species to those values;~~*

*~~d) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;~~*

*c~~e~~) Encouraging enhancement of those values ~~which~~ that contribute to the high value of the natural feature, landscape or seascape.*

***Policy 3.2.7 Landward extent of the coastal environment***

*Identify the landward extent of the coastal environment, recognising that the coastal environment ~~consists of one or more of the following~~ includes:*

*a) The coastal marine area;*

*b) Islands within the coastal marine area;*

*c) Areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;*

*d) Areas at risk from coastal hazards;*

*e) Coastal vegetation and the habitat of indigenous coastal species including migratory birds;*

*f) Elements and features that contribute to the natural character, landscape, visual qualities or amenity values;*

*g) Items of cultural and historic heritage in the coastal marine area or on the coast;*

*h) Inter-related coastal marine and terrestrial systems, including the intertidal zone; and*

*i) Physical resources and built facilities, including infrastructure, that have modified the coastal environment.*

***Policy 3.2.8 Identifying high and outstanding natural character in the coastal environment***

*Identify areas and values of high and outstanding natural character in the coastal environment, ~~where one or more of the following attributes are met~~ which 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, estuaries, 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;*

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

***Method 2:*** ***Regional, City and District Council Relationships***

*Method 2.1, Method 2.2*

***Method 3:*** ***Regional Plans***

*Method 3.1.5*

***Method 4:*** ***City and District Plans***

*Method 4.1.~~2~~3, Method 4.2.2*

***Method 5:*** ***Research, Monitoring and Reporting***

*Method 5.1.2 b.*

***Policy 3.2.9 Managing the outstanding natural character of the coastal environment***

*Preserve or enhance the outstanding natural character of the coastal environment, by all of the following:*

a) *Avoiding adverse effects on those values ~~which~~ that contribute to the outstanding natural character of an area;*

b) *Avoiding, remedying or mitigating other adverse effects;*

c) *Recognising and providing for the contribution of existing introduced species to the natural character of the coastal environment;*

d) *Encouraging enhancement of those values ~~which~~ that contribute to the outstanding natural character of an area;*

e) *Controlling the adverse effects of pest species, prevent their introduction and reduce their spread.*

***Policy 3.2.10 Managing the high natural character of the coastal environment***

*Preserve or enhance the high natural character of the coastal environment, by all of the following:*

a) *Avoiding significant adverse effects on those values ~~which~~ that contribute to the high natural character of an area;*

b) *Avoiding, remedying or mitigating other adverse effects;*

c) *Recognising and providing for the contribution of existing introduced species to the natural character of the coastal environment;*

d) *Encouraging enhancement of those values ~~which~~ that contribute to the high natural character of an area;*

e) *Controlling the adverse effects of pest species, prevent their introduction and reduce their spread.*

***Policy 3.2.13 Identifying outstanding freshwater bodies***

*Identify freshwater bodies where any one or more of the following significant values are outstanding:*

*a) Naturalness ;*

*b) Amenity or landscape values;*

*c) Kāi Tahu cultural values;*

*d) Recreational values;*

*e) Ecological values;*

*f) Hydrological values.*

***Policy 3.2.14 Managing outstanding freshwater bodies***

*Protect outstanding freshwater bodies by all of the following:*

*a) ~~Avoiding~~ Maintaining the values that ~~significant adverse effects on those values which~~ contribute to the water body being outstanding;*

*b) Avoiding, remedying or mitigating other adverse effects on the water body ;*

*c) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;*

*d) Encouraging enhancement of those values ~~which~~ that contribute to the water body being outstanding.*

***Policy 3.2.15 Identifying the significant values of wetlands***

*Identify the significant values of wetlands, having regard to all of the following:*

*a) Degree of naturalness;*

*b) Amenity or landscape values;*

*c) Kāi Tahu cultural values;*

*d) Recreational values;*

*e) Ecological function and values;*

*f) Hydrological function and values;*

*g) Geomorphological features and values.*

***Policy 3.2.16 Managing the values of wetlands***

*Protect the function and values of wetlands by all of the following:*

*a) ~~Avoiding significant adverse effects on~~ Maintaining the significant values of ~~the~~ wetlands;*

*b) Avoiding, remedying or mitigating other adverse effects;*

*c) Controlling the adverse effects of pest species, preventing their introduction and reducing their spread;*

*d) Encouraging enhancement ~~which~~ that contributes to the values of the wetland.*

*~~e)~~ Encouraging the rehabilitation of degraded wetlands.*

***Policy 3.2.17 Identifying significant soil***

*Identify areas of soil that are significant ~~according to one or more of,~~ using the following criteria:*

a) *Land classified as land use capability I, II and IIIe in accordance with the New Zealand Land Resource Inventory;*

b) *Degree of significance for primary production;*

c) *Significance for providing contaminant buffering or filtering services;*

d) *Significance for providing water storage or flow retention services;*

e) *Degree of rarity.*

***Policy 3.2.18 Managing significant soil***

*~~Protect~~ Manage areas of significant soil , by all of the following:*

*a) Maintaining those values which make the soil significant;*

*~~a) Avoiding significant adverse effects on those values which make the soil significant;~~*

*~~b) Avoiding, remedying or mitigating other adverse effects;~~*

*b)~~c)~~ Recognising that loss of significant soil to urban development ~~urban expansion on significant soils~~ may occur in accordance with any future development strategy ~~be appropriate due to location and proximity to existing urban development and infrastructure~~;*

*c)~~d)~~ Controlling the adverse effects of pest species, preventing their introduction and reducing their spread.*

***Method 3: Regional Plans***

*3.1.3 Policies 3.1.1, ~~3.1.2, and~~ to 3.1.5, and Policies 4.3.3, 4.4.1 and 4.4.3:*

*a. Manage land use and vegetation removal within the beds of lakes and rivers, wetlands, riparian areas, and in the coastal environment;*

*b. In appropriate circumstances, provide for activities that have a functional need to be located in the beds of rivers, lakes, wetlands, and their margins.*

*c.~~b.~~ Manage change in river morphology;*

*d.~~c.~~ Encourage restoration of water margins;*

*e.~~d.~~ Managing noise in the coastal marine area;*

*f.~~e.~~ Identify freshwater management units that include all freshwater bodies in Otago in accordance with the National Policy Statement for Freshwater Management 2014;*

*g.~~f.~~ Maintain good water quality and improve it where it is degraded.*

*h. Provide for resource users, people and communities that rely on fresh water within environmental limits;*

*i. Set limits and targets to give effect to the National Policy Statement for Freshwater Management 2014;*

***Method 4: City and District Plans***

*4.1.~~43~~ Policies 3.1.2, 3.1.9 and 3.2.2: by including provisions to:*

*a. ~~m~~Maintain or enhance ecosystems and biological diversity; ~~and to~~*

*b. ~~p~~Protect significant indigenous vegetation and significant habitats of indigenous fauna;~~:~~*

*c. Control the clearance or modification of indigenous vegetation and habitats of indigenous fauna;*

*4.1.15 Policy 3.1.2, 4.3.3, 4.4.1 and 4.4.3: by providing, in appropriate circumstances, for activities that have a functional need to be located in the beds of rivers, lakes, wetlands, and their margins.*

## *Schedule 3 Criteria for the identification of outstanding natural features, landscapes and seascapes, and highly valued natural features, landscapes and seascapes*

*The identification of natural features, landscapes and seascapes will ~~be based on, but not limited to,~~ have regard to the following criteria:*

| | |
|---|---|
| *1. Biophysical attributes* | *a. Natural science factors, including geological, topographical, ecological and dynamic components*<br>*b. The presence of water including in seas, lakes, rivers and streams*<br>*c. Vegetation (native and exotic)* |
| *2. Sensory attributes* | *a. Legibility or expressiveness—how obviously the feature or landscape demonstrates its formative processes*<br>*b. ~~Amenity~~ Aesthetic values including memorability and naturalness*<br>*c. Transient values including presence of wildlife or other values at certain times of the day or year*<br>*d. Wild or scenic values* |
| *3. Associative attributes* | *a. Whether the values are shared and recognised*<br>*b. Cultural and spiritual values for Kāi Tahu, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features*<br>*c. Historical and heritage associations* |

## *Schedule 4 Criteria for the identification of areas of significant indigenous vegetation and habitat of indigenous fauna*

*The identification of areas of significant indigenous vegetation and habitat of indigenous fauna are assessed against all of the following criteria. Areas will be considered significant where they meet one or more of the following criteria.*

| | |
|---|---|
| *1. Representativeness* | *An area that is an example of an indigenous vegetation type or habitat that is typical or characteristic of the natural diversity of the relevant ecological district or coastal marine biogeographic region. This may include degraded examples of their type or represent all that remains of indigenous vegetation and habitats of indigenous fauna in some areas.* |

| | |
|---|---|
| 2. *Rarity* | *An area that supports:*<br>a. *An indigenous species that is threatened, at risk, or uncommon, nationally or within an ecological district or coastal marine biogeographic region;*<br>b. *Indigenous vegetation or habitat of indigenous fauna that has been reduced to less than 20% of its former extent nationally, regionally or within a relevant land environment, ecological district, coastal marine biogeographic region or freshwater environment including wetlands;*<br>c. *Indigenous vegetation and habitats within originally rare ecosystems.* |
| 3. *Diversity* | *An area that supports a high diversity of indigenous ecosystem types, indigenous taxa or has changes in species composition reflecting the existence of diverse natural features or gradients. ~~vegetation and habitats of indigenous fauna or consists of a diverse range or sequence of interrelated vegetation and habitat types. The degree of diversity should be referenced to specific communities i.e. levels of diversity varying significantly between communities and habitat types.~~* |
| 4. *Distinctiveness* | *An area that supports or provides habitat for:*<br>a. *Indigenous species at their distributional limit within Otago or nationally;*<br>b. *Indigenous species that are endemic to the Otago region;*<br>c. *Indigenous vegetation or an association of indigenous species that is distinctive, of restricted occurrence, or has developed as a result of an unusual environmental factor or combinations of factors.* |
| 5. *Ecological Context* | *The relationship of the area with its surroundings, including:*<br>a. *An area that has important connectivity value allowing dispersal of indigenous vegetation and fauna between different areas;*<br>b. *An important buffering function that helps to protect the values of an adjacent area or feature;*<br>c. *An area that is important for indigenous fauna during some part of their life cycle, either regularly or on an irregular basis, e.g. for feeding, nesting, breeding, or refuges from predation.* |
| 6. *Coastal Environment* | *An area identified in accordance with Policy 11 of the NZCPS.* |

*This schedule applies to indigenous vegetation and habitat of indigenous fauna in the terrestrial, coastal and marine environments.*

*The Regional Council holds additional information to inform decision making on these criteria including the rationale for criteria and examples of areas representing these criteria.*

## SCHEDULE B

***Method 2.1.3***

2.1 *Regional, city and district councils together will:*

*2.1.3* *Apply an integrated management approach to address the relationship between land use and both fresh and coastal water.*

***Method 2.2.3***

2.2 *Regional, city and district councils may:*

*2.2.3* *Delegate or transfer any one or more of their functions, powers or duties from one local authority to another in accordance with section 33 of the RMA; and where this provides an ~~efficient and~~ effective service.*

***Method 3.1.3***

*Objectives, policies and methods to implement the following policies:*

*3.1.3* *Policies 3.1.1, ~~3.1.2, and~~ to 3.1.5, and Policies 4.3.3, 4.4.1 and 4.4.3:*

*a.* *Manage land use and vegetation removal within the beds of lakes and rivers, wetlands, riparian areas, and in the coastal environment;*

*b.* *In appropriate circumstances, provide for activities that have a functional need to be located in the beds of rivers, lakes, wetlands, and their margins.*

*c.~~b.~~* *Manage change in river morphology;*

*d.~~c.~~* *Encourage restoration of water margins;*

*e.~~d.~~* *Managing noise in the coastal marine area;*

*f.~~e.~~* *Identify freshwater management units that include all freshwater bodies in Otago in accordance with the National Policy Statement for Freshwater Management 2014;*

*g.~~f.~~* *Maintain good water quality and improve it where it is degraded.*

*h.* *Provide for resource users, people and communities that rely on fresh water within environmental limits;*

*i.* *Set limits and targets to give effect to the National Policy Statement for Freshwater Management 2014;*

***Method 4.1.4***

*Objectives, policies and methods to implement the following policies:*

*4.1.~~3~~4* *Policies 3.1.2, 3.1.9 and 3.2.2: by including provisions to:*

*a.* *~~m~~Maintain or enhance ecosystems and biological diversity; ~~and to~~*

*b.* *~~p~~Protect significant indigenous vegetation and significant habitats of indigenous fauna;~~.~~*

*c.* *Control the clearance or modification of indigenous vegetation and habitats of indigenous fauna;*

***Method 4.2.4***

4.1 *Implementing district plans.*

4.2.4 *Policies 4.5.1, 4.5.2, and 5.3.1 : by preparing or requiring structure plans for large scale land use changes, including subdivision;*

***Method 5.2.2***

*5.2 Research*

*5.2.2 Regional, city and district councils together will:*

*a. Research and share information relevant to the effects of land use on water, including:*

*i. The values supported by the catchment;*

*ii. Riparian vegetation cover or any land cover ~~which~~ that contributes to supporting freshwater values, such as tussock grasslands;*

*iii. Land use changes which might have significant effects on freshwater values;*

*iv. Areas particularly sensitive to land use changes, such as sensitive aquifers and water-short catchments;*

*v. The effects of land use on erosion;*

*b. Research and share information relevant to the effects of land use on:*

*i. Coastal network infrastructure;*

*ii. Coastal values;*

*iii. Coastal hazards;*

*iv. Riparian vegetation cover or any land cover ~~which~~ that contributes to supporting coastal values, or mitigating coastal hazards;*

*v. Areas particularly sensitive to land use changes.*

***Method 6.5.1***

*6.5 Pest management strategy*

*6.5.1 The regional council will:*

*a. Develop and implement a Pest Management Strategy for the control of pest species including those which:*

*i. Have adverse effects on the natural character of the coastal environment;*

*ii. Have adverse effects on significant indigenous biological diversity;*

*iii. Have significant adverse effects on indigenous biological diversity;*

*iv. Have adverse effects on outstanding natural features, landscapes, seascapes and highly valued natural features, landscapes and seascapes.*

*v. Have propensity for spread, including wilding trees.*

*b. Have regard to indigenous biological diversity when preparing any Regional Pest Management Strategy and prioritising pest management activities, including:*

*i. Any areas of significant indigenous vegetation and significant habitats of indigenous fauna;*

*ii. Any local indigenous biological diversity strategies.*

***Method 9.2.1***

*9.2 Facilitation*

*9.2.1 Regional, city and district councils ~~will~~ may facilitate the restoration of natural wetlands or construction of artificial wetlands, particularly when it contributes to the:*

a. *Management of diffuse discharges to water;*

b. *Protection or restoration of indigenous species;*

c. *Mitigation of natural hazards;*

d. *Restoration of the natural character of wetlands.*

***Method 9.2.2***

*9.2.2* *Regional, city and district councils ~~will~~ may facilitate the restoration or enhancement of riparian margins, particularly when they:*

a. *Improve the health and resilience of ecosystems supporting indigenous biological diversity;*

b. *Restore or rehabilitate indigenous biological diversity and natural character;*

c. *Encourage the natural regeneration of habitats, including habitats for indigenous species.*

d. *Contribute to a safe network of active transport infrastructure;*

e. *Improve access to rivers, lakes, wetlands and their margins;*

f. *Mitigate risks of erosion.*

***Method 9.2.3***

*9.2.3* *Regional, city and district councils ~~will~~ may facilitate initiatives that support:*

a. *Community-based development of strategies and plans to maximise community, ecosystem and natural resource resilience at a scale sufficient for those natural and physical resources;*

b~~a~~. *The conservation of indigenous vegetation;*

c~~b~~. *Conservation of biological diversity;*

d~~c~~. *Maintenance or enhancement of coastal values, including restoration or rehabilitation of the natural character;*

e~~d~~. *The protection or restoration of the significant values of wetlands;*

f~~e~~. *Co-ordination of the services provided by operators of lifeline utilities, essential and emergency services across and beyond Otago;*

g~~f~~. *Energy conservation and efficiency, at a community or individual scale;*

h~~g~~. *Small scale renewable electricity generation;*

***Method 9.2.4***

*9.2.4* *Regional, city and district councils ~~will~~ may facilitate coordination between lifeline utilities for emergency management, including by:*

a. *Recognising the interconnections between lifeline utilities;*

b. *Encouraging any development or upgrade of infrastructure which would resolve potential weaknesses in emergency management.*

| | |
|---|---|
| ***Biodiversity Offsets*** | *Measurable conservation outcomes resulting from actions designed to compensate for residual adverse biodiversity impacts arising from project development after appropriate avoidance, minimisation, remediation and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net lass and preferably a net gain of biodiversity on the ground.* |
| ***No net loss*** | *In the context of biodiversity offsets, means no net loss with respect to:*<br>*a) Species abundance, population structure, and compasition (e.g. individual species ar species groups)*<br>*b) Habitat structure (e.g. vegetation tiers, vegetation pattern)*<br>*c) Ecosystem function (e.g. nutrient cycling rates)*<br>*d) People's use of and cultural values associated with biodiversity (e.g particularly valued habitats or species).* |
| ***Wetland*** | *Wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.*<br><br>*In this Regional Policy Statement, 'wetland' excludes any wetland constructed for the purpose of water quality management* |

**BEFORE THE ENVIRONMENT COURT**

**Decision No. [2016] NZEnvC 236**

| | |
|---|---|
| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of an application for declarations under sections 310 and 311 of the Act |
| BETWEEN | ARAPATA TRUST LIMITED |
| | (ENV-2016-AKL-000252) |
| | Applicant |
| AND | AUCKLAND COUNCIL |
| | Respondent |

| | |
|---|---|
| Court: | Environment Judge DA Kirkpatrick sitting alone pursuant to s 279 of the Act |
| Hearing: | On the papers |
| Date of Decision: | 30 November 2016 |
| Date of Issue: | 1 December 2016 |

---

**DECISION OF THE ENVIRONMENT COURT**

---

A: The Auckland Council is ordered to pay to Arapata Trust Limited the sum of $5,000.00 as costs in this proceeding.

**REASONS**

**Summary**

[1] Arapata Trust Limited (**Arapata**) seeks an award of costs under s 285 of the Act against the Auckland Council in respect of legal costs incurred on an application for declarations which was withdrawn by Arapata on the eve of the hearing.

[2] The basic facts of the case are not in issue, but the nature of the circumstances and the basis on which the application for costs is contested are such that it is

necessary to consider the events giving rise to this proceeding and the central legal issue raised in it in order to determine whether any order as to costs should be made and, if so, what that order should be.

[3] I am satisfied that the factual position giving rise to this proceeding is clear, undisputed and sufficiently fully set out in the affidavits filed by the parties that I can consider the central legal issue and reach a conclusion on it and then proceed to determine the application for costs in light of that.

[4] The central legal issue is: Does the holder of a current but unimplemented land use resource consent require any further resource consent for the already consented use of land when a new or changed plan provision comes into effect? This issue focuses on the meaning and effect of s 9(3)(a) of the Act. Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (which includes a proposed rule that has legal effect under s 86B of the Act), but subject to an exception in s 9(3)(a) for a use that is expressly allowed by a resource consent.

[5] The exception in s 9(3)(a) is for a use which is allowed by a resource consent, rather than the contravention of a rule. The rules in any relevant operative or proposed plan may change but that use of land is still consented. The notification of a new rule which would otherwise apply to the use under s 86B does not mean that a further resource consent is required.

[6] As Arapata holds a current resource consent to refurbish the existing building and rebuild the roof annex at 83 Albert Street, it does not require any further resource consent to use land in that way or to undertake those activities. It is entitled to an award of costs as compensation for being put to expense in bringing its application for declarations because of the Council's unfounded requirement that it seek a further resource consent.

**Background**

[7] Arapata owns a four-storey commercial building at 83 Albert Street, on the southern corner with Kingston Street in central Auckland. It acquired this property on 1 July 2015. At that time, the property was :

(a) subject to a Character Overlay under the operative Auckland District Plan

(Central Area section); and

(b) the subject of a submission by Heritage New Zealand Pouhere Taonga (**HNZPT**) that the building be included in the Schedule of Significant Historic Heritage Places in the proposed Auckland Unitary Plan, and a further submission by Arapata's predecessor in title in opposition to that submission.

[8] Sometime after acquiring the property, Arapata reached agreement with HNZPT that the building could be scheduled as a significant historic heritage place in the Auckland Unitary Plan subject to HNZPT's written approval to various works proposed by Arapata. The proposed works included:

(a) refurbishing, strengthening and extending the existing building; and

(b) constructing a further four storeys atop the existing building.

[9] On 31 August 2015 Arapata applied to the Council for resource consent to undertake these proposed works. On 22 October 2015 resource consent was granted by the Council to Arapata to undertake all of the proposed works. The granting of this consent was considered in terms of:

(a) under the operative Auckland District Plan (Central Area section);

(i) Rule 5.5.1 relating to activities in the Central Area subject to the character overlay as defined in Appendix 13;

(ii) Rule 5.5.3 relating to new buildings or additions subject to urban design control; and

(iii) Rule 9.7.1.2(a)(ii) relating to a shortfall of one loading space; and

(b) under the proposed Auckland Unitary Plan (as notified), Rule 3.J.5.1.1 relating to work within 50m of a site and place of significance to Mana Whenua.


[10] In terms of HNZPT's submission requesting the scheduling of the building as a

significant historic heritage place, as at 22 October 2015 that submission had not been the subject of a recommendation by the Auckland Unitary Plan Independent Hearings Panel to the Auckland Council nor of any decision by the Auckland Council.

[11] On 22 July 2016 the Auckland Unitary Plan Independent Hearings Panel recommended to the Council that it accept the submission of NZHPT in relation to the building and on 19 August 2016 the Council notified its decision accepting that recommendation. There was no appeal against that decision.

**Dispute and application for declaration**

[12] Sometime after the granting of its resource consent, Arapata decided not to proceed with its full proposal, choosing instead to undertake only the works proposed to refurbish the existing building and rebuild the existing roof annex. On 22 September 2016, Arapata advised the Council of its intentions, and asked what the implications of this would be with regard to the existing resource consent, in particular seeking certainty that there would be no need to make an amendment to the resource consent. The Council responded on the same day with the following statement:

> The works which you have described below would be acceptable without a resource consent variation. The refurbishments described below are within the scope of the existing resource consent, and the new additions not going ahead would not have an impact on the existing building's scale or character.

[13] Then on 26 September 2016, the Council advised Arapata as follows:

> Although the works are already consented, the building's exteriors are now scheduled under the PAUP DV [proposed Auckland Unitary Plan - decisions version]. The building wasn't scheduled under the PAUP (notified version) and the operative district plan, so heritage matters were not addressed under the original consent.
>
> As such, the refurbishment and alterations to the building's exterior would trigger the need for a new resource consent for alterations to a heritage building under the PAUP DV.
>
> Heritage consents are exempt from any processing or deposit fees.

[14] Arapata immediately protested that it considered it had dealt with all heritage aspects with the Council and HNZPT. The Council responded later that day as follows:

> Unfortunately, the agreements met [sic] with Heritage NZ or our heritage team does not negate the requirement for a resource consent under the PAUP DV. The rules under the

> PAUP DV have legal effect (as of 19 August 2016) and resource consents are now required under this plan. Although a resource consent has been approved for the works under the operative District Plan and PAUP (notified version), the decision does not expressly provide for alterations to a historic heritage building. We have confirmed this with a principal planner from the practice and training team at Council ...
>
> We understand your concerns and appreciate the work that has been put into this process to date. Due to the minor nature of the work, we don't anticipate that there will be any major issues and the application will be able to be processed in a timely manner (with no fees required to be paid).

[15] On 28 September 2016 Arapata lodged its application for declarations in this proceeding supported by an affidavit of Mark Graeme Kirkland, a principal of Arapata which set out the foregoing facts. Essentially, Arapata sought declarations confirming that it could carry out works at 83 Albert Street pursuant to its resource consent under s 9(3)(a) of the Act.

[16] Arapata also sought an urgent fixture on the grounds, as evidenced in Mr Kirkland's affidavit, that:

(a) it had made representations to its bank that it had all necessary consents to undertake a refurbishment of its building;

(b) it had entered into agreements with a builder to start work on 1 February 2017 and with existing and future tenants as to the timing and extent of the works; and

(c) it needed to conclude its finance arrangements by 31 October 2016 and lodge its application for a building consent by 15 November 2016 to meet its commitments.

[17] The Court put this proceeding on its priority track and allocated an urgent fixture for 12 October 2016.

[18] No notice of opposition was lodged by the Council, but on 10 October 2016 the Council lodged an affidavit made by Karen Glenis Long, a senior planning officer employed by the Council, in response. Ms Long's evidence about primary facts and the sequence of events is consistent with Mr Kirkland's evidence. Relevantly, Ms Long's affidavit also includes the following statements:

(a) at paragraph 3.3, that the Council's confirmation on 22 September 2016 had been made in relation to the scope of the existing resource consent, and at the request of Arapata did not extend to the impact of the proposed Auckland Unitary Plan on its ability to carry out the proposed works;

(b) at paragraph 3.4, that the resource consent had not been implemented;

(c) at paragraphs 4.1 - 4.3, that a combination of the provisions of ss 148(4)(a) (*Auckland Council to consider recommendations and notify decisions on them*), 152 (*Proposed plan deemed approved or adopted on and from certain dates*) and 153 (*RMA provisions relating to legal effect of rules apply*) of the Local Government (Auckland Transitional Provisions) Act 2010 (**LG(ATP)A**), and ss 86A-G of, and clause 10(4) of Schedule 1 to, the Act meant that the historic heritage overlay schedule was in effect, that the building was now scheduled as a Category B historic heritage place and that Rule D17.4.1 (clauses A3, A6, A9, A10 and A12) of the proposed Auckland Unitary Plan (decisions version) now applied; and

(d) at paragraphs 4.9 and 4.10, that there were two key implications of this:

(i) the proposal to refurbish the building now required resource consent, although it did not require such consent at the time of the application for resource consent or the decision granting resource consent in 2015;

(ii) neither the assessment of environmental effects accompanying the application nor the Council's decision on the application included specific consideration of the historic heritage features of the building, including listed matters apparently taken from the assessment criteria in the proposed plan relating to Rule D17.4.1 and the clauses cited above.

[19] On 11 October 2016, the parties advised the Court that they had reached agreement on a settlement with Arapata withdrawing its application, but without prejudice to the issue of costs. On receipt of this advice, the Court vacated the allocated fixture for the next day and made directions to deal with the issue of costs should agreement on that not be able to be reached.

**Application for costs**

[20] In accordance with the Court's directions, Arapata made its application for costs on 4 November 2016. In its application Arapata:

(a) advised that the Council had offered to process with urgency Arapata's application for an additional resource consent and that such an application had been made on a without prejudice basis on 30 September 2016. Arapata had received advice from the Council that this application would be granted on 11 October 2016, at which time the Court was advised of the position. The second resource consent was granted on 12 October 2016.

(b) submitted that it had settled with the Council on these terms in the interests of expediency, preferring to obtain certainty as to its position and to avoid the cost of a contested hearing.

(c) sought "an appropriate contribution" towards its legal costs in respect of preparing and filing its application for declarations and preparing legal submissions for hearing. A schedule of time records was presented showing a total of $8,662.50 (net of GST) as the charge-out value of the time spent by counsel and an associate preparing and filing the application for declarations and preparing for the hearing. No award was sought in respect of the costs of preparing the application for further resource consent in acknowledgement that those were not the costs of the proceeding.

(d) submitted that it had been put to unnecessary expense because it was wrong for the Council to contend that a further resource consent was required, and that Arapata was forced to incur the costs of making an application for declarations to the Court to address the error of the Council's position given its need to meet its contractual commitments to its bank, builder and tenants on a timely basis.

[21] In response, the Council submitted:


(a) If any party should be awarded costs, it should be the Council because the dispute had been resolved in accordance with the Council's position that a further resource consent was necessary. However, because the dispute

had been resolved without a ruling to determine who was successful, the Council took the position that costs should lie where they fall.

(b) Arapata had applied to the Court unnecessarily, and on that basis the Council would be entitled to make its own application against Arapata on the grounds that Arapata had been unsuccessful and its proceedings should never have been commenced.

(c) Echoing the matters of law set out in Ms Long's affidavit at paragraphs 4.1 - 4.10 (and summarised above at [13]):

i. that the notification of the decisions version of the proposed Auckland Unitary Plan had triggered the application of its historic heritage provisions to the proposed work at 83 Albert Street and the consequent need for an additional resource consent pursuant to s 153 LG(ATP)A and s 86B of the Act; and

ii. that the agreement between Arapata and HNZPT did not and could not avoid the need to obtain the additional resource consent had legal effect.

(d) Arapata's application for declarations had been brought "no doubt" to apply pressure to the Council to change its position and that as a result the Council had been put to unnecessary expense.

(e) With reference to this Court's Practice Note, that costs are not usually awarded against a Council unless it has failed to perform a duty or acted unreasonably or has imposed an unusual restriction which is not ultimately upheld. The Council pointed out that, as the proceeding had been withdrawn, no finding of that kind had been made, nor had any finding as to the factors for an increased award of costs identified in cases such as *Development Finance Corporation NZ Ltd v Bielby*[1] been made.

[22] Arapata lodged further submissions in reply, making the following points:

(a) It did not rely on its agreement with HNZPT and acknowledged that the

[1] (1991) 1 NZLR 587 (HC) at 594-5.

agreement did not bind the Council.

(b) The issue is that it is wrong for the Council to say that a further resource consent is required.

(c) S 9 of the Act governs this situation, and s 86B and the making of decisions on submissions on the Auckland Unitary Plan are irrelevant.

(d) The work to be undertaken is expressly allowed by the first resource consent.

(e) Arapata's settlement with the Council was pragmatic and was made without prejudice to its position.

(f) There is a significant potential adverse effect on others if the Council says that the notification of the decisions version of the proposed Auckland Unitary Plan means that existing consent holders need further resource consents, which may involve significant risk if further consent is then withheld or is made subject to more onerous conditions than the first consent.

**The central issue**

[23] The central legal issue between the parties may be stated in this way: Does the holder of a current but unimplemented land use resource consent require any further resource consent for the already consented use of land when a new or changed plan provision comes into effect?

[24] Arapata says that the answer to this question is "no" while the Council says that the answer is "yes". Their respective submissions present an argument about the relationship between ss 9 and 86B of the Act. In that sense, the issue has wider importance than its application to the facts of this case: it raises an issue as to the relationship between the provisions in Part 5 of the Act relating to standards, policy statements and plans and those in Part 6 relating to resource consents. It also raises issues about the certainty of both the planning and the consenting process for landowners in respect of their use of land and for consent authorities in respect of the making and administration of plans.

[25] The facts of this case are sufficiently clear to enable the issue to be considered. The submissions of the parties in relation to costs also address the merits of the parties' respective positions on the central legal issue to a degree that shows that, notwithstanding the agreement to withdraw the application for declarations, this issue is not moot. It is important to be clear that this case is not unusual in terms of the nature of the first resource consent and that there is nothing on the face of the documents or raised in any submission to suggest that this consent stands apart from other consents. On that basis I will address this issue as part of this decision on costs.

[26] Section 9 relevantly provides:

> (3) No person may use land in a manner that contravenes a district rule unless the use–
>
> (a) is expressly allowed by a resource consent; ...

[27] Section 86B provides:

> **86B When rules in proposed plans and changes have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
>
> (a) subsection (3) applies; or
>
> (b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or
>
> (c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.
>
> (2) However, subsection (1)(c) applies only if—
>
> (a) the local authority makes the decision before publicly notifying the proposed plan under clause 5 of Schedule 1; and
>
> (b) the public notification includes the decision; and
>
> (c) the decision is not subsequently rescinded (in which case the rule has legal effect from a date determined in accordance with section 86C).
>
> (3) A rule in a proposed plan has immediate legal effect if the rule—
>
> (a) protects or relates to water, air, or soil (for soil conservation); or
>
> (b) protects areas of significant indigenous vegetation; or
>
> (c) protects areas of significant habitats of indigenous fauna; or
>
> (d) protects historic heritage; or
>
> (e) provides for or relates to aquaculture activities.
>
> (4) For the purposes of subsection (2)(c), a decision is *rescinded* if—
>
> (a) the local authority publicly notifies that the decision is rescinded; and
>
> (b) the public notice includes a statement of the decision to which it relates and the date on which the recision was made.
>
> (5) For the purposes of subsection (3), *immediate legal effect* means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

[28] "District rule" is defined in s 2 of the Act to have the meaning given to it in s 43AAB where it is defined to mean "a rule made as part of a district plan or proposed district plan in accordance with s 76." That definition is subject to s 86B and clause 10(5) of Schedule 1. It follows that s 86B has an important relationship with s 9(3) because the former provision sets out the basis on which a district rule in a proposed plan may have legal effect under the restriction in the latter provision.

[29] I note here that s 153 LG(ATP)A, which is one of a number of provisions in that Act governing the way in which the Auckland Unitary Plan is to be prepared and was cited in the Council's submissions, simply confirms that ss 86A to 86G of the Act apply, with all necessary modifications, to a rule in the proposed Auckland Unitary Plan.

[30] Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (being any rule in an operative plan or any rule in a proposed plan which has legal effect under s 86B), but subject to an exception in sub-paragraph (a) for a use that is expressly allowed by a resource consent. Similar exceptions are made for existing uses and activities under ss 10 and 10A in sub-paragraphs (b) and (c). It is important to observe that while s 9(3) is expressed as such a restriction, the exception to that restriction in s 9(3)(a) is for a use which is allowed by a resource consent, rather than for the contravention of a rule. Even though it is the contravention of a rule that gives rise to the requirement for a resource consent, the consent is for the use of land.

[31] This aspect of s 9(3) is consistent with other provisions in the Act relating to the nature of resource consents. In s 2 of the Act, "use" in certain sections (including ss 9 and 10) is defined to mean, relevantly among other things, "reconstruct ... a structure ... on ... land." The definition does not refer to "use" in terms of any rule in a plan that may apply to it. As defined in s 87A, a "resource consent" is "a consent to do something" that would otherwise contravene one or other of sections 9 or 11 - 15B of the Act. In this context, *to do something* must mean an activity, which for the purposes of s 9 means a use of land and in terms of the definition of "use" in s 2 means some action in relation to that land.


[32] Under s 104, the consideration of an application for resource consent must have regard to "any actual and potential effects on the environment of allowing the activity" and to any relevant provisions of certain planning documents made under the Act and any other relevant matters. While having regard to any relevant planning document will

involve an assessment of the effects of the activity against any relevant provisions of such a document (as required in an assessment of effects on the environment by clauses 2(1)(g) and 2(2)(a) and (b) of Schedule 4 to the Act), it is still the activity that is assessed in terms of the statutory requirements, rather than simply a contravention of a rule.

[33] The first consent granted to Arapata is expressed as a consent to the following proposal:

> To refurbish, strengthen and extend the existing building at the subject site including the addition of five floors with the provision for restaurant space on the ground floor, office activities on levels 1-7 and a penthouse suite on level 8.

[34] The consent document states:

> The resource consents are: Land use consents (s9) – R/LUC/2015/3529 ...

and then lists the rules in the operative and proposed plans which would be contravened by the proposal (as already set out in paragraph [9] above) and the activity status in respect of each rule.

[35] On first glance, it appears from this statement as if the resource consent is limited to those listed contraventions of certain rules. In my opinion that is not the correct way in which to interpret and understand a resource consent and the form of the document is not determinative of its substantive effect. The relevant statutory provisions, as discussed above, do not support such an approach. In reality, those listed rules which are contravened by the proposal do not, by themselves, describe the use of the land. The listed rules are the reasons why resource consent was required, but the reasons for the decision address "the proposed development" in its entirety and the conditions attached to the resource consent (which form part of it[2]) relate to the whole of the works. The use of land is described in the proposal, including the plans and drawings accompanying the application and which are incorporated into the resource consent by general condition 1 which provides:

> Except as amendment (sic) by the conditions that follow, the proposed restaurant and office activity shall be carried out in accordance with the plans and all the information submitted with the application, detailed below, and all referenced by the Council as


[2] The definition of "resource consent" in s 2 of the Act includes "all conditions to which the consent is subject."

[36] The consequence of a land use resource consent being considered as a consent which allows a person to use land in a particular way, as distinct from simply being a consent to contravene a particular rule, is that the rules in any relevant operative or proposed plan may change but that use of land is still consented. On that approach there is nothing in s 86B which would alter the effect of a current resource consent under s 9(3)(a).

[37] The Council's position, if accepted, would effectively mean that a resource consent only authorises, for the purposes of s 9(3)(a), those contraventions of district rules that might be specifically provided for in the terms of the consent. That approach to the interpretation of s 9(3) would mean that a person undertaking an activity pursuant to a resource consent in such terms would require a further resource consent should there be any change to any relevant rule applicable to that activity at any time in the future. In the event of any change to the operative plan or any review of it by a proposed plan, every holder of a resource consent would need to determine whether any new or changed rule affected their use of land and, if it did, apply for a further resource consent so that the use of land (in terms of its contraventions of rules) would still be expressly allowed under the new or changed rule.

[38] That outcome would impose a significant on-going compliance burden on every person in the district using land pursuant to a resource consent. It would put all such persons in significantly worse position than any person continuing to use land in a similar way but as an existing use under s 10 of the Act and protected by s 9(3)(b). A person whose use of land could occur under existing use rights would not be affected by any new or changed rule because s 10 of the Act specifically allows lawfully established uses to continue regardless of any such rule. There does not appear to be any reason why such a significant difference in the operation or effect of s 9(3) should exist between the exception for land uses which are the subject of a resource consent under s 9(3)(a) and the exception for those which are subject to existing use rights under s 9(3)(b).

[39] Given that an existing use must be "established," that is, in existence, it is pertinent to consider whether there is any basis on which to distinguish between unimplemented consents and those which have been given effect to in terms of s 125 of the Act. There is no distinction drawn on that basis in s 9 of the Act. The ability to

exercise a resource consent is governed by when it commences under s 116 and when it terminates. Subject to any particular conditions of a consent which may limit works to certain times or dates or seasons, a resource consent is a continuing right to do the thing for which consent has been granted. As a continuing right, the legal ability of the consent holder to do that thing is the same whether they have started to do it or not. The only difference relates to termination: an unimplemented resource consent will lapse under s 125 of the Act unless given effect to within a certain period of time, while the duration of a resource consent that has been given effect to is governed by s 123 of the Act. That difference, while important, does not appear to affect the issue in this case either as a matter of principle or in terms of the facts of this case.

[40] Even if the Council's approach were narrowed to apply only to the holders of unimplemented resource consents, it would still mean, as this case demonstrates, that a person who had obtained a resource consent and, on the basis of that consent, entered into binding arrangements with a bank, a builder and tenants, would then be subject to the risk, almost completely beyond their control, of being told they require some further resource consent at any stage of the development up until the original resource consent had been given effect to. Given the many different ways in which the implementation of consents may lawfully occur, or how existing use rights might arise, it is difficult to see how such an approach could be justified in pursuit of the purpose of the Act or on any other principled basis of avoiding, remedying or mitigating any adverse effects of the already consented activity on the environment.

[41] There is also an issue of retrospectivity. The Council's position on the interpretation of and relationship between s 9(3)(a) and s 86B would mean that the rights obtained on the grant of a resource consent would be changed by a future change to the rules in the plan, without any act or omission on the part of the consent holder. A person who had previously been using land lawfully in accordance with a resource consent for such use under s 9(3) would, on the Council's approach and in the absence of a further resource consent, then be acting in contravention of s 9 and thus potentially committing an offence under s 338(1)(a) of the Act.

[42] This would be inconsistent with the principle of interpretation in s 7 of the Interpretation Act 1999 that "[a]n enactment does not have retrospective effect."[3] This principle is said to be based on the essential idea of a legal system that current law


[3] For the purposes of the Interpretation Act, "enactment" includes regulations. Under s 76(2) of the Act a rule in a district plan has the force and effect of a regulation in force under the Act.

should govern current activities.[4] As the principal texts on interpretation explain, the principle is not an absolute rule: it must give way before any express statutory language and may be reduced in its ambit by a purposive interpretation in the context of the statutory regime and its application to the facts of a particular case to do justice or to avoid injustice.[5]

[43] One strong element of the principle against giving an enactment retrospective effect is that the Courts will seek to preserve existing rights where changes to those rights are not the purpose of the enactment.[6] Those familiar with the legislative history of the Act will know that the almost invariable transitional provision in successive amendment Acts has been to provide that the amendments do not affect proposed rules which were notified, or applications or other matters relating to a resource consent that had been lodged or initiated, before the commencement of the amendment Act.[7] But even more pertinent in this case is the protection of existing uses from later district rules under s 10 of the Act,[8] which is a clear example of the principle being given legal effect. As discussed above, the operation of s 86B has no effect on existing uses and there is no clear reason why a resource consent holder under the Act should be in any worse position in terms of s 9 than the holder of existing use rights.

[44] For those reasons, I conclude that a holder of a resource consent for a specified use or activity is not required to obtain a further resource consent for the same use or activity when a new or changed rule comes into effect.

[45] I therefore hold that as Arapata holds a current resource consent to refurbish the existing building and rebuild the roof annex at 83 Albert Street, it does not require any further resource consent to use land in that way or to undertake those activities. The Council was wrong to say, after the grant of the first consent and on the basis of it having notified its decisions version of the proposed Auckland Unitary Plan, that a further resource consent was required. It could not require a re-assessment of the consented use or activities based on a rule which did not have legal effect when the consent was granted and which does not have retrospective effect. It is on this basis that I proceed to consider the application for costs.

---

4 Bennion, *Statutory Interpretation*, 2nd ed. 1992, p. 214.

5 See Burrows and Carter, *Statute Law in NZ*, 5th ed. 2015, pp. 619-628; and *Craies on Legislation*, 8th ed. 2004, Chap. 10.3, pp. 389-399;

6 *Maxwell on the Interpretation of Statutes*, 12th ed. 1969, p. 218.

7 See e.g. ss 151 and 160, Resource Management (Simplifying and Streamlining) Amendment Act 2009.

8 Also, before the commencement of the Act, see s 90 Town and Country Planning Act 1977.

**Costs**

[46] The Court's power to award costs is conferred by s 285 of the Act, which relevantly provides:

> (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the court considers reasonable.

[47] The discretion conferred by s 285 is broad and a great deal of case law exists as to the principles which apply to the exercise of that discretion. Principles which are particularly relevant to this case appear to be as follows:

(a) There is no general rule in the Environment Court that costs follow the event.[9]

(b) Costs are ordered to require an unsuccessful party to contribute to the costs reasonably and properly incurred by a successful party.[10]

(c) Costs are awarded not as a penalty but as compensation where that is just.[11]

(d) An award may compensate parties for costs unnecessarily incurred as a result of proceedings which should not have been brought.[12]

(e) Costs at a higher level than usual party and party costs may be awarded where particular circumstances justify that, including where:

(i) the process of the court has been abused;

(ii) arguments are advanced that are without substance;

(iii) the case is poorly presented or the hearing is unnecessarily lengthened;

(iv) opportunities for compromise could reasonably have been expected but a party has failed to explore them; and


9 *Culpan v Vose* Decision A064/93.
10 *Hunt v Auckland CC* Decision A068/94.
11 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* [1996] NZRMA 385.
12 *Paihia and District Citizens Assn Inc v Northland RC* (1995) 2 ELRNZ 23.

(v) a party takes a technical or unmeritorious point of defence.[13]

(f) Where wasted costs have been incurred, such as where a hearing has had to be adjourned or a proceeding has been withdrawn at a very late stage, the party who is not responsible for the adjournment or withdrawal may be entitled to costs.[14]

[48] I accordingly approach my decision on this application for costs on the basis that the award should be a reasonable contribution towards costs incurred by the successful party rather than a penalty on the unsuccessful party. In terms of what constitutes success in a proceeding where the case did not proceed to a full hearing, I take into account the central issue between the parties, the approach they have taken to the resolution of that issue and the degree to which the Court can assess the merits of their positions and approaches. In many cases that are discontinued before trial, even where that occurs at a late stage, the basis of the discontinuance is often an agreement which addresses the issue of costs. In some cases, a settlement prior to hearing effectively prevents the Court from assessing the merits.[15] Unusually in this case, the withdrawal of the application for declarations did not resolve the central issue between the parties and they have placed it squarely back before the Court in their submissions on costs. This has meant that the Court has been able to assess the question of costs with regard to the merits of the arguments advanced on the central issue.

[49] Arapata's grounds in support of its application are set out in summary above at paragraphs [20] and [22]. It has been put to cost in applying for declarations to protect its rights as a consent holder. While it was Arapata which withdrew its application at a very late stage, I accept that it agreed to the settlement proposed by the Council, except as to costs, in order to obtain certainty as to its ability to undertake the works for the sake of its other contractual commitments that could be adversely affected by any delay.

[50] The Council's response to the application is set out in summary above at paragraph [21]. The Council's main ground of opposition may be summarised as being that as the proceeding was withdrawn, neither party was "successful" and accordingly


13 *Development Finance Corporation NZ Ltd v Bielby* (1991) 1 NZLR 587 (HC) at 594-5.
14 *OB Holdings Ltd v Whangarei DC* [2010] NZEnvC 164.
15 *Bridgecorp Holdings Ltd (in rec.) v Hamilton CC* Decision A21/08

costs should lie where they fall. Apparently as an alternative, the Council suggests that it is the successful party because the dispute has been resolved in a manner that is consistent with its position that a further resource consent was required. Linked to this is the Council's suggestion that Arapata brought its proceedings "no doubt" to apply pressure to the Council to change its position in that regard.

[51] These arguments on behalf of the Council might have merit had the Council presented some robust argument to show why the holder of a current resource consent to undertake particular works could be required to obtain a further resource consent in respect of the same works where some proposed rules, previously not in effect, had come into effect. The submissions presented by the Council address this but for the reasons set out above, I do not accept those submissions. I do not consider that this is a marginal issue. No robust argument has been presented to show any basis on which s 9(3)(a) should be interpreted to make the rights conferred by a resource consent subject to future changes to the rules in a plan.

[52] While in some respects the withdrawal of the proceeding on the eve of hearing gives rise to wasted costs, the issue is whether it is appropriate in the particular circumstances of this case for costs to be awarded in favour of the party withdrawing the proceeding, rather than (as would be more common) the party responding. I accept the evidence of Mr Kirkland and the submissions on behalf of Arapata that its agreement with the Council to seek a further consent was done so as to obtain certainty as to its ability to undertake proposed works on its building and in light of its commitments to its bank, its builder and its tenants. I do not accept the Council's submission that the proceeding was brought to put pressure on the Council to change its position: had that submission been supported by some analysis to show that the declarations sought were overly technical or otherwise unmeritorious, then there may have been a basis for it.

[53] For the reasons set out above, I am satisfied that Arapata's position is clearly supported by s 9(3)(a) and that is not altered in any way by s 86B of the Act. In relation to the positions taken on the central legal issue, this case bears some similarities to those where costs have been awarded against a local authority which has acted in a way that unduly restricts the rights of the other party without a reasonable justification for its position.[16]


[16] For example, *Stacey v Auckland Council* [2011] NZEnvC 184 at [8] - [9] and *Canterbury RC v Waimakariri DC* Decision C70/02 at [16] - [24].

[54] I conclude that Arapata is entitled to an award of costs. It seeks an "appropriate contribution" to the cost of the time spent by its counsel and an associate in preparing and filing the application and in preparing for hearing of $8,662.50 (net of GST).

[55] While the case law indicates a "rule of thumb" of a "comfort zone" (rather than any deliberate policy) for awards of costs in the region of 25-33 percent of the actual and reasonable costs and expenses incurred,[17] I am satisfied that a degree of uplift is warranted in this case because the Council pursued an unjustified requirement for a further resource consent notwithstanding that it knew that Arapata held a resource consent for that use of land. In all the circumstances, in my judgement a reasonable award is $5,000.00.

[56] I order the Auckland Council to pay to Arapata Trust Limited the sum of $5,000.00 as costs in this proceeding.

For the Court:

**DA Kirkpatrick**
**Environment Judge**


17 *Emerald Residential Ltd v North Shore CC* Decision A51/2004; *Baxter v Tasman DC* [2011] NZEnvC 119.

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA502/2007**
**[2009] NZCA 99**

| | |
|---|---|
| BETWEEN | AUCKLAND REGIONAL COUNCIL<br>Appellant |
| AND | RODNEY DISTRICT COUNCIL<br>First Respondent |
| AND | PARIHOA FARMS LIMITED<br>Second Respondent |

Hearing: 21 August 2008

Court: William Young P, Ellen France and Baragwanath JJ

Counsel: M E Casey QC, R B Enright and L S Fraser for Appellant
W S Loutit and J P Hassall for Respondents

Judgment: 26 March 2009 at 10 am

---

**JUDGMENT OF THE COURT**

---

**A The appeal is allowed.**

**B We declare that:**

**(a) In deciding whether to notify the application, the Rodney District Council was required to take into account the relevant outstanding landscape classifications of the affected land in the Auckland Regional Policy Statement.**

**(b) There was no need to notify the Auckland Regional Council under s 94.**

**(c) In deciding whether to notify the application, the Rodney District Council was entitled to take into account the conditions which it proposed to impose as part of the consent.**

**B There is no order as to costs.**

---

**REASONS**



**BARAGWANATH J**

**Table of Contents**

**Introduction**

[1] The coastline extending north from Te Henga (Bethells Beach) to Muriwai, some 25 kilometres west of the metropolitan area of the City of Auckland, is of great natural beauty. In 2005 the Rodney District Council (RDC) granted resource consent for the construction of a large house within view of the Te Henga walkway in a manner arguably inconsistent with the Auckland Regional Policy Statement (ARPS) of the Auckland Regional Council (ARC). Acting under s 93 of the Resource Management Act 1991 (RMA), the RDC made a decision that it was not necessary to publicly notify the application, or to inform the ARC before making its consent decision under s 104, which imposed certain conditions. The ARC learned of the project when it received a complaint from a member of the public who saw the construction in progress.

[2] Whereas the ARC's regional plan had identified the coastline as of high amenity value, the RDC's district plan did not accord the area the same status, and in its s 93 decision the RDC did not take into account the ARC or national instruments (higher order instruments). The ARC applied to the High Court for judicial review of the decision and was unsuccessful. It now appeals.

[3] The ARC does not pursue on appeal its challenge to the consent decision because of the good faith of the applicants for consent, and to that extent the proceeding is moot. But because of the general importance of resolving doubts about the respective roles and responsibilities of the two councils we accepted their joint request to hear argument upon three major questions of general importance.

[4] The issues we have agreed to determine are:

(1) Was the RDC obliged to consider the higher order instruments when considering its notification decision?

(2) Is the ARC "affected" so it should have been notified?

(3) In making its decisions on notification, can a council as consent authority take into account prospective conditions of consent as mitigating the effects of the activity?

[5] All members of the Court agree that the second question is to be answered no and the third is to be answered yes. We are unable to agree as to the answer to the first question, which Ellen France J would answer no and I would answer yes. It follows that the answer of the Court will be in accord with the intermediate position taken by the President: that in this case, although not as a general rule, the answer is yes. The difference results from an imprecision in the drafting of the RMA which may perhaps warrant Parliament's consideration in its current review of the Act.

[6] I record that the challenged determinations were made on 21 July 2005 under ss 93 – 94 of the RMA to process the application without notification, and under s 104 and the associated conditions provision, s108, to grant resource consent. The amendments to relevant sections by the Resource Management Amendment Act 2005 did not come into effect until 9 August 2005 and are therefore to be disregarded.

[7] It should be added that the members of the Court recognise that the environment in question is of importance to Māori. But because the tangata whenua were not represented before us we have declined to consider issues of particular concern to them.

**Issue 1: was the RDC obliged to consider the higher order instruments when considering its notification decision?**

[8] The answer in my opinion is yes. I begin with Harrison J's approach and outline the parties' submissions before setting out my own analysis.

*The High Court decision*

[9] Harrison J was not satisfied that the RDC erred in law by not taking account of Part 2 and the national and regional planning instruments when determining that

the effects of the proposed activity on the environment would be minor. He discussed the question as follows:

> [88] Mr Enright [for the ARC] categorises the regional and national planning framework as being of a 'higher order' than the district plan. He relies upon the location of the site within the Auckland Regional Policy Statement's (ARPS) designation of an outstanding landscape (sensitivity rating 6) or of reasonably significant landscape value (sensitivity rating 5). The distinction is not important. Whatever classification is adopted, the area obviously has a unique landscape value.
>
> [89] Mr Enright says that, if RDC had taken account of the ARPS, it would have learned of this special zoning, and adopted a much more careful approach. This knowledge would, he submits, have put the decision maker on inquiry that the issue merited more detailed consideration.
>
> [90] Mr Enright emphasises certain provisions of the ARPS, advocating a 'precautionary approach' to resource management decision making (but on analysis that dictum comes within advice to a local authority when it is not in a position to fully assess the adverse effects of a proposed activity 'due to inadequate information or understanding of these effects on the environment'). The policy emphasises the importance of controlling 'subdivision, use and development of land': first, to protect landscapes with a sensitivity rating of 6 or 7 'by avoiding subdivision, use and development which cannot be visually accommodated within the landscape without adversely effecting the character, aesthetic value and integrity of the landscape unit as a whole'; and, second, those with a sensitivity rating of 5 are protected by ensuring that use and development can be visually accommodated without adverse effects: para 6.4.19.
>
> [91] The ARPS further provides: para 6.4.21:
>
> > The intention of the policies is to protect the aesthetic and visual quality, character and value of the major and unique landscapes from inappropriate subdivision, use and development.
>
> [92] The ARPS also sets out policies for preserving the natural character of the coastal environment, and protection from inappropriate subdivision, use and development, also by avoiding adverse effects on the environment in the areas of high natural character; and for the purpose of preserving and protecting outstanding regionally significant landscapes accordingly: paras 7.4.4 and 7.4.7.
>
> [93] Mr Enright says these instruments required RDC to 'change its lens' from the district plan focus. While he concedes the result may not necessarily be different from an evaluation of district planning instruments, it may lead to a different inquiry encompassing different considerations. Mr Enright says that reference to the ARPS requirements to 'avoid' inappropriate locations and 'preserve' landscape values would have put RDC on notice of the need to evaluate alternative locations on the 235 hectare site which would not effect these values, or alternatively effect them to a lesser extent. The emphasis must shift, Mr Enright says, from local to regional interests and values.

[94] While acknowledging that RDC's report and notification decision made some reference to visual impact, Mr Enright characterised it as 'limited to district plan criteria' and a 'micro-focus' within that framework, whereas the regional instruments required a different type of assessment – one designed to consider the impact on the 'regional environment values at stake'.

[95] Mr Enright's detailed submission begs the question of why it was unreasonable, or of why there was an error of process, for RDC not to take the higher order instruments into account when deciding on notification. It was not until closing that he attempted to articulate the statutory genesis of an obligation on the consent authority. In answer to my inquiry, Mr Enright identified the requirement in Schedule 4, which specifies the requirements for an application for resource consent, for an assessment of environmental effects 'subject to the provisions of any policy statement or plan'.

[96] However, I read that phrase 'subject to the provisions of any policy statement or plan' as qualifying or modifying the mandatory obligation for the applicant's assessment of effects to include certain information. The assessment is to be made by the applicant within the prescribed form. Its purpose is to provide 'an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment': s 88(2)(b). The requirement does not separately or reciprocally oblige the consenting authority to take account of 'the provisions of any policy statement or plan' when deciding on notification.

[97] In this respect Schedule 4 serves to identify what is required in terms of assessing 'the effect of the activity on the environment'. The words 'effect' and 'environment', including 'amenity values', are defined. The consent authority's inquiry, when deciding on notification, is directed towards satisfaction 'that the adverse effects of the activity on the environment will be minor'. That inquiry is unaffected by regional policy statements or plans. The 'environment' comprises the defined resources, values, conditions and qualities, all of which are addressed in the district planning instruments.

[98] Alternatively, assuming for these purposes that the phrase 'any policy statement or plan' includes both regional and district plans, it links logically to s 9. That provision expressly proscribes contravention of a rule in a district plan, unless expressly allowed by a resource consent granted by the territorial authority: s 9(1); or, similarly contravention of a rule in a regional plan, unless expressly allowed by a resource consent granted by the regional council: s 9(3). Logically, the Schedule 4 reference to 'the provisions of any policy statement or plan' would relate or link back to the type of application for resource consent, whether under a district plan or under a regional plan. The distinction is verified by subsequent provisions – e.g. ss 12, 13, 14 and 15 – to which Mr Loutit refers; all relate to prohibited activities which require a resource consent under a regional plan.

[99] I am not satisfied that RDC erred in law by not taking account of the regional planning instruments when satisfying itself that the effects of the proposed activity on the environment would be minor.

[100] Also, Mr Enright says that RDC did not sufficiently consider relevant Part II values. He cited a number of general statutory provisions: ss 5, 6(a),

> 6(b), 6(e), 6(f), 7(a), 7(c), 7(f) and 8. With respect to Mr Enright, these provisions are general statements of values which are specifically addressed later in the district planning instruments. RDC's decision gave them express consideration, in any event. This argument, at best one of degree, does not advance ARC's case.

*Submissions*

[10] For the ARC Mr Casey QC contended that the Judge was wrong to conclude that the values, objectives or policies of the higher level instruments are, in the Judge's words, "all … addressed in the district planning instruments"; and that they are materially the same as or similar to the district planning instruments. That, he submitted, is because the RDC's district plan does not:

(a) attribute outstanding character to the landscape (as do the ARPS and Regional Coastal Plan);

(b) recognise the national importance of the landscape by reason of its outstanding character;

(c) recognise the national importance of the natural character of the coastal environment and the locality of the proposed dwelling;

(d) recognise the significance from the regional perspective, of both the landscape and the natural character of the coastal environment;

(e) carry over the requirement to have regard to the landscape assessment studies discussed in Appendix E of the Regional Plan: Coastal.

[11] Mr Loutit for the RDC submitted that the RDC was right to refer only to the RDC district plan. He contended that the reason why the applicants required consent was because, in terms of s 9, to perform earthworks and build a house without a resource consent contravened the RDC's district plan. No regional council consents were needed in this case. Sections 93 – 95, which deal with notification, make no mention of Part 2 of the RMA, the New Zealand Coastal Policy Statement (NZCPS) or regional documents. The references to "a plan or proposed plan" in ss 94A and 94B, relating to whether adverse effects are minor and to who may be adversely

affected, can relate only to the plan under which the resource consent is sought. That is the RDC's district plan. That may be contrasted with s 104 (consideration of applications) which, like the designation provisions in ss 168A and 171, does refer to the higher order documents. Mr Loutit submitted that where Parliament intended that Part 2 or regional and national documents be referred to that is specifically stated. That did not occur in ss 93 and 94.

**Discussion**

*General*

[12] The question for the RDC was whether the effects on the environment would be minor. Unless that was the case, it was obliged to notify the application. My analysis differs from that of the High Court Judge. And I do not accept Mr Loutit's submissions. I am satisfied that the RDC did err in law by not taking account of the regional planning instruments in satisfying itself that the effects of the proposed activity on the environment would be minor. My conclusion is a consequence of the statutory scheme, and is borne out by analysis of the specific documents in question. The effects on the environment cannot be considered objectively without reference to the values that are attributed to different aspects of the environment by the relevant instruments. In this case, each of the documents has a slightly different perspective on the environment, and therefore attributes value to it in a different manner. Requirements for protection of important and sensitive values will frequently be expressed at a higher level of specificity in a district plan than in a regional plan, but that will not necessarily be so and was not the case here.

[13] Commencing with the considerations mandated by the statute itself, I would reject the RDC's submission that, as Part 2 is not mentioned in ss 93 – 95, it is not relevant to the notification decision. That cannot be right as a matter of conventional statutory interpretation. The purposes and principles must be mandatory relevant considerations. They are expressed as applying to *all* persons exercising powers under the Act. There is no suggestion that the considerations can be delegated to the district plan or any other instrument. Parliament must have intended that these

principles be borne in mind by all decision-makers exercising any discretion under the Act.

[14] Moving next to the national and regional documents, the scheme, purpose, and words of the RMA all favour the interpretation that they must be taken into account.

[15] It is not clear from the Act that, at least before the amendment of 9 August 2005, the district plan was required to coincide with what was said in the higher level documents. The only document it was specifically required to give effect to was the national policy statement. By s 75(2) the district plan was to be "not inconsistent" with the regional policy statement and plan. This does not seem to prevent the district plan taking a somewhat different perspective, although insofar as it was inconsistent it would be ultra vires. (The 2005 amendment to s 75, requiring a district plan to "give effect to" national policy statements, NZCPS and regional policy statements, now allows less flexibility than its predecessor.)

[16] But that does not mean that provisions of Part 2 and of the national and regional instruments could be ignored. Indeed, the fact that the district plan can take a different perspective is a point in favour of the interpretation that the other documents (ie other perspectives) must be considered.

[17] Requiring the district council to consider the higher level instruments is also in keeping with the purpose of the Act. For example, s 6 requires that questions of national importance must play their part in the overall consideration and decision. The district plan is not required to address such issues, although failure to do so may not necessarily be inconsistent with higher documents. In that situation it would be necessary for a decision-maker to refer to higher documents in order to properly assess issues of national importance.

[18] It would be inconsistent with the statutory hierarchy for a district council to be able to disregard such specific provisions of a regional instrument provided by the regional map and the policies to which it gives effect.

[19] My conclusion that district plans do not (and are not required to) cover all of the ground covered in the national and regional instruments is borne out by the documents in question in this case. The protection of the area between Te Henga and Muriwai was expressed with significantly greater emphasis and specificity in the regional plan, not least in the wholly precise demarcation of the "Outstanding Character" discussed in the landscape assessment issues which it cites and which is depicted in the accompanying map. While the RDC's district plan referred in general terms to the value of the area, its account is less focused and emphatic than that of the regional instruments.

*Specific*

[20] The difficulty arises from the fact that ss 6 and 7 (stating the principles of the RMA) and also s 104 (requiring the council to have regard to higher order instruments when considering an application for resource consent) suggest that the higher order instruments should be considered by the district council when considering under s 93 whether the adverse effects on the environment will be minor; whereas ss 9 (prohibiting land use contravening a rule in a district plan) and s 93 contain no reference to such instruments.

[21] The answer to question 1 depends on which of these provisions are to be regarded as dominant. While I am attracted to the practical sense of the President's approach, my assessment of the text and purpose of the RMA in terms of s 5 of the Interpretation Act 1999 is that ss 6 and 7 of the RMA are dominant provisions and the message they convey is supported by s 104.

*Purposes and principles*

[22] Sections 6 and 7 appear in Part 2 of the RMA which is headed "Purpose and principles". It begins with s 5 which states the purpose of the Act, which is to promote sustainable management of natural and physical resources. Section 8 requires that the Treaty of Waitangi be taken into account.

[23] Section 6 relevantly 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:*
>
> *(a) The preservation of the natural character of the coastal environment …:*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
>
> …
>
> (Emphasis added.)

[24] And s 7 states:

> *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—*
>
> …
>
> *(c) The maintenance and enhancement of amenity values:*
>
> …
>
> *(f) Maintenance and enhancement of the quality of the environment:*
>
> (Emphasis added.)

[25] Sections 6 and 7 apply to all persons exercising functions and powers under the RMA in relation to managing the use, development and protection of natural and physical resources. There is no doubt that they apply to the RDC in its decisions on the notification and grant of resource consents. The RDC is therefore required to "recognise and provide for" the factors in s 6, and to "have particular regard to" the factors in s 7. It is necessary to determine in the present context what are "the environment" and the "amenity values" to which they refer.

[26] "[E]nvironment" is defined by s 2 to include:

> (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:

[27] "[A]menity values" are defined in s 2 as:

> 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

[28] What are New Zealand's amenity values is assessed by a series of decision-makers:

(1) Parliament (in enacting Part 2 which lists inter alia matters of national importance);

(2) The Minister for the Environment, who in 1994 made the NZCPS: ss 56 – 58;

(3) The regional authority, the ARC, which has made:
- the ARPS: ss 59 – 62;
- the Auckland Regional Plan – Coastal ("ARPC") ss 63 – 64;

(4) The RDC, one of seven local authorities exercising jurisdiction within the greater Auckland area, which has relevantly made:
- the Rodney District Reviewed District Plan (the Operative District Plan) : s 75;

and has promoted:
- Proposed Plan Change 55 (which came into force in April 2006);
- Proposed District Plan 2000;

(5) The RDC as consent authority, which made the decisions not to notify and to grant consent: Part 6.

[29] Section 104 requires the district council to have regard to all of the foregoing when considering an application for resource consent. The question is whether it must also do so when assessing whether the adverse effects on the environment of granting the consent will be more than minor (s 93).

[30] The standards of "the environment" referred to by s 93 are stated authoritatively by all the foregoing "instruments", including those of Parliament, the Minister, and the regional council as well as the district council. I prefer the view that, to know what are the relevant amenity values in order to make a worthwhile appraisal of that environment, it is not enough to limit attention to the Operative District Plan or the Proposed District Plan 2000, when (as in the present case) it gives only a partial account of what "the environment" is.

[31] That conclusion is supported by s 104's specific requirement that the district council have regard to all of the higher instruments when it makes its substantive decision. Parliament has decided that at that stage the district council must know what is in all of them, in order to "take them into account". To reject the interpretation I propose would not spare the district council effort in educating itself as to these things, since it must be fully familiar with them when it makes its s 104 decision, often immediately after its procedural decision under s 93 – whether the application can be safely dealt with without public notification. It would of course spare the applicant potential opposition and the consequent delay and costs. But my reading of the scheme of the foregoing sections is that, in cases where the higher instruments convey a different message from the district scheme, Parliament has preferred the opposing public interest – of getting the right answer via the objection process.

[32] Such conclusion is reinforced by an examination of how the RMA works.

*The operation of the RMA*

*(1) The RMA procedures*

[33] Administration of the coastline and its hinterland is governed by the RMA. As already noted, its purpose is to promote the sustainable management of natural and physical resources in a way which enables people and communities to provide for their social, economic and cultural wellbeing while sustaining the potential of the resources to meet the needs of future generations (s 5). This is achieved by the drawing up of district and regional plans, which translate the objectives of the RMA

into rules that apply in specific areas. Permission must be obtained to carry out activities that are restricted or controlled by these rules. That is done by applying for resource consent.

[34] In this case, it was necessary for the developers to apply for resource consent because the project infringed rules in relation to size, excavation of materials and earthworks under the Operative District Plan, Proposed District Plan 2000, and Proposed Plan Change 55.

[35] Applications to the RDC for resource consent are made under s 88(2), which provides that an application must:

> (a) be made in the prescribed form and manner; and
>
> (b) include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

[36] Schedule 4 states:

> *Subject to the provisions of <u>any</u> policy statement or plan*, an assessment of effects on the environment for the purposes of section 88 should include–
>
> (a) a description of the proposal;
>
> (b) where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking that activity
>
> (c) an assessment of the actual or potential effect on the environment of the proposed activity:
>
> …
>
> (g) a description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect:
>
> (h) identification of the persons affected by the proposal, the consultation undertaken, if any, and any response to the views of any person consulted:
>
> …
>
> (Emphasis added.)

[37] In the High Court, Harrison J (at [96] of his judgment) read narrowly the italicised passage with which Schedule 4 begins so as not to include reference to higher order instruments. But since the district council when considering the application at the s 104 stage is required to have regard to the higher instruments, the application should be prepared with them in mind and, for reasons of efficiency, deal with whichever of them are relevant to the decision. The alternative, that the district council alone is expected to look at them, would make for administrative inefficiency.

*(2) The decision-making power*

[38] The decision-making power in question is in ss 93 and 94A. Section 93 states that an application for consent *must* be notified unless the consent authority is satisfied that the adverse effects of the activity on the environment will be minor. (Notification is also unnecessary if the activity is controlled, but that is not the case here.) So the question is: by what legal standards is the issue whether the effects will be minor to be judged?

[39] Section 94A gives guidance as to how a consent authority may decide whether the adverse effects will be minor. Under s 94A the 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.

[40] A discretionary activity is one for which resource consent is required (s 77B).

[41] The section tells us what the district council may or must disregard. Since the present question is what the district council is required to consider when it is deciding whether the effects on the environment will be minor, it is therefore necessary to determine:

(a) What is the factual subject-matter of the enquiry?

(b) What are the legal criteria?

[42] As to (1), since the subject of the enquiry is the "environment", what is the relevant environment must be determined as a question of fact; and whether the effect upon it is minor is to be assessed as a matter of judgment. Neither question can be answered in a vacuum. Both enquiries are structured by (2), the considerations deemed by the RMA to be important. The point may be expressed another way: could the RDC as consent authority lawfully come to a conclusion that adverse effects on the environment will be minor, without first considering Part 2 of the RMA and the regional and national planning instruments? The answer is no. That conclusion arises from the statutory scheme, which sets up a hierarchy of the statutory, national and regional provisions of relevance in addition to the district plan.

*(3) The decision-makers*

[43] In *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176 at [39] (HC) Chambers J noted that the RMA "works from the most general to the most particular and each document along the way is required to reflect those above it in the hierarchy". That statutory hierarchy is described in *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA at [59] (HC). The question is what the implications of this are for decision-makers. Are district council instruments to be seen as including all the implications of the higher documents so that the latter may be disregarded; or are the higher instruments to be considered when they contain a dimension that is omitted or stated with less specificity in the district council instrument? I am satisfied that the latter is the case.

The hierarchy of decision-making in the present case has been recorded above at [28].

*(4) The interrelation of instruments*

[44] Parliament has sought to avoid inconsistency among the instruments at different levels in the hierarchy. So by s 62(3) a regional policy statement must *give effect to* a national policy statement or NZCPS. Section 55 (which applies to NZCPSs by s 57) also requires local authorities to *give effect to* a provision in the national policy statement that affects a regional policy statement or a plan. Under s 61, in preparing or changing a policy statement, the council must take into account the extent to which the regional policy statement needs to be consistent with the policy statements and plans of adjacent regional councils. Likewise, during the material period (1 August 2003 to 9 August 2005) s 75(2) provided:

> (2) A district plan must *give effect to* any national policy statement or a New Zealand coastal policy statement and *must not be inconsistent with*—
>
> (a) a water conservation order; or
>
> (b) the regional policy statement; or
>
> (c) a regional plan for any matter specified in section 30(1).
>
> (Emphasis added.)

[45] In this case the ARC provided in very specific detail, a precise assessment of how the amenity values of the coastline were to be measured. The following important and very specific provision from the ARPS, and the regional map which gives effect to it, do not appear in the RDC's district plan:

> **6.4.19 Policies: Landscape**
>
> The following policies and methods give effect to Objective to 6.3-4:
>
> 1. Subdivision, use and development of land … shall be controlled so that in areas identified in Map Series 2 and 3:
>
> (i) the quality of outstanding landscapes (landscapes rating 6 and 7) is protected by avoiding adverse effects on the character, aesthetic value and integrity of the landscape unit as a whole;
>
> (ii) outstanding landscapes with a sensitivity rating of 6 or 7 are protected by avoiding subdivision, use and development which cannot be visually accommodated within the landscape without adversely affecting the character, aesthetic value and integrity of the landscape unit as a whole.

…

The RDC's district plan depicts the subject property as in an area rated 6. It is immediately adjacent to a coastal area rated 7. Its sensitivity rating is 5. Each is a high and exacting rating. It was the clear intent of the ARC to treat the area as of especial sensitivity.

[46] The stipulations of the RDC's plan for amenity values in the area were expressed more generally and were therefore less exacting.

[47] It is argued for the RDC that it is immaterial that in this case the higher order instrument of the ARC provided with great specificity for more protection of the environment than did the RDC plan. Because the latter made provision for protection of the Te Henga-Muriwai coastline, counsel for the RDC submitted:

(a) It was "not inconsistent" with the more exacting requirements of the ARC instrument; and because the RDC was not required at the s 93 stage to consider the higher order instruments;

(b) It acted lawfully in deciding that no notification was required.

[48] It is unnecessary to consider (a) because I do not accept the argument as to (b). The result of its acceptance by the High Court is that the higher standards of the ARC instrument were ignored; so a lower standard than they stipulated was accepted on the s 93 decision; and the RDC lacked at the time of its s 104 decision the submissions of objectors who would have brought the ARC instrument to specific attention.

*(5) Section 9*

[49] Ellen France J would endorse the reasoning of Harrison J, contrary to the foregoing argument, that the dominant provision is s 9, which when taken with the absence of reference to higher order instruments in s 93 overrides the inference from ss 6, 7 and 104, that the higher instruments must be taken into account, which in my

view are decisive. Section 9 is the first in Part 3 "Duties and restrictions under this Act". It states:

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is
>
> (a) expressly allowed by a resource consent granted by the [district council] responsible for the plan; or
>
> (b) an existing use …

[50] So, it is argued, there being no like prohibition of use that contravenes a provision of the regional plan, Parliament does not seek to prevent such use.

[51] But such argument cannot in my view meet s 104, which makes quite clear that it is the duty of the council to "have regard to" the higher order instruments and, by necessary implication, to withhold resource consent unless that has been done. Certainly s 104 provides a less forthright prohibition of infringement of the higher order instruments than does s 9 in relation to rules in the district plan. But there should be no need for s 9 to do the work performed by sub 75(2) (to avoid inconsistency with the regional plan when the district plan is established) and s 104 (when the consent application is determined). Self-evidently, if there is consistency between the district plan and higher instruments there will be no practical need to refer to the latter. But where, as here, the regional instrument is in fact more exacting than the district plan, that difference is material to the s 104 decision. Such decision should be made with the benefit of a s 93 decision that considers the same environment as the s 104 decision, not a different one.

**Issue 2: is the ARC "affected so it should have been notified"?**

[52] The answer is no. I agree with the reasons given by the President.

**Issue 3: in making its decisions on a notification can a consent authority take into account prospective conditions of consent as mitigating the effects of the activity?**

[53] The answer to this question is yes, in respect of conditions that are inherent in the application, and no, in respect of those which are not.

[54] Where public notice is not required under s 93, the application must still be notified to "affected persons", that is, "all persons who, in the opinion of the consent authority, may be adversely affected by the activity" (s 94(1)).

[55] The activity is what the applicant wishes to do as expressed in its application. In so far as the application inhibits what it can do the activity will be narrower than would otherwise be the case. In *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 570 (CA), this Court said that "activity" appears to have the same meaning as "use".

[56] The definition of condition includes a term, standard restriction and prohibition (s 2) and is thus a qualification to a consent to a particular use: see *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 at [44] – [46] (CA). Reference was also made in *Body Corporate 97010* to s 127, which concerns an alteration to a condition but not an alteration to an activity. This Court said that the question of what is an activity and what is a condition may not be clear-cut and will often be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent. It was stated that it is preferable to define the activity which was permitted by resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation: at [46]. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in various ways.

[57] The Oxford Dictionary definition of the word "condition" includes "a provision, a stipulation". It may, as in *Body Corporate 97010*, be added by the decision-maker as a qualification.

[58] Here by contrast a form of condition was inherent in the application; the application states "the dwelling has been designed to fit in with its site". The likely external colours for the exterior of the building are designed to reflect the colours of a pebble beach. A stone roof and natural timber sides aid in achieving this. The conditions imposed by the RDC (at 56) give effect to that and are therefore inherent in the application. They are not super-added conditions, which may be what s 127 is about.

[59] In *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) I said (at [12]):

> It would defy common sense if when making the s 93 decision the consent authority could not have regard to the practical reality of what adverse effects on the environment would be. To determine that self-evidently requires consideration of conditions that would affect such reality.

[60] I would confirm that view. It has no application to conditions which are both certain and an integral part of the application so that potential objectors have the opportunity to appraise them when deciding whether to object, to appear and to give or call evidence.

**Relief**

[61] The RDC suggests that the Court should exercise its discretion against granting declarations because such orders would not serve any useful purpose. However it does accept that there is a public interest in having the matters at hand determined.

[62] The decision of the Court is to allow the appeal and make the following declarations:

(a) In deciding whether to notify the application, the Rodney District Council was required to take into account the relevant outstanding landscape classifications of the affected land in the Auckland Regional Policy Statement.

(b) There was no need to notify the Auckland Regional Council under s 94.

(c) In deciding whether to notify the application, the Rodney District Council was entitled to take into account the conditions which it proposed to impose as part of the consent.

[63] As agreed by the parties we make no order as to costs.

**WILLIAM YOUNG P**

**Table of Contents**



## Introduction

[64] I would allow the appeal and make the following declarations:

(a) In deciding whether to notify the application, the Rodney District Council was required to take into account the relevant outstanding landscape classifications of the affected land in the Auckland Regional Policy Statement.

(b) There was no need to notify the Auckland Regional Council under s 94.

(c) In deciding whether to notify the application, the Rodney District Council was entitled to take into account the conditions which it proposed to impose as part of the consent.

I will now explain why.

**In deciding whether to notify the application, the RDC was required to take into account the relevant outstanding landscape classification of the affected land which appears in the ARPS**

*No general requirement for decision-makers under s 93 to take into account regional planning instruments*

[65] This case concerns the relevance of regional planning instruments to the consideration of applications for land use consents and a little context may be of assistance:

(a) In many, and perhaps most, circumstances where a district council (or its delegate) is required to determine whether to notify a resource consent application, regional planning instruments will be completely irrelevant. An obvious example is if the resource consent is required because of recession plane requirements in the district plan which are unrelated to anything which appears in the regional planning instruments.

(b) Section 75 of the Resource Management Act (at the relevant time) envisaged that a district plan would "give effect to" national policy statements and NZCPSs (see s 75(3)) and "not be inconsistent with" inter alia, the regional policy statement. It should be noted that under the current s 75 a district plan must now "give effect to" the regional policy statement: see Baragwanath J at [15].

(c) Where the relevant rules in the district plan are, in effect, mandated by the regional planning instrument, conformity with s 75 should ensure

that nothing of relevance will be overlooked if the decision-maker focuses solely on the district plan.

(d) In any event, in such a case, the decision-maker will usually be well-familiar with the relevant provisions of the regional planning instrument.

(e) Section 104(1)(b), which requires a district council to have regard to regional policy statements when considering an application for a resource consent, should serve as an adequate backstop in case anything of relevance has been overlooked.

[66] Under s 93, a district council must notify an application for a resource consent unless the application is for a controlled activity or the council is satisfied that the adverse effects of the activity on the environment will be minor. In this case, the application was not for a controlled activity, therefore the only issue was whether the RDC was satisfied that the adverse effects of the activity on the environment would be minor.

[67] "The environment", as defined by s 2, has a reality that is independent of what is said about it in planning instruments. So it is perfectly possible to assess, or form views about, the environment without referring to such instruments. An effects assessment requires in the first instance a consideration of externalities associated with the proposed activity on the environment as it exists. District planning instruments are, however, relevant to the assessment of the significance of such effects (eg whether they are likely to be major, minor etc) because these instruments prescribe what activities can occur within the relevant environment. They thus have a necessary role to play where the baseline test (see *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA)) is relevant or where it is necessary to envisage a "receiving environment" (see *Queenstown Lakes District Council v Hawthorn Estates Ltd* [2006] NZRMA 424 (CA)) which, to use a current cliché, requires an assessment of the environment "going forward". In all of this, I think it important to keep the associated exercises required of decision-makers as simple and as grounded in reality as possible. In the case of a section 9(1) resource consent, application of

the baseline test and assessment of the receiving environment are not usually seen as requiring reference to regional planning instruments.

[68] It is important to recognise that where a district planning instrument is not consistent with a regional planning instrument, the regional council's primary concern should be with the statutory processes associated with that district planning instrument. A person dealing with a territorial authority should usually be entitled to assume that that a district plan is consistent with statutory requirements, including requirements as to consistency with regional planning instruments. Resource consent processes should not be used by a regional council as a forum to re-litigate the structure and contents of district plans.

[69] For these reasons, which are broadly similar to those given by Ellen France J, I see no general requirement for a s 93 decision-maker to have regard to regional planning instruments. For the sake of completeness, I agree in particular with what she says at [95] – [100] and [103].

[70] That said, there may be some cases where reference to regional planning instruments may be necessary at the s 93 stage. I see this as just such a case, for the very particular reason that that it was not possible to make sense of the district planning instruments without taking into account the regional planning instruments. This is in part because of the role of regional councils in respect of the protection of landscapes which is reflected in the ARPS and in part because of the poor drafting of the relevant district planning instruments. In the succeeding sections of this part of my judgment I will explain why this is so.

*The protection of outstanding landscapes: section 6 of the Act*

[71] Section 6(b) of the Act provides:

> **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:

…

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

*The protection of outstanding landscapes: The New Zealand Coastal Policy Statement*

[72] The 1994 NZCPS provides:

**Policy 1.1.3**

It is a national priority to protect the following features, which in themselves or in combination, are essential and important features of the natural character of the coastal environment:

(a) Landscapes, seascapes and land forms, including:

(i) significant representative examples of each land form which provides the variety in each region;

(ii) visually or scientifically significant geological features; and

(iii) collective characteristics which gives the coastal environment its natural character including wild and scenic areas; …

**Policy 3.1.2**

Policy statements and plans should identify (in the coastal environment) those scenic, recreational and historic areas, areas of spiritual or cultural significance, and those scientific and landscape features, which are important to the region or district and which therefore will be given special protection; and that policy statements and plans should give them appropriate protection.

*The identification and protection of outstanding landscapes: the ARPS*

[73] Consistently with the direction given in the NZCPS and ss 59 – 62 of the Act, the ARPS identifies outstanding landscapes and makes provision for their protection. Thus paragraph 6.4.1.19 provides:

1 Subdivision, use and development of land and related natural and physical resources shall be controlled so that in areas identified in Map series 2 and 3:

(i) the quality of outstanding landscapes (landscape rating 6 and 7) is protected by avoiding adverse effects on the character, aesthetic value and integrity of the landscape unit as a whole;

> (ii) outstanding landscapes with a sensitivity rating of 6 or 7 are protected by avoiding subdivision, use and development which cannot be visually accommodated within the landscape without adversely affecting the character, aesthetic value and integrity of the landscape unit as a whole;
>
> (iii) the quality of regionally significant landscapes (landscape rating 5) is protected by avoiding adverse effects on the elements, features and patterns which contribute to the quality of the landscape units;
>
> (iv) regionally significant landscapes with a sensitivity rating of 5 are protected by ensuring that any subdivision, use and development can be visually accommodated within the landscape without adversely affecting the elements, features and patterns which contribute to the quality of the landscape unit.

Paragraph 6.4.20 specifies as the methods by which this policy is to be given effect to:

> 1 Provision is to be made in district plans and relevant regional plans to give effect to policy 6.4.19 – 1, 2 and 3
>
> …
>
> 3 The ARC will, after consultation with interested persons and organisations, prepare and publish guidelines on the standard methodology for the assessment and the valuation of landscape within the region.

[74] Appendix F to the ARPS provides an explanation as to the regional landscape assessments which are reflected in the planning maps. The planning maps themselves are drawn on an unfortunately large scale. But when regard is had to the explanatory material, it is clear that the subject property is itself in an area rated as 6 and adjoins an area rated as 7. The sensitivity rating is 5.

*The identification and protection of outstanding landscapes: District planning instruments - identification of the primarily relevant instrument*

[75] There are three relevant district planning instruments – the Operative District Plan, Proposed Plan Change 55 and the Proposed District Plan 2000. Of these instruments the most significant (in terms of weight) might be thought to be Proposed Plan Change 55, given that when the resource consent application was considered, its relevant provisions were no longer open to challenge. But for present

purposes (associated with the relevance of the ARPS to the notification decision) I think it right to focus on the Proposed District Plan 2000. This is for timing reasons.

[76] The Operative District Plan came into force in 1993. A year later, in 1994, the ARPS was notified. The RDC recognised that the ARPS "provided a series of policy directions for managing the rural area, which needed to be implemented", and Proposed Plan Change 55 was drafted as a result. It was notified in 1995. However, as the ARPS did not become operative until 1999, Proposed Plan Change must have been based on the notified ARPS not the operative version. I do not know whether there are any material differences between the notified and operative versions of the ARPS. Because Proposed District Plan 2000, notified in November 2000, post-dates the ARPS there should be no timing issue in relation to the ARPS. For ease of discussion, I will focus on Proposed Plan Change 55 and Proposed District Plan 2000, and leave to one side the Operative District Plan, which is now of some antiquity and also precedes the ARPS.

[77] For this reason, I will address in this section of my judgment only the relevant provisions of the Proposed District Plan 2000.

*The relevant provisions of Proposed District Plan 2000*

[78] The Proposed District Plan 2000 makes a number of general references to landscape values. For instance:

> The rural area contains a number of sites of high natural environmental value, including areas of … coastal foreshore and headlands. A number of these sites have regional and national significance and all contribute to the to the amenity value of the rural part of the District. These features, combined with topography and features such as the seas, lakes and rivers, and the non-urban context collectively create attractive landscapes, and high amenity values with the rural area. (1)
>
> …
>
> There exist a number of landscapes and natural features of both regional and local significance which have been identified and protected for a number of years. (5)

The objectives include enhancement and protection of:

> [T]he distinctive special character of parts of the District which have a high degree of naturalness and high landscape and amenity values which contribute to the identity of the district.

The objectives for the landscape protection rural zone (in which the subject property is situated) include the protection and enhancement of:

> … the natural, coastal, non-urban and "remote" character of … the coast between Muriwai and Bethells [and]… wherever possible,. the high value landscapes … within the zone.

[79] Broadly, the policies and rules are consistent and give effect to these objective. For instance there is a policy that:

> … buildings are sited and designed so that they do not detract in any more than a minor way from both highly valued landscapes or significant rural landscapes. (21).

And, for the purposes of the land protection zone, there is a policy that:

> The location, nature and scale of buildings should not adversely affect the high quality landscape within the zone.

The explanation of this policy notes:

> The landscapes in this Zone are characterised by minimal subdivision and development, areas of coast beaches and dunes, and rugged cliffs bush, scrub and the Te Henga Swamp which is of natural/international significance. The area is ranked of outstanding landscape value. …

[80] The "Muriwai – Bethells" area is described in this way:

> The land in this area is located on the west coast of the district running down to the boundary between Rodney District and Waitakere City at a number of points. It consists of a rugged coastal strip between Te Henga (Bethells Beach) and Muriwai and the area inland as far as the edge of the hill country west of Waitakere. The inland area extends behind Muriwai as far north as Lake Paekawau.
>
> The significant elements making up the character of this area are:
>
> The steep rugged indented coastal cliffs along the west coast, with small beaches amid high, rocky headlands, largely uninhabited;
>
> Extensive wetlands bordering (but not within) the south western most part of the zone;
>
> River estuary (Waitakere River);

> Rolling to steep hills extending inland from the coast;
>
> Areas of regenerating and quality bush;
>
> A remote quality created by the combination of the above factors, low density of settlement, particularly along the coast and the lack of roads and other landscape modifications associated with urban development.
>
> Limited areas of pasture along the coastal edge behind the cliffs and amidst the bush areas …
>
> …
>
> The areas of native bush, wetlands and lakes are of high natural environment value, *while the landscape[s], particularly along the coast have been rated as both regionally significant and outstanding.*
>
> (Emphasis added.)

[81] In the passage which I have italicised the word "rated" must refer to the ratings in the ARPS, as it refers to a regional rating. So what comes out of the Proposed District Plan 2000 very clearly is that it refers to, and builds on, the landscape ratings which are incorporated in the ARPS. In the case of the coast between Muriwai and Bethells, the Proposed District Plan 2000 alerts the reader to the fact that landscapes in that area have been rated as regionally significant and outstanding but it is not specific as to which landscapes are so rated. To get that information, the reader must go to the ARPS. Indeed, because of the very large scale of the planning maps in the ARPS, it may be necessary to go behind those maps to the work on which they were based (and which in turn are specified in the ARPS).

[82] This allusive and referential style of drafting is far from ideal. Indeed it requires the assiduous reader of the Proposed District Plan 2000 to embark on quite a difficult paper chase. But, unless the Proposed District Plan 2000 is treated as incorporating the landscape ratings provided in the ARPS, it is necessarily incomplete and not in conformity with the statutory requirements as to consistency with the ARPS and the NZCPS (policy 3.1.2). In this context, I think that the courts are required to make the best of a bad job and construe the Proposed District Plan 2000 so that it is consistent (or at least not inconsistent) with the ARPS. This in fact is not too difficult; it primarily involves treating the references in the district planning instruments to outstanding and regionally significant landscapes as referring to those landscapes which have been so identified in the ARPS. If this

interpretation is adopted the rules in the Proposed District Plan 2000 can be applied in a way which fulfils the relevant policies in the ARPS.

[83] Under those rules, the proposed activity fell to be considered as a discretionary activity. The relevant criteria are expressed in a diffuse way and there is no point setting them out here given that there can be no doubt that the values of the affected landscapes were a relevant consideration.

*The error made in the non-notification decision*

[84] As discussed above at [66], the RDC was required to notify the application unless it was satisfied that the adverse effects of the activity on the environment will be minor: s 93(1)(b). In the particular context of landscape values, and particularly given s 6(b), I consider that an adverse impact of a type which might be minor (or less than minor) in the context of an "ordinary landscape" might be of more than minor significance if the landscape is rated as outstanding.

[85] The Proposed District Plan 2000 was insufficiently precise to enable the decision-maker to determine whether the landscapes affected by the proposal were outstanding. This could only have been determined by going to the ARPS. And, as I have indicated, I am of the view that the Proposed District Plan 2000 incorporates those ratings.

[86] It is clear from the affidavits filed in the High Court that there is scope for a difference of opinion as to the significance of the landscape values affected by the proposal. The house has been erected on what was pasture and its immediate environment has obviously been much affected by human activities. The recommendation as to non-notification and the subsequent decision recognised that the affected land was rural and adjacent to coastline. It also discussed the proposal's effect on landscape values by reference only to those general considerations and not the reality that the affected landscape had been rated as outstanding, a rating which engaged a number of the objectives and policies which appear in the district planning instruments.

[87] To put this another way, the failure by the decision-maker to go to the ARPS would not have mattered if the decision had been proceeded on the basis (or assumption) that the affected landscapes had an outstanding rating. But the way in which the recommendation and decision as to non-notification (and indeed the decision to grant the resource consent) are expressed makes it clear to me that the decision-maker did not proceed on this basis.

**There was no need to notify the Auckland Regional Council under s 94**

[88] If the s 93 decision-maker had recognised the relevance of the ARPS to the notification decision, it is at least likely, although perhaps not inevitable, that the application would have been notified. Where notification under s 93 is required, s 94 is not triggered. So if public notification had been required, the ARC would have been entitled to participate in the process and no s 94 issue would have arisen. This line of thinking suggests that this aspect of the case is artificial because the reasons why the ARC claims that it should have been notified under s 94 are largely the other side of the coin to the reasons why it challenged the s 93 non-notification decision.

[89] Obviously a regional council can be affected, in a general sense, by a resource consent which permits activities which are contrary to policies which it has adopted in regional planning instruments. In issue on this aspect of the case is whether an adverse impact of that kind is sufficient to engage s 94(1). The relevant authorities are *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] 2 NZLR 597 (SC), *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) and *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC). The current provisions are not in precisely the same form as those in issue in the *Discount Brands* case in which a majority (Blanchard, Keith and Richardson JJ) saw a proprietary interest as essential. But it still remains the position that only those affected in an environmental sense are entitled to notification under s 94, cf *Northcote Mainstreet* at [188]. Section 94(1) seems to me to read most naturally as referring to adverse environmental effects associated with the externalities of the activity in question. On a common-sense application of that test, the effect on the ARC is not the sort of adverse effect contemplated by s 94.

[90] There are other considerations which point in the same direction. Service is required on those who, in the opinion of the consent authority, "may be adversely affected by the activity". The focus is thus on the adverse impact of the activity rather than the granting of consent. This is a pointer away from the approach contended for by the ARC as its real grievance is in relation to the granting of the consent. As well, s 104(1)(b) means that regional planning instruments are relevant to the decision whether to grant a resource consent. There is no indication in the Act as a whole that a regional council is entitled to be notified merely because the provisions of an instrument which it has prepared will be considered by the consent authority.

[91] For those reasons, I prefer the view that the adverse impact asserted by the ARC is not of a kind which engages s 94(1).

**In deciding whether to notify the application, the Rodney District Council was entitled to take into account the conditions which were proposed in the application.**

[92] I agree broadly with the approach taken by Baragwanath J on this point.

**ELLEN FRANCE J**

[93] I take a view which differs from those of William Young P and Baragwanath J on the question relating to s 93. In particular, I do not consider that, in deciding under s 93 whether to notify the application, the RDC was required to take into account the relevant outstanding landscape classifications of the affected land in the ARPS. I explain my reasons briefly below.

[94] The applicants in this case needed a resource consent from the RDC only because their proposed use of the land contravened a rule in the Operative District Plan (or Proposed District Plan 2000) and was not an existing use: s 9(1). By contrast, when land use contravenes a rule in a regional plan, a resource consent must be obtained from the regional council: s 9(3).

[95] It follows from this dichotomy that the district plan was the focus of the application. It "is a frame within which the resource consent has to be assessed": *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [10] (SC) per Elias CJ.

[96] Randerson J in delivering the judgment in the *Discounts Brands* proceeding in the High Court (*Northcote Mainstreet Inc v North Shore City Council* HC AK CIV-2003-404-5292 5 February 2004) put it this way (at [48]):

> But the plan provisions are also relevant to an extent when considering notification issues under s 94. For example, the provisions of the plan or plans will be relevant in identifying the type of activity for which consent is sought. In addition, the plan provisions may be relevant in establishing the permitted baseline as discussed by the Court of Appeal in *Bayley v Manukau City Council* [1999] 1 NZLR 568, 577 and in other decisions of this court including one of my own in *King v Auckland City Council* (1999) NZRMA 145, 156-158. The provisions of the District Plan may also be helpful in identifying the Council's view about the importance or significance of adverse effects on the environment and the approach to be taken where there is potential for the kind of adverse effects identified.

[97] A focus on the district plan is consistent with the stated purpose of the district and regional plans. As to the latter, s 63(1) states that the purpose of the "preparation, implementation, and administration" of regional plans is to "assist a regional council" to undertake "its" functions so as to achieve the purpose of the Act. Section 72 identifies the same purpose for district plans in relation to territorial authorities.

[98] I agree that none of this makes Part 2, which sets out the purposes and principles of the Act, irrelevant. The provisions of Part 2 apply to all decision-makers exercising powers under the Act. But I agree with Harrison J that this does not alter the position in this case. That is because, as the Judge put it at [100], "[the Part 2] provisions are general statements of values which are specifically addressed later in the district planning instruments". It is relevant in this context that there is no statutory definition of the "outstanding natural features and landscapes", the protection of which is referred to in s 6(b) as a matter of national importance.

[99] I agree with the respondent that it is also relevant that the Act spells out the circumstances in which reference must be made to the "higher order" documents, ie

when making a decision on a resource consent application: s 104(1)(b). At least in the context of a resource consent application, that suggests that where the legislation is silent on the point it is not necessary to consider the higher order documents.

[100] It is also important that the consent authority must not grant a resource consent if the application should have been publicly notified and was not: s 104(3)(d). In the present case, for example, when considering the resource consent application and looking at the regional plan (as required by s 104(1)(b)) the decision-maker could have concluded that the distinction between the two plans was such as to affect the non-notification decision. If that was so, then resource consent could be refused under s 104(3)(d). The ability to decline resource consent on this basis provides a safeguard against the concerns underlying the appellant's complaint in this case.

[101] I add that, in any event, I am not entirely sure the differences between the sets of instruments in this case are so critical. Considerable emphasis is placed on the formal "rating" of the landscape in the regional planning instrument. However, the Act and the Coastal Policy Statement require only identification of important areas and appropriate protection of those areas. The RDC's district plan seems to meet that requirement. Ultimately, both sets of instruments recognise the unique nature of the landscape.

[102] In my view, the reference in Schedule 4 to "any" plan does not alter the position. Rather, as Harrison J said at [98], "[l]ogically, the Schedule 4 reference to 'the provisions of any policy statement or plan' would relate or link back to the type of application for resource consent, whether under a district plan or under a regional plan". Schedule 4 elaborates on the s 88 requirements imposed on the applicant when lodging an application for resource consent. It can be of little assistance to a s 93 decision on whether to notify a consent application.

[103] Finally, looking at the matter overall, the appellant's real complaint is more properly characterised as an objection to the content of the RDC's district plan. I do not see the resource consent process as the proper means of resolving those sorts of issues: see the discussion in *Auckland Regional Council v Living Earth* (2008)

[2009] NZRMA 22 at [41] – [43] and also at [26] – [29] (CA). The importance of this point is emphasised when, as here, we are dealing with a case where there is no live issue. An approach which reads the relevant provisions of the regional instrument into the RDC's district plan ameliorates concerns over the possible abuse of the resource consent process to some extent. But even that approach would require consideration of the regional plan on any decision not to notify simply to ensure there was no difference. I see such a requirement as inconsistent with ss 9 and 104 and as adding an unnecessary administrative burden.

[104] I agree that in relation to the second question there was no need to notify the ARC under s 94(1) of the RMA, essentially for the reasons given by William Young P. For the reasons given by Baragwanath J, I also agree that in relation to the third question the RDC was entitled to take into account the conditions which were proposed in the application.

Solicitors
Kirkland Enright, Auckland for Appellant
Simpson Grierson, Auckland for Respondents

**IN THE HIGH COURT OF NEW ZEALAND**
**DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**ŌTEPOTI ROHE**

**CIV-2020-412-000113**
**[2022] NZHC 510**

| | |
|---|---|
| BETWEEN | CLUTHA DISTRICT COUNCIL<br>Applicant |
| AND | OTAGO REGIONAL COUNCIL<br>Respondent |

Hearing: 30 June 2021

Appearances: P J Page and S R Peirce for the Applicant
P A C Maw and M A Mehlhopt for the Respondent

Judgment: 18 March 2022

---

**JUDGMENT OF NATION J**

---

## Introduction

[1] A District Council had a consent to take water from the Clutha/Mata-Au River for a community water scheme. It wanted to renew that consent for a period of 35 years. The Environment Court fixed the duration at 25 years, in part because water from the scheme was being used for dairy shed wash. The District Council says that end use of the water was not a relevant concern. It appeals the Environment Court's decision.

## Background

[2] The Clutha District Council (District Council) had a resource consent to take water from the Clutha/Mata-Au River (the river) for the Stirling (Bruce) Water Scheme (the scheme) that expired on 1 September 2018. The scheme provides water for

distribution to rural and urban destinations, including farming properties in the Clutha district, the townships of Stirling and Benhar, and the Cherry Lane suburb in Balclutha.

[3] The District Council applied to the Otago Regional Council (the Regional Council) for a new consent to take water from the river for the scheme. Under the Regional Plan: Water for Otago (the Regional Water Plan), the application was for a controlled activity. In granting a new consent, the Regional Council could decide the duration of the new consent. The District Council applied for 35 years, the maximum available under the Resource Management Act 1991 (RMA).[1] The Regional Council granted the consent for 25 years.

[4] The District Council appealed the Regional Council's decision to the Environment Court. In a decision on 19 November 2020, the Environment Court upheld the decision made by the Regional Council.[2] The District Council appealed the Environment Court's decision to this Court.

[5] An appeal is allowed only as to argued errors of law.

[6] In making its decision, the Environment Court considered that a significant proportion of the water taken from the river for the scheme was used by dairy farms for washing down dairy sheds. Before this Court, the District Council contended this was an error of law because the potential or actual effects of how water was used by people receiving water from the scheme were too remote and lacking in a sufficient nexus to the actual authorised take for those effects to be a relevant consideration in determining an appropriate duration for the new consent.

[7] Although that was the crux of the appeal, in its notice of appeal, the District Council contended there had been seven errors of law and 15 questions of law which this Court had to consider on appeal. I deal with the argued questions of law under various headings.[3]

---

1 Resource Management Act 1991, s 123(d).

2 *Clutha District Council v Otago Regional Council* [2020] NZEnvC 194.

3 One of the District Council's original grounds of appeal was that there had been a breach of natural justice because the Environment Court treated the end use of the water for dairy shed wash as a relevant consideration in making its decision, arguably, without giving notice to the District Council it was going to do so and without giving them the opportunity to be heard. At the outset

**Did the Environment Court err in having regard to an irrelevant consideration, namely the potential for contamination from the use of water for dairy shed wash, in deciding to limit the duration of the water take consent to 25 years?**

*The Environment Court decision*

[8] It is clear the Environment Court did regard the particular end use of the water in washing dairy sheds and the actual or potential environment effects of that in setting the term of 25 years for the new consent.

[9] Under the operative regional plan, the use of water for human consumption, not community water supply per se, was to be prioritised.[4] The evidence was that the scheme distributes water for human and stock consumption, also for dairy shed use. Less than 20 per cent of water was supplied for human consumption. The range of uses meant that, in terms of the relevant policy of the operative regional plan, they were unable to give priority to the scheme on the basis it was for the use of water for human consumption.[5]

[10] The Court referred to the lack of knowledge about the uses for water risking undermining the Regional Council's functions in relation to the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region (with reference to s 31 of the RMA).[6]

[11] They said, if the water was being supplied for human use (only) and maybe stock water consumption, they "would have [had] less difficulty with the proposition that a 35 year duration was appropriate".[7] They concluded "the facts are that there are a wider range of uses for the scheme's water which have not been properly assessed by the appellant [the District Council]".[8] This and the fact the planning regime was in a state of transition weighed in favour of a shorter duration for the consent.[9]

---

of the appeal hearing, Mr Page, for the District Council, advised this Court that this ground of appeal was not going to be relied on or advanced in the High Court.

4 At [50].
5 At [52].
6 At [73].
7 At [76].
8 At [76].
9 At [74].

[12] The Court's concern as to these matters could not be adequately addressed through adding a condition to the consent effectively constraining the supply of new water to farms with an up to date environment management plan. Such a condition would not address any present-day risk.[10]

[13] After referring to such matters, the Environment Court said they were "not persuaded to come to any different decision to the Regional Council on duration, albeit that in reaching this conclusion we take a different view on the effects of the activity".[11]

*The District Council's submissions*

[14] The District Council submitted:

(a) The Environment Court erred in considering the end use of the water because they went beyond the scope of issues raised in the proceeding through the notice of appeal to the Environment Court and a joint statement of facts and issues dated 6 March 2020 filed by the parties before the hearing in the Environment Court. The evidence before the Environment Court focused on the effects arising from the take of water from the river, but not its subsequent use.

(b) The scope of relevant considerations was also limited by the District Council's application being for consent to a controlled activity. An application for a controlled activity must be granted.[12] The Regional Council may impose conditions only for those matters over which a control is reserved to the Regional Council in the Regional Water Plan.[13] The potential end use of the water from the scheme was not a matter as to which the regional plan had reserved control to the Regional Council.

(c) The end use of water from the scheme and its effects were too remote, consistent with the approach of the Supreme Court in *West Coast ENT Inc*

---

10 At [62].
11 At [75].
12 RMA, s 87A(2)(a).
13 Section 104A(b)(ii).

*v Buller Coal Ltd* and the High Court in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* and *Aotearoa Water Action Inc v Canterbury Regional Council*, the Environment Court in *Beadle v Minister of Corrections* and *Cayford v Waikato Regional Council*.[14]

The common thread of those cases was that the effects in issue were too remote because they resulted from an end use of the resource by third parties whose activities were not controlled by the consent.

(d) The consent was not for the end use of the water once it was connected to the scheme. Methods of delivery and the use of water beyond the end point at which the water had been delivered to a property was left to a third party. The District Council could not know or control all the possible uses that a third party might use the water for, nor did they have the authority or responsibility to monitor such uses.

(e) The Environment Court's concern should have been only with the effects of the take up to the point at which water was supplied to the scheme, that is as to the environmental effects of the abstraction of water from the river to the extent authorised and whether that was an efficient and sustainable use of that resource.

(f) This approach was consistent with the objectives, policies and rules of the Regional Water Plan and the proposed change 7 (PC7) to that plan which had been notified before the hearing in the Environment Court.

(g) The effects of potential contamination by subsequent use would be subject to assessment and consideration by the Regional Council because discharges of potentially contaminated water from dairy shed wash could require resource consents under s 15 of the RMA. This was the responsibility of the Regional Council in the context of its regional plan.

---

[14] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32; *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76; *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580; *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002; *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998.

*The Regional Council's submissions*

[15] The Regional Council contended:

(a) The Environment Court is a specialist tribunal with a role of enquiry and assessment as to all RMA principles and purposes relevant to matters that come before it. The scope of its enquiry is not limited or prescribed by the manner in which parties choose to put issues before it.

(b) The issue before the Court was about the duration of the new consent. The Regional Council and then the Environment Court had a discretion as to what the appropriate term should be. In determining that, it was entitled to have regard to the purposes of the RMA, in particular s 5. It was required under s 104 to consider the actual and potential adverse effects of the activity on the environment. There was nothing in the regional plan to limit its consideration of the effects of the water take in the way the District Council contended for.

(c) The Environment Court also had to have regard, as it did, to the Proposed Plan Change 8 (PC8) to the Regional Water Plan. That change required it to adopt a holistic and integrated approach in considering all effects on the environment of the take, particularly the duration of the take which was the subject of its decision.

(d) The feature of the case before the Environment Court distinguished from *Cayford* and *Buller Coal* was the nexus between the water take and the consequential effects of the water being used for dairy shed wash purposes. That use arose directly from the consented take and supply of water to the community water scheme. Water was being used in that way, in the same way as it was available for stock water and the general use of ratepayers whose properties were connected to the scheme. Knowing the water was being used in that way, the Environment Court could not ignore the effects of that use.

[16] As to whether the end use of water for the scheme for dairy shed use was too remote for those effects to be a relevant consideration, the Regional Council's submissions are reflected in the discussion that follows.

*Discussion*

[17] I accept the Regional Council's submission that the Environment Court was not limited by either the terms of the District Council's original application for a water permit or the terms of the notice of appeal from considering the potential contamination of groundwater from the discharges of dairy shed wash onto land.

[18] In its notice of appeal to the Environment Court, the District Council made reference to the "adverse effects" arising from the water take activity by suggesting the Environment Court erred by not considering the District Council's history of managing such effects and whether conditions on the consent could manage such effects. The notice of appeal therefore did not prevent the Environment Court from considering adverse effects as they were specifically mentioned in it.

[19] Further, I do not accept that, with the way this appeal proceeded, the parties had limited the scope of matters to be considered in a way that did not permit the Environment Court to have regard to the actual or potential effects on the environment of the use of water from the scheme for dairy shed wash.

[20] After a telephone conference with the parties' counsel on 13 July 2020, the Judge directed counsel to file a joint memorandum identifying issues relevant to the determination of weight to be given to differing provisions relevant to the determination of the consent duration.

[21] Through their memorandum of 17 July 2020, counsel advised the Environment Court that, amongst the issues relevant to weighting, was the issue:

> When considering the matters listed under Policy 6.4.19 [of the Regional Water Plan] when setting the duration of a resource consent, is a 35 year consent term appropriate in this instance or are there circumstances which warrant a reduction from the maximum term?
>
> (a) Is a 35 year consent term necessary for the duration of the purpose of the use?

(b) Is there any uncertainty as to the adverse effects of the water take on the environment that might warrant a consent term of less than 35 years?

[22] One agreed fact was:

> The proposal is to provide water to the South Bruce Rural Water Supply Scheme which is a recognised schedule 1B community drinking supply in the Regional Plan: Water for Otago (RPW).

[23] The memorandum said the District Council and Regional Council did not agree on a number of facts. As to those matters, the District Council said it would adduce evidence to establish various facts which the Regional Council denied. One of those assertions was that "[t]here are no present or anticipated future adverse effects on the aquatic environment of the Clutha River/Mata Au arising from the water take".

[24] I thus accept the Court's consideration of potential land discharges of dairy wash effluent onto land was not inconsistent with the agreed statement of facts and issues. Even if it had been, with the way evidence was adduced as to the extent water from the scheme was being used for dairy shed wash, there would have been no error in the particular way the Environment Court considered this. Evidence as to that use of the water was given by the District Council's own witness. The Court made it clear during the hearing that it considered this evidence relevant through the questions the Judge asked the witness about such matters. In particular, Judge Borthwick raised with counsel and witnesses the way this was relevant to taking an integrated approach in considering both water take and associated discharges onto land in the management of activities under the RMA. Counsel for the District Council specifically addressed this issue in reply submissions.

[25] I do not accept that the hearing in the Environment Court proceeded on the basis that the way in which water from the scheme was ultimately used was irrelevant.

[26] The parties had agreed the single issue to be decided by the Environment Court was the duration of the consent term. As to that, the breadth of matters which the parties accepted had to be considered in the Environment Court was apparent from their submissions and evidence presented in support of those decisions. In their submissions to the Environment Court, the District Council addressed the following:

(a) the environment being assessed;

(b) the activity status of the application;

(c) the actual or potential effects on the environment;

(d) policy 6.4.19 of the Regional Water Plan;

(e) iwi management plans;

(f) PC7;

(g) the National Policy Statement for Freshwater Management (amended 2020) (NPSFM 2020); and

(h) a s 128 review condition.

[27] Mr Heller, a former hydrologist and environmental and water resources consultant, gave expert evidence for the District Council. In discussing the environment effects, Mr Heller said:

> There are no known measurable effects on water quality of the Clutha River as a result of the water take, as the primary use of the water is for human consumption and stock water. Water is not used for irrigation. Any adverse effects arising from water used for dairy shed supply are managed by each farm's dairy waste water system that is subject to a separate consent process with the ORC.

[28] In discussing matters under the heading "efficiency", Mr Heller said the Regional Council's recommending report's conclusion as to the current water use required for the scheme had not taken into account "the additional uses for the water such as stock water and dairy shed use, which comprises approximately 80% of the water taken".

[29] With reference to climate change, Mr Heller commented that additional impacts of climate change upon efficiencies in water supply for human and stock drinking water are considered to be small. He observed "[s]cheme water used for dairy shed washdown appears to be within certain published guidelines […] and is unlikely to significantly alter as a result of climate change".

[30] Even if the parties had sought to limit the issues for consideration by the Council in the manner suggested by the District Council, that would not have prevented the Environment Court from considering what, to it, was a relevant issue.

[31] Under s 290(1) of the RMA, the Environment Court had "the same power, duty and discretion" in dealing with the appeal as the consent authority. Under s 290(2), it could "confirm, amend or cancel the decision to which the appeal relates".

[32] As Dunningham J said in *Saddle Views Estate Ltd*:[15]

> [w]here the parties[']  understanding of the applicable law is considered by the Court to be either incorrect, or to admit consideration of some relevant factor, there can be nothing objectionable about the Court drawing that to the parties attention and seeking further submissions on it. This situation differs from a simple inter partes claim where the onus is on the parties to decide what claims to plead and what evidence to adduce.

[33] As the Supreme Court has stated:[16]

> [Section 290 of the RMA] confer[s] an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. … they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.

[34] There was no error in the Environment Court considering the use of water from the scheme for dairy shed washing on the basis this was associated with the taking of water for a controlled activity.

[35] It was agreed in the Environment Court that the activity was classified as a controlled activity under the Regional Water Plan. The classification of it was not affected by the change in status under PC7 because the District Council's application was lodged before PC7 was notified. The Environment Court expressly considered

---

15 *Saddle Views Estate Ltd v Dunedin City Council* [2017] NZHC 1727, (2017) ELRNZ 144, at [127].

16 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [28]. Footnotes omitted.

the appeal on the basis the proposed take was for a controlled activity under that Regional Plan.

[36] The District Council submitted the matters the Environment Court could consider were limited to matters over which control had been reserved in the relevant plan.

[37] Section 87A(2) of the RMA provides that, if an activity is described in a plan as a controlled activity, a resource consent is required for the activity and the consent authority must grant a resource consent (subject to limited exceptions). The consent authority's power to impose conditions on the resource consent is restricted to the matters over which control is reserved in the relevant plan.[17]

[38] In determining the appropriate duration for the water permit, the Environment Court was required to consider the matters contained in s 104, to the extent that these matters were relevant for the duration of the activity. These include: any actual or potential effects on the environment,[18] any relevant planning instrument,[19] and any other matter the Court considers relevant and reasonably necessary to determine the application.[20]

[39] The Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd* held that, in determining the appropriate duration of water permits granted to a large electricity generator:[21]

> The Environment Court was bound to evaluate the application in light of the fundamental purpose of the Act, namely the promotion of "the sustainable management of natural and physical resources": s 5. It had to do that on the basis of the evidence before it, in light of relevant policy statements, plans and proposed plans. If the Court considered it had insufficient material before it to enable a proper evaluation of certain effects, then it would have been appropriate to adjourn the hearing to enable further evidence of a defined character to come before it. Alternatively, it was bound to decide the matter on the basis of what was before it. In that regard, it must be remembered that resource management law is not "black letter" law: there will always be more

---

17 Section 104A(b).
18 Section 104(1)(a).
19 Section 104(1)(b).
20 Section 104(1)(c).
21 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, (2009) 15 ELRNZ 164 at [62] per Chambers J.

> evidence that could be called on every application or appeal. Decision-making bodies in this area often have to make decisions based on incomplete data.

[40] The District Council recognised the effects on the environment of the proposed take and use of water for the water scheme were relevant to the issue of the appropriate duration of the consent through the evidence it presented for the Environment Court and the submissions that were made in support of the appeal. The District Council also recognised the Environment Court's assessment of the effects related to the duration of the consent and vice versa through proposing that any uncertainty as to future effects of the proposed activity could be adequately mitigated through attaching review conditions to the consent that could potentially reduce the duration of the consented activity.

[41] Provided the effects of the use of water from the scheme were not too remote, it was appropriate for the Environment Court to consider these effects for the purpose of achieving integrated management under the RMA[22] and for the purpose of promoting "the sustainable management of natural and physical resources".[23]

[42] The District Council's primary challenge over this was that the application for a take was for the purpose of supplying water to the scheme and both the end use of that water and the effects of that use were too remote to be relevant considerations under the RMA.

[43] The Environment Court was able to have regard to the consequential effects of the end use of the resource that is the subject of the resource consent application, but with limits of nexus and remoteness.[24]

[44] In *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, the High Court cited, with approval, the statement from the Environment Court:[25]

> Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being

---

22 Section 30(1)(a).
23 Section 5.
24 *Beadle v Minister of Corrections*, above n 14, at [88].
25 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, above n 14, at 81, citing *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [61].

> considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision.

[45] In *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, the appeal before the High Court concerned consents to expand an existing spring water extraction and bottling operation, primarily to bottle water and export that bottled water overseas.[26] At issue was whether and to what extent the Environment Court could consider the environmental and cultural effects for Māori arising out of the use of plastic bottles and the discarding of plastic bottles overseas. Gault J decided, consistent with the judgment of the High Court in *Aotearoa Water Action Inc v Canterbury Regional Council*, that the effects of the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration on the application for a water resource consent to take water from the aquifer and, thus, outside the scope of what could be considered on a consent application.[27]

[46] In *Pukenamu Estates Ltd v Kapiti Environmental Action Inc*, one of the issues before the Environment Court and then the High Court was whether a consent authority could consider the effect of earthworks (road and building platforms) as an effect of a subdivision for which approval was sought under the RMA.[28] In the High Court, Ronald Young J held the Environment Court was required (by s 104 of the RMA) to consider the actual potential effects of the environment of allowing the activity (here, the subdivision). The applicant had provided little information relating to the earthworks that would be required with the subdivision because it was intending to leave it to the purchasers to apply. In rejecting the approach of the appellant, Ronald Young J said:

> [44] … Section 104 is concerned with the actual and potential effects on the environment of allowing the activity. The activity here is the subdivision. In part the Appellant's approach is predicated on the proposition that somehow assessment of effect is limited to only some actual effects of the subdivision. This cannot be correct. The actual and potential effects of a subdivision are well beyond the simple drawing of lines on a map. The section is concerned with actual effect if the activity is approved. Thus the focus of s104 (and s105 as relevant) is on individual actual effect (and potential) of allowing a subdivision of that land. One can envisage subdivisions where minimal

---

26 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, above n 14.
27 *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 14.
28 *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* HC Wellington AP106/02, 18 June 2003.

> roading is required, for example, the subdivision of land adjacent to an existing road, or of flat land where little or not [sic] excavation may be required for building sites. Actual and potential effect of the subject subdivision is the focus in s104(1)(a).
>
> [45] Nor do I consider the fact that other applications for resource consent may be required for some or all of earth works consequent upon the subdivision as prohibiting consideration of them as a effect under s104 or s105. To interpret s104 in this way would significantly downgrade the effect of subsection (1)(a). It would also prevent the local authority and subsequent appellate bodies from looking holistically at an activity requiring resource consent where, as here, the activity is non complying and where, as here, further resource consents may be required before the subdivision can be undertaken.

[47] In *Cayford v Waikato Regional Council*, the Environment Court held the relevance of effects on the environment of a proposed activity is not dependant on the need or otherwise for resource consents or whether effects can be the subject of controls.[29]

[48] The Court also referred to a statement from *Auckland City Council v Auckland Regional Council* that "[e]ffects which flow from allowing the activities for which the consent is sought may also include those from other activities which may inevitably follow".[30]

[49] In *Beadle v Minister of Corrections*, the Minister was seeking consent for earth works and stream works needed for the site of a prison facility.[31] He expected the Court to have regard to that ultimate purpose as one that would provide public benefits in Northland. The Environment Court held that submitters were entitled to challenge those claims and they were entitled to try and prove that facility would have adverse effects on the environment that should be offset against its positive benefits, and it ought to prevail over them. The Environment Court concluded they were "able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote".[32]

---

29 *Cayford v Waikato Regional Council*, above n 14, at 8.

30 *Auckland City Council v Auckland Regional Council* EnvC Auckland A101/97, 25 August 1997 at [7], cited in *Cayford v Waikato Regional Council*, above n 14, at 9.

31 *Beadle v Minister of Corrections*, above n 14.

32 At [91].

[50] The approach adopted by the Environment Court in *Beadle* was referred to without criticism by the Supreme Court in *Buller Coal*:[33]

> We accept that effects on the environment of activities which are consequential on allowing the activity for which consent is sought have sometimes been taken into account by consent authorities. This is particularly so in respect of consequential activities which are not directly the subject of control under the RMA. But questions of fact and degree are likely to arise as is apparent from the judgment of the Environment Court in *Beadle v Minister of Corrections*.

[51] So, the Environment Court in this case was required to consider the environmental effects of the consented activity because they were relevant to determining the appropriate duration of the consent. Provided there was a sufficient nexus between consequential effects and they were not too remote, they had to be considered by the Environment Court for the purpose of promoting "the sustainable management of natural and physical resources".[34] They could not be ignored by the Environment Court simply because the consequential use of the water and its effects was subject to management under the RMA and by the Regional Council in accordance with ss 15 and 30(f) of the RMA.

[52] I consider the end use of water for dairy shed wash and its subsequent discharge to the environment had a sufficient nexus to the take and were not so remote as to be matters which the Environment Court could not consider when fixing the duration for the water take consent for the scheme. The Court therefore had to have regard to these effects under s 104(1)(a) of the RMA.

[53] The use of water from the scheme was more than inevitable or foreseeable. It was already happening. Up to 30 per cent of water supplied to the scheme was being used for dairy shed wash. That use of the water was as much a reality as the use of water for human consumption, as part of a potable water supply.

[54] In a physical sense, the District Council, through the scheme, was providing water directly to the properties on which water was being used for dairy shed wash. The scheme was a piped water scheme owned by the District Council. Water was

---

33 *West Coast ENT Inc v Buller Coal Ltd*, above n 14, at [119], citing *Beadle v Minister of Corrections*, above n 14.

34 RMA, s 5.

piped from the point at which water was supplied from the take to the scheme and delivered to the properties which it supplied, including 28 dairy farms. On those properties, water was stored in tanks and then used for the landowner's purposes. In that way, the District Council, through the scheme, supplied water for dairy shed wash.

[55] It was the District Council who determined to whom water would be allocated as part of the scheme. The District Council, to a certain extent, was thus able to control to a significant extent how water from the scheme was used. With the Council permitting and facilitating the supply of water from the scheme to dairy farms where it was being used for dairy shed wash, the Council was permitting and facilitating the water which was being taken for the scheme to be used for dairy shed wash.

[56] The use of water for dairy shed wash and the associated discharges of it was thus physically much more connected to the initial take than was the case with the potential discarding of water bottles produced in the water bottling activities that were considered in *Te Rūnanga o Ngati Awa* and *Aotearoa Water*, or the burning of coal in *Buller Coal*.

[57] Section 104(1)(b)(iii) required the Environment Court to also consider any relevant national policy statement. The parties agreed that one of the planning documents which would be relevant to the Environment Court's consideration of the matter before it was the NPSFM 2020 and what is described in that document as the fundamental concept – Te Mana o te Wai.

[58] As the Environment Court has recognised, the NPSFM 2020 intends for the health and wellbeing of freshwater bodies to be at the forefront of decisions about fresh water. Inherent in the definition of Te Mana o te Wai is a connection between water and the broader environment.[35] Policy 3 of the NPSFM 2020 requires that:

> Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

---

35 *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [16]–[21].

[59] Clause 3.2(2)(e) requires every regional council to give effect to Te Mana o te Wai and, in doing so, to "adopt an integrated approach, ki uta ki tai to the management of freshwater".

[60] The Environment Court also had to promote "the sustainable management of natural and physical resources" when considering the effects of the activity.[36]

[61] In the context of the issues it was considering and on the evidence before it, the way in which the Environment Court had regard to the potential for contamination from dairy shed wash appropriately recognised the purposes and scheme of the RMA and the NPSFM 2020.

[62] Accordingly, there was no error of law in the way the Environment Court had regard to the way water from the scheme was used for dairy shed wash in determining that the appropriate duration for the water take consent was 25 years.

[63] I accordingly answer the following question of law included in the notice of appeal as follows:

> *Did the Environment Court err by considering that the effects arising from the discharge of contaminants subsequent to the use of water by third parties was relevant to the determination of consent duration?*
>
> No.

**Did the Environment Court err in its consideration of planning documents relevant to the appeal it was considering?**

[64] As to a number of the claimed errors of law in this regard, the District Council acknowledged the validity of its arguments turned on whether the Environment Court could have regard to the end use of water from the scheme and the environmental effects of that use in the way it interpreted and applied the policy.

---

[36] RMA, s 5.

[65] With this Court holding that the Environment Court could consider the consequential end use of water from the scheme and the environmental effects of that, that premise for error has not been made out.

[66] As already referred to, the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd* held that, in determining the appropriate duration of water permits granted to a large electricity generator:[37]

> The Environment Court was bound to evaluate the application in light of the fundamental purpose of the Act, namely the promotion of "the sustainable management of natural and physical resources", s 5. It had to do that on the basis of the evidence before it in light of relevant policy statements plans and proposed plans.

[67] The parties agreed the Regional Water Plan was a planning document relevant to the issues which the Environment Court had to consider. One of the policies in the Regional Water Plan was policy 6.4.19, which requires:

> When setting the duration of a resource consent to take and use water, to consider:
>
> (a) the duration of the purpose of use;
>
> …
>
> (d) the extent to which the risk of potentially significant, adverse effects arising from the activity may be adequately managed through review conditions;
>
> …

[68] In the notice of appeal, the second ground of appeal was that the Environment Court had erred in its interpretation of policy 6.4.19(a) and (d) of the Regional Plan by considering that "end use" effects are relevant to its determination of consent term.

[69] In the Regional Water Plan, under the heading "Integrated Water Management", one of the Council's policies was:[38]

> In managing the taking of groundwater, avoid in any aquifer:
>
> (a) Contamination of groundwater or surface water; and

---

37 *Ngati Rangi Trust v Genesis Power Ltd*, above n 21, at [62], per Chambers J.
38 Regional Water Plan, policy 6.4.10A5.

…

[70] In its decision, the Environment Court stated:[39]

> Given that up to 30% of the existing take and use of water is to supply dairy sheds, the District Council has not discharged its persuasive burden of providing evidence that the court, with any level of confidence, can rely on to make findings about the existing or future state of water quality within the command area. It follows we are unable to satisfy ourselves under Policy 6.9.19(d) of the operative Regional Plan that the risk of potentially significant adverse effects arising from this activity may be adequately managed through review conditions. In any event, for reasons that we will come to, we doubt the efficacy of the proposed review condition.

[71] It was agreed PC7 was a relevant proposed plan which had to be considered by the Environment Court.

[72] The s 32(1) evaluation report for PC7 explained that the purpose of PC7 was to provide an interim regulatory framework for the assessment of applications to take and use surface water before the new regional plan becomes operative, which is expected to be 31 December 2025. The National Policy Statement for Freshwater 2014 (updated 2017) requires regional councils to maintain or improve the quality of fresh water through, for instance policy A3:

> … making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.

[73] And policy C1:

> … managing fresh water and land use and development in catchments in an integrated and sustainable way to avoid, remedy or mitigate adverse effects, including cumulative effects.

[74] The report concluded that PC7 does not entirely give effect to these policies because the new regional plan is anticipated to more thoroughly cover them.

---

39 *Clutha District Council v Otago Regional Council*, above n 2, at [61]. Footnotes omitted.

[75] In its decision, the Environment Court said PC7 sought to limit the circumstances in which existing resource consents to take and use surface water could be granted. The Environment Court noted policy 10A.2.3 contemplated a consent duration exceeding six years might be granted for non-complying activities only in certain circumstances, namely:[40]

> (a) the activity will have no more than minor adverse effects (including no more than minor cumulative effects) on the ecology and the hydrology of the surface water body (and any connected water body) from which the abstraction is to occur; and
>
> (b) the resource consent granted will expire before 31 December 2035.

[76] The Environment Court said:[41]

> The application of Policy 10A.2.3 of PC7 to the facts is also problematic for the reason that the evidence is not capable of proving to the requisite standard that the proposal will have no more than minor adverse effects (including no more than minor cumulative effects) on the ecology of the Clutha River/Mata-Au (and any connected water body) from which the abstraction is to occur.

[77] The District Council submitted the Environment Court's third error of law was in giving weight to the proposed PC7 despite determining that the taking of water for the scheme was a controlled activity pursuant to ss 88A and 104A of the RMA. The District Council particularised that error by referring to the Environment Court having considered the effects of the end use of water from the Bruce water scheme in deciding that the evidence had not proved that the water take from the river would have no more than minor effects on the ecology of the river.

[78] That particular issue had to be considered only if the Court had to decide whether the application had been for a controlled activity under PC7. The Court accepted that PC7 was not relevant in that way. The Court did not consider policy 10A.2.3 in this manner. Instead, their observation was relevant in the context of its appropriate consideration of the effects of the end use of water.

---

40 At [22].
41 At [63].

[79] In considering the weight to be given to PC7 and evidence relevant to that, the Environment Court also referred to PC8 on discharge management. The District Council acknowledged that the provisions in that change had been notified.

[80] Currently in Otago, animal discharges were managed under the Regional Water Plan, particularly a rule which prohibited the discharge of animal waste, directly into water or onto land in circumstances where the waste was likely to result in overland flow entering fresh water.[42]

[81] The s 32 report on PC8 says it introduces a package of provisions that will improve the current minimum standards for animal waste storage and subsequent land application in Otago, bringing the region into line with good practice across the country. One of the objectives for the Regional Council, as set out in the National Policy Statement for Freshwater Management 2014 (updated 2017) is objective C1:

> To improve integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land, associated ecosystems and the coastal environment.

[82] The National Policy Statement also includes policy C1:

> By every regional council:
>
> …
>
> (b) of managing fresh water and land use and development in catchments in an integrated and sustainable way to avoid, remedy or mitigate adverse effects, including cumulative effects.

[83] In PC8, the Regional Council sought to recognise the need for it to give effect to relevant national policy statements and, in particular, national policy statements for fresh water management that came into effect on 1 August 2014 with amendments in August 2017 that took effect on 7 September 2017.

[84] The Environment Court noted that none of the witnesses had considered PC8. In response to the Court's request for the parties to identify by memorandum the planning documents relevant to the appeal, the parties had not mentioned PC8.

---

[42] Regional Water Plan, rule 12.C.07.2.

[85] For the reasons already discussed,[43] that did not limit the Environment Court's ability to consider that proposed change in determining the appropriate duration for the consent.

[86] The Court raised what it considered to be relevant aspects of PC8 with witnesses and counsel. In particular, the Court had raised with planners giving evidence for both the District Council and the Regional Council, the Court's concern over disaggregation of resource management and the importance of the need for integrated management of resources for the benefit of the environment.

[87] Counsel for both the District Council and Regional Council made submissions as to the weight to be given to PC8. In his final submissions to the Environment Court, counsel for the District Council emphasised that the take of the water, which was subject to the appeal, was for the purposes of the scheme.

[88] Both PC7 and PC8 were proposed plans for the purpose of s 104(1)(b)(vi) of the RMA. The weight to be given to PC7 and PC8 was a matter for the Environment Court. The Court noted the Regional Water Plan does not manage the storage of animal waste, and that discharge of animal waste is either a prohibited or allowed activity. The Court noted the Minister for the Environment considered "that the issues the plan changes aim to address have aroused widespread public concern or interest regarding their actual or likely effect on the environment.[44]

[89] In discussing PC7 and PC8, the Court said:[45]

> We have considered Mr Peirce's suggestion that the consent could be subject to an additional condition effectively constraining the supply of new water to farms with an up to date farm environment management plan. Such a condition is commended, but it does not address any present-day risk.

[90] On the hearing of the appeal in this Court, the District Council did not submit consideration of PC8 was an irrelevant matter. It was relevant if the Court could consider the actual or potential environmental effects of the end use of water from the scheme, as I have held they were entitled to.

---

43 At [32] and [33].
44 *Clutha District Council v Otago Regional Council*, above n 2, at [60].
45 At [62].

[91] The Court's determination as to the weight to be given to a proposed plan or, in this case, proposed plan changes was a matter for the Court under its broad discretion under s 104. The determination it made is not one that can be challenged as involving an error of law.[46]

[92] The Environment Court ended its consideration of the evidence, including aspects of PC7 and PC8 by stating "[t]he above findings on effects weighs in favour of a decision confirming the consent duration".[47]

[93] The Environment Court expressly considered the efficacy of a review condition proposed for the Council and also a further condition that might in future constrain the supply of new water to farms with an up to date farm environment management plan. Later in its decision when discussing whether there was a presumption that a take consent would be for 35 years unless there was good reason to depart from it, the Environment Court said:[48]

> While the matter was not fully argued, we doubt the efficacy of any review condition where the potential adverse effects are caused by a third-person and not the consent holder (e.g. discharge of contaminants from dairy shed washdown).

[94] The Environment Court thus considered the possibility of the inclusion of a review clause as a potential reason for a longer duration for the consent. The view it reached as to its efficacy in this regard was a decision for it to make on the merits and not amenable to appeal as an error of law.

[95] I accordingly deal with the further questions of law as set out in the notice of appeal as follows:

> *A. Did the Environment Court apply a wrong legal test when determining that effects on the environment arising from the discharge of contaminants that may arise from the end-use of water by third parties was relevant to the take and use of water pursuant to Rule 12.1.3.1 of the Regional Plan?*
>
> No.

---

46 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA) at [32]. See also *Hunt v Auckland City Council* [1996] NZRMA 49 (HC).

47 *Clutha District Council v Otago Regional Council*, above n 2, at [64].

48 At [72].

*B. Did the Environment Court take into account irrelevant considerations in relation to the deficiencies in the ORC's Regional Plan?*

No.

*C. Did the Environment Court err in its interpretation of Policy 6.4.19(1)(a)?*

No.

*D. Did the Environment Court take into account irrelevant considerations in determining that it could not give Policy 6.4.19(a) significant weight?*

No.

*E. Did the Environment Court take into account irrelevant considerations in its application of Policy 6.4.19(d) by [sic] when it determined that it needed to be satisfied of the adverse effects of the discharge of contaminants by third party users of water supplied to dairy sheds?*

No.

*F. Did the Environment Court err by taking into account an irrelevant matter, namely that the provisions of PC8 were relevant to the proceedings?*

No.

*G. Did the Environment Court err by giving weight to Policy 10A.2.3 when the status of the application is a controlled activity?*

No. Evidence that there were no adverse effects arising from the take and use of water that were more than minor was contested. The effects of discharge of contaminants to the environment arising from the use of water by third parties was a relevant consideration.

*H. Did the Environment Court err by not considering the efficacy of the review power pursuant to section s 128(1)(b) of the Act?*

No.

*I. Did the Environment Court err by finding that it could not be satisfied that the effects of the use are no more than minor under Policy 10A.2.3 when:*

*(a) The evidence was uncontested that there were no adverse effects arising from the take and use of water than were more than minor.*

*(b) The effects of discharge of contaminants to the environment arising from the use of water by third parties was an irrelevant consideration.*

No. Given the effects arising from the end use of water were relevant considerations, the premises for the claimed error as referred to in (a) and (b) had not been made out.

**Did the Environment Court fail to apply authorities that held a permit term duration of less than 35 years should only be imposed if there is a good reason?**

[96] The District Council submitted the consented water take was for "a community water supply to provide for the health and wellbeing of the South Bruce community" and the water delivery infrastructure required for the take had a design life of 100 years. The District Council submitted there was no evidence before the Environment Court that the community's need for water would diminish between a period of 25 and 35 years so as to require a wholesale review of the resource consent after just 25 years.

[97] In *Brooke-Taylor v Marlborough District Council*, the Environment Court observed that requiring an applicant to submit a full application for a renewed consent in respect of which there was to be a major capital investment in infrastructure designed and intended to last a much longer period was not an efficient use of resources when potential adverse effects on the environment could be monitored and managed through the use of the review process under s 128 of the RMA.[49]

[98] The District Council's submission was made on the basis that the end use of water from the scheme for dairy shed wash and the potential for the discharge of contaminants from such water was not a relevant consideration for the Environment Court. They accepted, if it was a relevant consideration, then the approach in *Brooke-Taylor v Marlborough District Council* would not, as a matter of law, have to apply to this consented take.

[99] It is clear the Environment Court did consider the value of the District Council's investment in their assessment of the appropriate duration. They however said this was not determinative of the outcome. The Court said:[50]

---

49 *Brooke-Taylor v Marlborough District Council* EnvC Wellington W67/2004, 2 September 2004 at [69].

50 *Clutha District Council v Otago Regional Council*, above n 2, at [66].

> A known but unquantified risk to investment yield must be the future impact of regulatory change on demand for water, particularly from the primary industry. Going forward, it is not known whether supply demand will soften.

[100] I also accept the submission for the Regional Council that the cases referred to by the District Council are not authority for the proposition that a take consent should be for 35 years when the applicant is investing in significant infrastructure to support the take. In *Brooke-Taylor v Marlborough District Council* and *Ngati Rangi Trust v Genesis Power Ltd* the consented takes were for the short duration of 10 years.[51] It was that particular duration which was criticised by the Courts in the circumstances of those consents.

[101] As the Regional Council referred to in their submissions and as the Environment Court noted in *Curador Trust v Northland Regional Council*, s 123(d) of the RMA provides that a water permit can have a term up to 35 years if specified in the consent but will be for just five years if no term is specified in the consent.[52] The presumptive period in the RMA is five years and the maximum period for which consent can be granted is 35 years. Accordingly, with reference to the legislation, there is no basis to suggest the presumption should be that a take consent will be granted for 35 years unless there is good reason to depart from that.

[102] As previously referred to, the Environment Court also expressly discussed the efficacy of a review clause as a potential reason for a longer duration for the water permit.

[103] Accordingly, the questions of law posed in the notice of appeal are answered as follows:

> *Did the Court start from the wrong premise, namely it failed to treat as its starting point that a term of 35 years should be allowed unless there is a good reason for a shorter term.*
>
> No.

---

51 *Brooke-Taylor v Marlborough District Council*, above n 49; *Ngati Rangi Trust v Genesis Power Ltd*, above n 21.

52 *Curador Trust v Northland Regional Council* EnvC Whangarei A069/2006, 31 May 2006 at [27].

*Did the Court err by failing to find that a review condition under section 128 of the Act could adequately address any relevant concern about the exercise of the Water Permit for a duration of longer than 25 years.*

No.

**Did the Environment Court make an error of law by going beyond the scope of the proceedings and considering the likely future demand for and efficiency of the volume of water required for the water take?**

[104] The Environment Court considered there was some uncertainty as to the future demand for the volume of water required for the water take. They considered there was potential for the demand to reduce due to future regulatory changes. They considered this would especially impact demand for water within the primary industry. The District Council's submission as to this question was based on the premise that the water take was just for the scheme, and the way water from the scheme was ultimately used was not a relevant consideration.

[105] I have held the end use of water from the scheme was a relevant consideration. There was accordingly no error in the Environment Court allowing for the possibility that the demand for water for the scheme might reduce through regulatory control at some point in the future.

[106] There was no error of law in the manner posed by this question.

**Did the Environment Court err in considering the provisions of the Kai Tahu Ki Otago Natural Resource Management Plan 2005?**

[107] The fourth alleged error of law as set out in the notice of appeal was that the Environment Court had erred in:

> … considering that [sic] provisions of the Kai Tahu Ki Otago Natural Resources Management Plan 2005 [the Environmental Iwi Management Plan] which fell outside the matters over which control is reserved in r 12.1.3.1, and the scope of policy 6.4.19 in the Regional Water Plan.

[108] A policy in the Kai Tahu Ki Otago Natural Resources Management Plan opposes the grant of permits for the taking of water for a period of 35 years.[53] There is also a policy to protect and restore the mauri of all water.[54]

[109] The parties agreed the Environment and Iwi Management Plan was a relevant document for the Environment Court on appeal.

[110] In their pre-hearing memorandum as to agreed issues and facts before the Environment Court hearing, the parties agreed that amongst the issues for determination were:

> 4. Do the relevant provisions of the Kai Tahu Ki Otago Natural Resources Management Plan 2005 (NRMP) and Ngai Tahu Ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008 – the Cry of the People, Te Tangi a Tauira (EIMP) oppose a consent term of 35 years in the circumstances of the present application?
>
> …
>
> 11. What weight should be given to the NRMP and the EIMP?
>
> 12. Is a precautionary approach required to be reflected in a consent term due to the effects of the water take on Kai Tahu values?

[111] In its submissions on this appeal, the District Council criticised the reference to the iwi management plan on the basis the concerns the Court had expressed related to matters outside the controlled activity rule and the scope of the proceedings. The District Council submitted that:

> On the basis that the adverse effects of the end-use of water are not a relevant effect of "allowing the activity," … the Environment Court … misapplied the policies in the Iwi Management Plan (if they are relevant at all) and ought to have applied those policies with respect to the evidence before the Court which considered that there was no measurable effect on water quality of the waterbody from which abstraction was to occur.

[112] The Environment Court recognised that Te Ao Marama Inc and Te Rūnanga O Hokanui did not submit on the application for resource consent.

---

53 Kai Tahu ki Otago Natural Resources Management Plan 2005, policy 25 at [5.3.4].
54 Policy 4 at [5.3.4].

[113] I have held the matters which could be considered within the controlled activity rule and within the scope of the proceeding were wide enough to include the potential adverse effects on the environment of the end use of water.

[114] Accordingly, the Environment Court did not err in law as alleged with this question.

**Conclusion**

[115] The Environment Court did not err in law in considering the potential effects of the end use of water from the scheme for dairy shed wash in agreeing the duration of the water take consent for the scheme should be 25 years. There were no errors on the questions of law posed by the District Council in its notice of appeal.

[116] The District Council's appeal is accordingly dismissed.

**Costs**

[117] The Regional Council is entitled to costs on a 2B basis. If there is any dispute as to those costs, the Regional Council is to file its memorandum within four weeks of this judgment. The District Council is to file a memorandum in reply within two weeks of receiving the Regional Council's memorandum. The Regional Council may file a reply within two weeks of receiving the District Council's memorandum. The memoranda are to be no longer than four pages. I will determine the issue of costs on the papers.

Solicitors:
Gallaway Cook Allan, Dunedin
Wynn Williams, Christchurch.

**BEFORE THE ENVIRONMENT COURT**
**AT AUCKLAND**

**I MUA I TE KŌTI TAIAO O AOTEAROA**
**KI TĀMAKI MAKAURAU**

**Decision No. [2021] NZEnvC 27**

| | |
|---|---|
| IN THE MATTER | of six appeals under s 120 and/or s 174 of the Resource Management Act 1991 for Mount Messenger Bypass proposed State Highway 3 between Uruti and Ahititi, North Taranaki |
| BETWEEN | DIRECTOR-GENERAL OF CONSERVATION<br>(ENV-2019-WLG-000003)<br>(ENV-2019-WLG-000004) |
| AND | TE RŪNANGA O NGĀTI TAMA TRUST<br>(ENV-2019-WLG-000005) |
| AND | POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE<br>(ENV-2019-WLG-000006)<br>(ENV-2019-WLG-000010) |
| AND | TE KOROWAI TIAKI O TE HAUĀURU INCORPORATED<br>(ENV-2019-WLG-000009)<br><br>Appellants |
| AND | TARANAKI REGIONAL COUNCIL<br><br>Respondent/Regional Authority |
| AND | NEW PLYMOUTH DISTRICT COUNCIL<br><br>Respondent/Section 274 party |

| | | |
|---|---|---|
| | AND | NEW ZEALAND TRANSPORT AGENCY<br><br>Respondent/Applicant |

| | |
|---|---|
| Court: | Environment Judge BP Dwyer<br>Māori Land Court Judge M Doogan<br>Environment Judge MJL Dickey<br>Environment Commissioner DJ Bunting<br>Environment Commissioner RM Bartlett |
| Hearing: | 15-19, 23 and 24 July 2019 |
| Interim Decision: | 18 December 2019 |
| Appearances: | D Allan and A Brenstrum for New Zealand Transport Agency<br>SJ Ongley for Director-General of Conservation<br>V Morrison-Shaw for Te Rūnanga o Ngāti Tama<br>R Enright and RG Haazen for Te Korowai Tiaki o Te Hauāuru Incorporated<br>D & T Pascoe for themselves through R Gibbs and M Gibbs<br>R Gibbs and M Gibbs for Poutama Kaitiaki Charitable Trust<br>HP Harwood for New Plymouth District Council and Taranaki Regional Council |
| Date of Decision: | 10 March 2021 |
| Date of Issue: | 10 March 2021 |

---

## SECOND INTERIM DECISION OF THE ENVIRONMENT COURT

---

A: (1) The appeals by the Director-General of Conservation and Te Rūnanga o Ngāti Tama are allowed.

(2) The appeals from Poutama Kaitiaki Charitable Trust and D & T Pascoe are dismissed.

B: Conditions are to be finalised in accordance with the Court's direction in paragraph [75] of this decision.

## REASONS

### Introduction

[1] In our interim decision dated 18 December 2019 we determined:[1]

> Result
>
> 1. This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.
> 2. In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents, absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.
> 3. That is because we cannot determine that the effects of the Project will be appropriately addressed until we receive advice on that acquisition and further mitigation.
> 4. This proceeding is adjourned until 31 March 2020.
> 5. On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

[2] Since our interim decision, we have been advised that Te Rūnanga have resolved to support the Project, and that the project agreements have been approved by an 81.6% majority of Ngāti Tama members who voted. Turnout for the vote was over 60%.[2] The Agency has asked that we finalise our decision.

[3] The Agency seeks a minor amendment to the Notice of Requirement (NOR) to alter the designation and the resource consents to accommodate an additional construction yard at the southern end of the Project area.

[4] We record that by memorandum dated 27 October 2020 Te Korowai Tiaki o Te Hauāuru Incorporated withdrew its appeal. Finally, we note that the High Court has dismissed the appeal against our Interim Decision.[3]

---

[1] Mount Messenger Interim Decision [2019] NZEnvC 203 at page 5.

[2] Transport Agency memorandum dated 16 July 2020, at paragraph 4. We record that the New Zealand Transport Agency is now known as Waka Kotahi NZ Transport Agency. For convenience we will continue to refer to it as the Agency as per the Interim Decision.

[3] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council & Ors* [2020] NZHC 3159.

[5] It therefore remains for us to make a final assessment of the matters we did not determine in our interim decision, address the request to amend the NOR, and finalise conditions.

## Matters raised in interim decision

[6] Our summary of findings on the core central issues was outlined in our interim decision at paragraphs [458]-[470]. They were as follows:

> ***Alternatives***
>
> [458] We have determined that the Agency's consideration of alternative sites, routes or methods of undertaking the Project was adequate.
>
> [459] We observe that the online option (staying within the existing SH3 alignment) was considered and not chosen, primarily for reasons of cost, constructability and cultural values.
>
> ***Consultation***
>
> [460] The Agency's consultation was detailed and extensive.
>
> ***Cultural effects***
>
> [461] There are significant adverse cultural effects from the Project on Ngāti Tama which are yet to be resolved.
>
> [462] We have found that Ngāti Tama has mana whenua over the Project area and it is appropriate that it be the only body referred to in conditions addressing cultural matters.
>
> [463] Mrs Pascoe and her family have not established on the evidence that they have and are able to maintain the whanaungatanga relationships or exercise the associated tikanga that would require recognition under Part 2 of the Act.
>
> [464] We have found that Mrs Pascoe is not kaitiaki in the sense the term 'kaitiakitanga' is used in the Act. The relationship the Pascoes have with their land is one of stewardship.
>
> ***Te Korowai***
>
> [465] We do not consider it is appropriate for Te Korowai to be included in the Kaitiaki Forum Group.
>
> [466] As we have already observed, the primary difference between Te Rūnanga and Te Korowai is whether the cultural effects can be appropriately mitigated. Te Korowai is not satisfied that the terms of the agreement being negotiated between Te Rūnanga and the Agency, together with the proposed conditions, will result in cultural effects being appropriately avoided. We will not determine that issue until we receive advice from Te Rūnanga as to what has been decided with

regard to its land.

***Poutama***

[467] We have found that Poutama are not tangata whenua exercising mana whenua over the Project area. It follows, therefore, that it is not appropriate that it be recognised in any consent conditions addressing kaitiakitanga that may issue.

***Mr and Mrs Pascoe***

[468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

***Ecology***

[469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.

***Conditions***

[470] Except for those proposed conditions we have addressed in this decision, we are presently unable to find that the proposed conditions, on their own, appropriately avoid, remedy or mitigate the effects of the Project. It may be that those effects can only be adequately addressed through the proposed conditions, the acquisition of the Ngāti Tama Land, and the Agreement for Further Mitigation. Until we know whether or not the acquisition has been agreed, the related agreement entered into (and whether any further amendments to conditions are required as a consequence of such agreements) we cannot finally determine these appeals.

[7] The matters left open until further information was received as to Te Rūnanga's acceptance of the Project are outlined at various parts of the interim decision. We can now complete our assessment.

## *Retention in Ngāti Tama ownership of subsoil of the highway*

[8] At paragraph [390] of our decision we put the issue of retention of the subsoil of the highway by Ngāti Tama to one side pending Te Rūnanga's decision on acquisition of its property. Counsel for the Agency submitted that the position of Ngāti Tama's members in support of acquisition of their land is now clear, and that we can proceed relying on the proposed mitigation package accepted by Ngāti Tama. We agree and record that no issue was raised by Ngāti Tama as to ownership of the subsoil. It was an

issue raised only by Te Korowai and was not supported by Ngāti Tama.

### *The Agency's objectives – reasonable necessity*

[9] The fourth project objective is:

> To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.

[10] In our interim decision we observed that a significant part of the Agency's ability to avoid, remedy and mitigate the effects of the Project rests on compliance with the proposed conditions addressing cultural and ecological effects. We determined that until the Ngāti Tama land needed for the Project had been acquired and agreement reached, the Project is, to all intents and purposes, 'incomplete'. We noted that the Agency could not proceed with the Project without agreement of Te Rūnanga and that, at that time, we could not be certain that the Agency's final objective could be fulfilled.

[11] Counsel for the Agency submitted that the Project's fourth objective in relation to cultural effects has been fulfilled by the acceptance of the Project by Ngāti Tama members. Further, the agreement to the other key elements referred to in Ngāti Tama's opening submissions have now been resolved. As there is now agreement for the Agency to acquire the Ngāti Tama land (and related agreements) we consider, having regard to those matters and our other assessments of the effects of the Project, that the Agency's final objective can be fulfilled.

### *Cultural effects*

[12] At paragraphs [466], [472] and [483]-[484] of the interim decision we did not finally determine whether the cultural effects of the Project could be appropriately mitigated. Having regard to the advice now received about Ngāti Tama's acceptance of the Project and the acquisition of its land and the related agreements, together with our assessment of the wider cultural effects of the Project, we consider that the effects of the NOR and the Project will be appropriately addressed.

***Southern construction yard***

[13] The Agency seeks to alter the NOR to accommodate an additional yard at the southern end of the Project area.[4] Certain of the designation conditions and regional resource consent conditions would also need to be amended if the change were made. The amendments proposed were to Condition 1 of the designation conditions and condition Gen.1 of the regional resource consent conditions, to refer to the drawing set dated 3 July 2020 rather than the set provided in evidence. The Agency advised that no other changes to conditions were necessary

[14] In our Minute of 2 September 2020, we invited any party opposing that amendment to advise the Court. We have received no advice of opposition save from Poutama and the Pascoes. However, apart from referring to it as a significant issue,[5] they provide no details of their opposition.

[15] In support of its proposal, the Agency has advised that there are efficiencies for the Project's construction in having north and south construction yards. In particular, the proposed southern construction yard is closer to the labour-intensive activities of Bridge 1 and the tunnel, and it will also significantly reduce the amount of construction related traffic using SH3 over Mt Messenger.

[16] The Agency stated:[6]

> 12. The proposed southern construction yard is entirely located on land owned by Mr Thomson. The NoR, and the resource consents, already cover Mr Thomson's land.
>
> 13. Mr Thomson has provided his written approval to the alterations and the southern construction yard being located on his land …
>
> 14 The proposed new southern construction yard requires a slight alteration of the NoR and consent boundaries by approximately 131m long and up to 54m wide and will result in approximately an additional 0.4ha (or approximately an additional 0.4% in the entire area to be designated) as shown in **Table 1**.

---

[4] Transport Agency memorandum dated 16 July 2020.
[5] Poutama/Pascoe memorandum dated 15 November 2020.
[6] Transport Agency memorandum dated 16 July 2020, at paragraphs 12-15.

**Table 1** – Southern construction yard approximate area and earthwork volumes

| | Total | | Outside designation | |
|---|---|---|---|---|
| **Item** | Area | Earthworks volume | Area | Earthworks volume |
| South construction yard | 8866m² (0.9h) | 11057m³ | 4103m² (0.4ha) | 5456m³ |

15. Overall the southern construction yard:

(a) has the written approval of Mr Thomson;

(b) will not result in additional adverse environmental effects;

(c) is supported by Te Rūnunga, has been discussed with the Regional and District Councils (and a draft of this memorandum provided to them) and a draft of this memorandum was provided to the Department of Conservation; and

(d) will provide efficiencies to the Project being:

(i) a north and south construction yard enabling better management of two work fronts;

(ii) positioning a construction yard closer to the labour-intensive activities of bridge 1 and the tunnel; and

(iii) will significantly reduce the amount of construction related traffic using SH3 over Mt Messenger.

(footnotes and appendix omitted)

[17] The Agency supported its application with an ecological assessment of the location, a memorandum confirming the efficiencies of the proposed southern construction yard, a "South Yard – Earthworks and Flood Assessment" and a specific Construction Water Management Plan to determine how erosion and sediment controls can be arranged.

[18] Having reviewed that information, we consider that the proposal to amend the designation and related resource consent boundaries is appropriate. However, before finalising our decision on this proposal we consider the jurisdictional basis for making the amendments.

*Amendment to NOR*

[19] In terms of s 174(4) of the RMA, the Court can modify a notice of requirement or impose conditions as it thinks fit. The discretion to modify the NOR is broad.[7] It includes the ability to modify the boundaries of the NOR,[8] however a modification must not alter the essential nature or character of the project which is a question of fact in any given instance.[9]

[20] Counsel for the Agency submitted that significant considerations when assessing this matter include that the Environment Court may make modifications where they are minor, reduce the environmental effects and the affected landowners remain unchanged;[10] and that the Court will be constrained by the principles of fairness.[11] The plausibility of additional submitters is a factor to consider in determining whether it would be fair to modify a notice of requirement in the way proposed.[12]

[21] Counsel for the Agency submitted:[13]

> 23 Applying the legal principles to the proposed southern construction yard modification to the designation amendment:
>
> (a) The modification is minor in scale (0.4ha).
>
> (b) The modification will not result in any additional environmental effects to those already assessed (it utilises an area of pasture between SH3 and the Mimi stream).
>
> (c) No person who did not submit, nor party, is prejudiced by the modification:
>
> (i) no additional land parcels (beyond those already listed in the NoR documents and designation property plans) are affected;

---

[7] *Director-General of Conservation v New Zealand Transport Agency* [2020] NZEnvC 19 at [16] and [26].

[8] *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [86].

[9] *Director-General of Conservation v New Zealand Transport Agency*, see above n 7 at [26]; *Quay Property Management Limited v Transit New Zealand* NZEnvC Wellington W28/2000, 29 May 2000 at [167].

[10] *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [38]-[41].

[11] *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [45].

[12] *Final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, Ministry for the Environment, Board of Inquiry, 18 September 2009 at [175].

[13] Transport Agency memorandum dated 16 July 2020, at paragraph 23.

(ii) the only affected land owner, Mr Thomson, while not a party to the proceedings already has the same parcel of land affected by the NoR (and resource consents) and he has provided written approval to the proposed southern construction yard; and

(iii) no additional person would have submitted due to the modification.

(d) The modification:

(i) does not alter the material (or essential) nature or character of the Project; and

(ii) is not at odds with the original NoR for the amended designation.

**Amendment to the resource consents**

[22] We acknowledge that it is common for changes to be proposed to a project after consent applications have been lodged. Amendments may be made provided they are within scope of the original application. An amendment is likely to be within scope if it is fairly and reasonably within the ambit and scope of the original consent application and does not result in what is, in substance, a different application; it does not result in a significant difference to the scale, intensity and character of a proposed activity; or the effects of the proposed activity; and it does not prejudice any person.[14]

[23] Counsel for the Agency submitted:[15]

27. Applying these legal principles to the proposed southern construction yard:

(a) The proposed southern construction yard will not increase effects of the project on the environment, or any person (Mr Thomson has provided his written approval).

(b) The proposed location of the southern construction yard is on land (owned by Mr Thomson) which is already affected by the resource consent package (no new land parcels are affected) and listed in the Schedule of Properties attached to the AEE.

(c) The proposed southern construction yard does not alter the substance of the application in any way, nor materially alter its scale, intensity or character.

---

[14] *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [20]-[21], *Car Distribution Group Ltd v Christchurch City Council* [2018] NZEnvC 235 at [23], *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29], *HIL Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45, (2014) 18 ELRNZ 29 at [42], *Shell New Zealand Ltd v Porirua City Council* CA 57/05, 19 May 2005 at [7]. See also *Re Horowhenua District Council* [2014] NZEnvC 184 at [13].

[15] Transport Agency memorandum dated 16 July 2020, at paragraph 27.

(d) No person who did not submit would have submitted due to the proposed southern construction yard and no party is prejudiced by this change.

[24] We consider that there is a jurisdictional basis to both modify the NOR and amend the Plan to which reference is made in the resource consent conditions because it is clear to us that the amendment enables the efficient construction of the Project, comprises land already included in the NOR documents and does not prejudice or affect any person save Mr Thomson, who has provided written approval to the proposed construction yard.

***National Policy Statement for Freshwater Management 2020 (NPSFM 2020) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES Freshwater)***

[25] Both these documents came into force on 3 September 2020.[16] In a memorandum dated 29 September 2020, the Agency addressed the NPSFM 2020 and NES Freshwater as they relate to the Project. Although both came into force well after the conclusion of the hearing, we are obliged to have particular regard to the NPSFM 2020 in considering the NOR and the application for regional resource consents under the relevant provisions of ss 104 and 171 of the Act. Further, we are obliged to consider the provisions of the NES Freshwater as its provisions must be complied with pursuant to Part 3 of the Act.

[26] In its memorandum, the Agency addressed new conditions that are proposed regarding management plan certification, amendment and review, and also made other amendments to the conditions. Of particular concern to this assessment is the amendment made to the conditions "to incorporate the requirements of the NES Freshwater".[17]

*NPSFM 2020*

[27] As discussed, the NPSFM 2020 is a relevant national policy statement. In addition, under s 55(2) of the Act, Taranaki Regional Council must amend its regional

[16] The parts of the NES Freshwater relevant to this decision came into effect on 3 September 2020. There are further provisions concerning: intensive winter grazing; stockholding areas other than feedlots; and application of synthetic nitrogen fertiliser to pastoral land which will come into force later in 2021.

[17] Transport Agency memorandum dated 29 September 2020, at paragraph 5(a).

plan, without using a Schedule 1 process, to make the changes set out in Part 1.7 of the NPSFM 2020. These are the changes required to:

- Clause 3.22(1) – Natural inland wetlands
- Clause 3.24(1) – Rivers
- Clause 3.26(1) – Fish passage.

[28] Part 4.1(1) of the NPSFM 2020 provides that every local authority must give effect to the NPSFM 2020 as soon as reasonably practicable. The Agency noted that it is therefore possible that Taranaki Regional Council will update its regional plan to provide for these changes before the Court delivers its decision. Irrespective, the Agency addressed these matters.

*Objective and policies of the NPSFM 2020*

[29] Counsel submitted that the Project is consistent with the objective and policy framework of the NPSFM 2020. For reasons of efficiency, we set out the relevant portions of counsel's submission addressing the objective and policies:

> 13. The objective of the NPSFM 2020 is as follows:
>
> *The objective of this [NPSFM 2020] is to ensure that natural and physical resources are managed in a way that prioritises:*
>
> *(a) first, the health and well-being of water bodies and freshwater ecosystems*
>
> *(b) second, the health needs of people (such as drinking water)*
>
> (c) *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*
>
> 14. The NPSFM 2020 includes 15 policies which relate to:
>
> (a) Te Mana o te Wai and involving tangata whenua in freshwater management (policies 1 and 2);
>
> (b) Integrated whole-of-catchment management (policy 3);
>
> (c) Integration with New Zealand's response to climate change (policy 4);
>
> (d) Implementation of a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems

is improved, and for all others is either maintained or improved (policy 5);

(e) Protection of wetlands and their values (policy 6);

(f) Avoidance of the loss of river extent and values to the extent practicable (policy 7);

(g) Protection of significant values of outstanding water bodies (policy 8);

(h) Protection of the habitats of indigenous freshwater species (policy 9);

(i) Protection of the habitat of trout and salmon (policy 10);

(j) Efficient use and allocation of freshwater (policy 11);

(k) Achievement of the national target (as set out in Appendix 3) for primary contact (policy 12);

(l) Monitoring and reporting (policies 13 and 14); and

(m) Enabling communities to provide for their social, economic, and cultural well-being (policy 15).

15. The Project is consistent with this objective and policy framework for the following reasons:

*In terms of the NPSFM 2020 objective:*

(a) The Project has been developed to prioritise the health and well-being of water bodies and freshwater ecosystems. While the Project involves activities that will affect water bodies and freshwater ecosystems, the response to those effects has been thorough and comprehensive, as described in the evidence of Mr MacGibbon. Mr Hamill and Dr Neale (in respect of streams and freshwater ecology) and Mr Singers (in respect of wetlands) prepared the technical reports attached to the AEE, supplementary reports and evidence at the council hearing. In particular, a suite of mitigation measures is proposed to avoid, minimise and mitigate effects on water bodies and freshwater values. Offset measures are also proposed as follows:

(i) The stream areas lost or disturbed as a result of the Project will be offset to achieve no net loss. Restoration (fencing and planting margins of an average 10m width on each bank) of 8455m of existing stream, equating to 10,738m$^2$ of stream channel offset will be carried out. In addition, Waka Kotahi will restore the 798m$^2$ of stream channel that is being diverted for the Project.

(ii) The planting restoration package includes 6ha of kahikatea - swamp forest restoration planting. The purpose of this planting is to transform grass, rush and sedgeland dominated areas to kahikatea, pukatea and swamp maire forest, with small areas of rimu and matai where ground conditions are not as saturated.

(b) The Project prioritises the health needs of people, appropriately manages flood risk and provides for a lifeline utility.

(c) The Project will create significant national and regional benefits as explained in the evidence of Mr Napier, Mr McCombs, Mr MacGibbon, Mr Copeland and Mr Hickman, and is supported by Te Rūnanga. The Project therefore provides for the social, economic and cultural well-being of people and communities.

*In terms of the NPSFM 2020 policy framework:*

(a) Te Rūnanga o Ngāti Tama has been involved in the development of the Project, as explained in the evidence of Mr Dreaver and the evidence provided by Te Rūnanga (policies 1 and 2). As the Court is aware from Te Rūnanga's memorandum of 27 August 2020 the agreement between Ngāti Tama and Waka Kotahi has now been signed and Te Rūnanga support the proposed conditions. Further, in terms of Policy 1, the comments above in relation to the objective apply.

(b) The stormwater design has appropriately considered the integrated management of fresh water and use of land, as described in the evidence of Mr Symmans (policy 3). Further, the 2018 Fish Passage Guidelines were adopted and the Councils and the Department of Conservation have agreed with the proposed conditions and Ecology and Landscape Management Plan (which have been the subject of expert conferencing).

(c) The effects of climate change have been considered as part of stormwater design and in assessing the hydrological effects of the Project, as described by Mr Symmans and at the council level by Mr Kenneth Boam (policy 4).

(d) The Project will maintain existing water quality. Therefore, the primary contact requirements in Appendix 3 of the NPSFM 2020 will not be affected (policy 12).

(e) The Project has avoided the loss of natural inland wetlands, has protected their values and promoted their restoration. In particular, the Project has been carefully designed to avoid effects on the ecologically significant Mimi wetland (policy 6).

(f) While the Project does involve the permanent loss of sections of streams, a thorough assessment was undertaken to avoid the loss of river extent as far as practicable. In addition, the freshwater offset package (summarised above at sub-paragraph (a(i)) will offset the effects of this loss of streams and protect the habitats of indigenous freshwater species (policies 7 and 9).

(g) The Project does not affect any outstanding water bodies (policy 8).

(h) The Project does not affect the habitat of trout or salmon (policy 10).

(i) The Project involves the temporary allocation of water to provide for construction/dust management. The level of take has been carefully identified to be a maximum of 150m$^3$ per day from the Mimi River and 300 m$^3$ from the Mangapepeke River, at a rate of 5L/s. The proposed conditions and mitigation measures have been designed to ensure that the effects of the water take will be appropriately minimised and mitigated. This is an efficient allocation of water to enable this significant

infrastructure project (policy 11).

(j) Policies 13 and 14 (which relate to monitoring and information sharing) are not relevant to the Project but the conditions require monitoring and reporting on water quality.

(k) The significant benefits of the Project will enable communities to provide for their social, economic and cultural well-being (policy 15).

(footnotes excluded)

[30] We agree with counsel's submission that the Project is consistent with the objective and policy framework for the reasons specified in the preceding submissions. with the possible exception of 15 (e) above, in relation to natural inland wetlands which we explore further below.

*Clause 3.22(1) – Natural inland wetlands*

[31] This provision requires that every regional council must include the following policy (or words to the same effect) in its regional plan:

16. Subpart 3.22(1) provides that every regional council must include the following policy (or words to the same effect) in its regional plan:

*"The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:*

(a) *the loss of extent or values arises from any of the following:*

(i) *the customary harvest of food or resources undertaken in accordance with tikanga Māori*

(ii) *restoration activities*

(iii) *scientific research*

(iv) *the sustainable harvest of sphagnum moss*

(v) *the construction or maintenance of wetland utility structures*

(vi) *the maintenance or operation of specified infrastructure, or other infrastructure*

(vii) *natural hazard works; or*

(b) *the regional council is satisfied that:*

(i) *the activity is necessary for the construction or upgrade of specified infrastructure; and*

(ii) *the specified infrastructure will provide significant national or regional benefits; and*

(iii) *there is a functional need for the specified infrastructure in that location; and*

(iv) *the effects of the activity are managed through applying the effects management hierarchy.*

[32] The Agency primarily relies on the *specified infrastructure* exception in (b) above. However, in its memorandum it does discuss the wetlands affected by the Project. Again, it is convenient and efficient to set out counsel's submissions in full:

> 18. The design philosophy adopted by the Project in relation to ecological values focused strongly on avoiding the ecologically significant Mimi wetland, which is described in the evidence of Mr MacGibbon as "*the area of greatest ecological significance in the wider Project area*". The Project has avoided direct adverse effects on the Mimi wetland through careful design (the use of Bridge 1 and shifting the road alignment away from the wetland) and selection of construction methodology for the bridge over the tributary to the Mimi wetland. The construction methodology chosen, which is set out in detail in the evidence of Mr Symmans, Mr Milliken and the AEE, is more expensive but eliminates the need for works in the valley floor leading to better ecological outcomes.
>
> Exotic rushland
>
> 19. Beyond the high-value Mimi wetland, the Project affects 5.83 ha of exotic rushland in the Mangapepeke Valley, assessed as low value (not significant) by Mr Singers. The exotic rushland is shown in Figures A1 and A2 of Appendix 2 to the evidence of Mr MacGibbon (taken from Mr Singer's February 2018 Supplementary Technical Report). The exotic rushland is predominantly located on Mr and Mrs Pascoe's property.
>
> 20. The definition of 'natural wetland' in the NPSFM specifically excludes "*any area of 'improved pasture that ... is dominated by (i.e. more than 50%) exotic pasture species and is subject to temporary rain-derived water pooling.*"
>
> 21. 'Improved pasture' is defined to mean "*an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.*"
>
> 22. The Mangapepeke valley floor where the exotic rushland occurs was cleared and has been maintained since for the purposes of pasture production over many decades. Its growth and composition has been modified, and is managed, by Mr and Mrs Pascoe for stock grazing.
>
> 23. In his Supplementary Technical Report Mr Singers assessed the 'exotic rushland' community as "*dominated by exotic rush and pasture species*" with native species occupying "*<3% cover*". This assessment reflects that the valley floor

> was cleared, is dominated by poor quality pasture species and has been grazed for many decades. Indeed, as the hillsides are bush covered, the valley floor provides the key grazing for Mr and Mrs Pascoe's stock.
>
> 24. Therefore, the 'exotic rushland' community within the lower Mangapepeke valley is not a natural wetland under the NPSFM.
>
> Upper Mangapepeke valley
>
> 25. The Project will impact areas of Pukatea treefern treeland (0.722ha) in the upper Mangapepeke valley. Parts of these areas, despite their significant modification, degraded state and a high component of exotic pasture species throughout, are likely qualify as a 'natural wetland' under the NPSFM. The likely area of affected 'Pukatea treefern treeland' inland wetland has been reduced by the inclusion of Bridge 1.
>
> (footnotes excluded)

[33] With regard to these matters, DOC has recorded[18] that it:

> ...
> (b) agrees with Waka Kotahi that parts of the Mimi Valley and Upper Mangapepeke Valley fall within the definition of 'natural wetland' under the NPSFM, and does not wish to comment whether the lower Mangapepeke Valley fits the definition or not as that relies upon an evidential foundation to which DOC has not led evidence and given the agreements DoC has reached with Waka Kotahi to provide for positive ecological outcomes; and
>
> (c) has relied on the expert evidence of Mr Robert MacGibbon and Mr Peter Roan for Waka Kotahi in support of the Project.
>
> (footnotes excluded)

[34] Mr and Mrs Pascoe and Poutama have an issue with the Transport Agency's claim that the 'exotic rushland' community within the lower Mangapepeke Valley is not a natural wetland under the NPSFM 2020. Referring to the statement by counsel for the Agency that "this [Singers] assessment reflects that the valley floor... is dominated by poor quality pasture species...".[19] Poutama/Pascoes assert that that statement is simply untrue. They assert that Mr Singers assessed the rushland as dominated (60-70%) by rush species in his supplementary report. They claim that it is self-evident that the rushland community in the Mangapepeke Wetland is not maintained or managed for the purposes of pasture production. If it were so maintained, it would not be a rushland. They maintain in summary that the rushland is not improved pasture. It is not maintained and

---

[18] Memorandum of counsel for Waka Kotahi NZ Transport Agency, Te Rūnanga o Ngāti Tama Trust, the Director-General of Conservation, Taranaki Regional Council, and New Plymouth District Council dated 27 October 2020, at paragraph 9.

[19] Referring to paragraph 23 of the Transport Agency memorandum dated 29 September 2020.

modified and managed for the purpose of pastoral production.[20]

[35] For its part, the Agency maintains that the exotic rushland is not a "natural inland wetland" under the NPSFM. However, it observes that in respect of any natural wetland affected by the Project (including the exotic rushland, were that area to be classified as natural wetland) the Agency primarily relies on the "specified infrastructure" limb of clause 3.22(1) of the NPSFM.[21]

[36] In considering this matter we find the definition of "natural inland wetland" (point 20 in paragraph 32 above) to be imprecise – it raises more questions than it answers, particularly in relation to the meaning of "improved pasture". For example:

- The definition of improved pasture in the NPSFM[22] is "*an area of land where exotic species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.*" In the current situation in the lower part of the Mangapepeke valley exotic species (grasses in particular) appear to have been deliberately sown – possibly in the past, the Pascoes having been in residence there for several decades, thus species composition and growth has been modified, and the very fact of grazing means that the pasture is being thus "maintained". Does that mean it qualifies as improved pasture or would other management techniques have to have been applied?

- Are "exotic pasture species" only those species that are most commonly sown specifically for grazing (grasses), which the "improved pasture" definition implies, or do they include common exotic herbaceous and rush species that also occur in pasture? Some farming practices encourage diversity of herbaceous species within pasture for stock health reasons – are these "exotic pasture species" or does their presence above a certain percentage assist in qualifying the area as a "natural inland wetland"?

---

[20] Poutama/Pascoes memorandum, paragraphs 33-45.
[21] Transport Agency memorandum dated 18 November 2020, at paragraph 3(b).
[22] NPSFM 2020 at page 23

[37] Policy 6 of the NPSFM 2020 is "There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted." This policy and the definition of natural inland wetland (however imprecise) lead us to think that the intention of the NPSFM is to ensure that even where a wetland has been substantially modified and may have a large component of exotic species, if it retains elements of natural hydrological function, then restoration should be promoted. Restoration is itself defined in the NPSFM 2020: "restoration, in relation to a natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning."

[38] We can also rely on the RMA definition: "wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals, that are adapted to wet conditions".

[39] The reference material referred to in clause 3.23 (3) and clause 1.8 of NPSFM 2020, which is said to assist "in case of uncertainty or dispute about the existence or extent of a natural inland wetland", does not on closer examination assist in more than determining whether or not an area is a wetland, and does not go to the questions we have about "natural inland wetland" or "improved pasture". There was no opportunity for the ecological experts to present evidence as to whether part or all of Mangapepeke valley is a natural inland wetland as the NPSFM 2020, with its definitions, was promulgated only in September 2020, well after the hearing. Thus we are unable to reach a firm conclusion as to the status of the wetland. Rather than concern ourselves further with the matter here we concur with the Agency that they are able to rely on the specified infrastructure limb of clause 3.22(1).

[40] Finally, with regard to the NPSFM, Poutama/Pascoes refer to the Objective of the NPSFM asserting that it ensures that the Project should prioritise the health and wellbeing of the waterbodies in the Mangapepeke Valley, the health needs of Poutama (including Pascoe whānau drinking water, the Mangapepeke puna waiora and mahinga kai) and the ability of Poutama, including the Pascoe whānau, to provide for their social, economic and cultural wellbeing. We find that the conditions to be applied during

construction to protect water quality and hydrology will be sufficient to enable a successful hydrological rehabilitation of the valley floor and that the attention being paid to the ecological restoration there is likely to result in an improvement to the biodiversity of the valley, given the currently low ecological value ascribed to it by the Agency's ecologists.

*Specified Infrastructure*

[41] We agree with the submissions of counsel that the Project fits within sub-clause (1)(b) of the policy in clause 3.22. We consider it is both a lifeline utility, as defined in the Civil Defence Emergency Management Act 2002, and specified infrastructure providing significant national and regional benefits. There is a functional need for the Project to occur in the identified location, identified after consideration of options in the route designation process. Further, we are satisfied that the adverse effects of the Project can be managed through the effects management hierarchy as we had previously identified in our interim decision. We accept the reasoning outlined in the Agency's 29 September memorandum, as set out below.

[42] Counsel submitted:[23]

> 26. Irrespective of whether natural inland wetlands are affected or not, the Court can be satisfied that the Projects fits within limb (b) of the policy in Subpart 3.22, for the reasons summarised below.
>
> 27. The Project is necessary for the construction of "specified infrastructure", which the NPSFM 2020 defines as including either:
>
> (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002 ("**CDEMA**");
>
> OR
>
> (b) regionally significant infrastructure identified as such in a regional policy statement or regional plan.
>
> 28. The Project clearly falls within this definition. Waka Kotahi is defined as a lifeline utility in the CDEMA, and the Project is of course infrastructure that delivers a service operated by Waka Kotahi. In addition, the Taranaki Regional Policy Statement acknowledges the importance of "*providing for regionally significant infrastructure*" and identifies the importance of transport route security

[23] Transport Agency memorandum dated 29 September 2020, at paragraphs 26-32.

and reliability to Taranaki's growth and development, particularly in relation to SH3, along with network efficiency, capacity and safety.

29 As explained in evidence (see above), and acknowledged by the Court in its decision, the Project will provide significant national and regional benefits through the construction of a modern, fit for purpose road, which is significantly safer, more reliable and connective compared to the current SH3. The Project will create significant economic benefits to the region, as well as ecological benefits through the Project's ecological restoration package.

30. There is a functional need for the Project to occur in this location. "Functional need" is defined in the NPSFM as meaning "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.*" This is the case for this Project, for the following reasons:

(a) The Project comprises large-scale, linear infrastructure. There cannot be gaps in the road – the whole route must fit together safely and efficiently.

(b) The constraints on the design of the Project included reducing cultural, ecological, and landscape (by keeping the road low in the landscape) effects while ensuring the road could be appropriately designed and constructed and its geometric design will deliver a safe fit for purpose modern section of state highway.

(c) The Project route was the subject of a "*detailed*" alternatives process; Waka Kotahi carefully selected the route as explained in the evidence of Mr Roan. As the Court noted "*the Agency as the requiring authority undertook a thorough and detailed evaluation of the route options before deciding on the preferred route along the Mangapepeke valley.*"

(d) The route design was refined at several points to avoid impacts on the ecologically significant Mimi wetland. These refinements included the addition of a bridge to the route across a tributary valley to the Mimi Wetland area, and shifting the southern end of the route further west away from the Mimi Wetland.

(e) As explained in the evidence of Mr Roan and Mr MacGibbon, and noted by the Court in its decision, the alignment though the Mangapepeke valley was shifted off the valley floor and moved to the eastern valley flanks, avoiding poorer soil conditions on the valley floor and an area that is a potential restoration target (for kahikatea swamp forest planting).

31. Further, the adverse effects of the Project are managed through applying the effects management hierarchy, which is also defined by the NPSFM 2020. The Project has applied this hierarchy as it has:

(a) Avoided adverse effects where practicable as set out in Mr MacGibbon's evidence in relation to ecology.

(b) Where adverse effects cannot be avoided, the Project has minimised (including remedied) them where practicable as set out in Mr MacGibbon's evidence in relation to ecology.

(c) Where more than minor residual adverse effects cannot be avoided,

minimised or remedied, provided for aquatic offsetting / compensation, as those terms are defined by the NPSFM 2020. In particular, the Restoration Package includes the re-establishment of kahikatea – swamp forest and wetland habitat in areas that were once swamp forest and wetland and which retain the environmental conditions suitable for re-establishment. Following restoration, the upper Mangapepeke valley will be transformed into a diverse, high value swamp/wetland ecosystem.

(d) The Restoration Package also includes the Pest Management Programme which provides for comprehensive, measurable, pest management in perpetuity over 3,650ha. Mr MacGibbon's evidence is that the ecological package is the largest and most comprehensive for a new road project in New Zealand and that "*the ecological gains will be substantial and permanent.*" The Court also recorded in its interim decision that:

> "[208] We are satisfied that the Restoration Package includes a range of mitigation, offset and compensation that together are sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole PMA (and potentially beyond it) in the longer term."

32. Therefore, the Court can be satisfied that the Project complies with this policy.

(footnotes omitted)

[43] We record DOC's position on the issue of 'functional need' as follows:

9. In respect of the 29 September memorandum, DOC wishes to record that it:

(a) Does not comment on whether there is a functional need for the Project matter since as stated at the Council-level hearing DOC "*has not closely scrutinised or challenged Waka Kotahi's evidential basis [for alternatives assessment] as it does not have the requisite engineering expertise to do so. DOC has relied upon the expert evidence of NZTA's engineers in the opinions that they provided to inform the Multi-Criteria Analysis (MCA) process. DOC has focused on the effects of the alignment now proposed*";

...

*Clause 3.24(1) – Rivers*

[44] This provision requires that every regional council must include the following policy (or words to the same effect) in its Regional Plan:

> The loss of river extent and values is avoided, unless the council is satisfied:
>
> (a) that there is a functional need for the activity in that location; and
>
> (b) the effects of the activity are managed by applying the effects management hierarchy.

[45] The Project is consistent with this Policy as there is a functional need for it to occur in this location, identified after consideration of options in the route designation process. Adverse effects of the Project have been managed through the effects management hierarchy as we have previously identified.

*Clause 3.26(1) – Fish passage*

[46] This provision requires every regional council to include the following fish passage objective (or words to the same effect) in its Regional Plan:

> The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.

[47] We consider the Project is consistent with this objective as it provides for fish passage in all culverts where fish passage is likely to be impeded, with all culverts providing fish passage being designed in accordance with the April 2018 Fish Passage Guidelines.

[48] Having regard to our earlier findings, the contents of the AEE, and the evidence we heard, we accept the submissions made by counsel for the Transport Agency. We find that, for the purposes of s 171(1)(a)(i) and s 104(1)(b)(iii) there is no aspect of the Project that will be inconsistent with any objective and policies of the NPSFM 2020 itself nor with any objective and policies which must be incorporated into the Regional Plan pursuant to s 55(2) of the Act.

*NES Freshwater*

[49] We have also considered the relevant provisions of the NES Freshwater, which came into force on 3 September 2020.[24] We are obliged to have regard to them pursuant to s 104(1)(b)(ii) of the Act. The regulations do not contain any transitional savings or related provisions addressing applications in the course of consideration at the time of their coming into force.

---

[24] See paragraph 25 above, and note 16.

[50] In its memorandum of 29 September, the Agency identified a number of regulations which it contended were of relevance to the Project. It submitted as follows:

> 42. The NES Freshwater includes the following regulations of relevance to the Project:
>
> (a) "Specified infrastructure" within or affecting "natural wetlands" is provided for in regulations 45 to 47 as follows:
>
> (i) Construction of specified infrastructure within or within a specified distance from a natural wetland is a discretionary activity (including vegetation clearance, earthworks or land disturbance, or the taking, use, damming or discharge of water).
>
> (ii) Maintenance and operation of specified infrastructure within or within a specified distance from a natural wetland (including vegetation clearance, earthworks or land disturbance, or the taking, use, damming or discharge of water) is a permitted activity subject to certain conditions provided for in regulations 46 and 55. If those conditions are not complied with, maintenance and operation becomes a restricted discretionary activity.
>
> (b) "Reclamation" of the bed of any river is a discretionary activity (regulation 57). "Reclamation" is defined with reference to the National Planning Standards as the manmade formation of permanent dry land by the positioning of material into or onto any part of a river (with certain exclusions). Project activities that involve the loss of streams require a resource consent under this regulation.
>
> (c) The placement and use of culverts or weirs are permitted activities, subject to compliance with conditions (regulations 70 or 72). Culverts or weirs that do not comply with those conditions have a discretionary activity status (regulations 71 or 73). In addition, regulations 62, 63, 64 and 69 create additional requirements that must be provided for by the conditions of consent for culverts or weirs as follows:
>
> (i) Regulations 62, 63 and 64 require certain information to be provided to the relevant regional council within 20 working days after any culvert or weir has been constructed as a condition of consent.
>
> (ii) Regulation 69 requires a resource consent granted for the construction of any culvert or weir to impose conditions that require monitoring, and maintenance of the structure in the manner set out in the Regulation.
>
> 43. The application before this Court is for all resource consents required for the Project under the regional rules noted therein, and any other rules which may apply to the Project, even if not specifically noted. The resource consents specifically applied for are for such activities as earthworks, works in watercourses, the taking and use of water, discharges to air, land and water, and disturbing contaminated land. The resource consents were bundled with an overall activity status of discretionary.

44. All the relevant activities within the NES Freshwater have been incorporated within the consents for the Project sought to date and before the Court. The AEE, supplementary reports and evidence on behalf of Waka Kotahi has comprehensively addressed these matters. In particular, agreement has been reached with the Councils and the Department of Conservation as to the conditions and the application of the mitigation hierarchy in this case.

45. The Project complies with the provisions of the NES Freshwater and the Court can grant any resource consents required under the NES Freshwater. None of the regulations that impose a non-complying activity status apply to the Project. The applicable regulations impose, at most, a discretionary activity status; the same activity status that the bundled resource consents were assessed under by the Court during the hearing and in its interim decision.

46. Therefore, on the basis of the extensive evidence and material before the Court, Waka Kotahi seeks that the Court confirm that, to the extent necessary, resource consent is granted under the following regulations of the NES Freshwater:

    (a) Regulation 45: Construction of specified infrastructure.

    (b) Regulation 57: Reclamation of the bed of rivers.

    (c) Regulation 71: Placement and use of culverts.

    (d) Regulation 73: Placement and use of weirs.

47. As noted above, regulations 62, 63, 64 and 69 create additional requirements that must be provided for by the conditions of consent for culverts or weirs.

48. The amended conditions in Appendix 1 include provision for these requirements as follows:

    (a) **GEN.24(b)(iii), DAM.7, TCV.9 and PCV.10** have been amended to require monitoring and maintenance of culverts and weirs to be carried out in a way that meets the requirements of regulation 69. This requirement is also reflected in Schedule 1 to the conditions in relation to the Freshwater Management Plan.

    (b) **TCV.9A** and **PCV.11A** have been added to ensure the information requirements in respect of culverts under regulation 62(3) and 63(3) are complied with.

    (c) **DAM.8** has been added to ensure the information requirements in respect of weirs under regulation 62(3) and 64(3) are complied with.

[51] For the purposes of this decision, we have accepted that the Transport Agency's identification of the provisions of the NES that are relevant to the Project is correct. There is nothing obviously to the contrary that stands out in our perusal of the regulations. We accept the proposition advanced in the *Westfield NZ Limited v Upper Hutt City Council* case that it is for the consent authority to classify activities by reference to

relevant rules, and we have had regard to the provisions of s 88A.[25] We note the provisions of s 88A of the Act to the extent that they are relevant, and note that under the Regional Plan the Transport Agency's applications have been treated as discretionary activities.

[52] We are concerned by the proposition contained in the Transport Agency's memorandum that, as the Project complies with the provisions of the NES Freshwater, the Court can grant any resource consents required under that document. Counsel submitted that none of the regulations imposing a non-complying activity status apply to the Project. They impose at most a discretionary activity status; the same status under which the bundled resource consents were assessed during the hearing and in our interim decision. It sought, therefore, that resource consents be granted under the following regulations: Regulations 45, 57, 71 and 73.

[53] We do not consider that it is possible in a jurisdictional sense to grant consent for an activity for which no consent was required as at the date the resource consent application was filed, notwithstanding the reference in the AEE to the application being for all resource consents required for the Project under the regional rules noted and any other rules which may apply to the Project even if not specifically noted.

[54] We conclude that, for there to have been a valid application for the consents required in the NES Freshwater (being other regulations), the application documents must have assessed the proposal against the relevant provisions of those regulations. It has not done so in this case as the NES Freshwater was not in existence at the time the application was filed. For these reasons we do not consider that the Court has jurisdiction to grant any further consent (assuming that further consents are, in fact, needed – we have not undertaken an independent assessment of that) required under the NES Freshwater. Further, we do not consider that it is appropriate to amend the conditions to address NES Regulations – the Regulations require compliance with certain matters not explored with the Court during the hearing.

---

[25] *Westfield NZ Limited v Upper Hutt City Council* (2000) 6 ELRNZ 335 (EnvC).

***Conditions***

[55] We received a final set of proposed conditions from the Transport Agency. We were initially concerned at the way in which management plans were proposed to be dealt with in the conditions, and asked that the Agency address those concerns. That has now occurred, with a final set of NOR conditions having been filed on 29 September 2020 and a final set of Regional Council consent conditions filed on 27 October 2020.

[56] The parties were given an opportunity to comment on those final conditions.

[57] In a memorandum dated 27 October 2020 from the Transport Agency, Te Rūnanga, Director-General of Conservation, Taranaki Regional Council and New Plymouth District Council, those parties indicated their support for a final set of Taranaki Regional Council conditions (with some minor amendments) and for the designations conditions. The only parties who have issues with the conditions are the Poutama / Pascoe parties. Royal Forest & Bird Protection Society of New Zealand Incorporated did not raise any issues.

[58] Poutama / Pascoes are concerned about:

(a) the removal of condition 5A (relating to the Pascoe land) from the Taranaki Regional Council conditions;

(b) geotechnical matters;

(c) the removal of the lapse date from the conditions.

*Condition 5A*

[59] The Pascoes are concerned that the substance of Condition 5A, which had been included also as part of the regional consents as GEN.6A, has been removed from the regional consent conditions. It is clear to us that the condition has been removed from the regional consents because the condition requires attention to land use matters only. It sets out a process by which the Pascoes may relocate from their home either temporarily or permanently. It seems to us that it is not appropriate that such condition be replicated in the regional consents, as compliance with it is a matter for the New

Plymouth District Council. The Pascoes have not lost anything as a result of its removal.

*Geotechnical*

[60] In their memorandum dated 15 November 2020, Poutama/Pascoes advised that they have asked Taranaki Regional Council for "further information regarding damage to the Mangapepeke wetland by NZTA earthworks carried out during geotechnical investigation entries. We have yet to receive a response".[26] In its memorandum dated 18 November 2020, the Agency responded. It said:[27]

> (a) The memorandum contends that drains present on the Mangapepeke Valley floor are the result of "probably unconsented" drainage work carried out by Waka Kotahi as part of geotechnical investigations. That is incorrect: the geotechnical investigations carried out for the Project have not involved the digging of drains, and the drains present on the valley floor were not created by Waka Kotahi or its contractors.

[61] We accept that explanation, but note in any event that this matter is not relevant to our assessment of the NOR and application for regional resource consents.

*Drinking water supplies*

[62] An assertion is made by the Poutama/Pascoe appellants to the effect that the Project will destroy the Pascoe whānau drinking water supplies, including the Mangapepeke puna waiora.[28]

[63] The Agency responded.[29]

> The memorandum states that the Project will destroy the Pascoe's drinking supplies. However, counsel note that Mr Symmans addressed the impact of the Project on groundwater (including springs) in Mangapepeke Valley in detail in his evidence, concluding that "the Project will have [a] negligible effect on the groundwater system".

We accept that evidence.

---

[26] 21st Memorandum for Poutama Kaitiaki Charitable Trust & D & T Pascoe in response to the Minute of the Environment Court dated 9 November 2020, 15 November 2020, at paragraph 16.

[27] Transport Agency memorandum dated 18 November 2020, at paragraph 4(a).

[28] Poutama/Pascoe Memorandum dated 15 November 2020.

[29] Transport Agency memorandum dated 18 November 2020, at paragraph 4(b).

*Lapse date*

[64] There is no lapse date for the NOR specified in the NOR conditions. In their memorandum, Poutama/Pascoes refer to a lapse period for the designation of 10 years proposed by the Commissioner in his decision on the NOR. They note that the Agency appears to have removed that requirement and in the absence of a proposed lapse period propose a standard five year lapse period.[30] In their opening submissions to the Court, Poutama/ Pascoes had argued that no lapse period would impose unreasonable uncertainty on the Pascoe whānau for an indefinite amount of time.[31]

[65] In its opening submission to the Court, the Transport Agency submitted that as the NOR is to vary an existing designation there is no statutory ability to impose a lapse period. It argued that s 181(2) (which relates to alterations to existing designations) does not incorporate s 184 which sets the lapse period for a designation.[32]

[66] The Court did not hear full argument on the matter of the lapse of the designation and is therefore reluctant to determine the matter. We will not impose a lapse date on the amended designation but in so doing are not endorsing the position of either party. We note however that the project has a de facto lapse period given that a lapse date of 10 years has been imposed on the resource consents.

*Conditions generally*

[67] Poutama/Pascoes assert that the conditions and Project do not provide for the cultural values, rights, responsibilities and interests, including kaitiakitanga and stewardship, of Poutama, including the Pascoe whanau. They assert that the conditions actually seek to impose adverse cultural, including social effects, on Poutama including the Pascoe whanau.

[68] We have addressed the cultural effects of the Project and the effects of the Project on the Pascoes and others in our Interim Decision and propose to say no more about them here.

---

[30] Poutama/Pascoe memorandum dated 15 November 2020, at paragraphs 48-49.
[31] Poutama/Pascoe opening submissions dated 22 July 2019, at paragraph 57.
[32] Transport Agency opening submissions dated 16 July 2020, at paragraph 251.

[69] Finally, Poutama/Pascoes maintain that any management plans, resource consent and designation conditions need to be consistent with any potential Public Works Act land agreement conditions. We consider that the conditions proposed to address the effects of the proposal on landowners, including the Pascoes, are appropriate.

**Outcome and Conditions**

[70] We are obliged to consider the relevant matters contained in ss 171 and 104 of the Act. We identified those matters in our Interim Decision. At the beginning of this decision we set out our findings on the core central issues (at paragraph [6]).

[71] For completeness, we record that we identified and considered the relevant provisions of the various instruments set out in s 171(1)(a)(i)-(iv) in paragraphs [391] – [422] of our Interim Decision. Since our Interim Decision, the NES Freshwater and the NPSFM 2020 have been promulgated and we have considered them in this decision. In the Interim Decision we noted that the effect of the Project on cultural values was a significant issue in the hearing, and also that Te Rūnanga had not yet consented to the Agency's use and acquisition of its land for this Project. We have discussed developments since then regarding cultural matters in this decision.

[72] The determinative issue before the Court arises pursuant to s 171(1)(b)(ii), namely the effects of the designation and whether, here, there has been adequate consideration of alternatives. In paragraphs [115] – [390] we addressed the effects of the designation (and the resource consent applications) and determined that, save for Cultural effects, the effects of the proposal will be appropriately addressed through conditions.

[73] Cultural effects have now been addressed to our satisfaction as outlined in paragraph [12] of this Decision.

[74] Finally, we had been concerned about whether the Agency's fourth Project Objective could be fulfilled. We are now satisfied that it can be fulfilled, given the agreements reached between the Agency and Ngāti Tama, and in light of our findings on the other effects of the Proposal.

[75] The Agency is directed to delete the amendments to conditions made to address the NES Freshwater (in accordance with our finding in paragraph [54] above). The Court has identified some minor additional issues. The Agency is directed to address those issues, set out in the attached Schedule. The Agency is to lodge an amended complete set of NOR conditions, regional resource consent conditions and a full set of the latest plans within 15 working days of the date of this decision. Upon receipt of same we will formally issue approval to the resource consents and confirm the application in respect of the NOR.

[76] The appeals from Poutama Kaitiaki Charitable Trust and D & T Pascoe are dismissed. Costs are reserved against Poutama Katiaki Charitable Trust. Any costs applications to be made and responded to in accordance with clause 6.6 of the Environment Court Practice Note 2014. Time limits to run from the date of issue of the final decision.

For the Court:

BP Dwyer
**Environment Judge**

M Doogan
**Māori Land Court Judge**

MJL Dickey
**Environment Judge**

RM Bartlett
**Environment Commissioner**

DJ Bunting
**Environment Commissioner**

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

## Schedule

### Designation Conditions:

i. Table of contents – Construction Environmental Management Plan – should this row refer to conditions "16 – 18B" (rather than "16 – 18")?

ii. Table of contents – Schedule 5 – should the reference to GEN.6A(e)(iv)(3) instead be to Condition 5A of the designation conditions?

iii. Glossary – the "CTMP" definition is repeated.

iv. Condition 1 – should "Ecological and Landscape Management Plan" be "Ecology and Landscape Management Plan " (see Glossary and other conditions, e.g. condition 8).

v. Condition 5A – advice note – the equivalent condition is no longer in the project resource consents conditions. The advice note will need amendment.

vi. Condition 6(b)(ii) – should "level of urgency is" instead be "level of urgency in"?

vii. Heading above Condition 25. Should "Landscape and Environmental Design Framework" instead read "Landscape and Environment Design Framework" (see Glossary)?

viii. Condition 28A(b) – delete the second sentence as this repeats the first.

ix. Condition 29A(e) – includes the wording "with any amendments deemed necessary to Conditions 30(a) to (f)". Is it intended that Conditions 30(a) to (f) themselves could be amended using the process set out in conditions? Should this refer to PMA locations in Condition 29A(d) are amended, not the conditions?

x. Condition 30(dd) – refers to "bat peer reviewer" but this person has already been identified (in Condition 30(d)) as the "independent peer reviewer".

xi. Condition 33(a)(ii)(2) – should the reference here to Condition 29(d)(i) instead be to Condition 29(d)(ii)?

xii. Condition 43 – the last paragraph starts with the words "Upon receipt of the notice of under…". Should this instead be "Upon receipt of the notice under …"?

xiii. Schedule 1 – paragraph 2(n) begins "Provision to undertaken post-construction …". Should this instead read "Provision to undertake post-construction …"?

xiv. Schedule 1 – paragraph 3(b)(ii) begins "all other trees that are ≥80 cm …". Condition 29(c)(i)(1) refers to "trees greater than 80cm". Is there an inconsistency between Condition 29 and Schedule 1?

xv. Schedule 1 – paragraph 8(b) – should "relocated it at predetermined release sites" instead be "relocate it at predetermined release sites"?

xvi. Schedule 1 – paragraph 9(d) refers to non-detection in the "planting" areas of pest plants and pest animals. Paragraph 7 in Schedule 1 contains non-zero levels of pest animal detection. What is the relationship between the "planting area" referred to in paragraph 9(d) and the PMA in paragraph 7?

xvii. There is an attachment to conditions, inserted after Schedule 5, relating to the CLMP. In paragraph 1B –should "Consent Holders's" be "Consent Holder's"?

**Regional Resource Consent Conditions:**

i. Table of contents – should the row referring to the Construction Environmental Management Plan refer to "GEN.19 – 21B" instead of "GEN.19 – 21"?

ii. Table of contents – should the row for the "Ecology and Landscape Management Plan" refer to "GEN.22 – 26" and new rows be created for Conditions GEN.27 and GEN.28 (as they have separate headings)?

iii. Glossary – "Construction Traffic Management Plan" is listed twice.

iv. Glossary – the definition of PMA should probably make it clear that the conditions referred in that definition are the Designation Conditions.

v. Condition GEN.1 – should "Ecological and Landscape Management Plan" be "Ecology and Landscape Management Plan" (see Glossary)?

vi. New Condition GEN.5(a) – should this be numbered "GEN.5A"? Numbering it GEN.5(a) and then inserting a paragraph (a) into Condition 5(a) could lead to

confusion.

vii. Condition GEN.14(g) refers to Condition 17. Is this a reference to Condition 17 in the Designation conditions, or a reference to Condition GEN.17?

viii. Condition GEN.18 – refers (after para (g)) to Condition 18B. Is this the correct reference?

ix. Condition GEN.23A(e) – the phrase "shall not commence" is repeated.

x. Condition GEN.24(a)(ii)(4) –refers to Condition 24(a)(ii)(2) and (3). Should this be a reference to Condition GEN.24(a)(ii)(2) and (3)?

xi. Condition SED.7, after paragraph (h), refers to Condition GEN.12. Condition GEN.12 is a blank condition.

xii. Condition SED.11, after paragraph (e) refers to "Conditions (b)". Should this be "Condition (b)"?

xiii. Condition SED.11 (g) begins "Any exceedance on …". Should this be "Any exceedance of …"?

xiv. Condition TCV.3 – should "details on the location" be "details of the location"?

xv. Conditions BRG.1 – 5 (Mimi River) and BRG.1, 2, 3A and 5 (Mangapepeke Stream). The Mangapepeke Stream conditions appear to be repeats of Conditions BRG.1, 2, 3, and 5 of the Mimi River conditions. Should the Mangapepeke Stream conditions be renumbered (BRG.6 – 9), or alternatively refer to the Mimi River conditions and simply say that Mimi River Conditions BRG.1, 2, 3 and 5 apply to the Mangapepeke Stream bridge (rather than repeating the Mimi River conditions with different numbers)?

xvi. Schedule 1 - see the suggestions regarding Schedule 1 to the Designation Conditions.

xvii. Delete Schedule 2 (the Pascoe Farm plan). As Condition GEN.6A is deleted, there seems no need to retain Schedule 2 in these conditions.

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2016-404-003106**
**[2017] NZHC 1540**

| | |
|---|---|
| UNDER | the Judicature Amendment Act 1972 |
| BETWEEN | MICHAEL JOHN DUGGAN AND JULIE ROGERS<br>Plaintiffs |
| AND | AUCKLAND COUNCIL<br>First Defendant |
| | IAN AND MICHELLE COSTELLO<br>Second Defendants |

Hearing: 7 April 2017

Appearances: R Enright for Plaintiffs
N Whittington and J Wilson for First Defendant
B Tree and A Theelan for Second Defendant

Judgment: 5 July 2017

---

## JUDGMENT OF VENNING J

---

**This judgment was delivered by me on 5 July 2017 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Crawford Law, Wellington
Meredith Connell, Auckland
Minter Ellison Rudd Watts, Auckland
Copy to: R Enright, Auckland

[1] Ian and Michelle Costello (the Costellos) and Michael Duggan and Julie Rogers (the plaintiffs) own neighbouring properties at Titirangi. The properties share a common boundary. The plaintiffs' site sits above the Costellos' property.

[2] On 26 August 2016 Auckland Council (the Council) granted the Costellos resource consent for construction of a residential dwelling on their property. The consent was granted on a non-notified basis. The plaintiffs seek judicial review of the Council's decisions.

**Background**

[3] In July 2015 the Costellos obtained land use consent for the construction of a residential dwelling and associated earthworks at their property at 19-25 Rangiwai Road (the first consent). The Costellos did not action the first consent. Then in May 2016 the plaintiffs bought 15 Rangiwai Road.

[4] On 29 June 2016 the Costellos lodged an application for resource consent for a differently designed residential dwelling, together with associated earthworks (including the removal of protected trees). The proposal again required land use consent.

[5] On 19 July 2016 the Council sought further information in relation to the second application. The Costellos responded on 21 and 22 July 2016.

[6] On 19 August 2016 the Council notified its decisions on the recommendation of the Independent Hearings Panel. As a consequence the Proposed Auckland Unitary Plan decisions version (PAUP DV) took effect. It replaced the Proposed Auckland Unitary Plan notified version (PAUP NV). The Council granted the Costellos a second consent on 26 August 2016.

[7] The Costellos commenced their building project relying on the second consent. On 29 August and 1 September the plaintiffs complained to the Council about what they regarded as unlawful tree clearance. On 16 September 2016 the PAUP DV became operative in part.

[8] The plaintiffs issued these proceedings on 8 December 2016 having previously indicated they intended to challenge the second consent.

**The decisions in issue**

[9] On 26 August 2016 James Dowding, the Council's team leader, Resource Consents – West, made two decisions under delegated authority on behalf of the Council:

(a) a decision to deal with the consent application on a non notified basis (the notification decision); and

(b) a decision to grant the resource consent subject to conditions (the substantive decision).

**Plaintiffs' challenge**

[10] The plaintiffs challenge both the notification and substantive decisions. They raise the following arguments:

(a) scope – lack of jurisdiction;

(b) the Council had regard to irrelevant considerations, namely the PAUP NV;

(c) the Council had regard to irrelevant matters, failed to take into account relevant matters, applied the wrong legal test or otherwise acted unreasonably in relation to the notification decision; and

(d) the Council had regard to irrelevant matters, failed to take into account relevant matters, applied the wrong legal test or otherwise acted unreasonably in relation to the substantive decision.

**The approach to judicial review**

[11] The principles concerning judicial review in this area of the law are well established. In *Coro Mainstreet (Inc) v Thames-Coromandel District Council* Wylie J summarised them as:[1]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

[12] *Coro Mainstreet (Inc)* went on appeal. The Court of Appeal did not take issue with the above summary.[2] Indeed, the Court suggested that in relation to notification, Parliament's apparent intention was to reduce the intensity of review to be applied to non-notification decisions.[3] The Court observed that given the amendments to s 95 Resource Management Act 1991 (RMA) in October 2009 it may be necessary at some time to review the approach of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[4] The Court of Appeal said:[5]

> [41] … But we should not be taken to have accepted that the amendments made to the RMA since *Discount Brands* have had no effect on the non-notification process and on the analysis of the previous law in the Supreme Court's decision in *Discount Brands*. 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*.

---

1 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 422 (footnote omitted).

2 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73.

3 At [41].

4 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

5 *Coro-Mainstreet (Inc) v Thames-Coromandel District Council*, above n 2.

**Relevant plans and legislative instruments**

[13] The proposed Auckland Unitary Plan was prepared under Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010[6] and the RMA. The PAUP NV was notified on 30 September 2013.

[14] Sections 86A to 86G of the RMA provide when rules in plans have legal effect.[7] Section 86B of the RMA provides:

> **86B When rules in proposed plans have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
>
> (a) subsection (3) applies; or
>
> …
>
> (3) A rule in a proposed plan has immediate legal effect if the rule—
>
> (a) protects or relates to water, air, or soil (for soil conservation); or
>
> (b) protects areas of significant indigenous vegetation; or
>
> (c) protects areas of significant habitats of indigenous fauna; or
>
> (d) protects historic heritage; or
>
> (e) provides for or relates to aquaculture activities.

[15] A number of rules in the PAUP NV that were relevant to the Costellos' application when lodged were identified in the decisions.

[16] From 19 August 2016, when the Council notified its decisions on the recommendations of the Independent Hearings Panel, the PAUP NV was replaced by the PAUP DV.

[17] Under s 86F of the RMA those parts of the PAUP DV not subject to appeal were treated as operative (and the legacy plan as inoperative) from Friday, 16 September 2016, the last date for lodging appeals against the PAUP DV.

---

6 Local Government (Auckland Transitional Provisions) Act 2010, s 121.
7 Local Government (Auckland Transitional Provisions) Act, s 153(1).

[18] Other relevant provisions of the PAUP DV became operative on resolution of the appeals, such as the yard rules for Titirangi Laingholm which were resolved following a later decision of the Environment Court.[8]

[19] In addition to the PAUP NV and PAUP DV the Waitakere Ranges Heritage Area Act 2008 (WRHA Act) is also relevant to this proceeding. The purpose of the WRHA Act is to recognise the national, regional and local significance of the Waitakere Ranges Heritage Area (WRHA) and to promote the protection and enhancement of its heritage features for present and future generations.[9] The Act identifies a range of features that contribute to the national significance of the WRHA and articulates the objectives of establishing and maintaining that area.

**First cause of action – scope and jurisdiction**

[20] The first cause of action is in essence a claim that the decisions of the Council were ultra vires. The plaintiffs say the Council had no jurisdiction to grant the second consent under the PAUP DV as the Costellos had not applied for consent under the PAUP DV. They say that in granting the consent the Council went beyond the scope of the Costellos' application.

[21] Mr Enright submitted that a consent authority cannot grant a consent to an application not applied for.[10] He argued that consent was required for breach of PAUP DV rules triggered from 19 August 2016 so that a fresh application was required. As no fresh application was sought the Costellos have unlawfully commenced construction and carried out unauthorised earthworks.

[22] Mr Enright submitted that there was an important shift in the planning framework between the date of the application for the resource consent on 29 June 2016 and the date of the decision of 26 August 2016. Prior to 19 August 2016 only four issues engaged the PAUP NV rules:

(a) earthworks exceeding permitted levels of 250 $m^3$ and 500 $m^2$ metres;

---

8 *Lenihan v Auckland Council* [2017] NZEnvC 22 at [14].
9 Waitakere Ranges Heritage Area Act 2008, s 3.
10 *Wellington City Council v Milburn New Zealand Ltd* EnvC Wellington W118/98, 17 December 1998.

(b) earthworks within a defined significant ecological area;

(c) vegetation alteration and removal;

(d) impervious areas within a stormwater management area.

[23] However, from 19 August 2016, when the PAUP DV had interim legal effect, additional provisions (both in policies and rules) were triggered for:

(a) Ridgeline Protection Overlay; and

(b) Large Lot Zone.

[24] It is common ground that both the Costellos' and the plaintiffs' properties are subject to Ridgeline Protection Overlay under the PAUP DV and are subject to ss 7 and 8 of the WRHA Act. As a result the overall status of the application under the PAUP DV was non-complying.

[25] Mr Enright submitted that the Council's incorrect approach was reflected in an email to the applicant of 19 August 2016:

> Thank you for your email and sorry for the continued delay in issuing your consent. Unfortunately, when the consent was reviewed by the Team Leader he noticed that the application hadn't been sent to the Local Board, which it should have been. I sent it to them straight away and asked for their comments as soon as possible, so once I receive their comments I will be able to grant the consent. This may not be today, in which case the Unitary Plan will take legal effect tonight and I will then need to undertake a further assessment of your proposal against the rules of the new plan as well as the current plan, however it shouldn't be too much additional work.

[26] Mr Enright also relied upon the following passage from the Council's *Proposed Auckland Unitary Plan: FAQs – Development rights and resource consents*:[11]

> When a rule in a *proposed* plan has legal effect, this means you need to comply with that rule, or seek consent to breach / infringe it. Consent will also need to be obtained under any rule in a legacy *operative* plan.

---

[11] *Proposed Auckland Unitary Plan: FAQs – Development rights and resource consents* (Auckland Council, 22 July 2016).

Later in the document under the heading "Resource Consents" the guidance note says:

> *If I lodge my resource consent application before 19 August 2016, will it only be assessed against the operative legacy plan rules?*
>
> The key factor is if your application is decided ***before*** **19 August 2016**. In that case, it will be assessed against legacy plan rules (and those rules in the PAUP Notified Version with immediate legal effect). Any resource consent that is decided on, and issued, ***after*** **19 August 2016** will need to be assessed against the provisions in legacy plans **and** any PAUP Decisions Version provisions relevant to the proposal.
>
> Legally, the Council, as consent authority, must have regard to relevant provisions of legacy plans and proposed plans, when making decisions on applications, in accordance with the RMA.
>
> *If I apply for a resource consent before the PAUP Decisions Version is released, but the consent hasn't been decided on and issued, will I need to apply for other consents?*
>
> You may do. As a result of certain provisions in the RMA, the Council is required to also have regard to any relevant provisions of a proposed plan when considering an application for resource consent. This may trigger a need to apply for consent under rules that form part of the PAUP Decisions Version, as they have legal effect from the date of their release.
>
> However, the 'activity status' of your consent is protected to what applied at the time of the application being accepted for processing. For example, if at the time of your application being lodged, the overall activity status was 'discretionary' and the PAUP Decisions Version introduced a relevant rule that the proposal was considered 'non-complying', the overall status would remain as 'discretionary'. You will still need to apply for the additional infringement / reason for consent, but the overall activity status would not be altered.

[27] On Mr Enright's submission where, as in the present case, there was a change from requiring a consent for discretionary activities to requiring a consent for a non-complying activity the application would in all cases have to be declined or not dealt with and the applicants required to make a fresh application for resource consent.

[28] The fundamental flaw in the plaintiffs' argument is that it overlooks the nature of the consent applied for. Consents granted under the relevant provisions of the RMA authorise activities, in this case land use. They do not authorise breaches of rules.

[29] The Costellos' application for resource consent was for a land use consent. That did not change under the PAUP DV. The description of the proposed activity was:

> This new application is for the construction of a new residential dwelling and associated site works, vegetation removal and impermeable surfacing at 19 Rangiwai Road, Titirangi.

[30] The application was accompanied by detailed plans which included a proposal for a swimming pool amongst other site earth works and improvements.

[31] The consent granted by the Council was for land use consent for the construction of a new four bedroom residential dwelling with swimming pool and stormwater retention tank at a height of 176.40m RL, including earthworks and removal of protected trees from the site. The consent granted was consistent with the activity described in the application and supporting documents.

[32] The Costellos' application for land use consent was made under s 88 of the RMA. Section 88A(1A) applied. The effect of s 88A(1)(b) and s 88(1A) is that, as the Council's FAQs advised, the activity status of the consent was protected. The Council accepts that it was still obliged to have regard to relevant provisions of the PAUP DV. The issue is whether a further and different consent was required. In this case I am satisfied it was not. The consent applied for and granted remained a land use consent.

[33] To the extent that the plaintiffs seek to rely on *Wellington City Council v Milburn New Zealand Ltd*, *Sutton v Moule* and *Shell New Zealand Ltd v Porirua City Council* to support their argument the consent was granted without jurisdiction, they have misinterpreted the effect of those decisions.[12]

[34] In *Sutton v Moule* the Court of Appeal confirmed that:[13]

> … a council has no jurisdiction to grant a consent which extends beyond the ambit of an application.

---

[12] *Wellington City Council v Milburn New Zealand Ltd*, above n 10; *Sutton v Moule* (1992) 2 NZRMA 41 (CA); and *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005.

[13] *Sutton v Moule*, above n 12, at 45.

In *Sutton v Moule* the ambit of the application was defined and determined by the terms of the application for consent. The Court of Appeal rejected the more restrictive view taken by Judge Treadwell in the Planning Tribunal, describing it as a strained interpretation. Judge Treadwell had found that the original consent related to land use while the subsequent application in issue was restricted to the modification of a structure on the land. He considered them different. The Court of Appeal took account of the practical situation facing the applicant at the time, considered the documents filed with the application and concluded that:[14]

> … [the application] related in substance and in effect to the use of the land and that the Council was entitled to deal with it on that basis. It follows from this conclusion that the Council's consent was not beyond the scope of the application. No question of the Council's decision in 1988 being *ultra vires* in this respect therefore arises.

[35] In *Shell New Zealand Ltd v Porirua City Council* the Court of Appeal dealt with an amendment to the application. The Court held:[15]

> [7] We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

[36] The cases referred to by the plaintiffs do not support their argument the Council's decision was ultra vires or that the consent was somehow beyond the scope of the application. Rather they support the contrary conclusion that as the application remained an application for a land use consent to build a dwelling (with associated site works) and the consent granted was within the ambit of such an application, it was within scope.

[37] Mr Enright referred to the Council's FAQs information which differentiates between "simple" and "complex" applications. He noted that s 91 RMA does not distinguish between simple or complex applications and provides for the Council to require further resource consents where appropriate. But s 91 only applies to a

---

14 *Sutton v Moule*, above n 12, at 48.
15 *Shell New Zealand Limited v Porirua City Council*, above n 12.

situation where other resource consents may be required. In the present case the resource consent required was a land use consent. That did not change. No further consents were required. As noted earlier, a resource consent authorises an activity. It does not authorise a breach of a particular rule.[16]

[38] I reject the suggestion that the Council did not have jurisdiction to determine the applications or that its decision to proceed with the application for land use consent after 19 August 2016 without requiring further consents was somehow ultra vires or outside scope.

**Second cause of action – irrelevant considerations**

[39] The plaintiffs challenge the Council's reference to the PAUP NV in its notification and substantive decisions and say that by doing so the Council took into account irrelevant considerations.

[40] Mr Enright submitted that from 19 August 2016 the PAUP NV was only relevant to determining the activity status under s 88A RMA but was otherwise irrelevant to the subsequent decisions on notification and approval. He then submitted that by referring to the PAUP NV the Council had regard to irrelevant considerations as there were material differences between the PAUP NV and the PAUP DV.

[41] Mr Enright pointed to passages from the consent decision which he argued suggested Mr Dowding wrongly had regard to the PAUP NV. Mr Enright submitted that Mr Dowding's evidence that the PAUP NV was only relied on to establish activity status under s 88A and not for any other purpose could be contrasted with the decision itself, which referred to the consents sought under the PAUP NV. He then submitted the error was compounded at para 6 of the substantive decision which stated:

> 6. Under the PAUP, district land use consent is required in respect of earthworks and regional land use consent is required in respect of earthworks within the SEA, vegetation removal within the SEA and creation of impermeable surfaces within a Stormwater Management

[16] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.

> Area being a SMAF 2. … For these reasons the proposed development is acceptable in the context of the "emerging PAUP".

[42] Mr Enright argued that the reference in para 6 to the PAUP was a reference to the PAUP NV.

[43] Mr Enright's submission that Mr Dowding wrongly had regard to the PAUP NV, instead of the PAUP DV, is inconsistent with the text of the decisions and the context in which they were delivered.

[44] In the notification decision, Mr Dowding said:

> Since the application was lodged, the council notified the PAUP DV on 19 August 2016. This replaces the PAUP Notified Version (PAUP NV). While this application is afforded the same activity status as when it was lodged (see s88A), resource consent(s) are required under the PAUP DV for the following reasons: …

[45] Given that express statement it is not arguable that Mr Dowding was other than fully aware when he made the notification decision that the PAUP DV had replaced the PAUP NV.

[46] The substantive decision was made on the same day as the notification decision. It strains credibility to suggest that Mr Dowding was not aware when making the substantive decision that the provisions of the PAUP NV had been replaced by the PAUP DV given the clear statement in the notification decision.

[47] Further, para 6 of the substantive decision is readily open to the interpretation that it referred to the PAUP DV. Having regard to the preceding parts of the decision which identified the district land use under the PAUP DV and the regional land use required, it is entirely consistent for the decision-maker to consider the effects of the earthworks, vegetation removal and creation of the impermeable surfaces in relation to the requirements of the PAUP DV. While the concept of an "emerging PAUP" as referred to in para 6 has no particular legal status, given the stage the process was at with the PAUP DV applicable but the plan not entirely operative at the time the reference to the "emerging" PAUP is understandable.

[48] Next, the text of the substantive decision demonstrates that Mr Dowding had regard to particularly relevant new rules under the PAUP DV relating to the Ridgeline Protection Overlay and Large Lot Zone rules. There are references in the substantive decision which confirm consideration was given to the effect of both. It is sufficient to refer to the following comments about the ridgelines:

> The proposed development, which is located on a designated sensitive ridge, will not compromise the inherent visual landscape qualities of the area, by reason of the development's sensitive design and siting; existing vegetation to act as screening; lack of potential viewpoints where clear views of the site can be achieved; and the greater dominance of other existing buildings within the locality that would be more prominent than the proposed dwelling.

[49] As to the Large Lot Zone rules:

> The effects relating to building coverage will be acceptable, by reason that the proposed dwelling will be less visually dominant than that previously proved by virtue of its sensitive design and appropriate use of materials of differing textures and colours. In addition, the retention of the majority of the quality vegetation on the site, and appropriate replanting, will ensure that an appropriate balance is struck between the built form and vegetation.

And:

> There are no concerns relating to the height in relation to boundary infringement, given that the two storey element of the proposed dwelling will be sited approximately 6.5m from the southern site boundary and the existing dwelling at 17 Rangiwai Road is also set well back from the boundary by approximately 14.5m. In addition, there is a strip of land approximately 3m width that is within the ownership of 15 Rangiwai Road, which provides further separation between site and the property at 17 Rangiwai Road. Daylight access to the proposed dwelling or adjoining sites will not be compromised by the proposal. In addition, when viewed from outside the site, an appropriate separation will be maintained between the proposed dwelling and the existing dwelling on the adjacent site to ensure that the built form within the locality will not be unduly dominant.

[50] Finally there is in any event the point Mr Whittington made that the objectives and policies of the PAUP NV, while overtaken by those in the PAUP DV, were not irrelevant in the sense of being an impermissible consideration. They may well assist a planner to understand how a specific objective or policy evolved from one version of a plan to another, or to inform the consideration of why the Council accepted or rejected a particular submission.

[51] The challenge to the decisions on the basis they took into account irrelevant considerations, namely the provisions of the PAUP NV, cannot succeed.

**The third and fourth causes of action – relevant and irrelevant considerations, wrong legal test and unreasonableness in relation to both notification and substantive decisions**

[52] The plaintiffs challenge both the notification and substantive decisions on the basis that the:

> Council had regard to irrelevant matters, failed to consider relevant matters, applied wrong legal test or otherwise acted unreasonably.
>
> Particulars
>
> (a) Adverse effects to the environment will be or are likely to be more than minor and adverse effects to adjacent properties are minor or more than minor …;
>
> (b) Council failed to assess the relevant planning framework under the decisions version … which impacted the effects assessment;
>
> (c) Council failed to consider relevant heritage effects, including impacts on s6(f) RMA;
>
> (d) Council failed to have "particular regard" to the purpose and relevant objectives of the Waitakere Ranges Heritage Area Act;
>
> (e) The existing resource consent should have been disregarded as irrelevant consideration.

[53] In addition, in relation to the substantive decision, the plaintiffs also allege the Council failed to consider and assess the PAUP DV provisions relating to the protected ridgeline, large lot rules, heritage protection and WRHA Act.

*Background - legal principles relating to notification*

[54] Section 95A RMA provides for public notification of the consent application to be at the consent authority's discretion. The application must, however, be notified in two circumstances:

(a) If the Council decides (under s 95D) that the proposed activity will have or is likely to have adverse effects on the environment that are more than minor then the application must be publicly notified.

Importantly for present purposes, s 95D provides that in determining whether an activity will have or is likely to have adverse effects that are more than minor the Council must disregard any effects on persons who own or occupy any land adjacent to that land. The plaintiffs and owners of other neighbouring properties fall into that category.

(b) If the Council decides (under s 95B) that there is an affected person in relation to the proposed activity then the consent authority must give limited notification of the application to any affected person.[17] Section 95E confirms that a person is an affected person if the adverse effects on them are minor or more than minor, but are not less than minor.

[55] In this case for the Council to form the view that the application did not need to be notified the Council had to be satisfied that the adverse effects of the proposed land use on the environment were not more than minor. In relation to the limited notification decision the Council had to be satisfied that the adverse effects on the plaintiffs (or any other person) were less than minor. In the event the Council, through Mr Dowding concluded that the effects were less than minor in both cases.

*Particular (a) – error in assessing adverse effects generally*

[56] Mr Enright submitted that the landscape and natural character effects on the sensitive ridgeline were the central issue in relation to public notification and the grant of consent. He criticised the Council for failing to obtain expert landscape input and failing to obtain a cross-sectional survey to indicate the level of impact on affected persons at 15 Rangiwai Road and other neighbours. He also submitted that the Council had failed to consider the relevant objectives and policies under the PAUP DV and therefore failed to correctly evaluate the receiving environment.

[57] The last point can be dealt with briefly. As noted above, in his notification decision Mr Dowding recorded at the outset the relevant zoning and precinct and special features and overlays that were engaged by the PAUP DV. Mr Dowding then

[17] Unless a rule or national environmental standard precludes limited notification of the application: Resource Management Act 1991, s 95B(2).

went on to expressly record that under the PAUP DV the land use consent was non-complying pursuant to the Ridgeline Protection rules. It is apparent that Mr Dowding was fully aware when he made both the notification and substantive decisions that the PAUP DV had replaced the PAUP NV. He properly considered the relevant objectives and policies under the PAUP DV.

[58] In coming to the view that the adverse effects on the environment were less than minor Mr Dowding had regard to an assessment report provided in accordance with sch 4 of the RMA, which concluded that:

- The trees proposed to be removed were not significant specimens and the effects of removal would be mitigated.

- Appropriate measures were proposed by the Costellos' arborist in respect of works within the dripline to ensure the continued health of protected vegetation.

- The level of earthworks proposed was reasonable given the topography of the site. Appropriate measures were to be adopted to ensure the erosion and sediment effects would be less than minor.

- The site was not known to provide habitat for threatened, endangered or otherwise unique species of fauna. Works within the defined significant ecological areas (SEA) were to be restricted.

- Local iwi had confirmed that a cultural impact assessment was not necessary.

- The proposed sensitive design of the dwelling was to be seen in the context of more prominent dwellings at 27 and 29 Rangiwai Road. Any distance views of the site were a significant distance away, and importantly, in addition, the ridge of the existing dwelling at 15 Rangiwai Road was higher than that proposed at the application site. Views of the dwelling would be partially obscured by mature

vegetation on the site within the wider area. The effects relating to the sensitive ridgeline would be less than minor.

- Public effects associated with the height in relation to boundary infringement at the southern side boundary would be less than minor because when viewed from public viewpoints there was sufficient separation between the proposed dwelling and the existing dwelling on the adjacent site.

- The effects relating to building coverage would be less than minor as the proposed dwelling would be less visually dominant than that previously approved. In addition the retention of the majority of the quality of vegetation on site would ensure the appropriate balance was struck between the built form and vegetation.

- Construction management plans would be provided to manage effects relating to development.

- Proposed detention tank would manage effects relating to stormwater and proposed driveway. A new connection to the public stormwater was also to be constructed.

[59] Taking these matters into account, Mr Dowding concluded that the adverse effects of the proposed land use on the environment would be less than minor and therefore public notification of the application was not required.

[60] In coming to the view that the effects on the plaintiffs were less than minor Mr Dowding accepted the applicants' consultants' opinion that:

> - The significant levels of vegetation to be retained and replanted will suitably mitigate the loss of the [relevant protected trees], none of which are of notable quality from an arboricultural perspective.
>
> - Silt runoff will be minimised by the use of appropriate sediment and erosion control measures;
>
> - Compliance with geotechnical recommendations will ensure that land stability will not cause adverse effects;

- The proposed development will not adversely affect 15 Rangiwai Road, which is a designed heritage item, by reason of the distance between the existing dwelling at 15 Rangiwai Road and the proposed dwelling on the subject site and the topography of the area which will screen much of the proposed dwelling when viewed from 15 Rangiwai Road;

…

- The natural qualities of the designated sensitive ridgeline will be protected, by reason of the dwelling's sensitive design, siting and the presence of natural onsite screening and background vegetation.

- Construction nuisance will be mitigated by restrictions in relation to working hours and a construction management plan. In addition, any effects will be temporary and will endure only for the duration of the construction phase.

- The proposed detention tank will effectively control stormwater discharge, thereby mitigating any effects from the impermeable surfaces.

- Connections will be made from the site to all necessary reticulated services, thereby avoiding all adverse effects in relation to wastewater, stormwater, water, power and telecommunications.

[61] As Ms Tree noted the application contained cross-sectional plans in building design and the geo-technical report. In addition, from the information Mr Dowding had before him, it was apparent that:

- the height of the top of the designated ridgeline was approximately 178 metres RL;

- the maximum height control of eight metres which applied to the property would allow a dwelling in the property that was 177.269 metres RL;

- the maximum height of the dwelling on the property authorised by the consent was 176.420 metres RL (1.58 metres below the ridgeline and 0.849 metres below the height that would be permitted under the direct decisions, under the PAUP DV); and

- the height of the single storey part of the consented dwelling closest to the right of way and dwellings on 15 and 17 Rangiwai Road was

approximately 173.020 metres RL (more than four metres lower than the eight metre permitted height).

[62] Mr Dowding recorded in the decision:

> There is a height in relation to boundary infringement at the southern site boundary measuring 0.42m in height and 0.7m width in relation to the single storey part of the proposed dwelling and 1.625m in height and 2.7m width in relation to the two storey part of the proposed dwelling. The effects associated with this infringement will be less than minor, by reason that the two storey element of the proposed dwelling is sited approximately 6.5m from the site boundary and the existing dwelling at 17 Rangiwai Road is also set well back from the boundary. There is also a strip of land of approximately 3m width that is within the ownership of 15 Rangiwai Road, which provides further separation between site and the property at 17 Rangiwai Road. These factors will ensure that daylight access to the proposed dwelling or adjoining sites is not compromised and that the attractive local vernacular will be maintained.

[63] Taking these matters into account, Mr Dowding concluded that the adverse effects of the proposed land use on other persons, including the plaintiffs, would be less than minor and therefore limited notification of the application was not required.

[64] There is no requirement for a Council officer making a notification decision to physically inspect the visibility of the proposed dwelling from a neighbour's site as was suggested in the submissions for the plaintiffs. The application was accompanied by a full set of plans and description of the proposal and subject site that was acceptable to the Council. The assessment of adverse effects provided sufficient detail corresponding with the scale and effects the activity might have on the environment. While the experts called for the plaintiffs, Ms Lucas and Mr Putt, suggest that further reports could have been obtained the Council was not obliged to obtain expert landscape input or to obtain a cross-sectional survey.

[65] I am satisfied that in making his assessment of the adverse affects on the environment and on the plaintiffs, Mr Dowding had regard to the relevant considerations and did not have regard to irrelevant considerations. There is no evidence that he applied the wrong legal test and his final decision was not unreasonable. The plaintiffs' challenge is essentially to the merits of his decision which is not reviewable. As this Court confirmed in the *Tasti Products Ltd v*

*Auckland Council* case it is not part of the Court's function on an application for review to consider the merits of the Council's decision on notification.[18]

*Particular (b) – failure to assess the relevant planning framework under the PAUP DV*

[66] For the reasons given above at [39]–[51] I reject the submission for the plaintiffs that Mr Dowding failed to assess the relevant planning framework under the PAUP DV.

*Particular (c) – failure to consider heritage effects*

[67] Mr Enright next argued that the Council failed to consider relevant heritage effects, including under s 6(f) RMA the need to recognise and provide for the protection of historic heritage from inappropriate use and development.

[68] Mr Enright did not direct any written submissions at this aspect of the pleading but in the affidavits of Ms Lucas and Mr Duggan it is suggested that 15 Rangiwai Road has heritage values because of the location of a 19th century flagpole and caves of Maori origin overlooking the Maori crossing between the Waitemata and Manukau Harbours. Ms Lucas suggests there is a "grand outlook" from 15 Rangiwai Road.

[69] Given the content of the PAUP DV, the development of the plaintiffs' residential dwelling on an adjacent property in the circumstances of this case does not infringe the requirement to provide for the protection of historic heritage from inappropriate subdivision use and development. The PAUP DV does not provide for a viewshaft or other protection of the view from 15 Rangiwai Road. As Ms Tree submitted, normal height controls for the surrounding area apply to the properties that can be seen from Rangiwai Road. There is no legal right to a view.[19]

[70] Although not directly addressed in Mr Enright's submissions I note the notification decision expressly referred to the special features of the PAUP DV as Natural Heritage: Waitakere Ranges Heritage Area Overlay – Extent of Overlay and

---

18 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [52].
19 *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [112].

other natural heritage issues. The decision recorded that the Waitakere Ranges Local Board had been notified of the application and had not responded. Next, it was also noted the Costellos had consulted with local iwi. The iwi confirmed a cultural impact assessment was not necessary.

[71] In light of that the pleading that the Council failed to consider heritage effects cannot be maintained.

*Particular (d) – failure to have "particular" regard to the Waitakere Ranges Heritage Area Act*

[72] Mr Enright referred to s 13(1) WRHA Act which required the Council to have particular regard to the purposes of the Act and its relevant objectives and to consider the objectives, having regard to any relevant policies in the regional and district plans. He submitted that the level of consideration required for a non-complying activity was "onerous".

[73] Mr Enright noted that the notification and substantive decisions did not refer expressly to ss 7 and 8 of the WRHA Act. He submitted the decisions failed to relate those provisions to the relevant objectives and policies of the PAUP DV. In his submission the reference in the decision to the WRHA was insufficient as it failed to have particular regard to ss 7 and 8 WRHA Act.

[74] The purpose of the WRHA Act is to:[20]

(a) recognise the national, regional and local significance of the WRHA; and

(b) promote the protection and enhancement of its heritage features for present and future generations.

[75] The objectives of the WRHA Act are set out at s 8. They are consistent with the objective of giving effect to the above purposes.

---

[20] Waitakere Ranges Heritage Area Act, s 3.

[76] It is apparent from the notification and substantive decisions that Mr Dowding was aware of the WRHA Act and its impact on the relevant policies in the PAUP DV. The first page of the notification decision records the special features, overlays etc of both the PAUP NV and the PAUP DV including the WRHA. The site is recorded as subject to Natural Heritage: Waitakere Ranges Heritage Area Overlay. In the notification decision Mr Dowding expressly referred to the WRHA:

> **Waitakere Ranges Heritage Area**
>
> The proposed development will preserve the character and appearance of the Waitakere Ranges Heritage Area, by reason of the dwelling's sensitive design, use of appropriate materials, and retention of significant vegetation and replanting of further native specimens. As such, effects in this regard will be less than minor.

[77] Mr Dowding repeated the same passage in the substantive decision, replacing the reference to the effects being less than minor with the statement that "[a]s such, effects in this regard will be acceptable".

[78] I agree with the submission by Mr Whittington that Mr Enright's criticisms are essentially an argument that the Council failed to give adequate reasons for its decision in dealing with the WHRA Act.

[79] The requirement to "have particular regard to" some criterion requires the consent authority to consider the relevant provisions and weigh them as part of the overall decision.[21] However, a consent authority is not required to expressly refer to every relevant consideration and decision on every application. To do so would be to impose an impossible burden on the consent authority.[22] Where the provisions are not expressly referred to in the relevant decision it is for this Court to determine on the facts of the case before it whether it can be said the consent authority has considered the relevant provisions and weighed them as part of its decision.

[80] The requirement under s 13 WRHA Act was to have particular regard to the purposes of the Act and the relevant objectives under s 8. The first objective under s 8(a) is to protect, restore and enhance the area. The reference in the decisions to

---

21 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 (PT).

22 *Fair Investments Ltd v Palmerston North City Council* HC Palmerston North CIV-2010-454-653, 15 December 2010 at [46]–[47].

the development preserving the character and appearance of the WRHA supports the view the Council considered that objective. The second objective under s 8(b) is to ensure that impacts on the area as a whole are considered when decisions are made affecting any part of it. Again the reference in the decision to the proposed dwelling's sensitive design, use of appropriate materials and retention and replanting supports the conclusion the decision-maker considered the impacts of the application on the WRHA. It was not necessary to expressly refer to particular sections of the WRHA Act.

[81] If I am wrong in that conclusion, I note that when preparing aspects of the PAUP that affected the WRHA the Council was also required to give effect to the purpose of and objectives in the WRHA Act.[23] It follows that the PAUP DV gives effect to the purpose of objectives in the WRHA by the Waitakere Ranges Heritage Area Overlay and the Natural Heritage: Ridgeline Protection Overlay. There is no suggestion that the relevant provisions in the PAUP DV are invalid or uncertain. Nor can it be said the PAUP NV failed to address the purpose and objectives of the WRHA Act. At D1 Waitakere Ranges Heritage Area Overlay, the PAUP DV says it gives effect to the purpose and objectives of the WRHA Act. At various parts the PAUP DV refers to the relevant objectives of the WRHA Act and specifically to ss 7 and 8. So in considering the application for resource consent for a non-complying activity such as the present in the Waitakere Ranges the Council can be said to have complied with its obligations under s 13 of the WRHA Act by having regard to the relevant provisions of the PAUP DV.[24] I note that in *RJ Davidson Family Trust v Marlborough District Council* the Court applied the reasoning in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* to an application under s 104(1) RMA.[25]

[82] Finally, I accept Ms Tree's submission for the Costellos that even if it could be said the Council failed to give sufficient specific consideration to the purposes and objectives in the WRHA Act when making the notification decision (which I do not accept) this is not an appropriate case to grant relief. It is apparent from the

---

23 Waitakere Ranges Heritage Area Act, s 11.

24 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

25 *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

notification and substantive decisions that the Council did consider the fact the property and adjoining properties were within the WRHA when making the notification decision, sought to give effect to the considerations and expressly considered the effects of the proposed development on the point of significance in this case, namely the protected ridgeline. Further, the Waitakere Ranges Local Board was given an opportunity to comment on the consent application and made no comment.

[83] There is no evidence to suggest that if the Council had undertaken the specific analysis suggested by the plaintiffs it would have reached a different decision when considering the application.

*Particular (e) – reference to existing resource consent as a base line*

[84] Mr Enright submitted that by referring to the existing consent granted in July 2015 the Council fell into error.

[85] While accepting that a decision-maker may have regard to an existing and unexercised resource consent as part of the existing environment,[26] Mr Enright nevertheless submitted that once the second consent was granted the Costellos needed to make an election and by December 2016 the Costellos had made their election by commencing the construction of the approved dwelling under the second consent. He argued that the first consent was therefore fanciful.

[86] Mr Enright noted that in their application for the second consent the Costellos themselves had noted there were no known approved but as yet unimplemented resource consents. He suggested that would amount to a "waiver" of rights under the first consent. Mr Enright submitted the Council fell into error by effectively deducting the effects of the existing consent when considering the second application. He submitted it was effectively an irrelevant consideration or, more accurately described, a wrong legal test.

---

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

[87] The first point is that in the notification decision Mr Dowding expressly noted there was no permitted baseline relating to the site. He did then go on to note that a consent had been granted in July 2015 for a similar development so that it was therefore reasonable to only consider the effects over and above those that were consented to by the previous approval. Such an approach was consistent with the authorities. In *Queenstown Lakes District Council v Hawthorne Estates Ltd* the Court of Appeal said, citing *Arrigato Investments Ltd v Auckland Regional Council*:[27]

> [78] …
>
> > [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.
>
> [79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to be implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[88] The unimplemented first consent is strictly inconsistent with the second consent to the extent that both are to build a dwelling on the same site. Both cannot

---

[27] *Queenstown Lakes District Council v Hawthorne Estates Limited*, above n 26, at [78] citing *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

be implemented. The second application supersedes the existing consent. But when considering the effects on the receiving environment, as Clifford J observed in *Nash v Queenstown Lakes District Council* the relevant assessment is essentially factual. It is relevant that at the time the Council was considering the second application the Costellos were entitled to rely on the first consent.[28]

[89] There was no waiver by the Costellos of their rights under the first consent by their application for the second consent. If for any reason the second application had been declined it would have been open to the Costellos (or a purchaser from them) to implement the first consent within five years of it being granted. As the Court of Appeal observed in *Arrigato*, flexibility is required in this area.[29] In the substantive decision the focus was properly on the effects of the particular application before it.

[90] I conclude it was open to Mr Dowding to take account of the first consent in the limited way he did.

*Further particular – failure to assess the relevant provisions of the PAUP DV (substantive decision)*

[91] The plaintiffs' last argument is that in its substantive decision the Council failed to consider and assess the relevant provisions of the PAUP DV in relation to:

(a) protected ridgeline;

(b) residential large lots;

(c) heritage protection; and

(d) WRHA Act provisions.

[92] Mr Enright submitted that the substantive decision failed to discuss the relevant PAUP DV rules, particularly the Protected Ridgeline Overlay and the Large Lot Zone. He submitted that the Council had failed to take them into account.

---

28 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64].
29 *Arrigato Investments Ltd v Auckland Regional Council*, above n 27, at [35].

[93] When the substantive decision is read as a whole and particularly when considered with the notification decision I am unable to accept Mr Enright's submission that the Council failed to take account of the relevant PAUP DV provisions.

[94] As noted it is relevant that the substantive decision was issued at the same time as the notification decision. In the notification decision Mr Dowding acknowledged that resource consent was required under the PAUP DV for a variety of district land uses and regional land uses. Significantly the notification decision recorded that land use consent was sought, for example, for a non-complying activity pursuant to r D15 and Table D15.4.1 of the Ridgeline Protection Overlay rules, by reason that the proposed dwelling would have a sky backdrop above the natural ridgeline when viewed from a public place (Rangiwai Road). That was repeated in the substantive decision.

[95] Both the notification and substantive decisions also identified the need for land use consent for a restricted discretionary activity pursuant to r H1.6.4 and Table H1.6.5.1 of the Large Lot Zone rules, by reason of the setback requirements. Further the notification decision identified as special features or overlays of the PAUP DV Natural Heritage: Waitakere Ranges Heritage Overlay WRHA 05 and Natural Heritage: Waitakere Ranges Heritage Area Overlay – Extent of Overlay.

[96] Under the PAUP NV the land use consent was a restricted or discretionary activity. It was only under the PAUP DV that it was non-complying. At the outset of the reasons section of the substantive decision Mr Dowding stated:

> An assessment of the gateway test for non-complying activities has been undertaken under s104D and demonstrates that the proposal passes both tests, by reason that the effects created by the development will be less than minor and that the proposal is consistent with the policies and objectives of both the operative and proposed lands.

[97] The substantive decision went on to state:

> In accordance with an assessment under s104(1)(b) of the [RMA] the proposal will be consistent with the relevant statutory documents. In particular, the development will … maintain the form, integrity and extent of the City's outstanding natural features; … will protect the City's valued

> heritage; … and will maintain the amenity values that contribute to the wellbeing of residents, as required by Part 5 of the District Plan titled 'Objectives, Policies and Methods'.

[98] In context I take the reference to relevant statutory documents to include the reference to the WRHA Act.

[99] It is plain from the above and from the preceding discussion that Mr Dowding had regard to the relevant requirements of the PAUP DV and the WRHA Act.

**Result**

[100] The plaintiffs' challenge to both the notification and substantive decisions of the Council fails.

**Costs**

[101] The Council and the Costellos are entitled to costs against the plaintiffs. In each case they are to have costs on a 2B basis together with disbursements as fixed by the Registrar.

_____

Venning J

**IN THE HIGH COURT OF NEW ZEALAND**
**TAURANGA REGISTRY**

**CIV 2008-470-465**

| | |
|---|---|
| IN THE MATTER OF | The Resource Management Act 1991 |
| AND | |
| IN THE MATTER OF | an appeal from a decision of the Environment Court pursuant to s 299 of the Act |
| BETWEEN | FRASERS PAPAMOA LIMITED<br>Appellant |
| AND | TAURANGA CITY COUNCIL<br>Respondent |

Hearing: 9 and 10 June 2009

Appearances: K Barry-Piceno and A Braggins for appellant
H Ash and D Hartley for respondent
T Richardson for interested parties

Judgment: 30 September 2009

---

**JUDGMENT OF ALLAN J**

---

*In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 1 pm on Wednesday 30 September 2009*

*Solicitors/Counsel:*
*Buddle Findlay (Auckland)*
*K Barry-Piceno: kate@kbplawyer.co.nz*
*Simpson Grierson (Auckland)*
*JK Hamilton Esq (Tauranga) and Schramm Law (Hamilton)*
*T Richardson: tim.richardson@clear.net.nz*

**Introduction**

[1] This appeal from interconnected decisions of the Environment Court requires this Court to consider the scope of the so-called *Augier* principle, first enunciated in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD), by which parties to environmental proceedings may be held to their undertakings given in the course of those proceedings. The Environment Court invoked the principle when imposing a condition upon the appellant developer requiring it to vest land in the respondent for use as a public walkway. The appellant maintains that the case does not fall within the *Augier* principle and that the Environment Court had no jurisdiction to impose the condition. On appeal this Court is asked to delete it.

**Background**

[2] The appellant is the owner of a substantial tract of land at Papamoa, a rapidly growing area adjacent to Tauranga City, which falls within the jurisdiction of the respondent. The land is zoned Residential A, the principal residential zoning under the respondent's Operative District Plan. The appellant formulated a proposal to develop the land for residential and commercial uses. For that purpose it applied to the respondent for resource consents (but not initially for subdivisional consent). The initial proposal for 741 residential dwelling units was later reduced to 711 units in the Environment Court. The overall development also incorporated four buildings designed for commercial uses.

[3] The appellant's development, known as the Papamoa Gateway Proposal, comprised seven separate precincts known as Neighbourhoods 1A, 1B, 2A, 2B, 3A, 3B and 4. The appellant applied to the respondent for seven individual land use resource consents, one for each proposed Neighbourhood. The applications were heard together by the respondent under s 103 Resource Management Act 1991 (the Act). The respondent granted consent to five of the proposed Neighbourhoods but declined consent in respect of Neighbourhoods 1B and 4.

[4] The appellant appealed to the Environment Court against the decision of the respondent to decline consent to those Neighbourhoods. Other interested parties appealed to the Environment Court against the respondent's decision to grant consents to the remaining five Neighbourhoods.

[5] In an interim decision dated 26 October 2007 the Environment Court upheld the Council's decision to grant consent to the five Neighbourhoods and to decline consent to Neighbourhoods 1B and 4. In that decision the Environment Court left over the question of the imposition of appropriate conditions for consultation among the parties.

[6] In a subsequent decision given on 23 April 2008 (the conditions decision) the Environment Court imposed a number of conditions, most of which had been the subject of prior agreement. But the Court also determined a strongly contested issue: namely, whether the appellant should be required to vest land in the respondent for the purpose of widening an existing access way linking Papamoa beach with its hinterland. The Environment Court ruled that the land should be so vested. The appellant disagrees. It contends that the Environment Court had no jurisdiction to require vesting. The present appeal is concerned with that jurisdictional issue.

[7] The land falling within the Papamoa Gateway Proposal is contained in Certificate of Title 191043 South Auckland Land Registry, comprising two separately identified allotments. The two allotments are separated by Papamoa Beach Road. Neighbourhood 4 occupies the whole of the allotment which lies on the seaward side of Papamoa Beach Road (known as Papamoa 5B Block). The remaining Neighbourhoods lie inland of Papamoa Beach Road on the larger of the two allotments (known as Papamoa 4B2 Block). There is currently an existing two metre wide public access way from Papamoa Beach Road to Papamoa beach which affords pedestrian access to the beach. It is vested in the respondent and is adjacent to the eastern boundary of the seaward allotment which is intended to become Neighbourhood 4.

[8] As part of its overall proposal, the appellant indicated to both the Council and the Environment Court an intention to provide an enhanced public access way to

Papamoa beach. In its conditions decision, the Environment Court held that it was appropriate to impose a condition requiring the appellant to provide an enhanced public access way by vesting in the Council an additional strip 2.7 metres wide. (Figures of 2.67m and 2.7m appear to have been used interchangeably by the parties. Nothing turns on the difference. I will use 2.7m throughout).

[9] Vesting of the additional land would produce a public access way some 4.7 metres in width. The Court left it to the parties to agree on the precise mechanism by which that would be achieved.

[10] In its final decision of 30 May 2008, the Environment Court made detailed orders as to the mechanism and timing of the vesting of the enhanced public access way. In particular, the Environment Court determined that the condition as to the vesting of the enhanced access way should be applicable as from the time of development of Neighbourhood 2A. The result was that the condition was to be brought down onto the consents for Neighbourhoods 2A, 2B, 3A and 3B.

[11] The generic condition imposed in respect of the resource consents for those four Neighbourhoods reads as follows:

> The consent holder shall, prior to issue of Code Compliance Certificate, establish walking and cycling routes in this neighbourhood in accordance with Traffic Design Group Figures 13 and 14, dated March 2007; and shall vest and construct a widened public access way of 2.7m to the beach (across 5B ML 342919), all to the satisfaction of Council.

**This Court's appellate jurisdiction**

[12] The principles governing appeals from the Environment Court to this Court are well established and are not in dispute. Section 299 of the Act provides that appeals to the High Court from the Environment Court lie in respect of a point of law only. A successful appellant must demonstrate that a material question of law has been erroneously decided by the Environment Court: *Smith v Takapuna City Council* (1988) 13 NZTPA 156. The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153 by the Full Court:

> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[13] As was pointed out by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426, the Court must be vigilant in resisting attempts by litigants disappointed before the Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law.

**Questions of law**

[14] As the appeal was originally constituted, the appellant raised 13 separate questions of law. These have subsequently been refined and reduced to three, only one of which requires an answer in this judgment.

[15] The first question is: apart from the *Augier* principle, did the Environment Court have jurisdiction to impose a condition requiring the appellant to vest land in the respondent in order to create a widened pedestrian access strip? Counsel are agreed that the answer to this question is "no", in that the provision of the access strip was neither a financial contribution for the purposes of s 108(9) of the Act nor a development contribution for a reserve under the provisions of the Local

Government Act 2002. It is therefore unnecessary to say anything more about this first question.

[16] The second question is: was the Environment Court correct in concluding that the appellant's offer to vest the enhanced access way was subject to the rule in *Augier* when the Court had declined the Neighbourhood 1B and Neighbourhood 4 applications? That question is the nub of this appeal.

[17] The third question is: did the Environment Court err in its conclusion that the intensity of development allowed by the consents exceeded the intensity of development allowed by the District Plan as a permitted activity? During the course of the hearing in this Court counsel agreed that question 3 did not require an answer at this stage. The appeal accordingly turns upon the answer to question 2.

**The conditions decision**

[18] An understanding of the Environment Court's approach to the widened access way issue can best be gleaned by reference to a lengthy passage from the conditions decision:

> [13] Part of the Applicant's initial proposal involved an enhancement of this 2 metre wide access strip. The Applicant proposed a wide landscaped access way between the road and the beach.
>
> [14] The issue which is in contention insofar as conditions are concerned is whether or not the Applicant ought still be required to provide an additional strip of land to be added to the existing public access way thereby giving an enhanced level of access to the beach, notwithstanding that the Applicant's proposed development of Papamoa 5B (Neighbourhood 4) was declined.
>
> [15] The Council seeks that a strip of land 2.67 metres wide be added to the existing public access way (giving a total width of access way in this area of 4.67 metres). This additional strip of land will come from Papamoa 5B. Other parties to the proceedings (Hadley Holdings Ltd and D & D J Holland and Others and Collingwood Trustees Ltd and Another) appear to seek an even more substantially enhanced access way again however it appears to the Court that the appropriate level of enhanced access way to be discussed is that sought by the Council, namely an additional width of 2.7 metres. An additional 2.7 metre wide strip had been proffered by Frasers as part of a subdivision proposal.

[16] The 10 metre enhanced strip which formed part of the application before us included a substantial amenity component to compensate for overheight buildings proposed in Neighbourhood 4 which were declined.

[17] In considering the appropriate condition to be imposed in respect of the access way width we have broadly looked at two issues:

- Does the Court have jurisdiction to impose a requirement that there be an enhanced access way as sought by the Council;

- If the Court has jurisdiction does the imposition of an enhanced access way requirement meet the tests identified in *Newbury DC v Secretary of State for the Environment* [1981] AC 578.

***Jurisdiction***

[18] In determining the jurisdictional issue we have looked at two matters.

- Scope of the initial application;

- The provisions of s 108 RMA.

[19] Insofar as the scope of the initial application is concerned there can be no doubt that an enhanced access way between Papamoa Beach Road and the beach was a part of the proposal initially put to the Council and heard by the Court. At the time of the Court hearing that enhanced access way was to have a total width of some 10 metres (including the 2 metre Council access strip).

[20] Ms Barry-Piceno for the Applicant contends that as consent for Neighbourhood 4 was declined that aspect of mitigation contained in Neighbourhood 4 (an enhanced access way) must also have been removed from the *package*.

[21] We consider that contention goes to the issue of reasonableness rather than jurisdiction and we shall consider that point in that context. Our starting point however is that the application itself has always proposed an enhanced access way as part of the development master plan and the matter of the enhanced access way was before both the Court and the Council.

[22] Although Frasers' proposal was advanced by way of seven separate resource consent applications, the application site in respect of each of those seven individual applications was all of the land in Certificate of Title 191043. Although (for example) Neighbourhood 1A was situated at the southern end of the title it was part of a comprehensive development proposal for the entire title extending over all of the lands in CT 191043, including Papamoa 5B. The fact that consent was declined for Neighbourhood 4 does not remove Papamoa 5B from the Court's jurisdiction to impose conditions applicable to other neighbourhoods, to the extent that the land comprised in Papamoa 5B is required to achieve the integrated development proposal advanced by Frasers.

[23] The second jurisdictional issue arises from the fact that the Court assumes that the enhanced 2.7 metre access way is to vest in the Council

> pursuant to the Council proposal. In accordance with the provisions of s 108(2)(a), (9) and (10) the contribution of land in these circumstances constitutes a financial contribution which must meet the requirements of s 108(10)(a) and (b). There has been no argument at all directed to us in that regard. However it appears that because the provision of an enhanced access way was always part of the Applicant's proposal irrespective of the requirements of s 108(10) its provision must be regarded as an *Augier* condition proffered by the Applicant and by which the Applicant might be bound irrespective of whether or not the requirements of s 108(10) are met.
>
> ***Reasonableness***
>
> [24] The tests for validity of conditions in a resource consent identified in *Newbury* are:
>
> - The condition must be for a resource management purpose, not for an ulterior one;
>
> - The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached;
>
> - The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.
>
> We consider those three issues separately.

[19] It will be seen that the Court set aside a consideration of s 108 of the Act (as have counsel on appeal) and concluded that the provision of an enhanced access way "… must be regarded as an *Augier* condition proffered by the Applicant and by which the Applicant might be bound irrespective of whether or not the requirements of s 108(10) are met".

[20] Earlier the Court ruled that, because an enhanced access way had always been proffered by the appellant as part of the development master plan, Ms Barry-Piceno's argument that the appellant could not be required to provide the widened access way because the master plan as a whole was not approved, went to the issue of reasonableness rather than jurisdiction (see [20]-[21]).

[21] The Environment Court simply referred to the proffered enhanced access way as "…an *Augier* condition …" without legal analysis. In order to understand the appellant's argument in this Court, it is necessary to consider the genesis and scope of the *Augier* principle.

**The *Augier* principle**

[22] In *Augier*, the second respondents had applied to the local planning authority for permission extract sand and gravel from land owned by them. Permission was refused. On appeal, a public inquiry was held. At that inquiry, a formal undertaking was given to write to the Kent County Council offering an agreement concerning the taking of additional land for traffic splays designed to improve visibility at a nearby road junction. The Court held that the undertaking was enforceable. Sir Douglas Frank QC, sitting as a Deputy Judge of the Queen's Bench Division, said at pp 226-227:

> It seems to me beyond argument that the undertaking given by Halls was a promise intended to be acted on whatever their rights under planning law, and I think that the Secretary of State acted to his detriment in granting a planning permission that he would not have granted but for the undertaking. It is true that he suffers no immediate pecuniary or material loss, but, as his function is to permit the development of land only in circumstances where it should be permitted, it seems to me that he suffers detriment if it is carried out in other circumstances…
>
> In my judgment, where an applicant for planning permission gives an undertaking, and, relying on that undertaking, the local planning authority, or the Secretary of State on appeal, grants planning permission subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot later be heard to say that there is no power to require compliance with the undertaking.

[23] In *Hearthstone Properties Ltd v Waitakere City Council* (1991) 15 NZTPA 93, the appellant had been carrying on business in breach of one of the conditions of an earlier consent despite Council threats of injunction proceedings. In order to quell concerns that the appellant would be unlikely to comply with the conditions of a consent sought before the Planning Tribunal, the applicant's counsel gave an undertaking to the Tribunal, recorded by the Tribunal at 96 as follows:

> Fortunately in this case counsel for the applicant was able to give us some basis for expecting that if conditional consent is granted the conditions would be observed. He did that by announcing that the applicant would accept consent limited to a term of two years, to the intent that a fresh application would then have to be made on which the applicant might be expected to demonstrate that it had adhered to the conditions. Counsel considered that there might be some doubt about the Tribunal's authority to impose such a condition on an unwilling applicant. Therefore, to give assurance that the applicant or a successor would not later question the condition, Mr Dormer expressly announced that, to the intent that they

> would be estopped from doing so in the manner described in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD), the condition was advanced by the applicant as an integral part of the proposal the subject of its application. We proceed with our consideration of the proposal on that basis.

[24] So the *Augier* principle was applied there in order to instil a measure of confidence that the applicant would indeed comply with the terms of the Tribunal's decision. Of particular importance for present purposes is the fact that the undertaking given in *Hearthstone* was formal and certain in the sense that it was unequivocal and made by counsel for the applicant in open Court for the purpose of being relied upon by the Tribunal.

[25] More recently the *Augier* principle was subjected to detailed analysis in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. There, the respondents had applied for planning consent for the removal of an historic home from a site they had purchased. The application was declined by the Takapuna Community Board and an appeal to the Planning Tribunal followed. During the course of the appeal the respondents reached an agreement with the objectors. The appeal was allowed by consent subject to conditions, the first of which read at 556:

> We the Trustees confirm that it remains the intention of the Trustees, on the removal of the existing house, to construct a new single family dwelling house on the site.

[26] Subsequently the historic home was removed from the site. Several months later the respondents applied for the site to be subdivided, indicating that cost increases had made the original plan to build a single dwelling uneconomic. The applicant applied for declarations and an enforcement order to the effect that the first condition in the consent order restricted the respondents to building a single dwelling house. The respondents defended the proposed subdivision, arguing that the condition was simply a promise as to future conduct from which they were free to resile.

[27] The respondents were held to have been bound by their representation. The Tribunal noted that the *Augier* principle had been adopted and applied in *Hearthstone*, and then turned to a detailed analysis of the *Augier* judgment. The Judge concluded the principle that underpinned the judgment in *Augier* was that of

equitable estoppel, which will catch assurances as to future conduct. In support of his analysis, Judge Willy in the Planning Tribunal referred to three New Zealand decisions: *Burbery Mortgage Finance and Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Gillies v Keogh* [1989] 2 NZLR 327; and *Morton-Jones v RB & JR Knight Ltd* [1992] 3 NZLR 582.

[28] In the last of these cases Doogue J referred to the judgment of the Court of Appeal in *Goldstar Insurance Co Ltd v Gaunt* (1992) 7 ANZ Insurance Cases 77,393 at 77,396-97, where the elements of an equitable estoppel were outlined as being: (a) the creation or encouragement of a belief or expectation; (b) a reliance by the other party; and (c) detriment as a result of the representation. Judge Willy held in *Mora* that the first respondents were unable to resile from the representations they had earlier given to the Planning Tribunal. Again, of significance for present purposes is the fact that in that case the undertaking given was formal and precise, and had earlier been recorded by the Tribunal as a condition of its consent.

[29] In *Springs Promotions Ltd v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846, Randerson J had occasion to review the principle in the context of an argument that the Act constituted a code. Unsurprisingly, he held that while portions of the Act might be regarded as constituting a confined code, the Act is not comprehensive in respect of all matters touching land. He said that it was going too far to describe the Act as a code if that description was intended to exclude the application of the common law and replace it with a set of statutory rules that are the exhaustive and exclusive source of the law: at [60]. But, having said that, Randerson J noted that it was in general inappropriate to introduce doctrines such as those relating to estoppel into the field of planning law: see the observations contained in the judgment of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 601, 616, 617; and those of Lord Scarman in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 at 140.

[30] There are, however, qualifications to the principle that equitable concepts, such as the doctrine of estoppel, have no place in environmental disputes. They are

discussed by Randerson J in his judgment. Among the identified exceptions was the *Augier* principle, as to which Randerson J said:

> [76] Next Mr Williams relied strongly on the decision of the Environment Court in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. Judge Willy held that an estoppel by representation arose in consequence of a statement by parties to a consent order of their intention to construct a new single family dwelling on a site once the existing historic house was removed. This statement was included in the consent order as one of its "terms, conditions or undertakings". The parties making the statement were found to be estopped from applying to subdivide the site to establish more than one dwelling. The decision makes no reference to *Newbury* or *Pioneer Aggregates*, but proceeds on the basis of a decision by Sir Douglas Frank QC sitting as a Deputy Judge in the Queen's Bench Division in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD). That case is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.
>
> [77] There are obvious differences between *Mora* and the present case. *Mora* was concerned with a specific representation made by one party to the Court and the other parties. It was relied upon to settle an appeal and was incorporated into a consent order as a "term, condition or undertaking". I view *Mora* as an example of the exceptional case envisaged by Lord Scarman, where reliance on a principle of private law is necessary in order to give effect to the purpose of the legislation. It is difficult to conceive how the Environment Court could proceed effectively if parties giving specific undertakings or making specific representations as a foundation for its orders are not to be held to their word. But *Mora* should not be taken as authority for any more general proposition beyond its specific factual setting.

[31] His Honour's reference in [77] to "the exceptional case envisaged by Lord Scarman" stems from the analysis at 140 of *Pioneer Aggregates* where Lord Scarman said:

> But I am satisfied that the Court of Appeal in the *Slough* case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion.
>
> Planning control is the creature of statute. It is an imposition in the public interest of restrictions on private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly

> authorised by Parliament or necessary in order to give effect to the purpose of the legislation. Planning law, though a comprehensive code imposed in the public interest, is, of course, based on land law. Where the code is silent or ambiguous, resort to the principles of private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

[32] I endorse, with respect, Randerson J's characterisation of the *Augier* principle as being concerned with "specific undertakings" or "specific representations" made as a foundation for orders of the Environment Court. It is in that formal setting that the cases earlier discussed have enforced *Augier* undertakings. Great care is required, in my view, in the application of the principle lest it be extended beyond its proper role.

[33] The Court is told that the principle is widely relied upon in determining resource consent appeals which are able to be settled by agreement; it assists in enabling applicants to offer attributes or mitigation beyond the jurisdiction of the Court in order to settle appeals; and it provides security for other parties in that undertakings and representations subsequently embodied in Court orders can thereafter be enforced by resort to standard enforcement mechanisms. But all of that occurs in the context of formal agreements and undertakings. None of the cases to which I have referred involved a representation or undertaking determined simply by inference or an assessment of the evidence as a whole.

[34] I accept Ms Barry-Piceno's submission that in order to activate the rule in *Augier* four separate elements must be established:

a) a clear and unequivocal undertaking to the Court and/or the other parties;

b) receipt of the grant of resource consents in reliance on that undertaking;

c) the imposition of a condition on those resource consents which broadly encompassed the undertaking; and

d) detriment to the Court or other parties if the undertaking is not complied with.

**Was the *Augier* principle engaged here?**

[35] The *Augier* principle applies only to clear and unequivocal undertakings. Such undertakings must be unambiguous and precise having regard to the context and all the surrounding circumstances: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 1 All ER 665 at 677. The meaning of the undertaking is to be assessed objectively: *Travel Agents Association of NZ Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553 at 555.

[36] In assessing the Environment Court's decision that the appellant had given an *Augier* undertaking it is necessary to consider all of the relevant circumstances. The five land use consents granted by the respondent did not include a beach access way as a condition. Only the interested parties represented by Mr Richardson appealed against those decisions. Their appeal did not specifically refer to the absence of a beach access way condition.

[37] The first set of draft conditions following the Environment Court's interim decision was prepared by Mr Raeburn, the respondent's planning witness. The draft conditions made no reference to a widened access way. Neither was there any requirement for such a condition in the evidence lodged by Mr Richardson's clients.

[38] The appellant's own proposed conditions included a condition 34, providing for an enhanced access way of 10 metres. But that proposed condition was associated with the grant of a consent for Neighbourhood 4 and was intended as mitigation in respect of the impact of Neighbourhood 4 upon the neighbouring Pacific Shores development. Consent to Neighbourhood 4 was, of course, refused.

[39] A requirement for a 2.7 metre enhanced access way first appeared in submissions of counsel for the respondent preceding the conditions decision, in which it was claimed that a widened access way of 4.67 metres (including the existing 2 metres access way) had always be seen by Council "… as mitigation of the extent of development in the consented neighbourhoods". However, there was no evidence-in-chief or cross-examination on any condition with respect to a 2.7 metre enhanced walkway. It is correct that documentation in support of the overall application referred to a 10 metre strip but, as the Court accepted, that was proposed in order to compensate for over-height buildings in Neighbourhood 4. There had also been an earlier reference to an enhanced walkway of an additional 2.67 metres in documents related to a subdivision consent, but that was later superseded.

[40] Against that background, I return to the conditions decision, where the Environment Court said:

> ***Reasonableness***
>
> [31] In her memorandum of 27 February 2008 Ms Barry-Piceno contends as follows:
>
> > 6 *An expansion of the existing public beach access way was 'consistently offered' by Frasers in its applications and through the appeals, in the context of being an integral part of a comprehensive design for the entire site area, through 7 Neighbourhood consents as sought, which included 741 dwellings. It was part of an extensive mitigation package of offering public benefits, such as landscaping, parks, reserves and 'borrowed' private space for public viewing, due to the proposed significant development, including 100 units and high rise Apartments on the beach front Neighbourhood 4 area.*
> >
> > 7 *It is Frasers' position that now Neighbourhood 4 appeal was declined, and this part of the overall development has been taken out of the Master Plan, the associated Neighbourhood 4 mitigation is also taken out, and cannot be included or relevant to the land use consents granted.*
>
> [32] In its submissions the Council relied quite heavily on the fact that the application was presented as an integrated overall development governed by the master plan. Ms Barry-Piceno contends that Neighbourhood 4 was in fact distinct and separate and should not be regarded as an integral part of the development. We do not accept that proposition. We consider that it runs directly counter to the basis on which the seven applications were presented as a comprehensive development with the master plan linking them together.

[33] The Court accepts that the character of Neighbourhood 4 is substantially different to the character. of the remaining parts of the development situated on the southern side of Papamoa Beach Road. We found that Neighbourhood 4 was situated in the *coastal environment* a finding which we did not extend to the balance land across the road. However that, in our view does not remove Papamoa 5B from being part of the overall development proposal advanced by the Applicant and in respect of which the master plan provided for an enhanced access way to the beach.

[34] The application document identified:

> ***1 Background –*** *1.1 Overall Development* – that the development proposed (inter alia):
>
> - *Neighbourhoods connected to each other and Papamoa Beach by a central 'spine road' and open space.*

It is the Court's understanding that the *open space* connecting the various neighbourhoods to Papamoa Beach was the enhanced access way provided on Papamoa 5B (Neighbourhood 4).

[35] We disagree with Ms Barry-Piceno's contention that because consent for the apartment development on Neighbourhood 4 was declined then the enhanced access way serving the remaining neighbourhoods must also be taken out of the proposal. We consider that she is wrong in describing the enhanced access way as *associated Neighbourhood 4 mitigation.* It is correct that the 10 metre planted access way proposed by the Applicant along the eastern side of Neighbourhood 4 was intended in part to provide mitigation for the five storey apartment building proposed in Neighbourhood 4. We are however satisfied that the enhanced access way was also to have the function identified in the application documents of connecting the remaining neighbourhoods to Papamoa Beach. The application states that.

[36] If it was the Applicant's position (as now contended) that should the Neighbourhood 4 apartment development be declined then the enhanced access way provided in the master plan was to be removed then that position should have been spelt out clearly and unequivocally at the appeal hearing. It was not.

[37] We consider that the imposition of an enhanced access way as sought by the Council is not unreasonable. A 10 metre access way was part of the Applicant's proposal heard by the Court and was to provide a linkage between the various neighbourhoods and Papamoa Beach, as well as protecting the amenity of the adjoining Pacific Shores complex from an overheight building. Because of the increased density of development permitted by the applications granted to date (over and above permitted activity standards) the development has the potential to lead to a higher demand for access to the beach than would a permitted activity development.

[38] We accordingly hold that it is appropriate that the conditions of consent provide for an enhanced access way of an additional 2.7 metres as sought by the Council. We leave it to the parties to resolve the mechanism by which that is achieved.

[41] It will be observed at [36] of the conditions decision that the Environment Court appears to have imposed an onus upon the appellant to spell out "clearly and unequivocally at the appeal hearing" the supposed undertaking. There is, in law, no such onus. The question is simply whether a clear and unequivocal undertaking exists. Only if it does can the *Augier* principle apply. The Court was not entitled to visit upon the appellant the consequences of the absence of a sufficiently clear and unequivocal undertaking. In doing so, it fell into error.

[42] Moreover, the Environment Court at [37] rests its decision upon a *Newbury* reasonableness test. As counsel agree, reasonableness is not a relevant consideration in determining the jurisdiction of the Environment Court to impose the augmented access way condition. Instead, the question is whether the appellant gave a clear and unequivocal undertaking capable of assessment. If it did not, then a consideration of reasonableness does not assist. Again, the Court's approach was in my opinion erroneous. The issue for the Environment Court was whether the material relied upon was capable of amounting to an undertaking to provide an enhanced access way of 2.7 metres otherwise than in the context of a grant of consent to the whole of the proposed development. Only if there was a clear and unequivocal undertaking to that effect could it be incorporated into the decision of the Environment Court as a condition.

[43] In [31]-[38] of the conditions decision, the Environment Court appears to have determined that an enhanced access way condition ought to be imposed because it was reasonable to do so. That conclusion seems to rest upon the integrated character of the development proposed in the master plan, the reference in the application document to an "open space" which the Court took to relate to an enhanced access way, and on its finding that the 10 metre access way proposed by the appellant along the eastern side of Neighbourhood 4 was intended in part to provide mitigation for the five storey apartment building proposed in Neighbourhood 4, but in part also to fulfil the function identified in the application documents of connecting the remaining neighbourhoods to Papamoa beach. The Court's discussion of these factors appears under a section of the conditions decision headed "Reasonableness".

[44] During the hearing in this Court, counsel identified a number of other references in the documents to access ways. It was contended by counsel for the respondent and for the interested parties that such references supported the conclusion that it was reasonable to impose the condition. It is, however, unnecessary to consider these references or indeed to analyse further the Environment Court's conditions decision. The question of whether it was reasonable or even desirable for an enhanced access strip to be provided falls outside the *Augier* principle and has no bearing on establishing the scope of the Environment Court's jurisdiction. The Court was not entitled, in my opinion, to pick through the appellant's documents for the purpose of constructing what could be no more than an implied undertaking. The *Augier* principle is significantly narrower than appears to have been assumed in this case. It applies only to clear and unequivocal undertakings intended to be relied upon and so to provide a measure of security for those who subsequently act to their detriment. The circumstances of this case are quite different from those arising, for example, in *Augier*, *Hearthstone* and *Mora*, each of which involved the provision of specific and unambiguous undertakings in circumstances where consent was granted.

[45] By way of answer to the second question posed, I conclude that the Environment Court was not correct to find that the appellant's proposal to vest an enhanced access way in the respondent was an undertaking falling within the *Augier* principle in circumstances where the Court declined the appellant's applications for Neighbourhoods 1B and 4.

**Result**

[46] As noted earlier, counsel were agreed that the Environment Court did not have jurisdiction to impose the condition in issue unless the *Augier* principle is engaged. I have found that principle does not apply here. It follows that the appeal must be allowed. The condition requiring the appellant to vest and construct a widened public access way to Papamoa Beach of 2.7 metres is quashed for want of jurisdiction.

[47] Ms Barry-Piceno urged me not to remit the proceeding to the Environment Court. But I am satisfied that it is appropriate to do so. There may be intensity implications (see [17] above). The proceeding is accordingly remitted to the Environment Court for further consideration in the light of this judgment.

[48] Costs are reserved. Counsel may file memoranda if they are unable to agree.

**C J Allan J**

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No. W005/2008
(ENV-2007-WLG-000085)

| | |
|---|---|
| IN THE MATTER | of an appeal under s120 of the Resource Management Act 1991 |
| BETWEEN | GATEWAY FUNERAL SERVICES<br>Appellant |
| AND | THE WHAKATANE DISTRICT COUNCIL<br>Respondent |

Court: Environment Judge C J Thompson, Environment Commissioner H M Beaumont, Environment Commissioner W R Howie

Heard at: Whakatane on 31 January and 1 February 2008.

Counsel/Appearances:

T S Richardson for Gateway Funeral Services

M C Allan for the Whakatane District Council

C & H H Erlbeck and B & C Olsen: - s274 parties

---

DECISION OF THE COURT

---

Decision issued 5 FEB 2008

A. The appeal is allowed and the resource consent is to be granted

B. Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

*Introduction*

[1] Gateway Funeral Services has been providing its services in Whakatane for some 17 years. Its existing premises are no longer adequate in size and facilities, or satisfactory in terms of their surroundings. It sought the necessary resource consent from the Whakatane District Council to re-establish its business in premises at 17 Awatapu Drive, Whakatane. The Council declined the application in a decision given on 10 May 2007, and this appeal is against that decision.

*The proposal*

[2] Since about 1981 the site at 17 Awatapu Drive has been a church, and support buildings and infrastructure, for the Jehovah's Witnesses Congregations in Whakatane. It is a site of about 1,852m$^2$ in area on the corner of Awatapu Drive and Cleary Avenue, and the existing single-storey building occupies about 426m$^2$. It has ample provision for carparking and the buildings can be adapted to Gateway Funeral Services' requirements with the additions of garaging, a mortuary, casket storage and a chiller. These will occupy about 188m$^2$. The existing toilet facilities will require upgrading and the internal layout of the main building will need to be adapted to provide offices, interview rooms and a refreshment area. Seating capacity in the main auditorium will be reduced from about 200 to 126. Most of the funeral services will be conducted elsewhere, at churches or other venues. Burials and cremations will of course take place elsewhere.

[3] The site is in an established residential suburb lying to the south-west of Whakatane's town centre. It is contained within an ox-bow of an old course of the Whakatane River.

*Zoning and Planning Status*

[4] It is common ground that in terms of the Proposed District Plan the site is zoned Residential 1 and is a *discretionary* activity because of non-compliance with the following Rules of the plan:

- Rule 3.8.1.1 - where the number of people attending will exceed ten.
- Rule 4.3.2 - where the likely traffic generation will exceed 25 vehicle movements per day.

- Rule 4.3.1.3 - where the proposed additions to the building will result in a front yard encroachment of 2.5 metres into the 4 metre front yard on Cleary Avenue.

The assessment criteria for discretionary activities are set out in Rule 3.11 and address issues such as amenity, visual impact, noise, social and cultural affects, traffic, on site parking and general intrusion into the neighbourhood.

[5] The transitional Operative Plan need not be discussed. The relevant provisions of the Proposed Plan are all now beyond appeal. In terms of s19 RMA, the Rules of that Plan are therefore deemed to be operative.

[6] As a *discretionary* activity, the proposal is to be considered under s104, s104B and Part 2 of the Act. We can work through those provisions in sequence.

*Section 104 – positive effects*

[7] To argue, as Mr Aaron Collier, the Council's consultant planner appeared to do in his evidence in chief, that the provision of funeral services cannot positively interact with a residential community, would not have been a credible position. In the course of discussion with the Court however, Mr Collier modified what he had said in his brief, explaining that by *residential community*, he really meant Mr and Mrs Olsen, whose position we shall discuss shortly. For all of history, people and communities have conducted the rituals surrounding death and grieving in the places where they have lived, or in communal facilities such as churches and Marae which have been and are intimately part of their residential communities. The provision of funeral services that are respectful and appropriate is, we think, unarguably something that ...*enables people and communities to provide for their social ...and cultural wellbeing*...in terms of s5.

[8] There is a consensus that the re-use of the former church and associated facilities is an efficient use of the physical resource it represents. The building appears to be in sound order and to have a good economic life ahead of it.

*Section 104 – adverse effects - Permitted baseline and existing environment*

[9] It is common ground that a funeral director's establishment is a *permitted* activity in the Residential 1 Zone, if no more than 10 people are on site at any one time. So are cemeteries

and urupa (without restriction on attendance): - see Rule 3.8.1.1. The limitation to a maximum of 10 persons would rule out all but the very smallest of funerals, so we assume that part of the intent was to provide for funeral directors' premises, including storage, embalming and the like, with funeral services being conducted elsewhere. In scale of effects from traffic, noise and the like this would seem little different from home occupations and small-scale accommodation providers. What is significant is that the Rule allows for the preparation of bodies and embalming, with funerals and subsequent burial or cremation elsewhere, as a *permitted* activity in the zone, whether the neighbours find it distasteful or not.

[10] The existing church is of course part of the existing environment in terms of the decision in *Queenstown Lakes DC v Hawthorn Estate Ltd* [2006] NZRMA 424. It has operated under a consent granted in 1981 (and now deemed to be resource consent under the RMA). The church can presently accommodate about 200, and we are advised that the average attendance for services is about 150. There are two main services on Sundays, between 9.30 and 11.30am. There are meetings on weekdays, and larger meetings on Tuesday and Thursday evenings between 7 and 9pm. Weddings and funerals also occur on occasions, and there is nothing in the 1981 consent that restricts the number of people attending or the frequency of services of any kind. Funerals conducted on Gateway Funeral Service' existing premises presently average about two per month. It is possible that with the new premises the frequency of on-site funerals will expand, but whatever impact on residential amenity there might be from those will likely be significantly less than can and do arise from lawful existing activities.

[11] While scale is certainly an issue, the significance of the permitted baseline and the existing environment is that activities and rituals intimately and unmistakably connected with death are allowed, as of right, to have their place in the Residential 1 zone. This recognises that, as much as many of us may prefer to avoid coming face to face with the realities of death, in the end those realities cannot be avoided and have to be accommodated.

*Residential amenity - approvals from neighbours*

[12] Section 104(3)(b) prohibits a consent authority (and this Court on appeal) from taking account of the effects of an activity on a person who has given written approval to that activity. In this case, the Council required the applicant to give notice to persons living in the

immediate neighbourhood, and that was done. In total, 28 neighbouring owners or occupiers were given such notice. Written approvals were received from the owners or occupiers of 9A, 9B, 16A, 16B, 18A, 18B, 19, 21, 23 and 27 Awatapu Drive, 1, 3, 4, 5, 6, 7, 9, 10, 13B and 15 Cleary Avenue, and 2 Edgewater Grove. Effects on those properties and their inhabitants cannot therefore be taken into account. Resource management disputes are not to be resolved by opinion polls, but given that of the neighbours who have formally expressed an opinion about the proposal, 21 approve and two oppose, the argument that this proposal is incompatible with its neighbourhood begins to look distinctly thin.

[13] We have further discussed the argued effects on residential amenity in paras [28] to [35] and need not repeat those views here.

*Mäori cultural issues*

[14] The issue of cultural sensitivity for Mäori was important in the Council's decision. Before us, the evidence on the issue was directly conflicting. Mrs Doreen McCorkindale was called by the Council. She is a retired teacher with great experience and knowledge of Te Reo and Tikanga Mäori. Among many other roles and offices, she has been an executive member of the Mäori Women's Welfare League, has been involved in establishing Kohanga Reo and Matua Whangai programmes, and is a tutor for Te Wananga o Waikato in Te Reo. It is her view that a funeral home has a high degree of tapu because it houses only the dead, and she fears that Mäori will feel that the tapu will permeate their houses and their lives.

[15] She feels too that rituals of mourning; the karanga, the whaikorero, and the karakia, which she says are occasionally conducted in places other than Marae, will be heard or observed in the neighbourhood and be felt as a negative influence or force by Mäori who, she says, form 75% of the Awatapu community, according to 2006 Census figures. In summary, she says that it would adversely affect the cultural, social, spiritual and emotional lives of the residents in and around Awatapu Drive, and those of Mäori heritage will feel the noa, or neutrality, of their homes to have been eroded, and may feel a pressure to adhere to cultural protocols that apply at times of death and mourning.



[16] Her views were largely supported by Mr Julian Tunui, who was called by Mr and Mrs Olsen. He is a kaumatua of Ngati Pukeko and Ngati Awa. While respectful of the views of

Mr Mason, shortly to be mentioned, he said he found them ...*interesting*. It is his view that the proposal does raise significant cultural issues, and he said that if he lived where Mr and Mrs Olsen do, he would arrange for his house to be blessed after each funeral at the proposed site. He acknowledged that the family which owns and operates Gateway Funeral Services is also a Mäori family, and thus conscious of Mäori sensitivities, but we remain unsure of what to make of Mr Tunui's comment that he gave evidence to support Mr and Mrs Olsen's position because they asked him first.

[17] All of that is quite discounted by Mr Joseph Mason, who was called by Gateway Funeral Services. Mr Mason is also eminently qualified to advise the Court on Tikanga Mäori. He is a retired school principal and is also a kaumatua of Ngati Pukeko and Ngati Awa. He was the founding secretary and later General Manager of Te Runanga o Ngati Awa, and one of the founders of Te Whare Wananga o Awanuiarangi in Whakatane, of which he was made an Adjunct Professor in 2002. He explains that the observance of tapu has changed over time, and is largely a matter for the individual, whanau and hapu, depending on the circumstances, and the type of community. Ngati Pukeko has for many generations held mana whenua over the Awatapu area, which is now part of the larger Whakatane community, and is really no different from any other suburb. In response to Mrs McCorkindale's concerns, Mr Mason says that tapu would only extend to the funeral premises if bestowed by tangata whenua. He does not believe that it will cause offence or concern to Mäori living nearby – he points out that there are no such negative effects on homes in close proximity to Marae, where tangi are held, or to Urupa. He says that it is only when a death occurs in a home, or a deceased is taken into a home, that tapu is effected and even then it does not affect the whole area.

[18] When people with such profound knowledge of custom, protocol and belief disagree so fundamentally, it leaves a non-specialist Court in a position where it can only say that there is no common or clear position. Unlike the Council's Committee, we can find no rational basis for saying that we ...*place more weight*... on one view than the other. The only conclusion we can come to is that this is a matter of opinion on which well-qualified and reasonable people may, and clearly do, disagree. It seems to us that we can take the issue no further than to say that within Maoridom there appears to be much the same spread of opinion, and the same spectrum of comfort to discomfort at coming face to face with the realities of death, as there may be in virtually any culture or belief system.

*Section 104 – planning documents*

[19] It is common ground that there are no relevant national policy statements, nor regional planning documents.

*Proposed District Plan – objectives and policies*

[20] The provisions of the Proposed District Plan which appear to us to be most relevant to the appeal are these:

**Incompatible Activities:**

Objective LRS1 To avoid, remedy or mitigate the adverse effects of incompatible use and development on natural and physical resources.

Policy 1 To ensure that activities whose adverse effects cannot be avoided, remedied or mitigated are given separation from other activities.

Policy 3 To discourage activities locating where they are sensitive to the effects of or may compromise the continued operation of lawfully existing activities.

**Tangata Whenua:**

Objective LRS2: To maintain and enhance the traditions, lifestyle and cultural identity of Maori.

**Amenity Values:**

Objective BE3: To maintain and enhance amenity values about dwellings or other forms of residential activity.

Policy 5 To maintain a pleasant and functional streetscape in urban areas.

**Business Activities in Residential Areas:**

Objective BE7: To enable business activities to locate in residential zones where adverse effects (including cumulative effects) will be minor when compared with the predominant residential use and character of the areas.

Policy 1 To limit the scale of business activities in a residential zone to those that are domestic in scale and character having regard to

- The design and appearance of the building;
- Traffic generation, parking, access and manoeuvring;
- Signs;
- Nuisance effects such as noise, light spill, dust, vibration and contaminants.



[21] We agree with the views of Mr Richard Harkness, a consultant planner called for Gateway Funeral Services, who said that all of those objectives and policies need to be read in

light of the plan provisions making the proposal a *discretionary* activity in the zone, and that they also need to be read in light of the permitted baseline and the existing environment, both of which we have already mentioned.

[22] We have mentioned the evidence of Mr Aaron Collier, the Council's consultant planner in discussing the positive effects of the proposal. In his discussion of various plan provisions Mr Collier's evidence is coloured by his pervading view that, by its very nature, the proposed business is incompatible with residential amenity in this zone. He has the view throughout that there will be adverse effects reducing residential amenity that have not been remedied or mitigated in the proposal. He also expresses the view, which we discount at para [26], that reverse sensitivity is a significant factor in assessing the proposal. When Mr Collier goes so far as to say, as he did in para 6.11 of his brief, that: ...*Grief and uncontrolled emotions will in my view have an effect on the existing amenity afforded to the neighbouring residential site and the adjacent residents' enjoyment of their environment*... we think he is going so far into the realms of hyperbole that he risks damaging the credibility of his opinions.

[23] Overall, we agree with Mr Harkness's view that, with reasonable conditions in place to provide mitigation for some possible adverse effects, the proposal is not contrary to the objectives and policies of the Proposed District Plan.

*The Council's decision – s290A*

[24] Section 290A RMA requires us to ...*have regard to*... the Council's decision, which in this case, as mentioned, declined the application for resource consent. The council gave as its main findings of fact:

- That the operation of this proposed funeral director's premise (sic) and its associated activities in this residential area is culturally insensitive and will adversely affect the amenity values of residents.
- That based on the evidence of Ms Rea, Traffic Engineer, the potential traffic effects of the proposal are minor and would be able to be mitigated by conditions of consent.

In expanding on the first of those points and in discussing what it regarded as the relevant objectives from the Proposed District Plan the Council went on to say this:

> The Council does not accept that the Applicant's proposal is an activity that can be considered to be compatible with the existing residential character of the area. In making its decision the Council considered all of the evidence presented but placed greater weight on the evidence

> from Mr and Mrs Erlbeck that the proposed funeral director's business which deals with death was incompatible with residential activities given that the site was in such close proximity to the residents who are bringing up families, living their lives and socialising. The proposed change in use from the church to a funeral director's premise (sic) is considered to be significant even though a church does infrequently hold funeral services. There are no conditions of consent which can satisfactorily mitigate against the potential and actual effects of the incompatible nature of the proposed activity occurring on this site.
>
> The Council while taking into account the submissions from Ngati Awa placed more weight on the submission from Mr Olsen, a submitter of Tuhoe decent, who lives directly adjacent to the site when he described how the whole of the outside of the proposed funeral director's premise (sic) would be tapu and he felt that the tapu nature of the activity would encroach on his property. The Council heard evidence from Mr Olsen and Mrs Erlbeck that the mauri of their environment would be adversely affected by the proposal because of their cultural beliefs and the Council accepted that this was fundamental to their social, environmental and cultural well-being.

We regret having to say that we find this reasoning quite flawed. The Council's own Proposed Plan makes the proposed processes of preparation of bodies, embalming, funeral arrangements, and the conducting of small funerals, a *permitted* activity in the zone. The existing church may conduct as many funerals as it wishes, with as many attendees as can physically be accommodated. To say that those activities are *...incompatible with residential activities...* is not sustainable.

[25] We should add, for the sake of completeness, that the Planners' report provided to the Council – which appealed to us as a very thorough and soundly reasoned document - recommended that the consent be granted.

*Reverse sensitivity*

[26] A very helpful definition of the concept of reverse sensitivity is given in an article by Bruce Pardy and Janine Kerr: *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away* 1999 3NZJEL 93, 94:

> Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new

use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

In the context of this appeal, it was argued that neighbours may feel inhibited from following their usual activities out of consideration for those attending services at the site. We find it difficult to see how neighbourhood children playing in the normal *backyard* context would disturb people attending a funeral inside the existing building. Perhaps activities such as lawn mowing might do so, but given that many funerals occur on weekdays, and most lawn mowing or other section maintenance is done on weekends, the opportunities for clashes would be few. Mr Olsen confirmed that he is conscious of such possibilities now, when church services are being conducted on Sundays, and avoids such activities then. There was no suggestion that this unreasonably inhibited the enjoyment of his property. Funerals on the site are certain to be less regular and less frequent than are religious services now. There really is nothing substantive in this issue, and we need not pursue it.

*Part 2 RMA*

[27] We should record that there was a suggestion from the Council that the Mäori cultural issue be addressed as arising under s6(e). We are sure that that is not where it fits in the scheme of things. Section 6(e) requires us, as a matter of national importance, to recognise and provide for: *The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.* There is nothing in this issue that relates to the relationship of Mäori with those things. Mr Mason's uncontradicted evidence is that there are no sites of cultural, spiritual or historical significance to Mäori that will be affected by the proposal. Rather, it is an issue related to cultural and personal beliefs and attitudes, and might be addressed under the rubric of *amenity* under s7, or as a relevant *other* matter under s104(1)(c).

*Section 7(c) – the maintenance and enhancement of amenity values and s7(f) - maintenance and enhancement of the quality of the environment.*

[28] Mr and Mrs Olsen live at 8 Cleary Avenue, immediately to the south west of the site. Between the two boundaries is a driveway servicing lots behind the Olsens and the church. From the Olsens' deck, which is on the north side of their house, the outlook has the church building prominently in the foreground. That outlook would not change substantially, although the proposed extensions to the building would expand it further towards the Cleary

Avenue frontage, occupying somewhat more of the view the Olsens have towards the north. In terms of outlook, the Olsens expressed some concern that they may be able to see into the coffin storage area in the extension, when the garage door is open. Depending on the final placement of the door that may be so, but it is hardly as if the door will be left open for any significant period. It will be open to allow a vehicle to enter the garage, then immediately shut. This seems to be a greatly exaggerated concern.

[29] What underlies the Olsens' opposition to the proposal is, as they put it in their brief of evidence, is the *...morbid thought...* that there will be a funeral parlour next to their home. They go on to say that they feel that their lives will be *...dictated by the funerals and the mourners.* That they might find the thought of a funeral director's premises next door a morbid one is entirely understandable. Few of us are comfortable in facing the realities of death and grieving. But the short point about the *nature* of the proposal is, as we have emphasised elsewhere, that the Plan makes a funeral director's premises a *permitted* activity there. Their second ground of opposition, which goes to the scale of the activity is, we think, to greatly overstate the issue. A maximum of three funerals per week cannot, on any objective view, be something that will *dictate* their lives.

[30] Mr and Mrs Erlbeck live at 17 Cleary Avenue, almost opposite the Olsens. They too have a deck beside their house, which is the focal point of their outdoor living arrangements, and the church building is in plain view from there. Mr Erlbeck suffers from a disabling illness and is not very mobile, so his home amenities are even more important to him than they would be for many. He sees the proposal as incompatible in nature with those amenity values, and his opposition as a defence of his family home. Mrs Erlbeck is of Mäori ancestry, and told us, in a very eloquent way, of her experiences on her home Marae on the East Coast with her mother being responsible for preparing the tupapaku for the funeral rituals and burial. From that background, she is very familiar with the rituals and protocols surrounding that process. She would feel very uncomfortable that the preparation of bodies was occurring so near to her house while being unsure of whether what she has been brought up to regard as proper formalities were being observed. For her also, opposing the proposal is a defence of her comfort in the home she has lived in for many years.

[31] For the Erlbecks, as we understand what they said, their concern is with the nature of the proposal, whether it be of small or larger scale. In respect of their concerns also, the point is that the Plan permits the nature of the proposed activity – the conduct of a funeral director's business, with all that entails, in this Zone.

[32] We understand what Mr and Mrs Olsen, and Mr and Mrs Erlbeck, were saying and we regret that they will feel discomfort at the proposal being able to go ahead. But the terms of the Plan leave no room for holding, on a principled basis, that a funeral director's business is, by its very nature, incompatible with a residential area.

[33] We have already expressed our clear view (see paras [7] and [8]) that the proposal promotes sustainable management in terms of s5. In terms of avoiding, remedying or mitigating such adverse effects as it might have on the environment in terms of s5(2)(c), we can summarise our view fairly shortly. Those are; that the proposal, particularly with suitable conditions, will not adversely affect the amenity values of the neighbourhood as a whole. It may, we accept, cause discomfort for Mr and Mrs Olsen, and Mr and Mrs Erlbeck. We do not see that as an issue arising under s6(e). It is an issue that arises because of their personal beliefs and attitudes which in essence are no different from beliefs and attitudes which could have very understandably have been held by people from any other culture. We do not doubt their sincerity, but we do question whether the actual effects on them will be as severe as they have convinced themselves they will be.

[34] That Mr and Mrs Olsen and Mr and Mrs Erlbeck are part of the environment is not in question. What is in question is whether the adverse effects on their amenity values and environment will be so severe as to call for the resource consent to be refused. In our view the answer clearly is No. The weighing exercise under s5 undoubtedly concludes in favour of the proposal.

[35] Presently, the site has no planting or other softening of the bluff side of the church building along almost all of the Cleary Avenue frontage. With the building being extended out towards that frontage by some 2.5m, mitigation planting would certainly enhance the streetscape and help mitigate an otherwise bland and unappealing outlook for neighbours and

passers-by. With suitable planting in place, such adverse effect as there might be in that regard will be considerably mitigated.

*Conditions*

[36] The suggestion has been made by Gateway Funeral Services, in an attempt to allay some of the expressed concerns, that there be a maximum, averaged over 12 month periods (beginning from the first day of operations) of three funeral services per week having more than 10 persons attending, and no more than one such service per day. We would not have regarded that possibility as an essential piece of mitigation, but if it is offered, it may go some way to reassuring the objecting parties that they will not be overwhelmed by the scale of the operation. Ms Caroline Rea, the Council's consultant traffic engineer, proposed a maximum of 26 such services per year, but acknowledged that that had nothing to do with the capacity of the street network, but arose from her view of community acceptability. We have difficulty in seeing any credible support for that view.

[37] There was some debate about whether planting or a high wooden fence along the driveway boundary between the site and the Olsen's property would be preferable. Having seen the site for ourselves, we have no doubt that landscape planting of suitable species and sizes would be the better option. Similarly, the Cleary Avenue frontage should have plantings of suitable species and sizes.

[38] One of the expressed concerns was the number of persons who might gather on and around the premises when a body was brought to the funeral home during the night. Numbers of up to 50 were spoken of, as a possibility. We heard no evidence which enabled us to form an assessment of the possible effects of that. Given the inherently sombre nature of such an occasion it seems unlikely that they would be disruptively intrusive. If some numerical restriction is agreed to by Gateway Funeral Services, the permitted activity maximum of 10 people may be a guide.

[39] In dealing with traffic flow, there seems little doubt that for on-site funeral services a traffic entry point off Awatapu Drive, and an exit point onto Cleary Avenue, would be desirable. For traffic movements for most other business purposes, particularly at night, we

agree that using the Awatapu Drive driveway for both ingress and egress would minimise whatever adverse effects there might be.

[40] We ask that the parties confer over the detail of conditions, and present the Court with a revised set of conditions for approval by Friday 22 February 2008.

*Result*

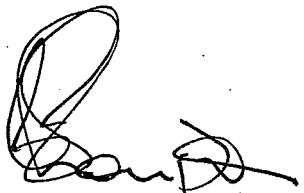
[41] For the reasons we have outlined, the appeal is allowed and the resource consent should be granted, subject to the conditions to be settled.

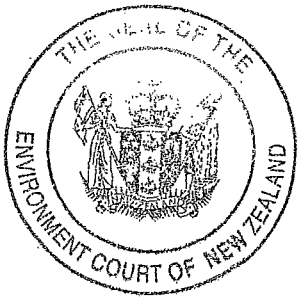
*Costs*

[42] Costs are reserved. Any application should be lodged by Friday 7 March 2008, and any response lodged by Thursday 20 March 2008.

Dated at Wellington this 5th day of February 2008

For the Court






C J Thompson

Environment Judge

**BEFORE THE ENVIRONMENT COURT**
**I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 250**

| | | |
|---|---|---|
| | IN THE MATTER | of the Resource Management Act 1991 |
| | AND | of an appeal pursuant to s 120 of the Act |
| | BETWEEN | GRAEME GRANGER, CRAIG WERNER, HAMISH FORRESTER, KATRINA BERKENBUSCH, MEGAN BARDELL, TOM MYERS |
| | | (ENV-2017-CHC-038) |
| | | Appellants |
| | AND | DUNEDIN CITY COUNCIL |
| | | Respondent |
| | AND | PENINSULA HOLDINGS TRUST |
| | | Applicant |

| | |
|---|---|
| Court: | Environment Judge J E Borthwick<br>Environment Commissioner R M Dunlop<br>Environment Commissioner J T Baines |
| Hearing: | at Dunedin on 13, 14, 15 and 16 August 2018<br>Supplementary evidence and submissions 7 December 2018 |
| Appearances: | G Granger and H Forrester in person<br>M Garbett and R Brooking for the Dunedin City Council<br>P Page and D McLachlan for Peninsula Holdings Trust |
| Date of Decision: | 21 December 2018 |
| Date of Issue: | 21 December 2018 |

---

**INTERIM DECISION OF THE ENVIRONMENT COURT**

---

**Contents**



## REASONS

### Introduction

[1] This appeal concerns a decision by the Dunedin City Council granting subdivision and land use consent at Papanui Inlet on Otago Peninsula.

[2] This proposal is to create an eight-lot subdivision with building platforms on four of those lots. The sites to be used for residential purposes are considerably less than the minimum size provided under the proposed and operative District Plans. Recognising the incongruence of the proposal with the methods in the District Plans, the application is advanced on the basis that the outcomes of the District Plans are achieved by way of a different method.

[3] The appellants are a group of residents whose primary concern is with the administration of the District Plans. They say the outcomes can only be achieved by adherence to the rules providing for minimum site sizes. The residents consider the proposal is contrary to the objectives and policies of those planning instruments and that the effects of the proposal on the environment will be adverse.

[4] The application is of some moment to all parties, the City Council included, as it engages with new policy under the proposed District Plan for residential development within rural areas.

**Status of the activities**

[5] The application for resource consent is for a non-complying activity under the operative and proposed District Plans. As such, the proposal must satisfy one of the threshold tests in s 104D of the Act before it is able to be considered on its merits under s 104.

[6] The appeal was heard prior to the City Council releasing its decision on submissions when only certain rules had been made operative. After our decision was reserved the City Council released its decision on submissions, with the consequence that all rules have legal effect (s 86B(1)). We have not undertaken the exercise of determining what additional rules the proposal does not comply with. If we are required to do so, this can be addressed in the Final Decision.

**Summary of the decision**

[7] Any grant of "resource consent" includes all conditions to which the consent is subject.[1] The standard of drafting on key proposed conditions of consent is such that we are not able to determine whether the application satisfies s 104D. This is not merely an editorial matter; the conditions go to the substance of the application.

[8] The intention of the conditions in question is to restrict the level of effect of the subdivision activities and subsequent land use on the environment. While the applicant's witnesses recommend the conditions be amended, save on one matter, no written amendments were proposed.


[1] Section 2, RMA.

[9] This is an adversarial process and the appellants seek the application be declined. While the appellants did not appeal against the conditions of consent, the conditions are material to our determination of this appeal and go to the heart of the reasons for the appeal, which asserts that the decision fails to protect the outstanding natural landscape and natural character of the coastal environment.[2]

[10] As matters stand, we are not satisfied that we have a proper understanding of the level of effects on the environment that could ensue.

[11] During the hearing, the court twice cautioned the applicant that poorly framed conditions could impact the court's decision-making. Those warnings went unheeded and this has resulted in the release of an interim decision.[3]

[12] Being mindful that this is an appeal against the decision of the Dunedin City Council to grant consent, fairness compels us to afford the applicant and City Council an opportunity to respond to this decision. By affording them this opportunity, we are not indicating any outcome. The applicant may elect not to respond, in which case it is probable the appeal will be upheld and the application declined.

[13] That said, we make three determinations which are final. We:

(a) decline in part the application for subdivision insofar as it concerns the creation of Lots 3 and 4;
(b) decline to give weight to the baseline environment based on an application of *Queenstown Central Limited v Queenstown Lakes District Council* (*"Queenstown Central Ltd"*);[4] and
(c) reject the submission that there is an adverse effect on the amenity enjoyed at the adjacent property owned by the appellants Ms M Bardell and Mr G Granger.



[2] Notice of appeal dated 2 May 2018 at [7(a)].
[3] Transcript at 296 and 329.
[4] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 (HC).

**The proposal**

[14] Peninsula Holdings Trust ("the applicant"), was represented at this hearing by a director, Steven Clearwater. His family have lived on Otago Peninsula since 1832. Purchasing this property from his parents some ten years ago, Mr Clearwater says that he cannot viably farm the 264-hectare (ha) property. While a beautiful place to live, it is not a productive property to farm.[5] His objective in pursuing this application is to reduce the capital tied up in farming and he proposes to do that by subdividing and selling the new titles.

[15] The application for subdivision and land use consent was varied several times prior to the hearing. We will not essay the changes, it is sufficient to say these are set out in a memorandum filed by counsel prior to the hearing.[6] No party has suggested the amendments are not within the scope of the original application.

[16] The property is held in 11 titles. The applicant seeks consent to create eight lots with building platforms[7] on four sites. There are two existing dwellings on proposed Lots 3 and 5 which the applicant seeks be re-authorised upon subdivision of the land.[8] Were the subdivision to be approved, the sites with building platforms and existing dwellings are on land less than the minimum site area provided for under the operative and proposed District Plans.

[17] We record that the applicant has no view on the size of the new sites, and has acted on the advice given about the same.[9]

[18] For convenience, we set out in Table 1 the proposed allotments and uses of land.[10]

---

[5] Clearwater, EiC at [6].
[6] Dated 25 July 2018.
[7] Each platform is dimensioned 30m x 40m.
[8] Cubitt, EiC at [26].
[9] Transcript at 52.
[10] Sourced from Roberts' EiC at [13] and Table 1.

**Table 1**

| Lot | Area (ha) | Land Use |
|---|---|---|
| 1 | 6.7 | Proposed Residential |
| 2 | 3.8 | Proposed Residential |
| 3 | 38.0 | Contains existing dwelling |
| 4 | 2.7 | Proposed Residential |
| 5 | 7.6 | Contains existing dwelling |
| 6 | 45 | To be amalgamated with adjoining sites owned by applicant[11] |
| 7 | 2.4 | Proposed Residential |
| 8 | 19.4 | To be amalgamated with adjoining sites owned by applicant |

[19] If successful the applicant would sell to a neighbouring farmer Lots 6, 8 and Certificate of Titles (CFR) OT 205/103 and OT 11B/1033 ("Farm Block") and offer for sale Lots 1, 2 and 4. It is the applicant's intention to retain the balance of the subdivision, including Lot 3 on which a working quarry is situated.[12]

[20] Proposed Lots 1, 2, 3 and 4 are presently held in two titles (CFR 207075 and part CFR 95918). The applicant has resource consent to carry out quarrying and filling activities on CFR 207075,[13] but does not propose to vary this consent to reduce its application to the area on which quarry and fill activities are authorised (proposed Lot 3).[14] The quarry consent expires in 2027 after which time Mr Clearwater advised he intends seeking a new consent to continue to deposit "fill".[15]

[21] Despite an Advice Note attached to the appealed resource consent suggesting the contrary, the applicant concedes that it has not applied for land use consent to authorise residential dwellings within an Outstanding Natural Landscape[16] and nor has it

---

[11] By proposed Condition 2(d) Lots 6 and 8 would be held with the bulk of the applicant's land east of Cape Saunders Road being OT 205/103, OT 254/295 and CFR OT 11B/1033. This land is collectively termed the "Farm Block" (Cubitt EiC [23]).

[12] Clearwater, EiC at [9].

[13] RMA 2006-1124.

[14] We were told the quarry consent limits quarrying activities to the area to become Lot 3.

[15] Transcript (Clearwater) at 57.

[16] Operative District Plan, rule 14.6.1(a), 2GP rule 16.3.4(3). Page closing submissions at [1].

sought any earthworks consents as may be required.

[22] We turn next to describe the proposed subdivision in greater detail.

*Lots 1 and 2*

[23] Lots 1 and 2 are situated on land that rises to a ridgeline on Varley's Hill. Access to these lots would be from Papanui Inlet Rd along a recently bulldozed track that extends from the base of Varley's Hill towards the ridgeline cutting across the hill's contours. Conditions require the upgrading and extension of the accessway to a minimum width of 4m and that it be formed with an all-weather surface. Adequate drainage is also to be provided.

[24] The conditions make clear that part of the accessway may be finished in concrete. Concrete is the recommended construction material under the Dunedin Code of Subdivision and Development 2010 where the maximum gradient for a private vehicle access exceeds 16%.[17] While the Code is not referenced in the conditions of consent, it is the City Council's expectation that the vehicle access will be designed and constructed in accordance with its guideline documents. There being no design for the accessway, the City Council has not given any consideration to the final standard for formation beyond the matters previously noted.[18] We heard evidence that the concreted part of the accessway could comprise two tracks tinted to reduce visibility.[19] However, these measures are not identified in the application nor are they secured by the consent conditions.[20] Given this, we must assume the accessway may include a section of concrete pavement across its width and have assessed the application accordingly.

[25] The building platforms are located below the summit of Varley's Hill, the elevation of which is some 134m.[21] Lot 1's building platform is situated at approximately 2m below a ridgeline and can be viewed from Hoopers Inlet and Papanui Inlet.[22] Lot 2's building platform is below the ridge with views of and towards the building platform confined to

---

[17] Fisher, EiC at [20]. See also memorandum of counsel dated 25 July 2018 at [8(g)] where it is advised that a section of the accessway will need to be concrete.
[18] Transcript (Fisher) at 339.
[19] Moore, EiC at [78]; Transcript (Moore) at 91.
[20] Transcript (Moore) at 93. There was no agreement on the tint colour with Mr Moore saying the tint would be "dark" and Mr Forsyth describing the colour as "sand".
[21] Cubitt, EiC at [9].
[22] Moore, EiC at [39].

Papanui Inlet.

*Lot 3*

[26] Lot 3 contains the site of a working quarry, although open pasture behind the quarry-face extends up to the ridgeline and the southern-most portion facing Hoopers Inlet has an extensive area of regenerating bush and wetland. Consent is sought to "re-authorise" an existing dwelling on Lot 3 presently occupied by quarry staff.[23] That said, we were not referred to any rule in the plan that requires existing dwellings on a proposed subdivision to be authorised by a resource consent.

[27] Access to Lot 3 would be from Papanui Inlet Rd and/or Cape Saunders Rd. The access arrangements are now shown on the figures attached in evidence and we assume in both instances the access to be from the access and egress used by quarry vehicles.[24]

*Lot 4*

[28] The building platform on proposed Lot 4 is located some 150m from the working quarry on Lot 3. Lot 4 would also gain access from Cape Saunders Rd. While the evidence referred to this access as a "farm track", it is an access used by quarry vehicles. The access passes within 10m of the proposed building platform.[25]

[29] Recognising the potential for conflict between quarry and residential activities the applicant proposes that Lot 4 be developed for residential purposes after the expiry of the quarry consent.[26] To that end a covenant restricting the use of Lot 4 was proffered at the end of the hearing, although its draft terms make clear the restriction applies in relation to extractive activities and not fill activities.[27] This proposal is in line with the evidence given by Mr Clearwater that it was his intention to continue to use the quarry site for fill, subject to obtaining a new grant of consent after 2027.[28]

---

[23] Clearwater, rebuttal at [13].
[24] Cubitt, EiC at [24].
[25] Figures A and 1(b).
[26] Clearwater, rebuttal at [13].
[27] Mr Page's closing submissions at [13]. See also Transcript (Page) at 478.
[28] Transcript (Page) at 477-478.

*Lot 5*

[30] Lot 5 contains an existing dwelling with access from Cape Saunders Rd. The size of the existing allotment would increase from 6,677m$^2$ to 7.6 ha. No further development of this site is proposed. The appellants and City Council called no evidence in relation to this allotment.

[31] Again, the rule requiring the approval of the existing dwelling on the new allotment was not identified.

*Lot 7*

[32] Proposed Lot 7 accommodates the site of a dwelling that burned down in 2010. Access is from Cape Saunders Rd. The building platform is to be located in the curtilage of the former dwelling, with some excavation required to ensure an adequate elevation above a water course and its debris flowpath.

*Lots 6 and 8*

[33] Proposed Lots 6 and 8 are to be held in an amalgamation covenant with Certificate of Titles (CFR) OT 205/103 and OT 11B/1033 (condition 2(d)). Consent notices restrict residential development on the Farm Block. A consent notice for Lot 8 states that should it be necessary for sections 28 and 29 Block VI OT 254/294 to rely upon amalgamated titles to meet the residential density provisions of the District Plans, this title would need to be amalgamated with Lot 8 and the balance land to form a site.[29]

[34] As noted, the applicant intends to sell the Farm Block to a neighbouring farmer.

**Status of the application**

[35] As noted, the proposal is a non-complying activity under the operative and proposed Dunedin District Plans.[30] Specifically, the proposal does not comply with the minimum site size for a new allotment under the operative District Plan or 2GP.



[29] Condition 3(r); Clearwater, EiC at [11].
[30] Operative District Plan, rule 18.5.2 and 2GP, rule 16.7.4.3.

[36] Section 104D applies and provides that 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 s 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 the relevant plan.

[37] The applicant, Peninsula Holdings Trust, contends the proposal satisfies both limbs of s 104D and therefore may be considered under s 104 of the Act. If correct, when considering the application for resource consent and any submissions received the court must, subject to Part 2, have regard (relevantly) to —

(a) any actual and potential effects on the environment of allowing the activity;
(b) any relevant provisions of the New Zealand Coastal Policy Statement, the operative and proposed Otago Regional Policy Statements and the operative and proposed Dunedin City District Plans; and
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

**Permitted baseline**

[38] While no party argues there is a permitted baseline that may be applied to disregard the potential adverse effects of the activities,[31] Peninsula Holdings submits there is a *baseline* future environment that the court could take into consideration when assessing the merits of this proposal. We come back to this later.

**The City Council's decision**

[39] The court is required, pursuant to s 290A, to have regard to the decision under appeal. The requirement "to have regard" does not create a presumption that the decision is either correct or that it will be followed; per *Blueskin Bay Forest Heights Limited v Dunedin City Council.*[32] Rather, the obligation is to give genuine attention and thought to the decision and to accord the decision such weight as the court considers


[31] See s 104(2) RMA.
[32] *Blueskin Bay Forest Heights Limited v Dunedin City Council* [2010] NZEnvC 177 at [53].

appropriate; per *Man O'War Station Limited v Auckland Regional Council.*[33] If the court does come to a different conclusion then it is to provide reasons for departing from the decision under appeal; per *H B Land Protection Society Inc v Hastings District Council.*[34]

[40] The applicant submits the decision under appeal is deserving of the highest respect given that it is made by a very experienced Commissioner whose decision "is grounded on judgement and experience". While the Commissioner is undoubtedly experienced, in one critical respect he does not give reasons for the exercise of his judgement as he is required to do pursuant to s 113(4). Beyond the bare recital of chapter headings for the operative and proposed District Plans, the naming of the higher order policy documents and an attestation the Commissioner had considered the relevant provisions therein, the decision does not evaluate the proposal under the relevant provisions.[35]

[41] As a result, the court was not able to understand the reasons for the decision relative to the policies of the planning instruments and while we have considered it, we are unable to give the decision much weight.

**Weight to be given to the proposed plan**

[42] When discussed in the context of a plan, weight has at least two aspects. First, the weight to be given to the provisions of a recently notified plan which may yet be modified by submissions on the plan and through the appeal process. Secondly, the weight (or strength of direction) of its individual provisions. In this section, we address the former aspect of weight.

[43] Counsel for the applicant, Mr Page, submitted for the reasons given in *Blueskin Energy,* the provision for outstanding natural landscapes should be accorded equal weight, we agree. He further submitted notwithstanding the fact that the 2GP minimum density rule had immediate legal effect, less weight should be given to this method since there were unresolved challenges to this rule.[36] This was also the view of the Council's

---

[33] *Man O'War Station Limited v Auckland Regional Council* [2011] NZRMA 235 at [65] (HC).
[34] *H B Land Protection Society Inc v Hastings District Council* Decision No. W57/2009 at [67], 28 July 2009.
[35] Dunedin City Council decision on Resource Consent Application SUB-2016-58, LUC-2016-336 and LUC-2006-370881/C at 12 and 22.
[36] Page, closing submissions at [32].

planning witness.[37]

[44] The weight to be given to the proposed 2GP is a matter for the court to decide. The extent to which the proposed measure has been exposed to testing and independent decision-making is relevant to weight. Relevant also is the extent to which the new measure may implement a coherent pattern of objectives and policies in a plan needs to be the same: *Hanton v Auckland City Council*[38] and the degree to which there has been a shift in the City Council's policy: *Lee v Auckland City Council.*[39]

[45] Regardless of the actual minimum site size, there has been a significant shift in policy under the 2GP, a shift which was strengthened in the decision version of the plan. Whereas the directions in the operative District Plan in relation to the productive capacity of the land and the outstanding natural landscape are open textured, not so the 2GP. The direction that residential activity in rural zones "is limited to that which directly supports farming", with residential development exceeding the level provided to be "avoided" is emphatic (objective 16.2.1, policies 16.2.1.5 and 16.2.1.7). Moreover, productivity of rural activities is to be maintained or enhanced and only subdivision activities that achieve this is to be allowed (objective 16.2.4, policy 16.2.4.3). Even though these provisions may yet be the subject of an appeal to the Environment Court, given the policy shift and strength of direction we will give the 2GP objectives, policies and rules as they pertain to density the same weight as the operative District Plan.

**Structure of the decision**

[46] We have structured the decision so that the evidence is grouped under broad topics and then evaluated. The topics are:

(a) receiving environment;
(b) overview of the planning context;
(c) the effect on the Granger and Bardell property;
(d) the effect on landscape, rural character and amenity values;
(e) use of public roads;
(f) reverse sensitivity effects between the quarry and occupants of dwellings;

---

[37] Roberts, EiC at [23].
[38] *Hanton v Auckland City Council* [1994] NZRMA 289 at 305.
[39] *Lee v Auckland City Council* [1995] NZRMA 241 at 255.

(g) the effect on ecological values;

(h) the effects on the outstanding natural landscape, rural character and visual amenity;

(i) an alternative baseline environment and proposed density of development; and

(j) the evaluation of the proposal.

**Receiving environment**

[47] Giving landscape evidence on behalf of the applicant and Dunedin City Council, we heard from landscape architects, Messrs M Moore and H Forsyth. They were in broad agreement on the physical attributes of the property and its landscape setting and so we draw upon their evidence to describe the landscape and receiving environment.

[48] Most of the property is located on a relatively narrow neck of land that is bounded either side by Papanui Inlet and Hoopers Inlet, being shallow tidal estuaries. Mt Charles (408m), is located on the eastern most part of the property, more specifically on Cape Saunders Peninsula. The Cape is recognised for its rugged coastline; its many headlands are interspersed by sandy beaches. Mt Charles and the two Inlets are notable features within this coastal landscape.

[49] The geology of the Peninsula landscape is volcanic in origin, with volcanic rock being exposed on the steeper slopes of the hills. Many watercourses and small streams drain to the Inlets and wetlands.

[50] Hoopers Inlet and Papanui Inlet are contained within separate visual catchments, each with its own distinct character. Commencing with Papanui Inlet, this Inlet has a regular and oval form. Its small headlands afford a wide field of view of the landscape which has an open character. Mt Charles rises steeply from the coast and is the dominant feature within the Inlet's visual catchment. The northern slopes of Mt Charles are under pasture, with a few exotic shelterbelts located at the base and along the mid-slope. Apart from two patches of remnant indigenous forest cover near the summit, there is no other vegetative landcover on the mountain.



[51] Eight dwellings are located along the Inlet shoreline with a further seven dwellings at the base of Mt Charles clustered together in a small settlement. There are boatsheds

associated with several of these dwellings. Recent residential development has seen an increase in house size to around 200-300m$^2$.

[52] To the west of Mt Charles are Geary's Hill and Varley's Hill, being two prominent cone-shaped landforms. The hills are located on the neck of land which otherwise is a narrow, lower coastal landform. Towards the coast the landcover and landform comprises pasture covered coastal ridges and small coastal scarps and terraces.

[53] When viewed from the north, Geary's Hill provides the visual backdrop to the site of the quarry and an existing dwelling that is occupied by quarry staff (proposed Lot 3). Some of the mature pine trees that screened the quarry from public view have been recently removed exposing most of the quarry to view from Papanui Inlet and most public places. Lot 4 and its proposed building platform are also located on the north-facing slope of Geary's Hill. There is a small fenced off saltmarsh at the toe of the hill. This saltmarsh is subject to a covenant.

[54] Further west again is Varley's Hill, where Lots 1 and 2 are proposed to be located on a north-facing slope that rises to a ridgeline that extends into the Hoopers Inlet catchment. There are already six houses on or near the base of Varley's Hill.[40] Varley's Hill contains a large area of regenerating forest located on its lower slopes, eucalyptus copses and blocks as well as forestry plantation.

[55] Turning briefly to the second visual catchment adjacent to Hoopers Inlet, the southern boundary of the property terminates by the public road that skirts around this Inlet. This part of the property and indeed the wider landscape setting is higher in natural character than the land facing Papanui Inlet. Regenerating indigenous forest on Varley's Hill descends from the summit to the coast, terminating near a large saltmarsh. Those features aside, pastoral farming is also very much in evidence at the property and within the wider receiving environment. In contrast with Papanui Inlet, where dwellings are located at low altitude near public roads, on the southern side of Hoopers Inlet (almost without exception) very large, and in most cases conspicuous, dwellings have been constructed on spurs and ridgelines.

[56] The only other notable features are the ungravelled coastal roads. We observed



[40] Forsyth, EiC at [27].

on our site visit that Allans Beach Rd and Papanui Inlet Rd are subject to tidal influences with erosion of its seaward edge being in evidence at several locations. Indeed, at several locations seaweed had been deposited onto the carriageway.

*Ecological values*

[57] The above description of the receiving environment is supplemented by Dr S Rate's description of the ecological values of the property. The evidence was uncontested and so again we draw broadly upon what he said to set the scene of the receiving environment.

[58] The importance of both Inlets as a habitat for birds, fish and invertebrates is recognised by their inclusion in Conservation Protection Areas in the Otago Regional Plan: Coastal – Schedule 2.

[59] While grazing stock are having an adverse effect on flora and fauna, the property nevertheless contains significant indigenous vegetation and significant habitats for indigenous fauna. It is possible, that the southern saltmarsh (Lot 6) is being grazed by stock.[41]

[60] There are saltmarshes located on Lots 3 and 6. The fact that only 10% of the original extent of freshwater wetlands remains nationally underscores the importance of the saltmarsh. Two nationally At Risk species[42] and four locally important plant species have been found at the marsh. The saltmarsh at Lot 6 is large and contiguous with ecologically significant areas to the north and south that are under the protection of QEII covenants and Wildlife Management Reserve status. The hydrology of all wetlands has been altered by the digging of channels and the formation of Allans Beach Rd.

[61] Heavily grazed, with little diversity in plant species, Lot 1 was not considered to be an area of any ecological significance. Lot 4 does contain a small area of nationally rare wetland habitat. While fenced to exclude stock, the wetland has been planted with non-local indigenous vegetation and cultivars; woody weeds (radiata pine and hawthorn) are also present.[43] The flora and fauna of the other lots were not commented upon.



---

[41] Rate, EiC at [29].
[42] *Chenopodium allanii* and jewelled gecko.
[43] Rate, EiC at [30].

*Outstanding Natural Landscape ("ONL")*

[62] Addressing next landscape and rural character in greater detail, the property is part of an outstanding natural landscape. The witnesses did not describe the values qualifying the landscape as outstanding, deferring instead to the District plans which list features and characteristics to be protected. The biophysical and sensory attributes that are present and which qualify this landscape as outstanding are:

- Papanui and Hoopers Inlets are recognised as important landforms with significant estuarine values;
- high legibility of the eroded volcanic landform;
- significant presence of natural elements i.e. wetlands / saltmarsh, areas of remnant / regenerating indigenous forest / tidal inlets;
- modest influence of human elements (i.e. buildings / exotic plantings not of dominating scale, roads responsive to natural landscape forms / narrow / winding);
- heritage character (farming history legible);
- tangata whenua wahi tupuna, i.e. upper slopes of Mt Charles / Papanui Inlet Islands / old settlement sites – Papanui Inlet south side / Otakou Native Reserve;
- qualities of remoteness and isolation;
- dramatic coastal landforms and views;
- presence of wildlife;
- natural night sky values;
- rural character (i.e. predominance of natural over built elements / openness / rural land use etc); and the
- natural character of the coastal environment.[44]



[44] Landscape JWS, dated 6 August 2018.

[63] While possessed of outstanding natural values, the landscape is very much rural in character.

[64] The aesthetic values of the wider landscape and of the property itself, are based upon the high legibility of the eroded volcanic topography and secondly, the presence of natural elements including the tidal inlets and wetlands, together with remnant and regenerating bush and wildlife. Indeed, the human elements have only "modest influence" on the landscape. The buildings and exotic planting are not dominating in scale. Existing built elements in Papanui Inlet are very largely limited to the water's edge. Local roads are narrow and responsive to the natural landscape forms.

*Amenity values*

[65] The amenity enjoyed by the appellants is underpinned by the contribution of the values that qualify this natural landscape as being outstanding. In common with the landscape architects, the appellants' focus was particularly on the Isthmus (or neck) of land. In their opinion, the small-scale of this landscape feature makes it particularly sensitive to development. For them, the sparsely settled Isthmus is peaceful and quiet. The visual amenity attributes of the Isthmus contribute to the appellants' appreciation of the area. Notably they affirm the amenity afforded by the present-day subservience of structures and buildings to the area's natural attributes and landform features.[45]

*Tangata whenua values*

[66] Significant tangata whenua values are identified on or near the property. While we have noted these, we do not understand the proposal to intrude on or to affect the same.[46]

*Coastal environment*

[67] While this is a coastal landscape, only a small portion of the subject land is located under the planning maps within the coastal environment. That said, the coastal environment, at least under the 2GP, extends within Lot 4 and also Lot 3 (adjacent to both Inlets).

---

[45] Appellants' supplementary evidence.
[46] Moore, EiC at [33].

[68] We turn next to the provisions of the Otago Regional Policy Statement ("RPS"), Regional Plan and District Plans to consider what they have to say about how to achieve the integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district (s 31 RMA).

**Otago Regional Policy Statement**

[69] The planners identified both the operative and proposed RPSs as relevant and without reference to specific matters concluded "the proposal is consistent with the relevant provisions contained in either document".[47] That said, Mr Cubitt, giving planning evidence on behalf of the applicant, did not actually address the statements in his written brief. On behalf of the City Council, Mr Roberts told us that:[48]

(a) Otago's outstanding natural features are to be protected from inappropriate subdivision, use and development (objective 5.4.3). On our reading the objective also applies, unsurprisingly, to ONLs;

(b) section 8 for the Coast has objective 8.4.5 which additionally requires the protection of "areas of natural character";

(c) policy 8.5.4 provides for these provisions to be given effect by "identifying and protecting" named natural resources. Papanui Inlet is amongst the identified *elements* that contribute, by way of example, to the region's "natural coastal character". It might be reasonably assumed that Hoopers Inlet is an equally deserving example. We note that Method 8.6.25 is for territorial authorities to consider placing conditions on or declining resource consent to applications, as necessary, to enhance the quality of Otago's coastal environment.

[70] Mr Roberts opined that the proposal was not inappropriate in the context of the applicable ONFL and s 6(b), based on the landscape and visual effects evidence of those experts, which strikes us as an unhelpful conflation of ss 6(a) and (b).

[71] Overlooking the applicable decisions version of the proposed RPS, Mr Roberts briefly addresses provisions of the statement in its notified form. Referring to objective


[47] Planners JWS, 7 August 2018 Items 1 and 11.
[48] Roberts, EiC at [78] ff.

2.2, policies 2.1.7, 2.1.8 and 2.2.9,[49] and again relying largely on the landscape witnesses, Mr Roberts considered the proposal does not detract from proposed RPS directions for maintaining distinctive landscape values and the natural character of the coastal environment. He deposed, without reference to any relevant provisions that may be under appeal, that the operative RPS should be given greater weight than the proposed RPS, that the documents have a common policy direction on relevant topics and that the applicant's proposal is consistent with the provisions of both.

**Otago Regional Plan: Coast**

[72] Mr Page told us in opening submissions that both adjoining Inlets have significant estuarine values as habitats for birds and nursery for flat fish and are recognised as "coastal protection areas" in the ORP: Coastal.[50]

[73] Counsel for the respondent identified the operative RPS and proposed RPS as relevant legal considerations but provided no further assistance on these aspects.

**The District Plans**

[74] In the witness box at least, the planning witnesses appeared to have grappled with the relative strength of direction (weight) of individual provisions of the District Plans, however this consideration is not recorded in the written evidence.

[75] That said, we reiterate what was said in *Blueskin Energy Ltd v Dunedin City Council*[51] at [94]-[95]:

---

[49] We find these provisions to be renumbered in the proposed RPS Decisions Version as objective 3.2, which is unaltered save deletion of the reference to protecting the "distinctiveness" of significant and highly-valued natural resources (including ONFLs, indigenous biodiversity and soils). Policy 2.1.7 for ONFL and seascapes has been renumbered as P3.1.10 and deletes reference to the coastal environment while attributes to be used when identifying values of, inter alia, landscapes continue to be scheduled. Policy 2.1.8 is renumbered as P3.1.11 and sets out the attributes from which the natural character of the coastal environment is derived. Policy 2.2.9 for managing the natural character of the coastal environment is renumbered as P3.2.9 and is now concerned with outstanding natural character while retaining the direction to "[avoid] adverse effects on those values which contribute to the outstanding natural character of an area". Method 4.1.2 provides for P3.2.9 to be implemented by district plans identifying and protecting areas of outstanding and high natural character in the coastal environment.

[50] Mr Page opening submissions at [24(i)] at 8.

[51] *Blueskin Energy Ltd v Dunedin City Council* [2017] NZEnvC 150.

[94] We consider it best practice to start with an understanding of the whole of the planning context. The application of plan provisions discretely, and out of context, carries the real risk that integrated management of natural and physical resources will not be achieved.

[95] The purpose of an overview is to understand the relationship between the different provisions within the plans and whether these provisions align with and support each other in order to achieve the integrated management of natural and physical resources.[52] In common with many District Plans, we found the supporting policies of Dunedin's District Plans present different but overlapping ways to achieve the objectives and, when read as an integrated whole, the objectives and policies inform and build upon and sometimes constrain each other.

**Operative District Plan**

[76] A key component in the character of rural areas is the use of land for productive purposes (Issues 6.1.2 and 6.1.4). Recognising the desire for people to live in rural areas, the operative District Plan ("DP") addresses the question of how to provide for expansion of residential activities without compromising the productive capacity of the land and minimising the conflicts that can arise between rural and residential activities (Issue 6.1.6).

[77] The plan seeks to integrate the use of rural land for residential activities with its productive function and with the natural environment. Any use will change the receiving environment, even so the amenity values associated with the character of the rural area are to be maintained and enhanced (objective 6.2.2). Related policies for maintaining and enhancing amenity values associated with rural character do not particularly advance the relevant objective (policies 6.3.5 and 6.3.6). That said, we are told development which may result in a cumulative adverse effect on Landscape Management Areas, amenity values and rural character "should not occur" (policy 6.3.14). In that regard, the policy to maintain significant landscapes by limiting the density of development (6.3.7) is important. Land use is also to maintain and enhance the natural character and amenity values of the margins of water bodies and the coastal environment (objective 6.2.7) and the potential for conflict between different land use activities is to be avoided or minimized (objective 6.2.5) by discouraging land fragmentation (policy 6.3.3).

[78] As the density of residential development is an important method for achieving

---

[52] Section 31 RMA.

the objectives for the rural area we digress to the relevant rules.[53]

*Density of development in the rural area*

[79] The level of residential activity within rural areas is an important method to achieve both the rural and subdivision objectives. For existing sites in the rural zone, residential activity is permitted provided that the minimum site size is 15ha (rule 6.5.2(iii)). This is also the minimum site size for subdivision of the land (rule 18.5.1(i)).

*Other provisions*

[80] Returning to the objectives and policies, the outcomes for the natural environment are expanded upon in Chapter 16. The use of land can compromise the protection and ultimately the life supporting capacity of significant indigenous vegetation and significant habitats (issue 6.1.2). These areas are protected (objective 16.2.2) and activities which may compromise their protection are to be avoided (policy 16.3.3).

[81] The natural environment underpins the outstanding natural landscape and this too is protected (objective 14.2.1). The plan, using directive language, states that we are to ensure land use and development do not adversely affect the quality of the landscape (objective 14.2.3). The associated policies do not particularly advance the objectives, with the exception of policy 14.3.4, which encourages development that integrates with the character of the landscape and enhances landscape quality.

[82] The plan ties the above provisions together under the Subdivision Chapter. This chapter reiterates subdivision of rural areas can lead to inefficiencies (issues 18.1.1 and 18.1.2). Expanding upon the issues, the plan explains amenity can be maintained or enhanced through, inter alia, innovative subdivision design. [We depart from the operative DP to note that clustering of dwellings is one such design technique that is identified in the 2GP in response to the threat of continuing encroachment of development into pastoral areas]. To address inefficiencies, the potential uses of land are to be recognised at the time of subdivision (objective 18.2.3) and the necessary applications for subdivision and land use activities heard jointly (objective 18.3.4). Subdivision is to "preserve" the natural character and "protect" intrinsic values of ecosystems along the margins of water bodies and the coast (objective 18.2.5).


[53] Cubitt (Transcript) at 181-188.

Subdivision must also "ensure" that the adverse effects of subdivision and land use activities on the natural and physical resources are "avoided, remedied or mitigated" (objective 18.2.6).

[83] Again, the supporting policies do not particularly advance the objectives save in one important respect. Subdivision consents should be considered together with appropriate land use consents and heard jointly (policy 18.3.4). There was some discussion between the bench and counsel whether consent for the dwellings had been sought because the conditions imposed did not address the controls in the relevant rule.[54] As noted above, the applicant eventually conceded that consent to erect dwellings in the outstanding natural landscape had not been sought. And it is likely also that land use consents for earthworks will be required under both the operative DP and 2GP.

[84] The assessment matters for subdivision consents provide further guidance. These matters make clear that there is to be consideration of the Landscape Management Areas and the provisions and methods that pertain to those areas. The Landscape Management Areas not only identify the features and characteristics that are to be protected but also how land use and development may threaten the same.[55] Under the assessment matters there needs to be consideration of the appropriateness of the building platforms together with proposed vehicle access to the site and an inquiry into whether the subdivision enhances the retention of the land's natural character.[56]

**Proposed District Plan**

***Introduction***

[85] Prior to the release of this interim decision, Dunedin City Council made its decision on submissions to the notified proposed District Plan. The release of the decision necessitated the updating of the planners' joint witness statement.[57] Again, the planners did not provide written comment on the relative strength of direction (weight) of the decision version of the 2GP.

---

[54] Transcript (Moore) at 113-114.
[55] Operative District Plan, Chapter 18, cl 14.5.1(iv) and (v).
[56] Operative District Plan, Chapter 18, cl 18.6.1(a), (h) and (s).
[57] JWS – planning, dated 30 November 2018 was received from the planners. Further submissions dated 7 December 2018 were received from the appellants and respondent.

[86] That said, where there is a need to distinguish between the 'Decision Version' ("DV") and 'Notified Version' ("NV") of the 2GP, we do so. Otherwise, all references in this section are to the decision version of the 2GP provisions.

***Twin themes***

[87] Twin themes of the use of rural land and the natural environment in the operative DP have been picked up and expanded upon in the more directive provisions of the 2GP.

[88] The 2GP identifies the principle functions of the rural environment as being to provide for productive rural activities and for ecosystem services. The key issue facing the rural area is the fragmentation of rural landholdings by subdivision and the non-productive use of land, including the establishment of activities that would normally occur in urban areas. This has led to a reduction in the productive capacity of the rural environment through the loss of rural land and soils. The spread of non-rural uses has the potential to adversely affect landscape values, rural character and amenity values and finally, the functions and values of the natural environment.[58]

***Subdivision rules have immediate effect***

[89] With the above issues in mind, in 2015 the Environment Court granted the City Council's application pursuant to s 87D of the Act that certain subdivision rules take immediate effect from the public notification of the 2GP.[59] This included the rule for minimum site size in rural zones which is considerably more restrictive than the operative District Plan (rule 16.7.4) and second, the assessment matters for subdivision (rule 16.9.5.5).

[90] The City Council applied for the rules to have immediate effect because of their strategic importance.

[91] Evidence called in support of the application recounts the fragmentation of the rural land resource. At that time, the City Council said there was a need to protect the production potential of rural land and to avoid the spread of lifestyle block development of rural land. Indeed, the 2GP recognises this as a critical resource management issue.

---

[58] 2GP, Chapter 16: 16.1 Introduction.
[59] *Re Dunedin City Council* [2015] NZEnvC 165.

The Council regarded 15 ha site size (the minimum site size in the operative DP) as difficult to manage because the sites are either too small to be viable for productive rural use or too large to manage as a lifestyle block.[60] The court accepted this evidence, concluding the Council did indeed have a clear strategic purpose.[61]

*Strategic Directions*

[92] As we observed in *Blueskin Energy Limited v Dunedin City Council*[62] the strategic directions are achieved through the detailed plan provisions. The JWS dated 30 November 2018, erroneously, in our view, contains an assessment of the proposal's compliance with the strategic directions. We do not think the strategic directions are intended to be applied directly to applications for resource consent. Rather, they are to be borne in mind when interpreting and applying the subsequent, detailed Plan provisions.

[93] Consistent with the evidence given in *Re Dunedin City Council* above, the strategic directions recognise productive rural land is important for economic productivity and social wellbeing and that it should be protected from less productive competing uses or incompatible uses, including activities that may give rise to reverse sensitivity (objective 2.3.1). The directions are to be implemented by rules that restrict residential activity within the rural environment to that which supports productive rural activities or that which is associated with papakāika and second, by rules that restrict subdivision that may lead to land fragmentation and create pressure for residential-oriented development (policy 2.3.1.2(d) and (e)). This objective is further supported by the provision that "in order to avoid cumulative effects on rural productivity and rural character values, set and **strictly enforce** a minimum site size standard for subdivision in the rural zones …" (2.3.1.3) [our emphasis]. This idea of "strictly" enforcing a minimum site size is repeated in policy 2.3.1.3 which states that in order to avoid cumulative effects on rural productivity and rural character values the rules for minimum site size are to be determined having regard to the factors listed. We note that the minimum site size in this zone has not been changed in the decisions version of the plan.

[94] Finally, strategic directions now expressly recognize protection as a means to

---

[60] [2015] NZEnvC 165 at [26].
[61] [2015] NZEnvC 165 at [67].
[62] *Blueskin Energy Limited v Dunedin City Council* [2017] NZEnvC 150 at [96].

achieve their outcomes. See, for example, the directions on biodiversity (objective 2.2.3) and outstanding natural landscapes (objective 2.4.4).

*Objectives and policies*

[95] The outcomes for both the natural environment and the rural area are set out in objective 16.2.1 which states:

> Rural zones are reserved for productive rural activities and the protection and enhancement of the natural environment, along with certain activities that support the well-being of rural communities where these activities are most appropriately located in a rural rather than urban environment. Residential activity in rural zones is limited to that which directly supports farming or which is associated with papakāika.

[96] Not only is farming to be enabled, but so too is conservation (policy 16.2.1.1). Two complementary policies explain what is meant by the objective to limit residential activity "to a level which directly supports farming". At first blush, the objective reads as if residential activity that "supports farming" is referring to farmer accommodation, but that is not what is intended. Rather, residential activity[63] is required to be at a level (density) that supports farming activity and also secures six key objectives (16.2.1.5). The zone rules provide for the level of residential activity in each of the zones. Residential activity that is not at this level of density is to be avoided, unless it is the result of a surplus dwelling subdivision (policy 16.2.1.7). These provisions are consistent with the strengthened strategic direction (objective 2.3.1).

[97] Further outcomes to be secured include that productivity in the rural zones is maintained or enhanced (objective 16.2.4). This objective is achieved by "only" allowing non-farming activities on high class soils where the scale, size and nature of the activity means the loss of current or potential future rural productivity would be insignificant (16.2.4.2) and "only" allowing subdivision where it is designed to "ensure" any future land use and development will:

(a) maintain or enhance the productivity of rural activities;
(b) maintain highly productive land for farming activity, or ensure the effects of any change in land use are:
    (i) insignificant on any high-class soils mapped area; and

[63] With the exception of papakāika.

(ii) no more than minor on other areas of highly productive land;

(c) maintain land in a rural rather than rural residential land use; and

(d) not increase the potential for reverse sensitivity.[64]

[98] The 2GP planning maps show an area of high class soils on Lots 1 and 2. We apprehend the area may be subject to earthworks for accessway and building platform formation purposes. On our reading Earthworks objective 8A.2.1 and its policies provide no additional guidance on the outcome sought for high class soils beyond those recorded in the preceding paragraph. We note, however, that rule 8A.5.8 provides, firstly, that earthworks must not remove topsoil or subsoil that is located within the high-class soils mapped area from "the site" and, secondly, that activities that contravene this performance standard are restricted discretionary activities. Unassisted by the evidence on related policy matters, and the nature, scale and likely significance of potential effects, we are unable to draw any conclusion on this aspect beyond noting the potential requirement for a resource consent.

[99] The maintenance of rural character values and amenity (objective 16.2.3) is provided for by controls on the density of residential activity (policy 16.2.3.2) and by requirement to allow subdivision activities where the subdivision is designed to ensure any associated future land use and development will maintain or enhance the rural character and visual amenity of the rural zones (16.2.3.).

*Level of residential density in the rural zone*

[100] Again, because of the importance of density as a method to secure the 2GP objectives, we divert to the operative 2GP rule for minimum site size to gain an understanding of what the plan says about the level of density within this zone (Peninsula Coast Rural Zone).[65] In Peninsula Coast Rural Zone the minimum site size is 40 ha (rule 16.7.4.1(f)). A subdivision not complying with the minimum site size is a non-complying activity (rule 16.7.4.3).

---

[64] Policy 16.2.4.3.

[65] While not yet operative, rule 16.5.2 applies to establish a maximum density of standard residential activities for existing sites. Four existing titles exceed 20 ha and, subject to compliance with the other rules in the plan, the titles could support five additional dwellings (including two dwellings on CFR OT11B/1033).

*Tension between the provisions for rural subdivision and outstanding natural landscapes?*

[101] In common with the operative DP outstanding natural landscapes are protected from inappropriate development. The values for the various landscapes are identified in Appendix A3. Those values are to be maintained or enhanced (objective 10.2.5). Indeed, the objective is given effect to by "only" allowing subdivision activities that are designed to "ensure" that any future land use or development will maintain the landscape values identified in the Appendix and in accordance with certain policies (in particular, policy 10.2.5.10). Appendix A3 assists by identifying "threats" to the landscape which may lead to inappropriate development[66] and how these threats can be addressed through subdivision and land use design.

[102] There is a new policy for large buildings and structures in an ONL (10.2.5.8(DV));[67] the antecedent of which was policy 10.2.5.6(NV). The parties will recall the court's discussion with the planners as to the meaning of "insignificant" in policy 10.2.5.6(NV). Mr Cubitt explained in evidence that he had not considered the meaning of "insignificant" and was inclined to the view that it meant "minor".[68]

[103] The new policy 10.2.5.8(DV) provides the adverse effects on large buildings on the values of the ONL are either to be "insignificant" or where there are no practicable alternative locations, "adequately mitigated". We have considered what the Hearing Commissioners have had to say about the drafting protocol used to describe levels of effects. They make clear "insignificant" is a stricter test than "minor".[69] Unless and until this provision is successfully challenged on appeal, it has to be applied according to its tenor.

[104] As an aside, we note that policy 10.2.5.13[70] limits the number of small buildings (i.e. no larger than 60m$^2$) clustered together with each other or a larger building in an ONL. While all buildings are to occupy the building platform we do not recollect receiving any evidence on the number of buildings proposed to be built. Counsel for the applicant

---

[66] Transcript (Cubitt) at 239.
[67] Large buildings and structures were formally addressed in policy 10.2.5.6(NV).
[68] Transcript at 241 ff.
[69] Decision of the Hearing Panel, Natural Environment at [1673] ff.
[70] We are uncertain whether this is a new policy introduced in the decision version of the pDP.

advises the performance standard permitting up to three 60m$^2$ does not apply.[71] We record policy 10.2.5.12 is also relevant, and we accept the outcome of this policy will be achieved by the proposal and do not discuss any further.

[105] With that said, Mr Cubitt thought that the objectives for rural subdivisions and outstanding natural landscapes (NV) were in tension.[72] The tension in his mind arises from the design elements that are "recommended or encouraged" to address specific threats to this landscape. He considered the incorporation of these elements into the design of a subdivision would pull in a different direction from a subdivision based on the minimum site size of 40 ha. However, we do not think Mr Cubitt's interpretation is correct because these design elements are given as the assessment matters for a subdivision complying with a minimum site size (rule 10.5.2.15(iii)). Thus, the clustering of buildings (for example) is not driving smaller site size but a subdivision layout that enables the grouping of dwellings and, we add associated infrastructure, in a way that protects the landscape while maintaining the minimum site size.

*Other provisions of the 2GP*

[106] To finish off, the outcome for areas of indigenous vegetation and the habitats of indigenous fauna are that they be maintained and enhanced (objective 10.2.1). The decision version of this objective has been strengthened by recognizing "maintaining" and "enhancing" may be achieved by protecting areas of significant indigenous vegetation and the significant habitats of indigenous fauna (objective 10.1.1). Likewise, the DV policy suite has also been strengthened by the adoption of directive language across various fields of interest. A new policy provides that in the first instance, adverse effects on areas of significant indigenous vegetation and significant habitats of indigenous fauna are to be avoided. But if avoidance is not practicable then ensure that (relevantly) there is no net loss and preferably a net gain in the biodiversity values of the area (policy 10.2.1.2). Development is now "only" allowed where biodiversity values are maintained or enhanced (policy 10.2.1.1). Similarly, subdivision is now "only" allowed where it is designed to "ensure" future land use "will maintain or enhance biodiversity on an ongoing basis and second, will protect significant indigenous vegetation and habitats (policy 10.2.1.11). Following in suite, coastal biodiversity values and natural character are also to be maintained and enhanced (objective 10.2.2) by, inter alia, encouraging



[71] Page email to Registry dated 6 December 2018.
[72] Transcript (Cubitt) at 231.

conservation activity in the coastal area (policy 10.2.2.1).

[107] Finally, and not least, the potential for conflict between activities in the rural zone is minimised through measures that ensure residential character and amenity of adjoining residential zones are maintained and ensure also a reasonable level of amenity for residential activities (objective 16.2.2). Those measures include requiring residential buildings to minimize, as far as practicable, the potential for reverse sensitivity by being set back an adequate distance from site boundaries and mining activities (policy 16.2.2.1). As for what is an adequate distance, the DV rules provide that where blasting is taking place an adequate distance is 500m and where it is not taking place, new residential activities must be located 200m from the mining activity[73] (rule 16.5.10). Activities that contravene the performance standard are restricted discretionary (rule 16.5.10(3)).

**Effects on the environment (s 104D(1)(a))**

[108] The four proposed building platforms and two existing dwellings are spread across the north facing slopes of the property. We address next the localised effects on land and property. These effects are relatively discrete and together with the objectives and policies can be dealt with on their own.

***The effect on the Granger and Bardell property***

[109] Recalling that the operative DP has provisions addressing the effect on the amenity of adjoining properties specifically (6.3.6) and the 2GP more generally (16.2.3) we consider concerns raised in relation to the amenity presently enjoyed at the Granger/Bardell property. The property is owned by two members of the appellant group and is located west of the quarry (Lot 3).[74]

[110] We accept Mr Roberts' evidence that this property is already impacted by the noise from the quarry.[75] This was confirmed on our site visit; the quarry noise is such that it cannot be said the Granger/Bardell property is imbued with a sense of peace or

---

[73] A condition of consent addresses blasting at the quarry site, the applicant has offered a condition that the new dwelling on Lot 4 will not be constructed until the quarrying activity on Lot 3 has ceased. The former quarry will continue to be used for mining activity, but this activity will be or become a landfill.

[74] Appellants' EiC at [143]-[175].

[75] Roberts, supplementary evidence dated 8 August 2018, at [31]-[35].

quietude such that would be adversely impacted by the additional noise from vehicles travelling along the accessway to Lots 1 and 2. Rather, the additional noise (and lights) from vehicle traffic will have an immaterial effect on the aural and lighting amenity currently enjoyed at the property.

[111] We heard evidence that the quarry consent holder (the applicant in this proceeding) has not complied with the conditions of the quarry consent and has removed landscaping that screened the view of the quarry.[76] The landscaping was said to have been removed when the consent holder bulldozed a track along the Lot 3 boundary (being the access proposed for Lots 1 and 2).

[112] We digress to record that the consent holder's compliance with the conditions of the quarry consent, is the subject-matter of enforcement proceedings before another division of the Environment Court. Those proceedings are on-going.[77] That said, we take note of the fact – unchallenged – that Peninsula Holdings has not produced a management plan for the quarry for the City Council's approval as directed under the conditions of the quarry consent granted in 2007.[78]

[113] On the issue of compliance with the quarry's landscape conditions, the evidence before us was insufficient to make any finding. Even if the appellants are correct in their understanding that an accessway cannot be located along the alignment of the bulldozed track, this does not necessarily mean subdivision consent cannot be granted. It means that if consent is granted it may not be able to be exercised. We leave this matter to be resolved by Judge Newhook's division of the Environment Court.[79]

[114] The appellants also raised an important issue as to the integration of the accessway into the landscape. We have considered this issue in the wider context of the proposal's effect on the landscape.

*Outcome*

[115] While the proposal would change the composition of their view and introduce traffic into their immediate environment, these changes would have only a minor effect

---

[76] Appellants' EiC at [130].
[77] [2017] NZEnvC 091; [2017] NZEnvC 094; [2018] NZEnvC 132.
[78] Transcript at 436-439.
[79] Transcript at 399.

on the occupants' amenity and are not contrary to any relevant provision.

***Use of public roads***

[116] The appellants raised a concern about the adequacy of the carriageway on public roads to safely accommodate traffic generated by the future occupants of the subdivision.

*Outcome*

[117] We accept the evidence of Mr G Fisher, a City Council transport planner, that the proposal will have negligible effect on the safety and efficiency of the transport network; his opinion was not effectively challenged under cross examination.[80] There are no policy implications arising from the development on the road network.

***Reverse sensitivity effects between the quarry and occupants of dwellings***

[118] The building platform on Lot 4 is approximately 150m (maybe less) from central work areas in the quarry and some 10m from the accessway used by quarry vehicles (ROW B).[81] Subject to confirmation[82] the dwelling on Lot 2 is approximately 420m from the working quarry, at which blasting is taking place.[83]

[119] The applicant also seeks consent to "re-authorise" the existing dwelling located within the working quarry on Lot 3.

[120] For reasons that we will give next, we decline consent for Lot 4 and its building platform. We have no evidence to satisfy ourselves as to our jurisdiction to "re-authorise" the existing dwelling on Lot 3. We will determine the reverse sensitivity effect arising from blasting on Lot 2 in the Final Decision noting the evident incongruity with 2GP Rural policy 16.2.4.3(d) which is to only allow subdivision where future land use activities do not increase the potential for reverse sensitivity.

---

[80] Transcript at 342-345.

[81] Appellants' EiC at [195]-[205].

[82] The plans produced by the applicant are not of a scale which we can verify the distance of the dwellings from the quarry face, being expressly marked in some cases "Do Not Scale".

[83] Applying available evidence, the figure in the appellant's memorandum dated 6 December 2018 at [8] appears reasonably accurate.

[121] As the appellants rightly point out the occupation of a dwelling on the building platform will very likely have a reverse sensitivity effect upon the quarry.[84] "Reverse sensitivity" refers to the potential for the new benign activity to restrain an existing activity that is lawfully carrying on its business: per *Auckland Regional Council v Auckland City Council.*[85] The effect typically occurs where a benign activity seeks to locate within the effects radius of an established activity: per *Independent News Auckland Ltd v Manukau City Council.*[86] Even though both land uses – existing and new – are legally established, the potential for the reverse sensitivity effect arises because the uses are or may be incompatible: per *J M & D M Sugrue v Selwyn District Council.*[87]

[122] Both planning witnesses recognised that the quarry could give rise to a range of adverse effects on proximate residential activities. Thinking about the compatibility of the activities during the hearing, Mr Cubitt advised there should be no residential activity while extractive and filling activities are taking place as these have a similar range of effects.[88] Mr Forsyth observed that a working quarry is a land use that is generally considered incompatible with proximate residential activity. We agree. However, unsupported by any analysis of the quarry activities, the planners, opined their incompatibility could be addressed by a no complaints covenant. A draft copy of the no-complaints covenant was not produced and it emerged that the applicant was not proposing to secure the covenant by a condition of consent.

[123] At the end of the hearing the applicant proposed a covenant deferring the residential development of Lot 4 while extractive activities were occurring. The restriction would not apply to the fill activities that are also authorised at this site.[89]

*Outcome*

[124] The applicant submits there is no scope under the notice of appeal to oppose the grant of consent based on a reverse sensitivity effect. We disagree. While the notice of appeal is broadly framed, the issue of reverse sensitivity is a consequence of site size. The applicant takes no issue with lot size being within scope of the appeal. By

---

[84] Appellants' EiC at [190]-[210].
[85] *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 at 206.
[86] *Independent News Auckland Ltd v Manukau City Council* Decision A103/2003 (EnvC) at [63].
[87] *J M & D M Sugrue v T R & Selwyn District Council* Decision C43/2004 (EnvC) at [12].
[88] Transcript at 286.
[89] The term "fill" is not defined in the 2GP. The term "landfills" is defined. We see no express definition of "cleanfills".

subdividing the underlying title of the quarry consent, the applicant would authorise new sensitive activities to locate within the effects radius of the quarry.

[125] To the extent that the conditions of the quarry consent address any effects, the conditions apply at the boundary of the "site". "Site" means CFR 207075 and includes land proposed in Lots 1, 2, 3 and 4. If the building platforms on Lots 1 and 2 are within the separation distance for the blasting activity the potential for adverse noise or dust effects on future occupants would require assessment.

[126] In the case of Lot 4, the applicant proposes developing the site after quarrying (and blasting) ceases. The potential effects the fill activity only, include effects on amenity from noise and dust. More troubling is the potential for injury or death arising from vehicular and pedestrian conflict on proposed rights of way B and C.

[127] Filling is a rural activity and a productive use of rural land. The design of the subdivision demonstrates no awareness of reverse sensitivity. The proposed conditions of consent would bring no relief from the effects of the filling activity. The decision not to amend the quarry consent means the consideration of setback as a tool to minimise effects is not available (operative District Plan 16.2.4 and 16.2.2.1). As for any no-complaints covenant, such a covenant has no value in addressing the adverse effects of the quarry – these effects will subsist. For the applicant, the covenant simply means "if you complain, we don't have to listen"; *per Ngatarawa Development Trust & ors v Hastings District Council* at [27].

[128] We conclude, the land in Lot 4 (and in the case of Lot 2, possibly) is required for the internalisation of the adverse effects of the quarry in accordance with the conditions of the quarry consent. The potential for reverse sensitivity would be increased were residential activities established on Lot 4 and possibly Lot 2. If that occurred, the productivity of the quarry, a rural activity, may not be maintained. We conclude the creation of Lots 3 and 4 together with the building platform and existing dwelling is contrary to the objectives and policies of the District Plans (operative District Plan objective 6.2.4; 2GP objective 16.2.4).[90]



[90] In the absence of appropriate consent conditions, the potential for reverse sensitivity would be increased were the future occupants of the existing Lot 3 dwelling unrelated to the quarry or filling operation.

**The effects on ecological values**

[129] As noted earlier, the property contains significant indigenous vegetation and significant habitats of indigenous fauna; including areas which have qualified the natural landscape as outstanding.

[130] By way of context only (the document is not relevant under s 104D) the Government has four national priorities for protecting biodiversity on private land which identify rare and threatened environments and ecosystems at a national level.[91] National Priority 1 is to protect indigenous vegetation associated with land environments that have 20% or less remaining indigenous cover. Part of Lot 6, outside of an area of land to be covenanted, is located on an Acutely Threatened Land Environment with less than 10% of the indigenous vegetation remaining. This vegetation also qualifies under National Priority 1 for protection.

[131] National Priority 2 is to protect indigenous vegetation associated with sand dunes and wetlands. The saltmarsh on Lots 3 and 6 and wetlands dominated by *Carex geminata* on Lots 3, 4 and 6 qualify under this policy.

[132] National Priority 4 is to protect habitats of Acutely and Chronically Threatened Indigenous Species. The habitats of two At Risk species found on Lot 6, and very likely Lot 3, qualify.

[133] Dr Rate was concerned to avoid the subdivision having a greater impact on the natural environment than what is already occurring under farm management, by the disturbing of wildlife; promoting predation of wildlife; spreading weeds or discharging sediment into the waterways.[92] The main threat to the jewelled gecko is habitat clearance and fragmentation; predation by pest animals and poaching.

[134] The subdivision and use of land may change the ecological context of the receiving environment. In Dr Rate's opinion, unless the development is carefully and purposefully managed, there will be an adverse effect on vegetation and fauna. The potential effects discussed are perhaps generic to all subdivision activities, and include increased disturbance of wildlife (people and vehicles); increased disturbance and


[91] Rate, EiC at [31]-[35].
[92] Rate. EiC at [50].

predation of indigenous fauna by pets, in particular cats and dogs; introduction and spread of weeds and sedimentation of the waterways.

***Recommended actions in response to adverse effects on ecological values***

[135] Given the significance of vegetation and fauna on the property Dr Rate recommended the legal protection of the saltmarsh on Lot 3 and its adjacent indigenous vegetation and habitats; to extend the habitat of the jewelled gecko to compensate for predation and to consider protection outside of an area of land to be covenanted in response to future changes in land uses.[93]

[136] He further recommended that a management plan be prepared that identifies the type and extent of restoration activities to be undertaken and sets time scales and closure criteria for completion of those actions. It is important, in his view, that the consent authority monitor the Management Plan.[94]

*Proposed conditions*

[137] The applicant proposed to enter into a covenant with the Dunedin City Council over part of Lot 3 for the purpose of "protecting and enhancing areas of indigenous vegetation". The covenant would require the preparation, approval and implementation of a management plan. The management plan is to address the matters identified by Dr Rate (condition 3(c)). In lieu of this covenant, the conditions provided for the applicant registering a QEII covenant (condition 3(d)).

[138] A copy of the draft covenant and management plan were not provided. Nor did the court receive an accurate plan of the areas to be covenanted.[95]

[139] Both Dr Rate and Mr Moore envisaged the covenanted land would be fenced and include the buffer area around the wetland.[96] However, on Exhibit Trust 1 the wetland buffer planting is shown outside the covenant[97] and this was subsequently confirmed by

---

[93] Rate, EiC at [39]-[43].
[94] Rate, EiC at [47].
[95] Transcript (Cubitt) at 165.
[96] Transcript (Moore) at 106; Transcript (Rate) at 137-138.
[97] Transcript (Rate) at 145.

Mr Cubitt.[98]

[140] While sub-clauses in condition 3(c) address the covenanting of "indigenous tree land"[99] and "hill slopes covered in exotic grassland", those features are not identified on any plan. Having explored the matter with the witnesses, the indigenous tree land is a stand of Ngaio and Kowhai trees located on Lot 6.[100] However, condition 3(c) does not take in this area of land. Neither Mr Moore nor Dr Rate could assist our understanding of where the "hill slopes covered in exotic grassland" were to be found – bearing in mind this description could apply to most of the property. Mr Moore thought the reference was to hill slopes on Lot 1 near the wetland.[101] Dr Rate did not know.[102] While the conditions refer to the habitat of the jewelled gecko, this has yet to be established for Lot 3, although there is habitat on Lot 6.[103]

[141] Notwithstanding Dr Rate's recommendation that the management plan condition identify the type and extent of restoration activities to be undertaken and set time scales and closure criteria for completion of those actions, this has not carried through into conditions. He agreed with the court, that a direction in a management plan requiring certain matters to be investigated or surveyed, without more on required responses and intended outcomes, does not secure their protection or enhancement (the stated purpose of the covenant).[104]

[142] We sought the assistance of the planning witnesses on how the condition was to operate. They were not the authors and each was critical about aspects of the same, acknowledging that conditions of consent providing for a management plan are to include clear objectives.[105]

[143] In addition to the matters noted above, Mr Forsyth also had concerns with the sub-clause pertaining to the harvesting of an exotic woodlot in the proposed covenant area. In addition to a wetland, the covenant area would include a mix of indigenous forest, regenerating bush and forestry and there may also be forestry outside the

---

[98] Transcript at 163; Exhibit Trust 1.
[99] Also referred to in evidence by Dr Rate as ngaio shrubland. See EiC at [40]; Transcript at 146.
[100] Transcript (Rate) at 146-147; Transcript (Moore) at 146; Transcript (Forsyth) at 423.
[101] Transcript (Moore) at 107.
[102] Transcript (Rate) at 148.
[103] Transcript (Rate) at 147.
[104] Transcript (Rate) at 138 and 147.
[105] Transcript (Cubitt) at 289-290. Transcript (Forsyth) at 418.

covenanted area immediately uphill of the area. There was no clear objective precluding the destruction of the indigenous values of this area during harvesting.[106]

***Discussion***

[144] Whether by deed or by contract, a covenant is a promise made between two people. While the conditions give the purpose of the covenant as "protecting and enhancing areas of indigenous vegetation and ecological habitat within Lot 3", the promises made as between the parties are not recorded.

[145] Management plans are a different tool and can be useful in that they describe the methods (practices and procedures) to achieve the conditions of a consent or, in this case, the promises made in a covenant. Where management plans are used to implement consent conditions, the conditions will usually provide they be developed by a suitably qualified expert; that the consent authority is to certify the methods in the plan will achieve the outcomes stated in the conditions; require the consent holder to conduct their activities in accordance with the management plan and finally, provide that the management plan will be periodically reviewed. Depending on their subject matter, the management plan will provide whether or not the plan is to endure for the lifetime of the consent.

[146] In this case, beyond a broad statement of the covenant's purpose, the promises made between the covenanting parties are not stated. Instead, the conditions imprecisely describe the content of the management plan by the subject matter the plan will address. In its current form, the proposed covenant of the saltmarsh will not protect significant habitats and wildlife within the landscape, which are recognised values within this landscape.

[147] That said, we doubt that a covenant is an appropriate condition where it is proposed as direct mitigation for the adverse effects of a proposal. If approved, could the consent authority monitor the implementation of the management plan? Would not the monitoring and enforcement of promises made in a covenant be a private matter as between the parties i.e Dunedin City Council in its non-regulatory capacity and thus not amenable to RMA enforcement action by third parties?



---

[106] Transcript (Forsyth) at 417-423.

[148] The parties did not address us on the appropriateness of the covenant as a mechanism to address effects and so we express no concluded view on the matter.[107] We do record, however, that the applicant was encouraged to respond to the expert evidence and review the conditions of consent but chose not to do so.

***Outcome***

[149] We accept Dr Rate's recommendation for active management and protection of the saltmarsh. The proposed mechanism is not, however, fit for purpose.

[150] Given this, the evidence does not place us in a position to make any affirmative finding that the proposal is not contrary to the objectives and policies or that the values of the saltmarsh will persist – and in that sense, are "minor". Instead we are simply left with uncertainty.

**The effects on the Outstanding Natural Landscape, Rural Character and Visual Amenity**

***Introduction***

[151] We agree with Mr Forsyth that the natural landscape's "outstanding" status does not preclude development.[108] Rather what is to be protected are those values that qualified the landscape as outstanding. Under the 2GP outstanding natural landscapes are protected from inappropriate development, and the values are maintained and enhanced (10.2.5) when the effects of change on the values are "insignificant" (10.2.5.8(DV)).

[152] In contrast with the operative District Plan, the 2GP has a convention to describe the level of effects under consideration. It was very important, therefore, that the methodology employed by the witnesses take cognisance of this.

[153] The landscape evidence addresses the effects of buildings and structures within the outstanding natural landscape. However, the witnesses constrained their evaluation


[107] We note that as an alternative to the applicant entering into a covenant with the City Council, the conditions provide for a covenant with QEII Trust.
[108] Forsyth, EiC at [34].

to subdivision activities (NV 10.2.5.11), perhaps overlooking the fact that this policy cross-references NV 10.2.5.6.[109] In doing so, they may have been unaware that the effect of change on the values are to be "insignificant". Their evidence presents a difficulty for the court where adverse effects on values have been assessed using a different convention or protocol to the 2GP. To illustrate, when the landscape architects describe some of the level (magnitude) of some effects in terms of being "very low", "low" or "moderate/low" does this mean the effects are "insignificant" as contemplated under the provisions (2GP, 10.2.5; 10.2.5.8)? There is nothing before us which would support this inference.

[154] Following the release of the decision on 2GP submissions, the planners address objective DV 10.2.5 and policy DV 10.2.5.8 (formerly NV 10.2.5(6)), asserting the effects on landscape values will be "insignificant". They do not point to where the landscape architects give this evidence. Also, absent the assessment of related land use consent(s), it is difficult to accept the planners' conclusion as robust. Indeed, the assertion that the effects will be "insignificant" is inconsistent with the landscape architects evidence as to the scale of adverse effects in the short to medium term (i.e. up to ten years). Longer term the scale of effects for Lots 1 and 2 are contingent on the effectiveness of landscape treatment. While landscape architects may consider those long-term effects on values 'acceptable' to them, it does not follow they are saying the effects are "insignificant". If the effects on values are not insignificant, the proposal will be contrary to objective 10.2.5.

***Lots 4 and 7***

[155] We have not assessed the effect on landscape, rural character and visual amenity in relation to the building platform on Lot 4. For the reasons given, it is our judgement that residential activity at this location is incompatible with "filling" on the neighbouring site.

[156] The appellants do not have any concern with the proposed building platform on Lot 7. Their objection is with the fact that the proposed lot size is less than the minimum provided in the District Plans. We record our agreement with the landscape experts that a dwelling at the base of Mt Charles set amongst the domesticated gardens and shelterbelts associated with the former dwelling at this site, will not change the


[109] New policy DV 10.2.5.8 also uses the term "insignificant" to describe the level of effects.

landscape's character.

***Lots 1 and 2***

[157] Lots 1 and 2 are located on a moderately visually sensitive low ridgeline with high visual amenity values.[110] The two landscape experts straight-out differed on many key aspects of this part of the development. On this occasion, we prefer Mr Forsyth's evidence because we have a clearer sense of the comparator landscape against which he was assessing the relative change and the probable consequences of change. In doing so he better contextualized how the landscape and visual conditions could respond to and be impacted by change.

[158] Mr Forsyth orientated the court into his assessment of effects by acknowledging the primary effect of the proposal will be a new pattern of land use in a visually open and elevated pastoral landform.[111] This change in the landscape will alter the composition of the views and, in turn, the visual amenity derived from the same.

[159] We accept his opinion that the use of the land for this purpose on Lot 1, will have a moderate to high adverse visual effect on the landscape. We are very concerned with his advice that it is unlikely the mitigation planting on the southern slopes will establish at this location "without a sustained effort over a number of years".[112] But even if it did, the planting around the dwelling and the partial removal of a shelterbelt to secure views of both Inlets from the ridgetop, is likely to engender its own – substantial – adverse effects.[113]

[160] Despite the applicant not having appealed the conditions of the consent, the condition precluding the visibility of the dwelling on Lot 1 from any location on Hoopers Inlet Road was deleted.[114] The evidence made clear that at its proposed location the dwelling would be visible from this vantage point.[115] No explanation was offered for this change.

---

[110] Moore, EiC at [40]-[41]. Forsyth, EiC at [106].
[111] Forsyth, EiC at [51].
[112] Forsyth, EiC at [47] and [130].
[113] Forsyth, EiC at [127].
[114] Condition 3(h) of the latest set of conditions.
[115] Moore, EiC at [39].

[161] Were the two building platforms to remain in their current location, Mr Forsyth's opinion that overall change in landscape character will likely have a moderate to high adverse effect is due principally to the location and elevation of Lots 1 and 2.[116] In response to these concerns, he recommended the building platform on Lot 1 be repositioned away from the ridgetop, lower down the north-facing slopes of Varley's Hill. If the platform was repositioned, the change in the landscape's attributes would have a lesser effect. With this change, taken together with the development at the other platforms, his overall view was that the development would have an acceptable level of effect on visual amenity.[117] While Mr Moore's opinion was that the adverse effects of the buildings was already acceptably low, he could also support the repositioning of the building platform on Lot 1.[118] Their evidence was not challenged by the applicant's counsel, but in saying that we were not told whether the applicant agreed to modify the proposal accordingly.

***Proposed planting and environmental enhancement conditions***

[162] We agree with Mr Forsyth that the development of Lot 1 and 2 is unlike the existing patterns of development situated near the coast.[119] Landform and vegetation will be key to successful integration of the development into both visual catchments.[120]

[163] The siting of the two building platforms, Lot 2 in particular, is somewhat advantaged by their location relative to existing exotic and indigenous vegetation. Bearing in mind the elevated position, vegetation behind Lot 1 and in the foreground of Lot 2, together with the supplementary planting proposed by Mr Forsyth, will minimise the prominence of future buildings within the landscape. This affords an opportunity to design the subdivision in a way that will visually anchor the development within the landcover. However, we are mindful of there being no evident condition controlling the gross floor area of building within the proposed envelopes. Nor does the court have evidence on earthworks necessary for the creation of building foundations on sloping land[121] or the formation of rights of way. Little insight or certainty is created by conditions that the earthworks should "blend seamlessly" with natural, surrounding contours.[122]

---

[116] Forsyth, EiC at [64] and [126].
[117] Forsyth, EiC at [136].
[118] Landscape JWS, dated 6 August 2018 at [11]-[12] and [15].
[119] Forsyth, EiC at [44].
[120] Forsyth, EiC at [32]-[34].
[121] Forsyth EiC [41] ff.
[122] For example, Condition 3(h)(i)(iv)

[164] We took note of the experts' recommendation that success of the mitigation and environmental enhancement planting depends on the process being competently managed and to that end they recommended a "binding management plan".[123] The necessity for this seems self-evident given the harsh growing conditions on the Peninsula. We are mindful also of the deleterious effects of the applicant's current land management on the covenanted wetland in Lot 4,[124] and we are mindful also of its continuing omission to produce a management plan for the quarry.

[165] The recommendation that the conditions be secured by a management plan was not, however, taken up. Instead the conditions for consent propose mitigation planting (referred to in conditions as "screen planting")[125] be undertaken six months after the issue of a building consent and second, environmental enhancement planting (referred in the conditions as "locally appropriate indigenous species") be undertaken prior to the issue of the s 224 certificate. Being low in confidence about what may materialise, but conscious of the scale of effects on the landscape and visual amenity predicted by Mr Forsyth in the short to medium term, our tentative thinking is prior to construction commencing we would require certification by an appropriately qualified person that the screen planting is thriving and has established to a height sufficient to acceptably integrate the dwellings into the landscape. In other words, something more than a condition requiring the planting of plants. Alternatively, we would wish to have compelling evidence that there would be a greater probability of successful planting with an owner resident on-site.

***Other matters***

[166] Three other matters arise.

[167] First, the building platforms and lots have common mitigation measures. The mitigation maintains the values identified in the 2GP in relation to the property's historic features and light pollution.[126]

---

[123] Landscape JWS, dated 6 August 2018 at [8]. The experts are addressing both mitigation and environmental enhancement planting and we assume, therefore, the management plan applies to the location of all the plantings.

[124] Rate, EiC at [30].

[125] While the keys to the attached plans do not adopt these labels, we infer screen planting occurs adjacent to the building platforms.

[126] Appendix A3.2.3 pp 40-44.

[168] Second, both District Plans note the siting of roads and tracks may also threaten the landscape's value. The 2GP gives, by way of example of poor siting, roads cutting across the landform. There is no evidence that consideration was given to the 2GP's design recommendation that roads be in the least visually prominent area and, wherever possible, follow contours of the landform.

[169] The evidence of the landscape architects was that the acceptability of the lineal form of the driveway to Lots 1 and 2 depends on the existing plantings either side of the proposed accessway. Mr Moore recommended the conditions of consent secure the retention of these plantings and under cross-examination he agreed there was room to better integrate the driveway into the landscape with additional planting, although he was not in a position to make recommendations.[127] The applicant did not respond by proposing amendments to either secure the existing plantings or to augment the same.

[170] Together with the quarry, the existing track detracts considerably from the visual amenity otherwise afforded by this landscape. The development affords an opportunity to undertake remedial work by upgrading of the carriageway.

[171] The landscape plantings east of the track serve to reinforce the track's lineal alignment. Without additional landscaping, the lineal profile of the access is likely to become more emphasised when the carriageway is formed to the requisite standard, including the concreting of the most visible section. If the applicant wishes to pursue the application it will need to consider whether the existing landscaping can be augmented to reduce the lineal profile of the accessway and propose conditions of consent that properly secure the landscape planting. Considered advice is required on the appropriate colour tint of the concrete.[128]

[172] Third, we have signalled above our misgiving that the applicant has not applied for all necessary consents. By its own admission this most certainly involves the consent required under operative DP rule 14.6.1(a) for the erection of buildings within a Landscape Building Platform and, we think, the corresponding provisions in 2GP DV rule 16.3.4. From our reading of the plan it appears highly likely that consent for earthworks is also required under 2GP DV Section 8A.1 and possibly other rules as well.


[127] Transcript at 408-409.
[128] Mr Forsyth, EiC at [106] recommended a sand tint and Mr Moore, EiC at [40(f)].

[173] It is well established that "where more than one resource consent is required for a proposal, applications for all consents required should be made at about the same time".[129] The reason for this is set out in the well-known case of *AFFCO New Zealand Limited v Far North District Council and Northland Regional Council.*[130] Quoting directly from Judge Sheppard:

> The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to impose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials. (The limits on delegation were authoritatively described in Turner v Allison [1971] NZLR 833; 4 NZTPA 104(CA)).

[174] In the circumstances of this case, we remain to be satisfied why it is appropriate to grant subdivision consent in the absence of application for all consents required, particularly in relation to the earthworks consents. We are mindful of objective 18.3.4 in the operative DP and its direction that subdivision activity consents should be considered together with appropriate land use consents and heard jointly. We tend to the view that the earthworks and subdivision activities, at least, are integral and should have been bundled together in a comprehensive application. We are reinforced in this view by the assessment matters for subdivision activities that direct us to the appropriateness of any building platform including its location in relation to any vehicle access or service connection (cl 18.6.1(h)). While we have an indicative two dimensional location of the accesses, in the absence of any application for earthworks consent, we are uncertain which evidence is led to satisfy the court that the building platforms are appropriate. Does not the potential scale of the earthworks associated with the platforms and vehicle access together with an unknown risk of land instability[131] in some areas, support a comprehensive assessment of the proposal?

[175] Moreover, the appropriateness of a building platform in an outstanding natural landscape is addressed in the same provision and includes consideration of restrictions of floor area and height of buildings and associated development. While each building platform is dimensioned 30m x 40m, we do not understand this represents the restriction

---

[129] *AFFCO New Zealand Limited v Far North District Council and Northland Regional Council* Decision A6/94 at 13 ff. We expect that the reference in *AFFCO* to "about the same time" recognised that in that case there were two respondent consent authorities. That is not the case on the current proceedings.
[130] Decision A6/94.
[131] Cl 18.6.1b.

in floor area. Indeed, the scale of the buildings, other than their maximum height, is unknown in spite of this being a matter identified in the operative District Plan (at least) for assessment.[132]

**Effects on the environment (s 104D (1)(b))**

***An alternative baseline environment and proposed density of development***

[176] The grounds of appeal include the allegations that the decision:

(a) unlawfully assessed the magnitude of effects of the application against an erroneous permitted baseline; and

(b) unlawfully assessed the magnitude of effects of the application against an erroneous determination of the existing environment.

[177] Taken at face value, these grounds of appeal are somewhat unexpected as the decision does not refer to a permitted baseline applying and the findings of the Commissioner on the existing environment do not extend beyond the statement that he accepts the description of the environment contained in a council officer's report and in the application.

[178] Elsewhere in the decision the Commissioner also observes that both the operative and proposed District Plans anticipate a greater degree of development than what is proposed by the applicant. Indeed, the Commissioner concludes the application presents a better approach to managing the effects on the environment than the "cookie cutter approach" afforded by the rules in the District Plan.[133]

[179] Leading on from that, counsel for the applicant, Mr Page, developed a theory of the future environment to which he would have the court give weight. He reminded us of the High Court decision of *Queenstown Central Ltd v Queenstown Lakes District Council*,[134] a case also concerning non-complying activities. Our judgement, he submitted, about the future environment and assessment of the effects of the proposal under s 104D(1)(a), must be made having regard to the provisions of the operative


[132] Transcript (Moore) at 113-114.
[133] Dunedin City Council decision on Resource Consent Application SUB-2016-58, LUC-2016-336 and LUC-2006-370881/C at 16 and 17.
[134] [2013] NZHC 815 (HC).

District Plan.[135] "[T]he 'real world approach' requires more than simply ignoring the reality that the future may look very different". Indeed, were this consent not to be upheld the applicant says the real world may be considerably more impacted by alternative development scenarios that are supported by the provisions of the operative District Plan.[136]

[180] Mr Page frankly admitted his argument was to overcome the directive policy in the proposed DP to:

> Avoid residential activity in the rural zones on a site that does not comply with the density standards for the zone, unless it is the result of a surplus dwelling subdivision (policy 16.2.1.7).[137]

[181] Giving planning evidence on behalf of the applicant, Mr Cubitt was charged with establishing the future environment if the applicant were to proceed with a "complying" subdivision or alternatively, with a proposal to establish residential activities on the property's existing titles.[138]

[182] Mr Cubitt's evidence was that, subject to compliance with minimum lot size, the District Plan's density rules give rise to a "yield" in the range of 7 to 18 dwellings[139] depending on the development scenario elected. Mr Cubitt could give credence to this "future environment", which includes the 185 ha Farm Block, because of his understanding that Dunedin City Council will never refuse an application for subdivision that complies with the minimum lot size rule under the operative District Plan.[140]

[183] In contrast with the above, the principal benefit of the proposal under appeal is that only four new dwellings are proposed and the Farm Block will be subject to an amalgamation covenant (condition 2(d)) and a consent notice registered on the title precluding further residential development of the land (condition 3(r)).[141] Mr Cubitt's evidence was that the consent notice only "partially reflected" what was intended.

---

[135] Page, opening submissions at [35] referring to paragraphs [35] and [66] of *Queenstown Central Ltd v Queenstown Lakes District Council*.
[136] Page, opening submissions at [36].
[137] Transcript at 466.
[138] Page, opening submission at [34].
[139] Cubitt, EiC at [67]. We have already commented on the level of density anticipated under the existing title structure or a "cookie cutter" 15 ha lot subdivision.
[140] Cubitt, EiC at [71].
[141] Recognising the exception for one more dwelling in the circumstances stated in this condition.

However, he did not correct the condition by proposing an amendment.[142]

[184] In a separate condition, a consent notice is to be registered stating residential development shall not be permitted on Lot 6 and that it could not be used with other land to meet the density requirements for a dwelling on other land (condition 3(s)).

***Discussion***

[185] Returning to *Queenstown Central Limited v Queenstown Lakes District Council*, this case concerns an appeal to the High Court against the decision to grant of resource consent to build a Mitre 10 and Pak'nSave at Frankton Flats, Queenstown. The applications were directly referred to the Environment Court which, in separate decisions, granted consent.

[186] Allowing the appeals, Fogarty J found the Environment Court had created an artificial future environment.[143] This had come about when the court applied *Queenstown Lakes District Council v Hawthorn*[144] in a way that removed from its consideration the operative District Plan's objective for Frankton Flats.[145] For context, the relevant objectives and policies of the operative District Plan follow:

> 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.

---

[142] Cubitt, EiC at [26].

[143] *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177; *Foodstuffs (South Island Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 at [85].

[144] [2006] NZRMA 424 (CA).

[145] At [49]. See also Environment Court decision *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 for *Pak'n Save* at [104]-[105] for discussion on *Queenstown Lakes District Council v Hawthorn*.

[187] A proposed District Plan for Frankton Flats area had also been notified (referred to by the High Court as PC19(CV)). The overall purpose of PC19(DV) was the completion of the rezoning of Frankton Flats for urban activities, implementing the above objective and policies.[146] PC19(DV) was, however, the subject matter of several appeals and, agreeing with the Environment Court, Fogarty J found that the ultimate shape of PC19(DV) was difficult to forecast.[147]

[188] While Frankton Flats was zoned General Rural under the operative District Plan, that plan recognised the area would be urbanised.[148] There was no suggestion that Frankton Flats would remain undeveloped as rural land, indeed it was going to be the setting of intensive development.[149] As a consequence of the Environment Court's decision, Fogarty J found that the court had not considered either the subject site or the receiving environment as a place where industrial activity may occur under the operative District Plan; an approach which Fogarty J held was contrary to objective 6 of the operative plan which expressly provides for this activity.[150] This precluded an assessment of the effects of the proposed retail activities on the environment and of any determination whether those effects "will be" minor under s 104D(1)(a). It is in this context that Fogarty J remarked there needed to be a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment".[151] The High Court held this was a significant error of law.[152]

[189] In summary, we understand *Queenstown Central Limited v Queenstown Lakes District Council* to say that the environment is not circumscribed solely by its natural and physical attributes "but is also shaped by the uses of land detailed in the provisions of the District Plan".

*Strategic propositions*

[190] Mr Page's submission is developed under the heading "Baseline" and we infer the applicant's strategic proposition is that there is a level of development that could occur

---

[146] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 (HC) at [25].
[147] *Queenstown Central Ltd* at [33].
[148] *Queenstown Central Ltd* at [23].
[149] *Queenstown Central Ltd* at [39].
[150] *Queenstown Central Ltd* at [48]-[49].
[151] *Queenstown Central Ltd* at [85].
[152] *Queenstown Central Ltd* at [85].

within the environment and this level is the "baseline" above which, or in relation to which, this proposal is to be assessed. Alternatively, the court should give weight to the expert opinion that the proposed development is an improvement on an alternative which the applicant may proceed with if it is unsuccessful on appeal.

[191] We find, however, the applicant's approach to be novel and unsupported by *Queenstown Central Limited v Queenstown Lakes District Council.* Following *Queenstown Central Limited v Queenstown Lakes District Council* we have no hesitation in finding that within the rural environment some level of residential development is acceptable. This is consistent with the objectives for the area under both the operative and proposed District Plans.

[192] Unless the future environment was one that was permitted and for which no consent was required, the applicant cannot overcome the directive policies in the 2GP in the way proposed. Instead, the applicant needed to engage with the content of the District Plans.

[193] The argument overlooks the salience of the application's non-complying activity status and its engagement with a wider range of policy considerations than what would arise for a restricted discretionary activity. It also overlooks the fact that residential activities and possibly earthworks require consent under both District Plans. Put another way, Mr Cubitt's environment wherein there are an additional seven to 18 dwellings, is not one that is permitted under either plan.

[194] We must assume that a consent authority, properly seized of its jurisdiction would know that it can either grant or refuse resource consent for a restricted discretionary activity (s 104C) or for that matter a non-complying activity under s 104B. And the same consent authority would make its decision having assessed the merits of the application against the relevant objectives and policies of the District Plan; *R J Davidson Family Trust v Marlborough District Council.*[153]

[195] We do not accept Mr Cubitt's assertion that the lots under minimum lot size support productive use of the land.[154] Apart from his lack of expertise to offer this opinion, what he says fundamentally cuts across the grain of both District Plans. While we do

---

[153] *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 316 at [74].
[154] Cubitt, EiC at [154], Transcript at 225.

accept that not all rural land has the same productive capacity, the rules in the 2GP are sensitive to context and minimum site size varies across different parts of rural Dunedin.

[196] By stipulating a minimum lot size the District Council is working on the level of residential density in rural areas for a number of stated purposes. The applicant approached the density provisions in each District Plan as if they anticipate a certain yield of residential dwellings within the rural environment. The idea that subdivision could be laid out in a "cookie cutter" style to *yield* 7 to 18 dwellings presumes little or no attention need be given to this complex challenging land form; the values of the environment or the productivity of rural land.

[197] Under the applicant's approach the objectives and policies are met by removing from rural production 23.2 ha of land for residential development (Lots 1, 2, 4, 5 and 7) and by jeopardising the rural activity occurring on a further 38 ha (Lot 3). Our approach is more straightforward: the provisions are met when residential activity takes place at a level of density where all sites retain their productivity and the values of the environment (in context, the ecological and landscape values) are maintained.

**Outcome**

[198] We decline to give weight to the baseline environment based on an application of *Queenstown Central Limited v Queenstown Lakes District Council.*[155]

[199] Mindful that the decision version of the 2GP may be appealed, we find the proposed eight lot subdivision to be inconsistent with objective 16.2.1, policies 16.2.1.5 and 16.2.1.7 and objective 16.2.4, policy 16.2.4.3(a) and (d) and in tension with objective 18.2.1 of the operative district plan.

[200] We are unable to reach a view on the balance of the objectives and policies of both District Plans, given that the proposed consent conditions are poorly drawn and likely ineffective for their purpose.


[155] [2013] NZHC 815 (HC).

**Overall Outcome**

[201] For the above reasons, the following decisions are final:

(a) decline in part the application for subdivision insofar as it concerns the creation of Lots 3 and 4;
(b) decline to give weight to the baseline environment based on an application of *Queenstown Central Limited v Queenstown Lakes District Council*;[156] and
(c) reject the submission that there is an adverse effect on the amenity enjoyed at the adjacent property owned by the appellants Ms M Bardell and Mr G Granger.

**Directions**

[202] We direct that by **Friday 8 February 2019**:

(a) the applicant will advise whether an amended Lot 1 building platform is to be located in accordance with Landscape JWS 6 August 2018;
(b) if the application for subdivision consent and necessary land use consents are to be pursued, the applicant is to propose amendments to the following subdivision conditions responding to the issues raised by the court and provide expert evidence confirming the content of the conditions (as indicated):
    1. Condition1: invalid condition;
    2. Condition 2(d) and/or condition 3(r): the content of the consent notice is to be confirmed;[157]
    3. Condition 2(d): we have yet to be satisfied that the amalgamation covenant is an appropriate mechanism. Contrary to what Mr Cubitt said, could not the agreement to hold with parcels of land be varied by the agreement of the promisee (City Council)? Condition 2(d) is inconsistent with condition 3(r) which addresses the land as an "amalgamated site" and second, provides OT references;
    4. Condition 3(c): again we are yet to be satisfied that a covenant is an appropriate mechanism. It is our preliminary view that it is not. The

[156] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 (HC).
[157] Cubitt, EiC at [26].

court will not approve a covenant unless it knows the promises made or alternatively, the conditions that the management plan will implement. Expert evidence confirming the content of the promises/conditions is required together with amended plans clearly showing the aerial extent of the land to be covenanted;

5. Condition 3(d): the court will not approve the QEII covenant;
6. Condition 3(f) – (g); 3(i) (xi-xii): as currently worded the court has a low level of confidence that if implemented, the conditions will reduce to the level provided for in the District Plans, the adverse effects on landscape values and rural character. The same concern arises in relation to Lots 2 and 7;
7. Condition 3(l) and (m) (Lot 3) and condition 3(n) and (o)(x-xii) (Lot 4): the court has declined the creation of these two lots. It follows the conditions will need reviewing generally and specific consideration will need to be given to the impact, if any, on the roadside landscaping of the quarry site under RMA 2006-1124 and any other consequential changes that may be required;
8. Advice Note 16 to subdivision consent SUB 2016-58 should be amended by deleting the text that commences "In this case …";
9. Regarding the land use consent conditions pertain to dwellings on Lots 1, 2 and 7, in the absence of any resource consent application for the dwellings, the parties are to confirm these conditions are not applicable.

(c) should the applicant elect not to pursue the course at (b) above it is to file and serve advice of this by **Friday 8 February 2019**. The court will then proceed to issue a final decision;

(d) should the applicant decide to address the matters raised in this decision, further directions will be made. At this stage, it is our tentative view that the hearing will need to be reconvened.

For the court:

**J E Borthwick**
**Environment Judge**

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2010-404-008097**

| | |
|---|---|
| BETWEEN | GUARDIANS OF PAKU BAY ASSOCIATION INC<br>Appellant |
| AND | WAIKATO REGIONAL COUNCIL<br>First Respondent |
| AND | TAIRUA MARINE LIMITED<br>PACIFIC PARADISE LIMITED<br>Second Respondents |

Hearing: 24 May 2011

Counsel: M Casey and B Stainton for the Appellant
The First Respondents Abiding the Decision of the Court
D Kirkpatrick for the Second Respondents

Judgment: 25 July 2011

---

**RESERVED JUDGMENT OF WYLIE J**

---

This judgment was delivered by Justice Wylie
on 25 July 2011 at 2.30 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

*Distribution:*
*B Stainton: bruce@staintonchellew.co.nz*
*M Casey: matt@casey.co.nz*
*J Milne: j_milne@xtra.co.nz*
*D Kirkpatrick: david.kirkpatrick@parkchambers.co.nz*

# INDEX

## Introduction

[1] The appellants, the Guardians of Paku Bay Association Inc (the "Guardians"), appeal a decision of the Environment Court dated 22 November 2010 granting various resource consents for the establishment and operation of a marina at Paku Bay in Tairua Harbour.[1]

[2] The notice of appeal alleges that the Environment Court erred in law in deciding that the proposed marina development would not be contrary to the objectives and policies of the Waikato Regional Coastal Plan. As is noted below, this allegation is particularised. Eight separate matters are raised and detailed grounds of appeal are set out.

[3] The first respondent, the Waikato Regional Council, granted the consents for the proposed development. It was served with the notice of appeal. It advised that it abides the decision of the Court. It considered that the relevant arguments could and would be properly presented by the appellant and by the second respondents respectively.

[4] The second respondents, Tairua Marine Limited and Pacific Paradise Limited (jointly the "applicants"), are the members of an unincorporated joint venture which was formed for the purpose of applying for the requisite consents needed for the development and operation of the marina. They oppose the appeal, and say that the Environment Court made no error of law in upholding the grant of the various consents by the Waikato Regional Council.

## Factual Background

[5] The applicants have, for a number of years, aspired to develop a marina at Paku Bay alongside reclaimed land in which they have an interest. Paku Bay is on the eastern coast of the Coromandel Peninsula. It is just inside and to the north of the

---

[1] *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 398.

entrance to Tairua Harbour. There are nearby settlements. Pauanui is immediately to the south and Tairua is to the east.

[6] Relevantly, in or about 2002 or 2003, the applicants sought the introduction of marina zones into the relevant planning documents. They were successful. The planning map in the now operative Waikato Regional Coastal Plan shows two marina zones in Paku Bay: Tairua Marina Zone 1 and Tairua Marina Zone 2. The background detailing the applicant's endeavours to develop the area are summarised in the decisions of the Environment Court which introduced those zones.[2]

[7] Following the introduction of the marina zones, the applicants applied for consent to develop a 150-berth marina in Paku Bay. That proposal became known as "Option 5". Option 5 was for a 150-berth marina occupying the whole of the area of seabed in Tairua Marina Zone 1, and part of the area in Tairua Marina Zone 2. It was proposed that there would be a substantial reclamation of part of Paku Bay on the northern perimeter of the marina basin, with a rock wall on the basin's western and southern perimeters. The proposed Option 5 marina was to be dredged to a depth of three metres and it was intended that boats would access the marina via a dredged access channel which runs adjacent to a nearby beach known as Esplanade Beach.

[8] The Option 5 proposal was declined by the Waikato Regional Council and on appeal by the Environment Court.[3] The Environment Court's decision was upheld by this Court.[4]

[9] The applicants then reconsidered their plans and ultimately they promoted a revised design known as "Option 55". Option 55 involves a 95-berth marina, mostly within Tairua Marina Zone 1, although partly within Zone 2. The total area covered by the proposal is 2.1 hectares. It involves less reclamation than Option 5, and it is intended that the marina basin will be surrounded on its outer perimeter by a PVC sea wall. In common with Option 5, boats entering and leaving the marina will be required to use a dredged channel adjacent to Esplanade Beach to access the

---

2 *Pacific Paradise Ltd v Waikato Regional Council* EnvC Auckland A86/2002, 26 April 2002 (interim decision) and *Pacific Paradise Ltd v Waikato Regional Council* EnvC Auckland A139/2003, 20 August 2003 (final decision).

3 *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A108/2005, 1 July 2005.

4 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006.

Tairua Harbour mouth and the open sea. The dredged channel however has a slightly different alignment from that proposed for Option 5, and its dredged configuration will be different.

[10] The Option 55 application came before the Waikato Regional Council, which appointed commissioners to consider it. The commissioners recommended that the 30 or so consents required for the establishment and operation of the marina should be granted, and the council adopted that recommendation. The decision included a number of conditions.

[11] A number of land use consents were also required and they were granted by the Thames Coromandel District Council, subject again to a number of conditions.

[12] The applicants, the Guardians and the Director-General of Conservation appealed the decisions of the Regional and District Councils to the Environment Court. The applicants and the Guardians reached agreement, settling the appeals as to the conditions attaching to the land use consents. The appeal by the Director-General of Conservation was also settled. The live issue before the Environment Court was the grant by the Regional Council of some 30 or so consents required for the development and operation of the proposed marina. The Court upheld the grant of the consents. At the same time, it recommended to the Minister of Conservation that restricted coastal activity consent should be granted for the necessary reclamation works, the erection of an outer sheet pile retaining wall, and the realignment and diversion of a stream within the bay. The present appeal has resulted.

**The Environment Court's Decision**

[13] The Environment Court introduced its decision by discussing the application, the parties, and the consents sought.

[14] The Court noted that the proposal before it was the latest in a long history of attempts to establish a marina in Paku Bay. It recorded the emphasis the Guardians had placed on the earlier decision on Option 5. It compared the Option 5 proposal and the Option 55 proposal by reference to a table as follows:

| | Option 5 | Option 55 |
|---|---|---|
| Number of berths | 150 | 95 |
| Capital excavation | 142,000m$^3$ | 40,000m$^3$ |
| Annual excavation | 23,500m$^3$ | 5,000m$^3$ |
| Marina basin area | 4.1ha | 2.1ha |
| Reclamation area | 3.8ha | 0.13ha |
| Length of external wall | 580m | 480m |
| Length of internal wall | 280m | 300m |

The Court noted that Option 55 focussed on the same location within the Tairua Harbour, but with a smaller footprint and a slightly different alignment for the access channel. It recorded that the materials proposed for the marina wall were plastic sheet piling with concrete capping, rather than rock as was proposed for Option 5. It noted that Option 55 included the realignment of a creek known as Grahams Creek to follow its original course around the periphery of Paku Bay. It then stated as follows:[5]

> [17] This comparison confirms a significant difference in scale between the two proposals, although the number of berths represents only about 50% more than the current proposal. The capital excavation volume for Option 5 was to have been over three times greater; annual excavation volume over four times greater; the basin area double; and the reclamation area four times larger.
>
> [18] The most notable difference between Option 5 and Option 55 is the significant reduction in the footprint of the marina. The application now almost entirely fits within the footprint for the Tairua Marina Zone I (**TMZ I**) shown in the Waikato Regional Coastal Plan (**the Coastal Plan**) as amended by the Court in its 2002 and 2003 decisions. Option 5 occupied all of TMZ I and a large area within Tairua Marina Zone II (**TMZ II**)...

[15] The Court then analysed the decisions which had been given in relation to the Option 5 application. It noted the argument submitted on behalf of the Guardians that a number of findings in these decisions were binding on it, and that there was issue estoppel in various respects. It observed as follows:[6]

> [28] We have already noted the significant differences in scale between Option 5, as considered in the previous decision, and Option 55, as proposed at this hearing. As a consequence there are differences in both the nature and scale of effects (including both positive and adverse effects) between the two proposals. Mr Casey was not arguing issue estoppel with respect to the evaluation of effects except for Esplanade Beach. However, even those findings are directly related to the nature and scale of effects and the proposed conditions of consent for Option 5. As such we do not consider the findings of

---

5 *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 398 at [17] and [18].

6 Ibid, at [28] and [29].

> the previous decision binding when considering the effects or when evaluating the significance of those effects in relation to the policy framework.
>
> [29] We do accept that the policy framework itself and the receiving environment are largely unchanged...

[16] The Court then analysed the existing environment and the relevant planning instruments. It focussed on the New Zealand Coastal Policy Statement, the Hauraki Gulf Marine Park Act 2000, the Waikato Regional Policy Statement and the Waikato Regional Coastal Plan. It observed that the Coastal Plan was the key planning document and it set out the key policy provisions.

[17] The Court then considered the status of various aspects of the proposal. It concluded that the marina proposal should be assessed as a whole, and as a non-complying activity.

[18] The Court then dealt with the key elements of the proposal and considered the effect on the environment of each, concentrating on coastal processes, water quality, marine and avian ecology, landscape, natural character and visual amenity, general amenity and recreation, economic and social benefits, and tangata whenua relationships to water and land.

[19] In relation to coastal processes, it concluded that the effects of dredging and deposition were to be regarded as minimal and discounted as de minimis. It concluded that the effect of the marina, the diversion of Grahams Creek and dredging on coastal processes would be minimal. It also considered that there were potential amenity benefits in providing sands to eroding beaches.

[20] In relation to water quality, it considered that there was potential for contaminants, but accepted evidence presented for the applicants that that risk could be managed by appropriate rules for marina users and the provision of facilities for sewage disposal. It considered that tidal flushing of the marina would be sufficient to maintain water quality with appropriate marina rules in place, but indicated that the marina would need to be managed carefully to ensure a very low risk of contamination. It considered that the conditions of consent should specify in more

detail the matters to be addressed by a marina management plan. It indicated the various matters that plan should address.

[21] In relation to marine and avian ecology, it concluded that after the construction and re-establishment period, the effects would be minimal.

[22] In relation to landscape matters, it assessed the proposal in the context of an outstanding landscape, and concluded that the proposal would not detract from that landscape although it would have low to moderate effects on the landscape of Paku Bay. It concluded that the impact of the activity on identified natural character values would be less than minor, and that some aspects of natural character would be preserved, and perhaps even enhanced. It concluded that the overall effects of the proposed marina on visual amenity would be low to moderate.

[23] Dealing with amenity and recreational issues, it considered that the works would have some beneficial amenity effects, and that some recreational activities such as bird watching would not be adversely affected. It did not consider that there would be any general amenity and recreational effects which would be more than minor, and that when considered in terms of the provisions of the district plan and the Resource Management Act 1991 (the Act), the works were acceptable. It acknowledged that Esplanade Beach is a popular recreational venue and that it is used by families for swimming. It did not however consider that there was any great risk of adverse effects on water quality.

[24] In reaching these various conclusions, the Court referred to the earlier decision on Option 5 on a number of occasions. As noted in the decision, it adopted various aspects of the decision of the Environment Court in the previous case.[7]

[25] The Court then considered the relevant statutory criteria, and concluded that the proposal could not comply with s 104D(1)(a) of the Act because the adverse effects on landscape and visual amenity when assessed from viewpoints close to the site would be more than minor. However, it went on to conclude that the proposal would not be contrary (in the sense of repugnant) to the objectives and policies of the

---

7 Ibid, at [40].

coastal plan or the regional policy statement, and that accordingly, the requisite threshold detailed in s 104D(1)(b) was met. It then went on to consider s 104 and Part 2 of the Act and reached the following conclusion:[8]

> In the end we consider that the application can be granted consent, provided that a set of conditions generally as outlined, and with improvements discussed during the course of the hearing and in this decision, is adopted. In particular, the Court is anxious to see final designs showing more detail in relation to landscaping and the treatment of the north-eastern area and access to the offshore pontoon. The conditions should explicitly address the water quality monitoring programme and the proposed marina management plan.

[26] The Court invited the applicants and the parties to discuss the final conditions. That occurred, and following a hearing on 31 March 2011, the Court issued a further decision confirming the grant of the resource consents sought and detailing the conditions attaching to them.[9]

**The Notice of Appeal**

[27] As noted above, the notice of appeal alleges that the Environment Court erred in law in deciding that the proposed marina development was not contrary to the objectives and policies of the Waikato Regional Coastal Plan. Specifically, it raises the following questions:

(a) Whether the Environment Court erred in law in finding that the proposed marina is not contrary to Policy 3.1.4B, which requires that tidal flushing rates are adequate to ensure pre-existing water quality is maintained or enhanced both within and adjacent to the marina basin, and that the use is compatible with recreational values and uses of the harbour.

(b) Whether the Court erred in law by not referring to Policy 3.3.1 which requires that existing recreational values (including coastal recreational opportunities) are maintained.

---

8 Ibid, at [239].

9 *Tairua Marine Ltd v Waikato Regional Council* [2011] NZEnvC 161.

(c) Whether the Court erred in law in finding that the proposal is not contrary to Policy 6A.1.1 which requires that potential adverse effects of marina development be avoided, remedied or mitigated by the conditions of consent.

(d) Whether the Court erred in law in finding that the proposal is not contrary to Policy 6A.1.2 which requires that the marina will not compromise safe recreation.

(e) Whether the Court erred in law in finding that the proposed marina was not contrary to Policy 6A.1.3 which requires integrated management of the marina facilities, adjacent land based activities, public access to the coastal marine area, and coastal recreational expectations.

(f) Whether the Court erred in law in making findings in respect of which there was no evidence or the only evidence was to the contrary.

(g) Whether the Court erred in law in disregarding and/or not following the findings of the Environment Court in *Tairua Marine Ltd v Waikato Regional Council*,[10] that a marina in the proposed location is contrary to Policies 3.3.1, 6A.1.1 and 6A.1.3.

(h) Whether the Court erred in law in finding that conditions it proposed in respect of a marina management plan and water quality monitoring could be taken into account in assessing the adverse effects of the proposal for the purpose of determining whether it is contrary to the policies (other than Policy 6A.1.1).

**Appeals under s 299 of the Act**

[28] Section 299 of the Act provides that a party to a proceeding before the Environment Court may appeal to this Court on a question of law. There is no right of appeal on the facts. The onus is on the appellant to identify a question of law arising

---

[10] *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A108/2005, 1 July 2005.

out of the Environment Court's decision and then to demonstrate that the question of law has been erroneously determined by the Environment Court.[11]

[29] It was common ground that the approach to be taken by this Court is that derived from the decision of the Full Court of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.[12] A question of law arises where the Environment Court:

(a) applied a wrong legal test; or

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

(c) took into account matters which should not have been taken into account; or

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

[30] Curiously, the Act does not detail the powers of the High Court on a successful appeal. Rather, r 20.19 of the High Court Rules applies.

[31] Relief ought not to be granted unless an identified error of law has materially affected the Environment Court's decision.[13] The Environment Court is the sole decision maker responsible for the balancing process required under the Act, and that process is an integral part of the consideration of resource management consents under s 104.[14] The weight to be given to the assessment of relevant considerations is for the Environment Court and is not for reconsideration by this Court as a point of law.[15]

---

11 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

12 *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153 (HC); see also *Nicholls v District Council of Papakura* [1998] NZRMA 233 (HC) at 235.

13 *Countdown Properties*, at 153; *BP Oil New Zealand Ltd v Waitakere City Council* [1996] NZRMA 67 (HC) at 69; *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC) at [22].

14 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [11].

15 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; *Hunt v Auckland City Council* [1996] NZRMA 49 (HC) at 54; *Skinner v Tauranga District Council* HC Auckland AP98/02, 5 March 2003 at [13].

[32] It was also common ground that the Court must be vigilant in resisting attempts by litigants disappointed by Environment Court decisions to use appeals to the High Court in an endeavour to re-litigate factual findings made by the Environment Court.[16] This Court can only intervene in such situations where the Environment Court has come to a decision to which, on the evidence, it could not reasonably have come. This can be described as a situation in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination.[17] It is trite law however that the sufficiency of evidence, rather than the want of it, cannot amount to a point of law.[18]

[33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence.[19] As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.[20] No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise,[21] and the weight to be attached to a particular planning policy will generally be for the Environment Court.[22]

**Submissions**

[34] Mr Casey QC for the Guardians noted that the Environment Court held that the applications were to be assessed as non-complying activities. He referred to s 104D of the Act, and to the jurisdictional thresholds detailed in that section. He referred to the Environment Court's finding that the marina proposal would have adverse effects on the environment that would be more than minor, and to its conclusion that the proposal was not contrary to the objectives and policies of the plan.

---

16 *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC) at 426.
17 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36.
18 *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC); *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605 (SC); *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA).
19 *Hungry Horse Ltd v Manukau City Council* HC Wellington M117/84, 28 October 1984 at 6.
20 *Hutchison Brothers Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC).
21 *J Rattray & Son Ltd v Christchurch City Council* (1983) 9 NZTPA 385 (HC).
22 *Foodtown Supermarkets Ltd v Auckland City Council* (1984) 10 NZTPA 262 (CA).

[35] Mr Casey then argued that the Court had disregarded Policy 3.3.1, and that the proposal was contrary to that policy. He also submitted that the Court was wrong to hold that the proposal was not contrary to other relevant policies, and that a finding that the proposal was contrary to those policies required that the consents be refused.

[36] Mr Casey argued that the Environment Court started from an erroneous premise, namely that there was a presumption in favour of the marina because that was the purpose of the marina zones. He then focussed on findings made in the earlier Environment Court decision in relation to Option 5 concerning water quality and recreational amenity at Esplanade Beach, and submitted that if "proper regard" was had to those findings, the Option 55 proposal must also be contrary to the relevant policies. He argued that issue estoppel applied, and that in relevant respects, the Option 55 proposal was simply a re-run of the Option 5 proposal. He submitted that it could not succeed, because a number of the issues raised by Option 55 had already been judicially determined when Option 5 was considered. He submitted that those issues could not be re-litigated.

[37] Mr Kirkpatrick for the applicants noted that the applicants have proposed a marina in part of Tairua Harbour which has been expressly identified in the Waikato Regional Coastal Plan as Tairua Marina Zone 1. He submitted that the relevant objectives and policies are enabling of marinas, subject to assessment and consideration of the effects of any particular marina proposal. He put it to me that the Environment Court had had regard to the relevant coastal plan provisions, and determined that this particular proposal for a marina was not contrary to the objectives and policies in the coastal plan. He argued that the Environment Court had correctly applied the threshold test detailed in s 104D(1)(b) of the Act.

[38] In regards to the argument made for the Guardians that issue estoppel applies to the issues of water quality and recreational amenity, Mr Kirkpatrick noted that before a party can rely on issue estoppel, it must show that the issue in the two proceedings is the same and that the determination relied on was fundamental to the decision. He submitted that when Option 5 and Option 55 are compared, there is a difference between the two, and the decision in relation to Option 5 did not bind the Court when it was considering Option 55. He also argued that neither the Environment Court

when considering Option 5 nor Asher J subsequently in the High Court ruled that any marina was contrary to the relevant policies. Both were careful to focus on the particular proposal before them.

[39] Mr Kirkpatrick went through the evidence which was presented to the Environment Court in relation to each of the alleged errors of law, and submitted that the Environment Court did not err in any of the respects asserted in the notice of appeal. He submitted that the conditions imposed as part of the consents were within the jurisdiction of the Court, and that the appeal should be dismissed.

[40] Before analysing the competing submissions and dealing with the alleged errors of law, I set out the relevant policies which are in issue in this appeal.

**Waikato Regional Coastal Plan – Relevant Provisions**

[41] It is common ground that the key planning document was the Waikato Regional Coastal Plan. I set out the main planning provisions in issue.

[42] Paku Bay and Tairua Harbour are shown on Map 23 in Appendix III of the Waikato Regional Council's Regional Coastal Plan. That map shows Tairua Marina Zones 1 and 2. Part 6A of the plan records that the Act states that a Regional Coastal Plan may, when appropriate, provide for the recognition of opportunities for recreation and other forms of development. It refers to the earlier Environment Court decisions approving the marina zones, records that a marina development has already been partially implemented, and that provision for a marina in those locations is consistent with the Waikato Regional Policy Statement. It identifies benefits arising from marina development, as well as potential conflicts and adverse effects. It records that potential adverse effects may be able to be avoided, remedied or mitigated through appropriate construction and design and through sensitive management and operational practices.

[43] Relevant policies in Part 3 of the plan dealing with natural character, habitat, and coastal processes are as follows:

**3.1.4B Policy - Use of and Occupation of Space for Marinas**

The use of and occupation of space for a marina in the CMA is considered appropriate where it is located in an area where the following criteria can be met:

...

f) Tidal flushing rates are adequate to ensure that the pre-existing water quality is maintained or enhanced both within and adjacent to the marina basin; and

...

j) The use of the area is compatible with social, economic, cultural and recreational values and uses of the harbour or estuary ...

**3.3.1 Policy - Amenity Values**

Maintain existing amenity and recreational values, including open space qualities and coastal recreation opportunities. Seek to enhance areas where amenity and recreational values have been compromised or require improvement.

[44] As already noted, Part 6A deals with marinas. Relevant policies in that section of the plan are as follows:

**6A.1.1 Policy - Marina Structures**

The potential adverse effects arising from the placement of marina structures and marina development in the CMA at Tairua shall be avoided remedied or mitigated through design, construction methods, or conditions of consent on applications.

**6A.1.2 Policy - Recreation and Navigation**

Ensure that a marina at the identified location in Tairua Harbour is located, constructed and maintained in a way which does not compromise safe recreation and navigation.

**6A.1.3 Policy - Integrated Management**

Promote at Tairua the integrated management of marina facilities in the Tairua Marina Zones I & II in the Tairua Harbour, adjacent land based activities, public access to the CMA and coastal recreational expectations. This policy requires liaison, consultation and integrated co-operation between marina operators and all agencies responsible or involved with the coastal interface in the vicinity of the marina site.

[45] The CMA referred to in policies 6A.1.1 and 6A.1.3 is a reference to the coastal marine area.

**Analysis**

*Section 104D(1)of the Act*

[46] The Environment Court noted that the construction and operation of a marina is a restricted discretionary activity in Tairua Marina Zone 1, and a discretionary activity in Zone 2. Other proposed activities were either discretionary, permitted, or non-complying. It held that the proposal should be assessed as a non-complying activity.[23]

[47] There was no challenge to this finding.

[48] Section 104D(1) applies to resource consent applications for non-complying activities. It provides as follows:

> **104D Particular restrictions for non-complying activities**
>
> (1) ... 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 ...will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—
>
> (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.

[49] The matters detailed in paras (a) and (b) are gateways.[24] If neither gateway is satisfied, any application for a non-complying activity must fail. If an application can pass through either gateway, then the applicant still has to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1). The consent authority also retains an overall discretion under s 104B.

---

[23] *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 398 at [53]–[57].

[24] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA), referring to the equivalent provision in the Act at that time.

[50] Here, the Environment Court considered that the marina proposal could not pass through the gateway detailed in s 104D(1)(a).[25] Again, there has been no appeal against this aspect of the decision.

[51] The Environment Court then went on to consider whether or not the proposal was contrary to the relevant objectives and policies contained in the applicable planning documents, and in particular, in the Regional Coastal Plan and the Regional Policy Statement. It considered the various objectives and policies and concluded as follows:[26]

> Overall we find that the proposed marina development would not be contrary (in the sense of repugnant) to the objectives and policies of the Coastal Plan or the [Regional Policy Statement].

[52] The Guardians do not suggest that the Environment Court misunderstood the objectives or policies, or that it misinterpreted them, or otherwise applied a wrong legal test in relation to them. Indeed, there is nothing to suggest this. The Court's approach, and the meaning it accorded to the words "contrary to" in s 104D(1)(b), was orthodox and in line with relevant authorities.[27] Rather the Guardians direct their attack on the Court's decision on the relevant policies to three main issues:

(a) an alleged failure to consider one policy;

(b) the Environment Court's conclusion that it was not bound by the findings made by the Environment Court in relation to Option 5; and

(c) an assertion that the Environment Court made findings which had no evidential foundation or which were contrary to the evidence.

[53] Issue (b) prevades the errors of law alleged in the notice of appeal. I deal with it separately and also with Mr Casey's submission that the Environment Court proceeded on an erroneous premise, before dealing individually with the alleged errors.

---

25 *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 398 at [222].

26 Ibid, at [226].

27 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 80; *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC).

*Issue Estoppel*

[54] As I have noted above, a previous application for resource consents for a marina (the Option 5 marina) was rejected at both Council and Environment Court levels as being against the policies of the then proposed, but now operative, Waikato Regional Coastal Plan, and on the basis of having more than minor adverse effects on the environment. The Environment Court's decision was upheld by the High Court. Mr Casey argued that the Environment Court, in rejecting the Option 5 proposal, made various determinations, which were binding on the Environment Court in the present case when considering Option 55. He referred to s 295 of the Act, which provides that decisions of the Environment Court are final unless they are re-heard or appealed, and submitted that where an issue raised by a new application has already been judicially determined with finality against the party raising it, the issue cannot be re-litigated in a subsequent application.

[55] Mr Casey directed these submissions to the following findings made by the Environment Court when it was considering Option 55:

(a) In relation to water quality:[28]

> We have found that there would be good flushing of the water in the basin (assisted on occasions by entry of stormwater). We also accept that if consent is granted, the conditions would require management plans as described by the appellants.
>
> Even so, we find that contaminants would accumulate in the marina basin from stormwater, from runoff from boats, from occasional unwanted discharges of wastewater from berthed boats, from accidental spillages of fuel, from uncontrolled litter and so on. Because the invert level of the access channel would be higher than the bottom of the marina basin, mixing of contaminated water with fresh water each incoming tide would not be complete, and tidal flushing would not remove all contaminated water each tidal cycle. Some contaminants would settle on the basin floor. Although the marina management would be obliged to keep the water in the marina basin clean, and to dredge the basin floor periodically, concentrations of contaminants would build up between dredging events. The water draining from

---

[28] *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A108/2005, 1 July 2005 at [292]–[294].

the basin on outgoing tides would carry concentrations of contaminants past Esplanade Beach, which is used for public recreation. Shortly after dredging events, those concentrations may be low, but as time passes they could increase. On incoming tides some lower concentration of contaminants may be carried back up the channel into the basin or across the sand flats of Paku Bay.

In short, we find that there would be a potential adverse effect on the environment of Esplanade Beach and Paku Bay of contaminants from the marina basin.

(b) In relation to amenity values:[29]

We find that the part of the harbour off Esplanade Beach is appreciated by many people for its pleasantness and for its recreational value for boating, including trailer boats, sailing dinghies and kayaks.

We also find that the use of the relocated channel off Esplanade Beach by the additional boat traffic generated by a 150-berth marina would alter the natural and physical characteristics of the water off Esplanade Beach that contribute to people's appreciation of its pleasantness, and recreational value for boating. People who are experienced with handling boats could, no doubt, cope with those alterations to the natural and physical characteristics, although for many of them their appreciation of the pleasantness and recreational value would be diminished. For those less experienced, and children under instruction, the alterations would lead to their appreciation of the natural and physical characteristics being considerably reduced, even to the point where the beach would no longer be regarded as suitable for some activities for which it is suitable, safe and pleasant at present.

In short, we find that the proposal would have significant adverse effects on the amenity values of Esplanade Beach, and the waters off it, for recreational boating.

...

In short, we find that the proposal would have adverse effects on the amenity values of Esplanade Beach, and the waters off it, for recreational swimming and bathing.

...

We have found that the proposal would have significant adverse effects on the amenity values of Esplanade Beach, and the waters off it, for recreational boating and for recreational swimming and bathing; and that the amenity

---

[29] Ibid, at [459]–[461], [470] and [478].

> values of Paku Bay for bird-watching and for shellfish-gathering would be reduced.

(c) In relation to the various policies in the Waikato Regional Coastal Plan:[30]

> Policy 6A.1.1 is for potential adverse effects of marina development to be avoided, remedied or mitigated through design, construction methods, or consent conditions. The net adverse effects of the proposed marina development that we have identified show that the design, construction methods and proposed conditions would not give effect to this policy. We find that the proposal would be contrary to it.
>
> ...
>
> Policy 6A.1.3 is for integrated management of marina facilities, adjacent land-based activities, public access to the coastal marine area, and coastal recreation expectations. Except in the last respect, the proposal is not contrary to that policy. But our findings on the effects on amenity values related to boating, swimming, bathing, bird-watching and shellfish-gathering indicate that the proposal would not meet coastal recreation expectations. We find that it is contrary to this policy in that respect.
>
> Turning from Chapter 6A, Policy 3.3.1 is for maintaining existing amenity and recreational values, including open space qualities and coastal recreation opportunities. Our findings that the proposal would have consequential adverse effects on amenity values of the locality for recreational boating, swimming and bathing, bird watching and shellfish-gathering show that the proposal does not give effect to that policy, and is contrary to it.
>
> In short, we find that the proposal is contrary to the policies of the [Proposed Waikato Regional Coastal Plan].

[56] Mr Casey pointed out that the Environment Court's decision was upheld by the High Court, and he submitted that apart from questions of issue estoppel, the High Court's decision was binding on the Environment Court when it was considering Option 55.

[57] Mr Kirkpatrick for the applicants conceded that issue estoppel applied in RMA proceedings, but submitted that Option 55 was very different from Option 5. As a

---

30 Ibid, at [506], [508]–[510].

result, the Environment Court when considering Option 55 was not bound by the earlier findings made in the context of Option 5.

[58] Issue estoppel is concerned with the prior resolution of issues rather than causes of action. It precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him.[31]

[59] Whether or not issue estoppel can apply to findings made in the Environment Court has been the subject of discussion in that Court.[32] It has been held that issue estoppel can occur if certain conditions are met, but that it is likely to arise only rarely. In the High Court, it has on occasion been assumed that issue estoppel could be applicable to findings made in a resource management context or by the Environment Court.[33] However, other judgments have held that private law doctrines such as waiver, estoppel or election are not generally appropriate in the field of resource management law, unless exceptional circumstances exist.[34] It has been held that the Act is a comprehensive code and that common law principles or equitable doctrines such as waiver, estoppel and election generally have no application.

[60] Although res judicata and issue estoppel are particular types of estoppel, the reasoning adopted by the courts in the latter decisions does not expressly apply to issue estoppel. Issue estoppel and the doctrine of res judicata are primarily concerned with ensuring the finality of litigation. They have a public policy rationale. In contrast, waiver, estoppel and election give rights to private parties that could be otherwise inconsistent with public policy and with the provisions contained in the Act.

---

31 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 41. See also *Thoday v Thoday* [1964] P 181 (CA) at 198; *Blair v Curran* (1939) 62 CLR 464 (HCA) at 521–533; *Specialist Group International v Deakin* [2001] EWCA Civ 777.

32 *André v Auckland Regional Council* [2003] NZRMA 42 (EnvC) at [25]; *Tasman Action Group Inc v Inglis Horticulture Ltd* EnvC Christchurch C126/2007, 18 September 2007 at [20].

33 *Francis Mining Co Ltd v West Coast Regional Council* HC Christchurch CP114/99, 20 December 2001 at [10]–[25]; *Cash For Scrap Ltd v Auckland Regional Council* HC Auckland CIV-2006-404-4270, 9 October 2007.

34 *Springs Promotions Ltd v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846 (HC) at [80]–[84]; *Auckland Regional Council v Holmes Logging Ltd* HC Auckland CRI-2009-404-35, 17 June 2010 at [86]; cf. *Frasers Papamoa Ltd v Tauranga District Council* [2010] 2 NZLR 202 (HC).

[61] These observations notwithstanding, it is my preliminary view that issue estoppel has either no or limited application in the resource management context. I say that for the following reasons (which do not purport to be exhaustive):

(a) Resource management law is a creature of statute. It imposes in the public interest restrictions on private rights which would otherwise attach to legal ownership.[35]

(b) Resource consent applications and their determination involve matters of public interest, and not just private rights. When determining an appeal in relation to a resource consent hearing, the Environment Court is not engaged exclusively or even principally in an inter partes dispute.

(c) Persons are entitled to make successive applications for resource consents. The Act does not preclude this and it is common resource management practice. Indeed, some consents which can be granted under the Act have a finite term and they have to be sought afresh at the end of that term.

(d) The Act contains various provisions which are inconsistent with the application of the doctrine of issue estoppel. For example, the Environment Court is not bound by the rules of evidence: s 276(2). It is arguable that issue estoppel is a rule of evidence which must be pleaded. Further, the Environment Court has all the powers and duties of the original consent authority: s 290. It hears applications afresh. The provisions under which a decision on an application must be made — ss 104 to 104D and Part 2 of the Act — are critical to the decision making process. They import a wide range of public interest considerations, and the appeal should be unfettered by what has gone before. A hearing before the Environment Court is in substance the exercise of an original jurisdiction to determine the matter afresh on the basis of the evidence before it and in light of the then prevailing

---

[35] *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 (HL) at 140.

circumstances.[36] Issue estoppel could preclude the Environment Court from carrying out its mandated functions. The doctrines of res judicata and issue estoppel must yield to the fundamental principle of public law that statutory duties and powers cannot be fettered.[37]

(e) It is trite law that precedent in the strict sense does not arise from the grant of a resource consent.[38] There is no reason why it should arise where a consent is declined.

(f) It has traditionally been accepted that, while the Environment Court is entitled to take into account the decisions and dicta of other courts which have considered the same or similar matters at an earlier stage,[39] it is not bound by its previous decisions, and is free to consider each case on its merits. Its failure to take into account previous decisions is not an error of law.[40]

(g) Applications which blatantly raise, in the same circumstances, identical issues already decided, can be dealt with in other ways – for example, a strike out for abuse of process, or applicants can be mulcted in costs.

[62] I illustrate the dilemma by reference to two examples:

(a) An applicant applies for resource consent to subdivide a farm to create rural lifestyle blocks, with associated housing platforms. He is opposed by a residents group which says that the proposal will detract from existing landscape values. The application is declined by the relevant council and by the Environment Court on appeal. They hold that the grant of consent would have a more than minor effect on the existing environment and on landscape values. Subsequently, a number of

---

36 *Ireland v Auckland City Council* (1981) 8 NZTPA 96 (HC).

37 HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, London, 2009) at 205; and see Michael Fordham *Judicial Review Handbook* (5th ed, Oxford, Hart Publishing, 2008) at [2.5.12] and the cases there cited.

38 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA); *Murphy v Rodney District Council* [2004] NZRMA 393 (HC) at [33]–[39].

39 *Smeaton v Queenstown Borough Council* (1972) 4 NZTPA 410 (SC).

40 *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605 (SC) at 607.

approvals are granted permitting smaller and one-off residential development on various properties in the general vicinity. Five years later, the applicant applies afresh. The application is the same. The residents group opposes the application, and for the same reason. The applicant argues that the environment has changed and that landscape values have been undermined by the grant of other applications. Is he precluded from arguing that point as a consequence of the Environment Court's earlier decision?

(b) A health board applies for consent to discharge contaminants into the air from a high temperature incinerator. The material intended to be incinerated is hospital waste, including medical and pharmaceutical waste. The application is opposed by a local neighbourhood group, who argue that there is a risk of adverse health effects. The Environment Court finds on the basis of the evidence before it that there is no such risk. It grants consent for a term of 10 years. Subsequent research overseas suggests that there may be adverse health effects from the incineration of some of the materials which are included in the waste stream. The discharge permit is due to expire, and the health board applies for a new discharge permit. The overseas findings have not been confirmed in New Zealand or incorporated into New Zealand clean air standards, but the research is well-founded, and it is prima facie sound. Is the neighbourhood group precluded from opposing a renewal of the consent because of the earlier finding made by the Environment Court?

[63] In both cases, common sense suggests that the answer must be no, and that issue estoppel does not apply.

[64] In my view, there is much to be said for the approach taken by Lord Bridge in *Thrasyvoulou v Secretary of State for the Environment*:[41]

> A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves

---

41 *Thrasyvoulou v Secretary of State for the Environment* [1992] 2 AC 273 (HL) at 290.

> no issue of legal right whatever. It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an *estoppel per rem judicatam.*

[65] The statutory regime which governs planning law in the United Kingdom is very different from that which applies in this country. Whether or not issue estoppel applies to findings made by the Environment Court in an earlier decision between the same parties was not fully argued before me. As noted, Mr Kirkpatrick conceded that issue estoppel could apply. Given that concession, counsel did not refer to many of the relevant authorities, and there was no detailed discussion of the underlying principles that are involved. Accordingly, I reach no conclusions in this regard. The issue is best left for another day.

[66] For present purposes, it suffices to say that if issue estoppel applies in the resource management context, it can only arise if inter alia, the matter in issue in the earlier and the later proceedings is the same, and the determinations relied upon were fundamental to the decision to the extent that without them it could not stand.[42]

[67] I agree with Mr Kirkpatrick that the first of these criteria is not met in the present case.

[68] It is clear that the Option 5 marina was very different from the Option 55 proposal. The Environment Court carefully analysed the two differences and detailed them in its decision.[43] In short, the Option 55 marina is half the size of the Option 5 marina. Its total excavation is less than a third that of the original proposal. Significantly less dredging is required on an annual basis and a third less marina berths will be available. There is a clear difference in size and scale. Those differences must reduce the impact of the Option 55 marina significantly.

[69] The Environment Court's finding that the two proposals were different is a finding of fact and it does not involve any error of law. There is no principled basis on

---

42 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 41; *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37–39.

43 *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 398 at [15]–[18].

which the Court can disturb the finding. It is clearly not manifestly unreasonable; nor is it contrary to the evidence, or based on no evidence.

[70] It is also noteworthy that both the Environment Court when considering Option 55 and Asher J in the High Court, were careful to limit their respective findings to the specific marine proposal before them. I refer, for example, to the Environment Court's observations:[44]

> Although in principle a marina would not be inappropriate development in the Tairua Marina Zones, the appropriateness of a particular marina proposal has to be judged by the adverse effects it would have on the environment. In our judgement, the proposed marina in this case fails to provide for those matters of national importance identified in section 6, and to that extent it would be inappropriate development in the particular site in the coastal environment.

In the High Court, Asher J observed as follows:[45]

> However, the Environment Court did consider the marina zonings and placed weight on them. Its finding was that this particular marina proposal was inappropriate on the particular site, not that any marina would be inappropriate...
>
> Another marina proposal might comply with the dredging requirement, which has ultimately made the entire proposal non-compliant. There would be compliance if the dredged material was used for replenishment purposes within nominated harbour systems. If that were so the Court's approach could be different. If the dredging and disposal complied, then the use would not be non-complying and would not have to pass through the s 104D gateway.
>
> The excavation and dredging in the proposal involved 142,000 cubic metres and included very substantial breakwaters. A different marina proposal could involve much less dredging, smaller breakwaters, and have different effects. The Environment Court's consideration of adverse effects was particular to the specific proposal. Different conclusions could have been reached if different designs were proposed. Clearly the task of getting approval for much more limited marina design, particularly if it were limited to the Marina Zone 1, would be entirely different, and the chances of success considerably better.
>
> The fundamental theme of all the points on appeal was that the decision of the Environment Court was inconsistent with and effectively negated the status of the Tairua Marina 1 and 2 Zones. The result, it was submitted, was that there could be no marina in the Tairua Marina Zones.
>
> This fundamental premise is incorrect. A marina proposal might well succeed. However, it has to succeed in terms of the relevant provisions of the Proposed Waikato Regional Coastal Plan. Those provisions, or certain selected and

---

44 *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A 108/2005, 1 July 2005 at [521].

45 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV 2005-485-1490, 29 June 2006 at [56], [58], [101]–[102].

> inconvenient provisions, cannot be ignored. If the proposal had not had a substantial non-complying aspect in relation to the dredged material, it would not have had to go through the s 104D gateway. It could well have succeeded. Equally, a different proposal with different effects might succeed, even if the overall use remained non-complying. The Proposed Waikato Regional Coastal Plan applies to an application in its totality, and cannot be given a sympathetic or artificial interpretation because of some assumed underlying purpose that the existence of marinas should be accepted. The careful rigour that was applied to the application by the Environment Court was appropriate and not in error.

[71] Accordingly, I have concluded that issue estoppel cannot apply in this case, even assuming that the doctrine has some application in the field of resource management law. The Option 55 proposal is very different from the Option 5 proposal. As a result, the Environment Court's findings in regard to the Option 5 proposal were not binding on the Environment Court when considering the Option 55 proposal.

*The Environment Court's "starting premise"*

[72] Mr Casey commenced his attack on the Environment Court's findings in regard to this policy by criticising what he said was the Court's "starting premise".

[73] The Court noted as follows:[46]

> The Coastal Plan provisions anticipate that the adverse effects of a marina may be able to be adequately avoided, remedied or mitigated. When dealing with questions of what is inappropriate development it could not be said that a marina is necessarily inappropriate at this location given that this is envisaged as the purpose of the zoning. Whether a particular proposal is appropriate or not will turn on an evaluative judgment based upon the level of effects (including their extent, character, and duration) with the zone provisions giving some assistance in ascertaining what might be appropriate or inappropriate.

[74] In my judgment, the Court did not err when it made these observations.[47] Rather, it was recording, in summary form, the introduction to Part 6A of the plan.

[75] Further, and contrary to Mr Casey's submissions, I do not consider that there is anything in the earlier decision of Asher J which bears on this issue. Asher J rejected

---

46 *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 39 at [48]

47 I note that they echo similar observations made by the Environment Court in *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A108/2005, 1 July 2005 at [521].

the proposition that the planning provisions which allow marina development either on a restricted discretionary basis or on a discretionary basis, are part of the permitted baseline.[48] He also went on to refer to submissions made that the history of the Marina 1 and 2 zones pointed towards an acceptance that a marina could be considered as appropriate development in the particular location.[49] His view was that the Environment Court did consider the marina zonings and placed weight on them. Asher J noted that the Environment Court found that the Option 5 proposal specifically was inappropriate for the particular site, not that all marinas would be inappropriate. [50] . I do not read Asher J's observations as extending beyond the marina that was the subject of the Option 5 proposal.

[76] There is nothing in para [48] of the Environment Court's decision which to my mind suggests any presumption either for or against a marina in either zone. Instead, the Court was simply recognising that by establishing marina zones within Tairua Harbour, the Council was acknowledging that the development of a marina in those zones was not necessarily inappropriate. It cannot be criticised in this regard.

[77] I now turn to consider the various questions posed in the notice of appeal.

*Question A: Did the Environment Court err in law in finding that the proposed marina is not contrary to Policy 3.1.4B?*

[78] As noted above, the Environment Court when considering Option 5 did not address this policy. It was not then in place. Rather, it was introduced after the Environment Court decisions on Option 5 by way of a variation to the Coastal Plan, which introduced Part 6A.

[79] Part 6A deals with the marina zones in the Tairua Harbour. Policy 3.1.4B is a policy of general application that applies in relation to new marinas anywhere in the region.

---

48 *Tairua Marine Ltd & Pacific Paradise Ltd v Waikato Regional Council* HC Auckland CIV 2005-485-1490, 29 June 2006 at [44], [45] and [53]..

49 Ibid, at [54].

50 Ibid, at [56] and [59].

[80] Policy 3.1.4B sets out 12 particular matters which must be addressed when the policy is being considered. They are not worded as specific tests or performance standards. The language used requires the exercise of judgment, in relation to matters of degree and the particular circumstances which apply.

[81] Mr Casey limited his challenge to sub-paragraphs (f) and (j) in Policy 3.1.4B.

[82] Sub-paragraph (f) deals with tidal flushing rates. It requires that they are adequate to ensure that pre-existing water quality is maintained or enhanced both within and adjacent to the marina basin.

[83] Mr Casey submitted that water quality in a marina does not have to conform to recreational bathing standards. He submitted that much, if not all, of the evidence presented for the applicant was confined to water quality standards within the marina. Mr Casey's point was that little or no evidence was led as to the effect on the water quality standards at Esplanade Beach, which he suggested is adjacent to the marina in terms of criterion (f).

[84] The Environment Court addressed this issue at paras [95] to [108] of its decision. It reviewed the evidence called by the parties, and noted that the experts referred to both the ANZECC water quality guidelines and to risk-based recreational bathing water guidelines published jointly by the Ministry for the Environment and the Ministry for Health. It accepted evidence given for the applicant by a coastal scientist, a Mr Reinen-Hamill, that tidal flushing of the marina would be sufficient to maintain water quality with appropriate marina rules in place. The Court acknowledged there was a potential for contamination, but thought that the risk could be managed.

[85] The Court also referred to the evidence of a Mr Franks who expressed concern that bathing water standards at Esplanade Beach would be adversely affected.

[86] I have considered the evidence referred to me by both parties.

[87] Mr Reinen-Hamill gave detailed evidence on the topic. He was supported by evidence from a Dr Coffey and from a Dr Pickett, who was called by the Regional

Council. The Guardians called evidence from Mr Franks, but he was not qualified in the field of hydrology. Other than raising concerns about water quality, he did not give any evidence about tidal flushing.

[88] Mr Casey asserted that Mr Reinen-Hamill's evidence was focussed on water quality within the marina, and therefore that it was not open to the Environment Court to make findings about water quality outside the marina based on the evidence. With respect to Mr Casey, that assertion is both illogical and incorrect. Discharges from the marina will necessarily flow out of the marina on the ongoing tide, down the access channel past Esplanade Beach, and then to the open sea. If water quality inside the marina can be maintained, then water quality will not be adversely affected in areas adjacent to the marina. Indeed, effects outside the marina entrance are likely to be less, given the additional dilution which will occur in the larger water body outside the marina. Mr Reinen-Hamill dealt with these matters both in his evidence in chief and in his rebuttal evidence. He noted that water quality measurements (albeit limited measurements) had been undertaken by the applicants in the lower harbour area, at the marina site, and at Esplanade Beach. He noted that existing sources of contamination would be reduced and controlled. He expressly dealt with the concern raised by Mr Franks for the Guardians that Esplanade Beach would become unsuitable for recreational bathing and would remain so. He acknowledged that there was a potential risk, but suggested that careful management and ongoing monitoring should ensure that contamination and discharges from the marina would be prevented. He was cross-examined in relation to this issue. The following exchange took place:

> MR CASEY: Now, other than by reference to the ANZAC and MFE guidelines, you have provided no separate assessment of the water quality, or the likely water quality in the access channel, have you?
>
> MR REINEN-HAMILL: The work I carried out using the USEPA method looked at flushing of the marina and the dissolved oxygen change within the marina. By inference, that would include the channel as that is the conduit for that water to flow to the larger water body, but it is not explicit, I agree.
>
> MR CASEY: In fact any water exiting the marina will go along the access channel?
>
> MR REINEN-HAMILL: Yes
>
> MR CASEY: And some of it will go further away into the harbour and out the harbour entrance?

MR REINEN-HAMILL: The majority of it will go out the harbour entrance...

[89] Mr Casey referred to the passages relating to water quality in the Option 5 decision noted above. I have already observed that the Environment Court's observations in that case were made in regard to a very different marina proposal. Furthermore, it does not seem that these passages were put to Mr Reinen-Hamill. The gist of the passages was put to a Mr Sinclair, a Regional Council Officer, and he observed that there was a difference between a contaminant being detectable and it being at such a level that it would result in an adverse effect.

[90] In accepting Mr Reinen-Hamill's evidence, the Environment Court has made a finding of fact on the basis of the evidence which was before it. As I have already noted, such findings do not raise an issue of law.

[91] Mr Casey then focussed his attention on Policy 3.1.4B(j), which deals with amenity and recreation.

[92] This issue was dealt with by the Environment Court at paras [173] to [201] of its decision. It was the subject of evidence from a number of witnesses, both expert and lay. The Court found, at paras [228] to [229], that there would be both beneficial and adverse effects resulting from the development.

[93] Mr Casey took me through a number of passages in the court transcript in order to criticise the Environment Court's evidential findings in relation to Policy 3.1.4B(j). I do not need to repeat them. There was clearly significant evidence before the Court on this issue. The Court considered the evidence and made a finding based on it. There is nothing to suggest that it erred in its understanding of Policy 3.1.4B(j), that it took into account irrelevant considerations, or that it failed to take into account relevant considerations. It cannot be said that the Court's decision is so unreasonable, that no reasonable Court could have made the same. Rather, the Guardians are doing no more than asking me to revisit the factual material which was before the Court and draw my own conclusions. That is not an issue of law.

[94] Accordingly, I find that the Environment Court did not err in law when it found that the proposed marina was not contrary to Policy 3.1.4B contained in the Waikato Regional Council's Regional Coastal Plan.

*Question B: Did the Court err in law in disregarding Policy 3.3.1?*

[95] Policy 3.3.1 is also a general policy that applies to the coastal marine area in the whole of the Waikato region.

[96] It is clear that the policy is relevant to the applicant's proposal, as the marina proposal is an activity which seeks to use part of the coastal marine area and will provide coastal recreational opportunities as stated by the policy. Mr Kirkpatrick did not suggest that the policy does not apply.

[97] The Environment Court referred to the policy in passing in para [26] of its decision. However, it did not specifically address it. Clearly it should have done so under s 104D(1)(b) of the Act, and also under s 104 once it concluded that the s 104D(1) threshold was met. The question is whether this omission requires that the decision be set aside and sent back to the Environment Court.

[98] Mr Casey submitted that the proposed marina is contrary to this policy, and he urged me to make a finding in that regard. Mr Kirkpatrick submitted that the absence of specific consideration by the Environment Court of Policy 3.3.1 does not amount to a material error, because the Environment Court considered similar issues in relation to amenity and recreation, and essentially the same policy considerations as in Policy 3.3.1. when it considered Policies 3.1.4B(j) and 6A.1.2.

[99] I agree with Mr Kirkpatrick.

[100] Policy 3.3.1 is directed to the maintenance of existing amenity and recreational values. It also seeks that areas should be enhanced where amenity and recreational values have been compromised or require improvement. These issues were addressed by the Environment Court when it considered Policy 3.1.4B(j) and Policy 6A.1.2. A reading of the Environment Court's decision shows that it fully considered the

evidence in relation to them. The fact that it omitted to refer to policy 3.3.1 is unfortunate, but in my view, it is not a material error which would require that the decision be set aside and the matter remitted to the Environment Court for reconsideration.

*Question C: Did the Court err in law in finding that the proposal was not contrary to Policy 6A.1.1?*

[101] This policy is specific to a marina in Tairua Harbour. It requires that potential adverse effects be avoided, remedied or mitigated through design, construction methods, or conditions of consent.

[102] The Environment Court went through all of the various effects that were in issue in paras[82] through to [212]. It drew its various conclusions together in paras [213] to [242]. I agree with Mr Kirkpatrick that the decision demonstrates a careful and methodical approach to the assessment required that is consistent with the policy and with the legislative requirements.

[103] The Environment Court found in 2005 that Option 5 did offend this policy. For the reasons I have already set out, I do not consider that that finding was binding on the Environment Court when it was considering Option 55. The structures proposed for the Option 55 proposal are very different than those proposed for the Option 5 proposal. The Option 55 proposal involves a lot less excavation and reclamation, covers a significantly smaller area, and has a shorter external wall. Compared to the Option 5 proposal, the access channel has a slightly different alignment and a different bottom configuration once it is dredged. The Option 55 marina walls are proposed to be plastic sheet piling with concrete capping, rather than rock as was proposed for Option 5. There is simply no proper basis on which it can be said that the Option 5 findings were binding on the Environment Court when it was considering Option 55.

[104] Accordingly, I hold that the Tribunal did not err in law when it found that the Option 55 proposal is not contrary to Policy 6A.1.1.

*Question D: Did the Court err in law in finding that the Option 55 proposal is not contrary to Policy 6A.1.2?*

[105] In broad terms, this policy requires that the marina does not compromise safe recreation.

[106] The Environment Court in considering Option 5 found that the Option 5 proposal was not contrary to this particular policy. The Court when considering Option 55 did not rest on this finding in relation to Option 5. Rather, it considered the issue afresh on the evidence before it.

[107] I have already dealt with water quality and the potential effects on the use of Esplanade Beach above. To the extent that the policy raises issues of recreational amenity, and particularly the use of Esplanade Beach, I have also dealt with that issue above.

[108] The specific issue of safe recreation and navigation was addressed by the evidence of the Harbour Master, a Mr Price. His opinion was that people on and in the water generally would show respect for one another. He was confident that that would continue if a new marina were to be approved. That opinion was not shaken in cross-examination.

[109] Again, it seems to me that the Court's findings in this regard are factual findings, made on the basis of evidence which was before the Court. No question of law arises.

[110] Accordingly, I find that the Court did not err in law in finding that the proposal was not contrary to Policy 6A.1.2.

*Question E: Did the Tribunal err in law in finding that the proposed marina was not contrary to Policy 6A.1.3?*

[111] This policy requires integrated management of marina facilities, adjacent land-based activities, public access to the proposed marina area, and coastal recreation expectations.

[112] The Environment Court addressed the issue at paras [62] to [63] and [75] to [77] of its decision. It detailed the practical issues it was required to consider, and noted that the question of how access was to be gained from the land to the marina pontoons was problematic. The Court observed that this led to issues about how lighting could be provided, whether electricity and sewerage would be piped to various areas, how the marina would be fenced off from publicly accessible areas, as well as other similar concerns. It noted as follows:[51]

> In the end our understanding was that any substantive fencing would only be land based, inside the marina, and that although there would be some fencing at the north eastern end of the marina, this is likely to be lower in scale and separation may be created by intensive mass planting with a suitably designed rail fence or the like. These details will need to be resolved if consent is granted.

[113] Essentially, the Court was suggesting that matters of fine detail needed to be resolved. The fact that the fine detail had not been resolved at the time of the hearing does not mean that the proposal was contrary to the relevant policy. In any event, those matters of detail have since been resolved. The various resource consents issued by the Tribunal in its decision of June 2011 require that the consent holder is not to restrict or impede public access to and within the coastal marine area, except through areas where the safety of the public would be endangered as a result of works being undertaken, or the access or the public would prevent the consent holder from exercising the consent. [52]

[114] Mr Casey submitted that the Environment Court was bound by the decision of the Environment Court on Option 5 in regards to this policy. I have already dealt with that issue. In my view, there were significant differences between the two proposals. Issue estoppel does not apply.

[115] Accordingly, I find that the Environment Court did not err in law when it held that the proposed marina was not contrary to Policy 6A.1.3.

---

51 *Tairua Marine Ltd v Waikato Regional Council* [2010] NZEnvC 39 at 63.

52 *Tairua Marine Ltd v Waikato Regional Council* [2011] NZEnvC 161.

*Question F: Did the Environment Court err in law in making findings in respect of which there was no evidence, or the only evidence was to the contrary?*

[116] The grounds of appeal recorded in the notice of appeal suggest that this allegation is relevant to Question B, particularly in relation to water quality and to the Court's findings at paras [106] (in relation to the reduced risk of contamination), [182] (the potential discharge of sewerage and other pollutants being controlled at other marinas) and [185] (refuelling on Esplanade Beach).

[117] I have already dealt with Question B above. I concluded that there was ample evidence on which the Environment Court could reach its conclusion.

[118] At para [106], the Environment Court acknowledged that there was a potential adverse effect on water quality, but noted the reduction in the size and the number of boats to be accommodated within the marina as compared to Option 5. It considered that this would reduce both the concentration of contaminants and the risk of spills.

[119] There was evidence from various witnesses about other marinas, including their location and proximity to other recreational activities, and their controls on, and management of discharges. I refer in particular to the evidence of Mr Reinen-Hamill, Dr Coffey, a Mr Earley, a Dr Ison, and Mr Franks. The Court's observations are a factual finding made on available evidence. Further, and in any event, the observations of the Environment Court are a matter of common sense. All other things being equal, if the number of boats in the proposed marina is reduced, the risk of contaminants entering the water must reduce.

[120] At para [182] the Environment Court recorded that it was satisfied that the potential discharge of sewage and other pollutants could be managed, just as it was at many other marinas. Mr Reinen-Hamill, Dr Coffey, Mr Earley, Dr Ison, and Mr Franks all gave evidence on this issue. Again, it cannot be said that the Environment Court had no evidence before it on which to reach its conclusions.

[121] In para [185] the Court noted its understanding that on many occasions refuelling and the like was undertaken on Esplanade Beach, or in the water in that

vicinity. Again there was evidence, albeit limited evidence, in this regard from Mr Franks. He acknowledged that discharges could occur, including discharges of hydrocarbons. A Mr Jackson, who was also a witness for the Guardians, agreed that boaties removed the bungs from their vessels as soon as they were on their trailers, discharging bilge water onto the beach and through Tairua. Again, there was evidence on which the Tribunal could reach the understanding which it recorded, and again no error of law arises.

[122] Accordingly, I find that the Tribunal did not err in law in making findings in respect of which there was no evidence, or where the only evidence was to the contrary.

*Question G: Did the Environment Court err in law in disregarding and/or not following the findings of the Environment Court in Tairua Marina Limited & Anor v Waikato Regional Council & Ors?*[53]

[123] I have already dealt with this issue above. In my view, the Court was not bound by the findings of the Environment Court in the earlier decision. Issue estoppel did not apply.

*Question H:Did the Environment Court err in law in finding that conditions proposed by it in respect of the marina management plan and water quality monitoring could be taken into account in assessing the adverse effects of the proposal for the purposes of determining whether it was contrary to the policies of the Waikato Regional Coastal Plan (other than Policy 6A.1.1)?*

[124] Mr Casey submitted that the Court placed heavy reliance on the claimed ability of more detailed conditions in the marina management plan to control discharges of sewage and other pollutants from the marina, and thereby avoid effects on water quality and the suitability of Esplanade Beach for recreational bathing. He submitted that as a matter of law, the Court was wrong to do so, because the conditions in the management plan were not in evidence and were at best a matter for speculation. He submitted that the Court's decision "was one of aspiration, not based on evidence or sound judgment".

---

53 *Tairua Marine Ltd v Waikato Regional Council* EnvC Auckland A 108/205, 1 July 2005.

[125] Mr Kirkpatrick argued that in the circumstances of this case, the Environment Court's decision was appropriate. He noted that the Tairua Marine Ltd and Pacific Paradise Ltd have never applied for a consent to discharge contaminants from the operation of the marina into the wider coastal marine area. He submitted that it cannot be assumed that the applicant will not, and cannot be trusted to, comply with the Act.

[126] The power to impose conditions on resource consents is broad. Relevantly, s 108(3) of the Act provides as follows:

> **108 Conditions of resource consents**
>
> ...
>
> (3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.

[127] Here, and as Mr Kirkpatrick argued, the applicants did not seek a consent to discharge contaminants from the operation of the marina into the wider coastal marine environment. That was noted by the Environment Court at para [184] of its decision. The Environment Court however accepted the possibility that there could be unintended discharges from boats. It acknowledged the possibility that the collection of up to 95 vessels in the marina could lead to inadvertent events effecting Esplanade Beach. Notwithstanding the fact that the applicants were not seeking to discharge contaminants from the marina operation, the Court was concerned with how to minimise that risk, and, to that end, suggested that the conditions of the consents should specify in more detail the matters to be addressed in the marina management plan. It listed the matters which it considered the management plan should include at para [107] of its decision, and went on to observe that there should be a review of the consent conditions relating to water quality after two years of operation.

[128] It appears from the decision that one of the applicant's witnesses, Dr Coffey, had earlier produced a list of principles that he considered should guide a management plan for the marina. It seems that those principles were put forward in the assessment of effects on the environment prepared for the Option 5 proposal, and that they had been drawn from experience at other marinas. For some reason they were not put

forward in relation to the Option 55 proposal. Nevertheless, as the Court's decision records, the control of the discharge of contaminants was addressed by a number of witnesses. The applicants were clearly mindful of this issue, and it seems to have been common ground that the issue needed to be addressed in a marina management plan.

[129] In reaching its decision, the Court was entitled to take into account the proposed conditions of consent as mitigating the effects of an activity if the conditions were inherent in the application.[54]

[130] Here, the fact that there were to be no discharges of contaminants from the marina operation was inherent in the application. No consent was sought in that regard. The management plan technique seeks to address how the requirement for a zero discharge policy will be achieved.

[131] Before the matter got before the Environment Court, a hearing had been held before Commissioners for the Regional Council and the District Council. Reports had been prepared under s 42A of the Act by Council Officers. Recommendations had been made and draft conditions proposed. The decisions of the consent authorities, incorporating those draft conditions, were the subject of appeals by three parties: the Guardians, the applicants, and the Director-General of Conservation. All three raised concerns about particular conditions. The Environment Court considered that further conditions should be imposed on the grant of the consents, and that there should be a review of the conditions relating to water quality under s 128 of the Act after two years of operation. The decision therefore concluded with directions for the preparation of final conditions. Agreement was reached between the applicants, the Councils, and the Director-General of Conservation. However, agreement was not reached between the Guardians and the applicants. There was therefore a further hearing before the Environment Court on 31 March 2011. An oral decision was given, and the written decision is now available.

[132] In the circumstances of this case, the various conditions proposed have thus been the subject of scrutiny and debate throughout the application and appeal process.

---

[54] *Auckland Regional Council v Rodney District Council* [2009] NZCA 99 at [53] to [60]; *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12].

[133] In *New Zealand Rail Limited v Marlborough District Council*,[55] the Environment Court took the view that if an applicant is relying on a management plan as a method of avoiding, remedying, or mitigating adverse effects, that plan should be formulated so it could be scrutinised by the Court and, if accepted, included as part of the conditions of consent. Further, it has been held that it is not appropriate for a Council to endeavour to reserve to itself the power to approve a management plan at a later date outside the formal resource consent procedure.[56] However, in other cases the subsequent preparation of a management plan has been imposed as a condition of consent. In *Wood v West Coast Regional Council*, the Court acknowledged the difficulties that can be faced in specifying a management plan as a condition of consent, particularly where it might benefit from future amendments to keep pace with developments in technology. [57] The Court accepted that a management plan can be required to be prepared pursuant to s 108(3) of the Act, and that its purpose should be to provide the consent authority and anybody else who might be interested with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent.[58]

[134] In the present case, a management plan was required by the Environment Court to mitigate the risk that there could be unintentional discharges from boats in the marina and from marina operations. The base position however remains that the applicant has not sought, and does not hold a discharge permit permitting it to discharge contaminants into the coastal marine environment. It is entitled to be treated on the basis that it will comply with the consents it holds, and with the Act.[59] If it does not comply, it will become liable to enforcement action under Part 12 of the Act. The applicant's principals could become liable personally under s 340, while certain contraventions could be offences of strict liability under s 341.

[135] With respect to Mr Casey, the question of law posed in the notice of appeal does not accurately state the Environment Court's findings. The Environment Court was simply seeking to minimise the possibility of contamination. It was entitled to do

---

55 *New Zealand Rail Limited v Marlborough District Council* [1993] NZRMA 70.
56 *Bird v South Canterbury Car Club* PT Christchurch C 27/94, 11 March 1994; *Macraes Mining Co Ltd v Waitakare District Council* PT Christchurch C 14/94, 20 January 1994.
57 *Wood v West Coast Regional Council* [2000] NZRMA 193 (ENC).
58 Ibid at [17] to [20].
59 *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA).

so under s 108(3) of the Act. In my judgment, the Court did not err in law when it directed that a management plan should be prepared to detail how the zero discharge policy was to be achieved.

**Summary**

[136] In summary, I have concluded that the Court did not err in any of the respects alleged by the Guardians. It follows that the appeal is dismissed.

**Costs**

[137] The applicants are entitled to costs. I direct that any application for costs is to be filed and served within 10 working days of the date of this decision. Any response to it to be filed and served within a further five working day period thereafter. I will then deal with the issue of costs on the papers unless I require the assistance of counsel.

Wylie J

IN THE COURT OF APPEAL OF NEW ZEALAND CA158/00

| | | |
|---|---|---|
| | BETWEEN | HOUSING NEW ZEALAND LIMITED |
| | | Appellant |
| | AND | WAITAKERE CITY COUNCIL |
| | | First Respondent |
| | AND | PALMERSTON NORTH CITY COUNCIL |
| | | Second Respondent |

| | |
|---|---|
| Hearing: | 11 December 2000 |
| Coram: | Richardson P<br>Blanchard J<br>Tipping J |
| Appearances: | P J Radich and L J Rossiter for Appellant<br>D A Kirkpatrick for First Respondent<br>J W Maassen for Second Respondent |
| Judgment: | 14 December 2000 |

---

**JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J**

---

[1] The applicant, Housing New Zealand Ltd, seeks leave to appeal from a judgment of the High Court dismissing an appeal from certain judgments of the Environment Court. Leave to appeal to this Court was refused by Fisher J on 19 October 2000.

[2] The first decision of the Environment Court concerned an application for declarations under s311 of the Resource Management Act 1991 about the powers of

the Waitakere City Council to impose various conditions on consents to subdivisions of land. The other two decisions of the Environment Court related to appeals under s120 of the Resource Management Act 1991 in respect of conditions imposed on the applicant by the Waitakere City Council in relation to a subdivision consent concerning properties in New Lynn and Te Atatu. Both cases were heard together, with a judgment being delivered in each case, and then a further supplementary judgment which has no bearing on the issues now sought to be appealed.

[3] The two properties in New Lynn and Te Atatu were held as single parcels of land, but had multiple housing units developed on them. The applicant sought to subdivide the land to provide separate legal titles for the individual units. The Waitakere City Council imposed conditions on the subdivisions requiring, *inter alia*, payment of reserves contributions under transitional provisions in the Resource Management Act. No further development was proposed in relation to either site. The Palmerston North City Council appeared, and its counsel made submissions in support of the Waitakere City Council's application for declarations in the Environment Court, because it takes a similar position on reserves contributions. (Although certain other conditions were in issue before the Environment Court, we are not now concerned with them.)

[4] The essential issue between the parties arises from the fact that the properties to be subdivided have already been developed. The applicant asserted that in those circumstances the act of subdivision does not have any effect on the reserves of the district, and therefore any payment in lieu of provision of public reserves is not justified. The Councils contended that a reserves contribution is payable irrespective of whether or not the subdivision actually places additional demand on reserves.

[5] The case concerns s 407(1) of the Resource Management Act, which states:

> **407 Subdivision consent conditions**-
>
> (1) Where an application for a subdivision consent is made in respect of land for which there is no district plan, or where the district plan does not include relevant provisions of the kind contemplated by section 108(2)(a) or 220(1)(a), the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under

sections 283, 285, 286, 291, 321A, or 322, as the case may be, of the Local Government Act 1974 if those sections had not been repealed by this Act.

[6] The relevant provision under the sections of the Local Government Act which are preserved by s 407 is s 285, which related to reserves contributions in the case of residential subdivisions. That section provided:

**285. Reserves contributions in case of residential subdivisions-**

(1) Where the council is of the opinion that all or any of the allotments shown on a scheme plan submitted to it for its approval are intended to be used solely or principally for residential purposes, the council may require that provision shall be made to the satisfaction of the council for public reserves under the Reserves Act 1977 within the land on the scheme plan amounting to not more than 130 square metres for each allotment on the scheme plan which in the opinion of the council will be used for such purposes.

(2) Subject to subsections (3) and (4) of this section, where the council is satisfied that the subdivision is adequately served by reserves or it is impracticable to provide such reserves, or where the area of the proposed reserves is less than 1,000 square metres,-

(a) The council may, in lieu thereof, make it a condition of approval of the scheme plan that the owner shall pay to the council, within such time as it may specify, an amount of money specified by the council; or

(b) The council and the owner may agree that instead of making such a payment the owner shall set aside within the subdivision an area of land to be vested in the council; or

(c) The council and the owner may agree that a combination of the provisions of subsection (1) of this section and of paragraphs (a) and (b) of this subsection, or any of those provisions, shall apply.

(3) The value of the total contribution that the owner may be required to make under subsection (2) of this section (whether in money or land or both) shall not exceed 7.5 percent of the value of the allotments shown on the scheme plan that in the opinion of the council are intended to be used solely or principally for residential purposes.

(4) Where the subdividing owner undertakes, pursuant to a requirement of the council, earthworks, tree planting, or other

> work on the land to be set aside as reserves under this section (not being work done for ensuring the stability of the land or necessary land drainage), and the work is done to the satisfaction of the council, the value of that work shall be taken into account in assessing the area to be set aside under subsection (1) of this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).
>
> (5) Where the subdividing owner makes provision for the setting aside within the land on the scheme plan of open space for the use only of persons to live within that land, the council may take into account the whole or part of the areas to be set aside when assessing the area to be set aside as reserves under this section or, as the case may be, the contribution to be made under subsection (2) of this section (whether in money or land or both).
>
> (6) The area of land to be set aside as reserves, or work to be done, or the sum to be paid by the owner to the council, under this section shall be ascertained having regard only to the number of allotments shown on the scheme plan in excess of the number of allotments comprised in the land before the subdivision that could have been used for residential purposes.

[7] In its judgment dated 9 February 2000, the Environment Court granted the Waitakere City Council's application for declarations, holding that there were no words in s407 suggesting that the preserved Local Government Act provisions are a guide only and saying that the power conferred by s407 is not fettered by the other provisions of the Resource Management Act or Local Government Act. The Environment Court held that where a proposed subdivision would not place any additional demand upon network infrastructure or upon reserves in the neighbourhood, a territorial authority may nevertheless lawfully impose conditions of subdivision consent requiring payment of a reserves contribution. The Court further held that the common law requirements for the exercise of power to impose planning conditions do not prevail where they are inconsistent with express statutory powers to impose conditions. The parties had agreed that the absence of any effects in terms of any additional demand upon reserves is a relevant factor in the exercise of a consent authority's discretion as to the quantum of any contribution, but is not a matter going to the power to require any contribution. The Court concluded that the Waitakere City Council's imposition of conditions requiring reserves contributions on the applicant on its consent to the proposed subdivision was lawful.

[8] In a further decision dated 28 February 2000, the Environment Court considered the merits of the particular conditions imposed by the Waitakere City Council. The Court held that there was no general exemption for subdivisions of an existing development, and that the fact that Housing New Zealand provides housing for low-income families is not relevant to the exercise of the discretion to impose reserves contribution requirements. It concluded that, even though the subdivision would not itself result in additional use of public reserves, it was fair and reasonable that the subdivider be required to pay a contribution towards the cost of providing public reserves to meet past shortfalls.

[9] Housing New Zealand appealed to the High Court. In a judgment delivered by Glazebrook J on 17 July 2000, a Full Court, consisting of Fisher and Glazebrook JJ, dismissed the appeal. The Court held that the Environment Court had not applied a wrong legal test in deciding that the contribution could be imposed. The Court considered that there does not need to be additional demand created by the subdivision for there to be the legal power to impose a reserves contribution. It expressed the opinion that the test of whether the contribution was "so unreasonable that no reasonable authority could have imposed it" was perhaps not appropriate, except as a "final check", because it provided no real guidance, but concluded that it was not the only basis of the decision and therefore did not invalidate the Environment Court's findings. The Court concluded that the Environment Court had not made an error of law in assessing whether or not the contributions should have been made in respect of the New Lynn and Te Atatu properties, and in assessing the level of those contributions.

[10] Leave to appeal to this court was refused by Fisher J on 19 October 2000. The Judge accepted that the subject could fairly be described as a matter of general or public importance, as it affects many territorial authorities and many Housing New Zealand parcels of land. However, Fisher J found that there was no readily identifiable question of law, and the only potential question of law had been well traversed.

[11] Leave to appeal to this Court is governed by s 308 of the Resource Management Act which provides that s 144 of the Summary Proceedings Act 1957

applies in respect of a decision of the High Court on appeal from the Environment Court. Section 144 in turn provides that the applicant may apply to this Court for special leave to appeal in the event that leave to appeal is refused by the High Court. But the appeal must raise a question of law which, "by reason of its general or public importance or for any other reason," ought to be submitted to this Court for its decision.

[12] It is apparent that the argument which counsel for the applicant, Mr Radich, who did not appear in the Environment Court or upon the substantive hearing in the High Court, now would wish to present to this Court is in a significant respect put differently from the argument on Housing New Zealand's behalf below. Counsel also recognised that he was facing the problem that leave is being sought in relation to a question of law concerning a transitional provision. Acknowledging this, Mr Radich emphasised that it might be 18 months or even longer before transitional plans are replaced throughout the country by new district plans which will, almost certainly, have self-contained provisions taking the place of s285. It has been necessary to preserve s285 only because schemes drawn up under the predecessor of the Resource Management Act do not have such provisions. Counsel said that large sums of money are at stake in the meantime for his client if it continues to pursue its policy of obtaining separate titles to its units.

[13] There are two arguments sought to be advanced. The first is that s285 is not to be read in isolation and applied as it would have been when the Town and Country Planning Act 1977 was in force. Now it must be applied in the context of the Resource Management Act whose policies and principles, it is said, require the decision-maker to concentrate upon the effects of the particular resource consent which is being sought – here, subdivisions which are "on paper only", involving no change or prospective change to the physical environment and no effects upon existing Council reserves.

[14] Secondly, it is submitted that the High Court erred in law in declining to receive guidance from the well-known decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 in

which it was said that conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them, which was a reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

[15] A second appeal on a transitional provision will not usually give rise to a question of law of general or public importance. Here, in one respect, it can arguably be said to do so but, unfortunately, because of the way the matter has been argued below, this Court is being asked to consider embarking upon a potentially major review of the basic principles and policies of the Resource Management Act, which the applicant's argument before us would require, without the very substantial benefit of having the views of the specialist body, the Environment Court, expressed upon them in the context of this case, and without also having the advantage of a first review of the matter on that basis by the High Court. The concentration in the Environment Court appears to have been upon the circumstances of the particular case, rather than being directed to any more general questions. The High Court recorded that the view expressed for the appellant in that Court was "that there was the jurisdiction to impose a contribution but that the contribution should not be imposed in such circumstances [which is the way it is now put] or alternatively that it should always be imposed at 0%." The latter formulation appears to have been predominant.

[16] If the applicant had chosen to present its case in the Environment Court so as to generate discussion of the principles and policies of the Resource Management Act, a course seemingly still open to it in relation to a future subdivision where the issue emerges, we might well have been disposed to grant leave. But in the present circumstances we regard embarking upon that question as inappropriate, particularly when it would arise on the application of a provision which will fairly soon cease to have practical effect.

[17] As to the High Court's treatment of *Newbury*, we think that the applicant may be giving too much importance to what appears to us to be a remark which was no doubt influenced by the case as it was argued before the Full Court and which was

directed to the particular statutory provision. The High Court commented that *Newbury* was a case dealing with different legislation in a different jurisdiction, and with general rather than specific legislation. It said that conceivably *Newbury* had been over-used in this context, although the Court proceeded to refer to the third part of the *Newbury* test in a later portion of the judgment.

[18] We take the view that the *Newbury* test remains of general application and that New Zealand Courts should continue to apply it in relation to the provisions of the Resource Management Act. We note that the Environment Court, in a passage not criticised by the High Court, did in fact deal with the common law requirements upon the Council in terms which clearly were drawn from *Newbury*. It said that it found that the acquisition and improvement of public reserves is a resource management purpose and asked itself whether the purpose related to the activity authorised by the consent, that is, the subdivision, and whether the condition for a reserve contribution was so unreasonable that a reasonable consent authority could not have imposed it.

[19] When the High Court's observation is read in the setting of its judgment as a whole and with particular reference to the transitional provision we see no danger that the Court will be interpreted as indicating that *Newbury* is not to be followed in resource management cases. Hence the applicant's second point is not of public or general importance. It is also subsidiary to the first argument.

[20] The application for leave to appeal is declined with costs of $2,500 to each of the respondents together with their reasonable disbursements, including travel and accommodation costs, to be fixed if necessary by the Registrar.

**Solicitors**
Bell Gully, Wellington for Appellant
Simpson Grierson, Auckland for First Respondent
Cooper Rapley, Palmerston North for Second Respondent

**BEFORE THE ENVIRONMENT COURT**

**Decision No. [2017] NZEnvC 35**

| | | |
|---|---|---|
| | IN THE MATTER | of the Resource Management Act 1991 |
| | AND | of an appeal under section 120 of the Act |
| | BETWEEN | INFINITY INVESTMENT GROUP HOLDINGS LIMITED |
| | | (ENV-2015-CHC-92) |
| | | Appellant |
| | AND | CANTERBURY REGIONAL COUNCIL |
| | | Respondent |

Court: Environment Judge J R Jackson
(under section 279(1)(c) of the Act)

Hearing: In Chambers at Christchurch on the papers
(Final submissions received 7 February 2017)

Written submissions received from:

R J Somerville QC for Infinity Investment Group Holdings Limited
L F de Latour for Canterbury Regional Council
P Steven QC for Waitaki Irrigators Collective Limited and others (section 274 parties)
M Baker-Galloway for Fish and Game (section 274 party)

Date of Decision: 17 March 2017

Date of Issue: 17 March 2017

---

## PROCEDURAL DECISION

---

A: Under section 279(1)(e) of the Resource Management Act 1991 the Environment Court rules in relation to application CRC155773 by Infinity Investment Group Holdings Limited to take water from the main stem of the Hakataramea River lodged with the Canterbury Regional Council on 25 October 2013:

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(1) that resource consent is not now required under the pre-Plan Change 3 ("PC3") version of the Waitaki Catchment Water Allocation Regional Plan ("WCWARP");

(2) as for the consent required under the WCWARP with PC3 ("the Allocation Plan"), the proposed water permit to take is a discretionary activity.

B: Costs are reserved as costs in the substantive proceeding.

## REASONS

**Table of Contents** Para



### A. Introduction

[1] The primary issue for this procedural decision is whether the status of a proposed take of water from the Hakataramea River is a non-complying or discretionary activity. Because there is a plan change to the relevant regional plan, a related issue is whether that status of the activity is affected by section 88A of the Resource Management Act 1991 ("the RMA" or "the Act").

[2] Section 88A states:

> **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 section 88 or 145; and
>
> (b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, 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(1) 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 section 104(1)(b).

...

[3] The application of section 88A has led to some results which are at first sight surprising notably in *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[1] *("Ngāti Rangi")* where water takes that were ostensibly controlled activities at the time of the Environment Court hearing were held by the High Court to be non-complying because that was their status under a (by then) inoperative regional plan.

## B. Background: the application, the rules and the arguments

The application to take water for the Hakataramea River

[4] Taking of water from the Hakataramea River is not a permitted activity under the relevant regional plans. A permit is required[2] before water can be taken from the river. Consequently by application dated 25 October 2013 Infinity Investment Group Holdings Limited ("Infinity") sought water permits from the Canterbury Regional Council to take 93 litres per second ("L/s") from the main stem of the Hakataramea River (a tributary of the Waitaki River). The application was originally given the reference CRC144934 by the Council.

[5] After judicial review of the Council's original decision not to notify the application – see *Sutton v Canterbury Regional Council*[3] – the application was amended by a letter from Infinity's agent Mr T Heller on 5 March 2015, reducing the proposed take to 68 L/s. Dr Somerville QC submitted[4] that Infinity lodged a new application in 2015. That submission is incorrect because it is clear from the express words of Infinity's agent's letter to the Council that Infinity was intending to amend its 2013 application, not make a new one. The letter from Environmental Associates Ltd states: "The

1 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.
2 Section 14(2) RMA.
3 *Sutton v Canterbury Regional Council* [2015] NZHC 313; [2015] NZRMA 93; (2015) 18 ELRNZ 774.
4 R J Somerville submissions 30 January 2017 at para 26(e) [Environment Court document 38].

Applicant wishes to amend application CRC 144934 … All amendments are within the scope of the application as originally lodged." One reason for that approach may have been not to lose priority for the application.

[6] The application was renotified (twice[5]) as CRC155773 and it then went to a hearing. By decision dated 4 September 2015 Independent Hearing Commissioners Emma Christmas and Hugh Thorpe declined consent. Infinity appealed to the Environment Court under section 120 of the Resource Management Act 1991 ("the RMA" or "the Act").

[7] The appeal was joined by two submitters as section 274 parties: The Waitaki Irrigators Collective Ltd ("the Collective") and the Central South Island Fish and Game Council of New Zealand Inc ("Fish and Game"). Both support the Council's position.

[8] The operative regional plan when the water permit was sought was the Waitaki Catchment Water Allocation Regional Plan ("the WCWARP") which became operative in July 2006 under the Resource Management (Waitaki Catchment) Amendment Act 2004 ("the 2004 Act"). That plan is[6] the regional plan "for the allocation of water in that part of the Waitaki Catchment that is within the Canterbury region" under section 14 of the 2004 Act.

[9] On 28 June 2014 the Canterbury Regional Council ("the CRC") notified Plan Change 3 ("PC3") to the WCWARP. The process of submissions, further submissions and a hearing under Schedule 1 to the RMA followed. The recommendations of the Hearing Commissioners on PC3 were adopted by the CRC on 18 June 2016 and the plan change became operative on 8 September 2016. I will call the version of the WCWARP which includes the operative PC3 (and earlier changes 1 and 2) the "Allocation Plan".



5 For a second time on 21 March 2015 and for a third time, due to an error in the second notice, on 2 April 2015: see the Independent Commissioners' Decision 4 September 2015 at [13].

6 By resolution dated 25 August 2016.

[10] The timing of events is shown in this chronological table which compares relevant dates in relation to the WCWARP, PC3, and Infinity's application:

| | WCWARP | PC3 | Infinity application |
|---|---|---|---|
| July 2006 | Operative | | |
| 25 October 2013 | | | Lodged |
| 28 June 2014 | | Notified | |
| 27 February 2015 | | | High Court decision[7] quashed grant |
| 5 March 2015 | | | Application amended |
| 2 April 2015 | | | Notified (again) |
| 4 September 2015 | | | CRC decision (refusing consent) |
| 8 September 2016 | Inoperative (as provisions amended by PC3) | Operative | |

[11] Because the Allocation Plan became operative while the court was deliberating on its substantive decision, by Minute dated 6 December 2016 the court asked for further submissions on the status of Infinity's application and on the effects of the changes made by PC3. Submissions from all parties have now been received.

The rules

[12] The rules governing the status of the taking of water include (relevantly):

> **Rule 15** Any activity that complies with Rules 2, 6 and 7, and is not subject to Rule 15A is a discretionary activity.
>
> ...
>
> **Rule 16** Any activity which contravenes any of Rules 2, 6 or 7 is a non-complying activity. In considering an application to which this rule applies the consent authority will have regard, among other matters, to all the policies of this Plan.
>
> ...



[7] *Sutton v Canterbury Regional Council* above n 3.

[13] These rules refer back to rules 2 and 6 (7 is irrelevant to this proceeding). Activities that comply with both rules 2 and 6 of the Allocation Plan are discretionary activities (rule 15). In contrast, activities which do not comply with either rules 2 or 6 (or both) under the Allocation Plan are non-complying (rule 16).

[14] Before PC3 became operative, rule 2 provided (relevantly):

> **Rule 2**
>
> (1) Except as provided in (2) and (3) no person shall take, use, dam or divert surface water or ground water unless:
>
> ...
>
> b. the amount taken or diverted from the relevant river or stream is for a replacement consent or in combination with the amount of water authorised to be taken **or diverted** by existing resource consents, does not exceed the allocation limits in Table 3; and ...

[15] The allocation limit for the Hakataramea River main stem was 500 L/s.

> "Allocation limits" was defined as:
>
> The limits on the cumulative rate of taking **and diverting** of water that are established by this Plan and are specified in rule 2 of this Plan. (emphasis added)

[16] The reference to a diversion of water in rule 2 is important because the evidence is that 472 L/s of the 500 L/s limit had already been allocated. The figure of 472 L/s counted 150 L/s for the "Davenport" diversion, rather than merely the 110 L/s for the associated "Davenport" take[8]. Consequently, Infinity's proposed take was non-complying when lodged in October 2013.

[17] PC3 removed the words "or diverted" from rule 2(1)(b) and removed the words "and diverting" shown in bold from the definition of *Allocation limits* above[9]. It follows that diversions are no longer counted in the allocation limit when determining whether there is available allocation under the environmental flow and level regimes for the Hakataramea River in Table 3 of the WCWARP (now Table 3B of the Allocation Plan) and whether the overall allocation is exceeded in Table 5 of the plans (discussed next).



8 J A Todd evidence-in-chief paras 13 and 55 [Environment Court document 9].
9 See chapter 10 Definitions and abbreviations of the Allocation Plan.

[18] Consequently Infinity's proposal to take 68 L/s complies with the allocation limit in Table 3B and is discretionary under rule 2 of the Allocation Plan.

Rule 6 (and Table 5)

[19] Rule 6 in the Allocation Plan relates to the total annual allocation for all abstraction from the Waitaki catchment below the Waitaki Dam. The relevant part of rule 6 of the Allocation Plan now reads (relevantly):

> (1) Except as provided in (2), no person shall take, use, dam or divert water, if the take, by itself or in combination with any other take, results in the sum of the annual volumes authorised by those resource consents, exceeding the annual allocation to that activity in Table 5.
>
> ...
>
> (Underlining in the original)

It was the same for all relevant purposes in the WCWARP. What has changed is the way in which the volumes are calculated. As explained above "diversions" no longer count, and Table 5 as referred to in the rule has been amended.

[20] The relevant part of Table 5 is (v) because the Hakataramea River is within that part of the Waitaki catchment described as "downstream of Waitaki dam but upstream of Black Point". The table reads:

**Table 5:** Annual allocations to activities
Note: units = millions of $m^3$ per year.

| | | Town and Community water supplies | Industrial and commercial activities (outside municipal or town supply areas) | Tourism and recreational facilities | Agricultural and horticultural activities | Any other activities | Hydro-electricity generation |
|---|---|---|---|---|---|---|---|
| ... | | | | | | | |
| v | Downstream of Waitaki Dam but upstream of Black Point | 3 | 1 | 2 | ~~150~~ **200** | 16 | All other flows except the flows that must remain in the rivers, pursuant to the environmental flow regimes |

[21] The difference between the WCWARP and the Allocation Plan is that the former had an annual allocation to agricultural and horticultural activities of 150 x $10^6$ cubic metres of water each year (shown as struck through in Table 5), whereas PC3 increased that to 200 x $10^6$ cubic metres (shown in **bold** in Table 5). PC3 also changed how the volumes were calculated by excluding diversions from the allocation limits.

[22] Under the WCWARP Infinity's application was non-complying, because the annual allocation for the Lower Waitaki catchment was already exceeded[10]. Under PC3 and now under rule 15 of the Allocation Plan, the application is, at first sight, for a discretionary activity.

[23] Infinity relies on a proposed condition linking the take to an existing consent so that the proposed take would not, in theory, increase the annual volumes taken from the river. However, even if that is correct and workable (and in this decision I make no findings on either point) the fact is that the annual limit from under Table 5 (as it was at the date of Infinity's application) of the WCWARP was already exceeded so Infinity's application was still non-complying.

The arguments

[24] Ms Baker-Galloway, counsel for Fish and Game, submits[11] that since the application was lodged under the WCWARP, the activity must, under section 88A RMA, continue to be assessed as a non-complying activity. She submits that two lines of authority have developed as to the application of section 88A RMA. The first set of cases states that the new activity status (introduced in a new plan or plan change) applies if the relevant rule has legal effect or has become operative at the time of the decision. This line includes *Canterbury Regional Council v Christchurch City Council*[12]; *Campbell v Napier City Council*[13]; *Batten v Rodney District Council*[14] and *Royal Forest and Bird Protection Society Inc v Whakatane District Council*[15].

---

10 J A Todd evidence-in-chief para 21 [Environment Court document 9]; EJC Soal evidence-in-chief para 28 [Environment Court document 10].

11 M Baker-Galloway supplementary legal submission 22 December 2016 [Environment Court document 37].

12 *Canterbury Regional Council v Christchurch City Council* (2001) 7 ELRNZ 97 at [41] and (2001) 7 ELRNZ 113.

13 *Campbell v Napier City Council* (EC) W067/2005 at [17] et ff.

14 *Batten v Rodney District Council* (EC) A66/2009.

15 *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2012] NZEnvC 38 at [7].

[25] The second set of cases holds that the activity status as at the date of the application applies even if the new rule is effective or operative. This set includes:

- *Calder Stewart Industries Ltd v Christchurch City Council*[16];
- *Mapara Valley Preservation Society Inc v Taupo District Council*[17];
- *Bradford v Rodney District Council*[18];
- *Eades Land Partnership v Ruapheu District Council*[19].

[26] There are also two recent decisions of the High Court. The first is *Macpherson v Napier City Council*[20]. That is a land use case where Duffy J commented that:

> Section 88A saves applications from the effect of changes to a District Plan that become effective after an application has been lodged. However what is saved is the application either as it was first lodged, or as it was treated as being for at the time it was first lodged.

The second is *Ngāti Rangi*[21] which I have already referred to and will discuss shortly. Neither was referred to by counsel.

[27] The Regional Council submits that the first line of cases identified above is correct but does not discuss them or any others.

[28] The Collective disagrees with Fish and Game's position. Ms Steven submits[22] that section 88A(2) requires regard to be had to any plan that "exists" when the application is considered. She said that the WCWARP no longer exists (because it is inoperative, presumably) and therefore need not be applied. However, while that may be correct, it is not because of section 88A(2). That subsection is only there to ensure that when carrying out a section 104(1)(b) evaluation all relevant provisions are considered. Section 88A(2) does not affect the status of an application: that is determined under section 88A(1) and (1A).

[29] For Infinity Dr Somerville observes that the RMA was amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 ("the Simplifying

---

16 *Calder Stewart Industries Ltd v Christchurch City Council* (EC) C017/2006 – (this case was decided before section 88A was amended in 2003) at [42].
17 *Mapara Valley Preservation Society v Taupo District Council* (EC) A82/09 at [28].
18 *Bradford v Rodney District Council* [2010] NZEnvC 318 at [12].
19 *Eades Land Partnership v Ruapehu District Council* [2012] NZEnvC 255 at [73].
20 *Macpherson v Napier City Council* [2013] NZHC 2518 at [47].
21 *Ngāti Rangi,* above n 1.
22 P Steven submissions in reply 7 February 2017 para 6 [Environment Court document 40].

Act") which came into force on 1 October 2009. It introduced sections 86A to 86G, and 87A and 87B, and in reliance on these, he submits[23] that the principle[24] that general provisions do not derogate from specific ones applies. He submits that "section 86B contains clear and explicit provisions as to when rules that protect or relate to water have legal effect and so must be compiled with. The clear intent is that they have legal effect immediately upon notification. … Parliament would not have intended that they could be overridden by recourse to the more general provisions in section 88A." Further he submits that the purpose of section 88A is to protect an applicant, not, in effect, to penalise them.

## C. The application of section 88A before the Simplifying Act

Sections 9 and 14(2) RMA

[30] The primary obligations to obtain resource consents are imposed by Part 3 ("Duties and Restrictions") of the RMA. It is worth noting that section 88A (quoted above[25]) may operate differently for resource consents under sections 9 and 14(1) of the RMA than it does for consents under sections 11, 12, 14(2), 15 and 15A RMA.

[31] To understand why and for comparative purposes, it is useful to set out section 9 of the RMA which relates to the use of land. It states (relevantly):

> **9 Restriction on use of land**
>
> …
>
> (2) No person may use land in a manner that contravenes a regional rule unless the use —
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (3) No person may use land in a manner that contravenes a district rule unless the use —
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is allowed by section 10; or
>
> (c) is an activity allowed by section 10A.
>
> …

23 R J Somerville submissions 30 January 2017 para 38 [Environment Court document 38].

24 Referring to the discussion by J F Burrows and R I Carter *Statute Law in New Zealand* (5th edition LexisNexis, Wellington, 2015) at 475-478.

25 At para [2].

[32] Section 9 is generally regarded as permissive – *Nga Puawaitanga (Meremere) Ltd v Waikato District Council*[26] – in that land can be used as owners like unless and until some aspect (manner) of its use contravenes a regional or district rule[27] in which case it can only be used if that manner of use is expressly allowed by a resource consent[28] or is an existing use[29]. In passing I note that in *Macpherson v Napier City Council*[30] Duffy J wrote (obiter) of section 9 that "[t]he overall effect of the Act is to prohibit uses of land that are not specifically permitted under its provisions[31]. In my view the preferable view is exactly the other way around. As Dr Ceri Warnock and Ms Maree Baker-Galloway record in *Focus on Resource Management Law*[32], in the third parliamentary reading on the Resource Management Bill, the Hon Simon Upton, then Minister for the Environment said[33]:

> Current law presumes that one can use land only in accordance with the provisions of the Law. Clause 7 [now s 9] intentionally reverses that presumption. That was a very important reversal that the authors of the Bill made right at the outset – that is, people can use their land for any purpose they like. The law should restrain the intentions of private land-users only for clear reasons and through the use of tightly targeted controls that have minimum side effects.

[33] The meaning of "district rule" (which includes a proposed rule) in section 9 has the effect that consents for land uses are needed under both an operative and a proposed plan if each has a relevant rule: *Bayley v Manukau City Council*[34], as followed in *Stokes v Christchurch City Council*[35] (approved in *O'Connell Construction Limited v Christchurch City Council*[36] *("O'Connell")*). In *Bayley*[37], Blanchard J wrote for the Court of Appeal:

> … Applications can be made under s 88(3) for a consent "under a plan or proposed plan". Naturally, where two such district plans co-exist a consent under one will be of no immediate practical use if there is still a need for a consent under the other. But there is no good reason for adding to the complexity of the legislation a further complication. … [by requiring] all applications at the same time. That course may be preferable as a matter of practice, but in our view the Act does not impose any such requirement. …

---

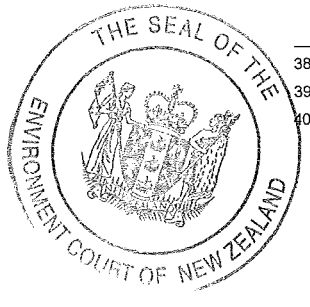
26 In *Nga Puawaitanga (Meremere) Ltd v Waikato District Council* (1998) 4 ELRNZ 480 at 490 (HC).
27 Or a national environmental standard: section 9(1) RMA.
28 Sections 9(2) and 9(3) RMA.
29 Sections 9(1)(b)-(d), 9(2)(b), 9(3)(b) and (c) RMA.
30 *Macpherson v Napier City Council* above n 20 at [13].
31 *Macpherson v Napier City Council* above n 20 at [13].
32 C Warnock and M Baker-Galloway *Focus on Resource Management Law* LexisNexis (2015) at 122.
33 [(4 July 1991) 516 NZPD 3018-3020 at 3020].
34 *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 581; [1998] NZRMA 513 at 526 (CA).
35 *Stokes v Christchurch City Council* [1999] NZRMA 409 (EC) at 416.
36 *O'Connell Construction Limited v Christchurch City Council* [2003] NZRMA 216 (HC) at [79]-[81].
37 *Bayley,* above n 34 at 581 and 526 respectively.

[34] In contrast a resource consent to take fresh water[38] is needed because section 14 RMA states (relevantly):

> **14 Restrictions relating to water**
>
> ...
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if —
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for —
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of an individual's animals for drinking water, —
>
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
>
> ...

The scheme of the RMA for fresh water is that – subject to some relatively minor[39], but vitally important, exceptions for basic needs (drinking water, stock water, fire fighting) in section 14(3)(b) to (e) – the taking of water is prohibited by the Act unless it is expressly allowed by a rule in a regional plan and in any proposed regional plan or by a resource consent.

[35] So there are (at least) two important contrasts between the regime of the RMA in relation to land use and water[40] taking. The first is that, as discussed earlier, section 9 RMA leaves the property privileges and powers of the common law extant unless and until they are managed by rules, whereas section 14(2) of the Act manages all water takes (diversions, etc.) other than for basic needs. Second, by itself (I will consider the scheme of the Act later), the wording of section 14(2) suggests that because taking of water is binary – a volume of water is either abstracted or not – only one consent is




38 As opposed to coastal water which is subject to section 14(1) RMA.
39 In a volumetric sense.
40 Other than coastal water to which section 14(1) applies.

necessary for a fresh water take whereas for land use under section 9 two consents will be required: one under a rule in an operative plan and one under a rule (in legal effect) in a proposed plan if the latter exists at the relevant time. Further in *Re Waiheke Marinas Limited*[41] the Environment Court suggests that applications for land use consent are often for consent to the manner of use (i.e. specific "elements and activities")[42] managed by plans (or proposed plans) rather than for a "use"[43] as defined in the Act. That means that the operative and proposed plans may be managing different activities as manners of use: *Shell Oil NZ Ltd v Rodney District Council*[44]. (Although see *Arapata Trust Limited v Auckland Council*[45] ("*Arapata*") – a costs decision – for a different view).

[36] In any event a water permit[46] is a resource consent required by section 14(2) of the RMA, not by a regional plan or proposed plan. A regional plan can at most permit a take (although few plans do), or it may alter the default status[47] from discretionary, or particularise the matters to be considered upon an application. Consequently since only one resource consent need be obtained (under Part 3 RMA anyway) and if at the time of an application there is a rule in a proposed plan, or even if one takes legal effect later (before the water permit "commences"[48]) the effect of section 88A RMA (quoted above) has been that the status of the proposed activity has been determined under the previously operative regional plan.

*Ngāti Rangi*

[37] As I said at the outset a striking example of the application of section 88A in that way is the recent High Court decision in *Ngāti Rangi*[49]. In that case NZ Energy Ltd ("NZEL") had applied on 18 June 2007 for two water permits (to replace expired water permits for the Raetihi hydroelectricity scheme)[50]. On 22 September 2011 NZEL applied[51] for associated discharge permits. Later again, but before the Environment Court hearing, it also varied its take applications.

---

41 *Re Waiheke Marinas Limited* [2015] NZEnvC 218.
42 *Re Waiheke Marinas Limited,* above n 41 at [22].
43 While "use" in relation to section 9 is defined in section 2 RMA by some basic identified activities, the key point is that "use" also means "(v) any other use of land".
44 *Shell Oil NZ Ltd v Rodney District Council* (1993) 2 NZRMA 545 (PT) at 550.
45 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236. There is also a question whether a simpler solution to the difficulty in *Arapata* was to be found in section 10B RMA.
46 Section 86 RMA.
47 Section 87B(1) RMA.
48 Under section 116 RMA.
49 *Ngāti Rangi,* above n 1.
50 *Ngāti Rangi,* above n 1 at [13].
51 *Ngāti Rangi,* above n 1 at [15].

[38] It is unclear when the application was notified. What is clear is that on 31 May 2007, less than a month before the application was lodged, a new combined regional policy statement and regional plan ("the One Plan") had been notified[52] by the Manawatu-Whanganui Regional Council ("the MWRC"). After submissions and hearings it became operational[53] on 19 December 2014.

[39] Resource consent for each take was required under the MWRC's operative regional plan as a discretionary activity. At the hearing before the Environment Court six different "scenarios" (which seem to be suggested flow regimes for the rivers from which water was to be taken) were put forward by the parties. Only two seem to have been acceptable to the applicant NZEL – the first and sixth scenarios. The Environment Court recorded that "in a final twist"[54] NZEL submitted that if scenarios one or six were not to be granted, NZEL's fallback position was for its current consents to be renewed as a controlled activity at the same rate and flows. That was accepted by the Environment Court with the result that consent could not be refused, and was granted on amended conditions.

[40] As to the status of the water take applications in *Ngāti Rangi*, on appeal, the High Court wrote[55]:

> [23] It appears to have been accepted by the parties in the Environment Court that:
>
> ...
>
> (2) Had NZEL applied for its proposed water takes under the One Plan, they would have been non-complying activities.
>
> (3) Similarly, had NZEL applied for consents under the One Plan on the basis they were "like-for-like" to its existing take consents, then, NZEL's application would have to have been assessed as controlled activities under the One Plan.

[41] In relation to the Environment Court's conclusions on NZEL's fallback position the High Court held[56]:

---

52 *Ngāti Rangi*, above n 1 at [11].
53 *Ngāti Rangi*, above n 1 at [11].
54 *Ngāti Rangi*, above n 1 at [24].
55 *Ngāti Rangi*, above n 1 at [23].
56 *Ngāti Rangi*, above n 1 at [46]-[48].

> [46] NZEL's 2007 application for a resource consent was lodged under the then extant Land and Water Regional Plan, which specified the taking of more than 15 $m^3$ of surface water a day was a discretionary activity.
>
> [47] Under s 88A of the Act, where an application for a resource consent has been lodged it continues to be dealt with as an application for the type of activity that applied at the time the application was lodged. NZEL's application was therefore, in relation to a discretionary activity.
>
> [48] The Trust and Regional Council are therefore correct when they say the Environment Court erred in law when it said that it was able to "consider renewal of the current consents as controlled activities".

[42] There were additional difficulties[57] with the Environment Court's decision including that the other parties had no opportunity to respond to NZEL's fallback position, but it is the High Court's conclusions above that are relevant here. What is of particular interest is that the High Court held that the status of the activity under the new operative plan was as described in a rule in a replaced plan which was, by the time of the Environment Court's decision, inoperative.

[43] I note that the original applications in *Ngāti Rangi* were made before the Simplifying Act came into force and thus the amendments did not apply[58]. The application had to be determined as if the Simplifying Act had not been made. That is important because the 2009 Amendment made significant changes to the consenting regime. Consequently I have not sought submissions on *Ngāti Rangi* from the parties. In any event there was no discussion by the High Court of why section 88A should be applied as it was so there is little more to say about it.

[44] The approach taken by the High Court in *Ngāti Rangi* for a take of water under section 14(2) RMA also applied for consents under sections 11, 12, 13, 15 and 15B. For example in *Eades Land Partnership v Ruapehu District Council*[59], the Environment Court was concerned with an application for subdivision consent which was lodged in early 2008, (although not notified[60] until February 2010) and therefore section 87A RMA as added by the Simplifying Act did not apply.[61] It appears the Environment Court regarded the plan change as "... to all intents and purpose ... operative"[62]. The Court

---

57 *Ngāti Rangi,* above n 1 at [49] et ff.
58 Section 160 Simplifying Act 2009.
59 *Eades,* above n 19.
60 *Eades,* above n 19 at [6].
61 Section 160 Simplifying Act 2009.
62 *Eades,* above n 19 at [9].

simply held[63] that section 88A RMA "operates so that the proposal lodged in March 2008 continues to have the status which it had at that time, namely discretionary ..." (rather than non-complying under the effectively "operative" plan).

[45] What *Ngāti Rangi* and the second line of cases identified by Ms Baker-Galloway show is that section 88A RMA was important when consent was sought under sections 11, 12, 13, 14(2), 15 and 15B because it resolved a potential problem: if consent was needed under one of those sections, but the status of the activity was described differently in an operative plan and a proposed plan, which status controlled the one consent required?

[46] What counsel other than Dr Somerville have rather overlooked is the effect of the changes to the RMA made by the Simplifying Act in 2009, and I now turn to those.

## D. The amendments in the Simplifying Act

The new definitions introduced by the Simplifying Act in 2009

[47] The restrictions (including sections 9 and 14) in Part 3 of the Act were themselves amended by the Simplifying Act. They are also now affected by later provisions of the Act introduced by the Simplifying Act. Section 2 RMA was also amended and now states that "plan" and "rule" have the meaning given in section 43AA of the RMA; "proposed plan" has the meaning given in section 43AAC.

[48] The new definitions in the Simplifying Act include (relevantly):

> **43AA Interpretation**
>
> In this Act, unless the context requires another meaning, –
>
> **change** means –
>
> (a) a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1; and
>
> (b) a change proposed by any person to a policy statement or plan by a request under clause 21 of Schedule 1
>
> **district plan** –
>
> (a) means an operative plan approved by a territorial authority under Schedule 1; and
>
> (b) includes all operative changes to the plan (whether arising from a review or otherwise)



63 *Eades,* above n 19 at [7].

**operative**, in relation to a policy statement or plan, or a provision of a policy statement or plan, means that the policy statement, plan, or provision –

(a) has become operative –

(i) in terms of clause 20 of Schedule 1; or

(ii) under section 86F; and

(b) has not ceased to be operative

**plan** means a regional plan or a district plan

...

**regional plan** –

(a) means an operative plan approved by a regional council under Schedule 1 (including all operative changes to the plan (whether arising from a review or otherwise)); and

(b) includes a regional coastal plan

**regional policy statement** –

(a) means an operative regional policy statement approved by a regional council under Schedule 1; and

(b) includes all operative changes to the policy statement (whether arising from a review or otherwise)

**rule** means a district rule or a regional rule

**variation** means an alteration by a local authority under clause 16A of Schedule 1 to –

(a) a proposed policy statement or plan; or

(b) a change.

**43AAB Meaning of district rule and regional rule**

(1) In this Act, unless the context otherwise requires, district rule means a rule made as part of a district plan or proposed district plan in accordance with section 76.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

(3) In this Act, unless the context otherwise requires, regional rule means a rule made as part of a regional plan or proposed regional plan in accordance with section 68.

(4) Subsection (3) is subject to section 86B and clause 10(5) of Schedule 1.

**43AAC Meaning of proposed plan**

(1) In this Act, unless the context otherwise requires, **proposed plan-**

(a) means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 but has not become operative in terms of clause 20 of Schedule 1; and

(b) includes a proposed plan or a change to a plan proposed by a person under Part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

[49] Important aspects of this suite of definitions are, first, section 43AA – which defines the meaning of "operative" – contemplates a plan (or provision) becoming inoperative when it describes the meaning as including that the plan or provision in a plan:

> … (b) has not ceased to be operative.

Second, a rule (whether district or regional) at first sight includes a rule in a proposed plan. However, that is expressly qualified by section 86B (and by clause 10(5) of Schedule 1) to be discussed shortly. Third, in most contexts a proposed plan includes[64] not only, as one would expect, a proposed (district or regional) plan but also a variation and a proposed plan change that has been notified[65].

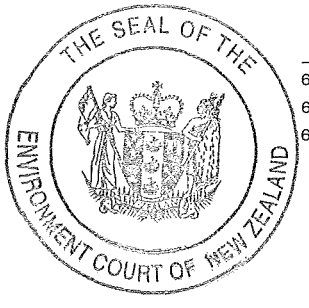
Legal effect of rules

[50] When new rules are proposed for a district or regional plan there is a question as to whether and, if so, when the proposed (as opposed to operative) rules have any effect. Under the RMA before 1 October 2009 any rule about an activity in a proposed plan determined the status of the activity as from the date of notification of the proposed plan. In 2009 the former sections 19 and 20 as to when rules become operative were repealed[66] by the Simplifying Act and replaced by a fuller set of provisions in Part 5 of the Act under the heading *Legal effect of rules.*

[51] To save space I will not set out sections 86A to 86G in full here. They provide an important part of the scheme of the Act in that they are a detailed mini-code as to when proposed rules may have legal effect even though they are not yet operative (and may never become so).

[52] Relevantly section 86B states:

> **86B When rules in proposed plans and changes have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if —
>
> (a) subsection (3) applies; or




64 Section 43AAC(1) RMA.
65 Obviously a proposed plan or variation would have to have been notified too.
66 Section 68 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

(b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or

(c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.

(2) However, subsection (1)(c) applies only if —

(a) the local authority makes the decision before publicly notifying the proposed plan under clause 5 of Schedule 1; and

(b) the public notification includes the decision; and

(c) the decision is not subsequently rescinded (in which case the rule has legal effect from a date determined in accordance with section 86C).

(3) A rule in a proposed plan has immediate legal effect if the rule —

(a) protects or relates to water, air, or soil (for soil conservation); or

(b) protects areas of significant indigenous vegetation; or

(c) protects areas of significant habitats of indigenous fauna; or

(d) protects historic heritage; or

(e) provides for or relates to aquaculture activities.

(4) For the purposes of subsection (2)(c), a decision is rescinded if—

(a) the local authority publicly notifies that the decision is rescinded; and

(b) the public notice includes a statement of the decision to which it relates and the date on which the decision was made.

(5) For the purposes of subsection (3), **immediate legal effect** means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

(6) *[Repealed]*

(emphasis added)

[53] It seems to be common ground in this case that the rules in PC3 had immediate legal effect[67] upon notification under section 86B(3)(a) RMA since it concerns rules relating to water.

[54] The Simplifying Act expressly introduces the concept of a rule becoming inoperative (it was only implicit earlier). I have already referred to the definition of "operative"[68] including the concept of ceasing to be operative. Section 86F adds to that by stating that:



67 As defined by section 86B(5) RMA.
68 Section 43AA.

> **86F When rules in proposed plans must be treated as operative**
> A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule, —
>
> (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.
>
> (Underling added)

The important aspect of this provision is that a previously operative rule "must be treated" as "inoperative".

Resource consents

[55] Part 6 of the RMA sets out the process for application for and grant of resource consents and this too was amended by the Simplifying Act which introduced[69] sections 87A and 87B. These identify when resource consents are required. Section 88 and the sections which follow set out the process.

*Classes of activities*

[56] The first relevant provision is section 87A (amended subsequently[70]). This section is important because it relates to the status of activities. It now states (relevantly)[71]:

> **87A Classes of activities**
>
> ...
>
> (4) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a discretionary activity, a resource consent is required for the activity and —
>
> (a) the consent authority may decline the consent or grant the consent with or without conditions; and
>
> (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

69 Section 69 Simplifying Act 2009.
70 By (inter alia) section 19 Resource Management Amendment Act (No 2) 2011.
71 I have only included the provisions for discretionary and non-complying activities but there are similar provisions for the other nominated classes.

(5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—

(a) decline the consent; or

(b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

...

Section 87A now appears to require two consents – one under an operative plan and one under proposed plan where both exist at the date of an application for consent.

[57] For completeness it should be noted that a rule controlling an activity described in sections 11, 12, 13, 14(2), and 15 may not exist. To manage these situations where an application for resource consent is made for an innominate category[72] section 87B provides that the application must be treated[73] as a discretionary activity. This section only applies to these innominate activities if there is no rule in a plan or proposed plan. If there is, as stated above, section 87A applies. Section 87B also governs the situation where a proposed plan (change) is to prohibit[74] an activity.

[58] Section 88 (also as amended in 2009 by the Simplifying Act) now states:

**88 Making an application**

(1) A person may apply to the relevant consent authority for a resource consent.

(2) An application must—

(a) be made in the prescribed form and manner; and

(b) include the information relating to the activity, including an assessment of the activity's effects on the environment, as required by Schedule 4.

(2A) An application for a coastal permit to undertake an aquaculture activity must include a copy for the Ministry of Fisheries.

(3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—

(a) include the information prescribed by regulations; or

(b) include the information required by Schedule 4.

(3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.

72 Under sections 11, 12, 13, 14(2) and/or 15.
73 Section 87B(1)(a) RMA.
74 Section 87(1)(c) RMA.

(4) If, after an application has been returned as incomplete, that application is lodged again with the consent authority, that application is to be treated as a new application.

(5) Sections 357 to 358 apply to a determination that an application is incomplete.

[59] The section refers to the information which Schedule 4 of the Act requires that the proposed activity is assessed against "any relevant objectives, policies or rules in a document referred to in section 104(1)(b) [RMA]" which includes "a proposed plan". Obviously a proposed plan needs to exist (and have legal effect under e.g. section 86B RMA) for that to occur.

[60] Looking at section 88 by itself a proposed plan comes into legal effect before a resource consent, or certificate of compliance is obtained under an operative plan, then in theory – and probably this would be good practice too[75] – section 88 seems to support a separate application being required. In that fresh application an assessment of the activity against the objectives, policies and rules of the proposed plan can be carried out. In fact, it seems to be common practice for regional councils to treat an application under an operative plan as being for the activity generally, rather than for the activity as referred to in an operative or proposed plan. Notionally the application is sometimes split into two, one under the operative plan, and one under the proposed plan.

## E. One consent or two?

[61] If at the date an application is made or later, a proposed plan (including a plan change) is notified and a rule in it with legal effect (either at notification or later) states that the activity sought by the consent is discretionary (limited or fully) or non-complying, then a crucial question is whether consent also needs to be obtained under the proposed plan in addition to and separately from any consent needed under an operative plan.

[62] In Part 3 of the RMA, sections 11, 12, 13, 14(2), 15 and 15A suggest that only one consent is required under the Act. Section 87A suggests that separate consents are needed under two plans – the operative plan and the proposed plan – where the latter exists. So the question arises: Is one consent required or two?



75 *Bayley,* above n 34 at 581 and 526 respectively.

[63] In contrast sections 9 and 14(1) RMA suggest that two consents are needed: one under the operative plan and one under the proposed plan. There is no apparent conflict with section 87A here, although in fact even sections 9 and 14(1) raise problems with the application of the latter provision.

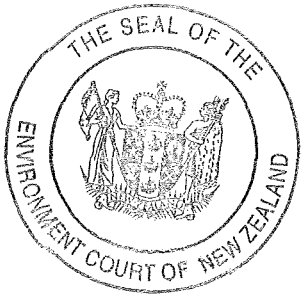
[64] Factually at least five situations may arise in relation to an activity to which section 87A would apply. These scenarios differ in the timing of events especially in relation to the date that a rule in a proposed plan has legal effect. They are:

(1) a resource consent for an activity (under an operative plan or its predecessor) has been granted and has been "given effect to"[76] when a proposed plan ("PP") has "legal effect"[77] and introduces an activity which requires consent (the "Effective Consent Scenario");
(2) a resource consent for an activity has been granted[78] and/or "commenced"[79] but has not yet given effect to[80] when a (rule in a) proposed plan starts to have legal effect (thus requiring a further consent) (the "Granted Consent Scenario");
(3) an operative plan applies and so does a proposed plan with legal effect (the "Two Plans Scenario");
(4) an operative plan applies but before a consent is granted and/or commenced, a proposed plan starts to have legal effect ("Later Proposed Plan Scenario");
(5) (uncommonly) an ODP applied when a application was made, and a proposed plan then or subsequently had legal effect, but by the time a final decision is made the ODP is inoperative because it is superseded by a newly operative (formerly proposed) plan ("Inoperative Plan Scenario").

(1) <u>The Effective Consent Scenario</u>

[65] Read literally, section 87A applies to any activity that requires a resource consent under a proposed plan even if that activity is being lawfully carried out. Clearly that is inconsistent with Part 3 of the RMA. Section 87A must be read as subject to

76 Section 124 RMA.
77 Under section 86B RMA.
78 Section 113 RMA.
79 Section 116 RMA.
80 Section 124 RMA.



Part 3 of the Act so that if, for example, an activity comes within an existing use[81] a resource consent is not required under the proposed plan (as it is not required under the operative plan). Similarly if a resource consent has been granted under an operative plan and is being given effect to[82] (exercised) it would defy Part 3 and the scheme of the RMA if a further consent was required because a proposed plan had been notified and had legal effect.

(2) The Granted Consent Scenario

[66] Similarly and more generally if a resource consent is held (to use a broad term which may mean "granted"[83] and/or "commenced"[84]) under an operative plan but not yet "given effect to"[85] then even if a proposed plan appears to require consent for the same activity and in relation to land use activities in particular that may be quite problematic. As *Re Waiheke Marinas* Ltd[86] shows section 87A needs to be read in a qualified way.

[67] Kirkpatrick E J had this scenario before him (although indirectly – the case actually concerned costs) in *Arapata*[87]. The applicant held a resource consent to carry out renovations when the proposed plan introduced a rule which made renovations on the applicant's site a discretionary activity. It is difficult to tell from the decision but the activity in the operative plan ("renovations") seems to have been the same in the proposed as he wrote:

> ... if the Council's approach were narrowed to apply only to the holders of unimplemented resource consents, it will still mean, as this case demonstrates, that a person who had obtained a resource consent and, on the basis of that consent, entered into binding arrangements with a bank, a builder and tenants, would then be subject to the risk, almost completely beyond their control, of being told they require some further resource consent at any stage of the development up until the original resource consent had been given effect to. Given the many different ways in which the implementation of consents may lawfully occur, or how existing use rights might arise, it is difficult to see how such an approach could be justified in pursuit of the purpose of the Act or on any other principled basis of avoiding, remedying or mitigating any adverse effects of the already consented activity on the environment.

81 Under sections 10 or 10A RMA.
82 Within the meaning of section 124 RMA.
83 Under section 113 RMA.
84 Under section 116 RMA.
85 Under section 124 RMA.
86 *Re Waiheke Marinas Ltd,* above n 41 at [22].
87 *Arapata,* above n 45 at [40].

Kirkpatrick E J did not refer to section 87A but his approach is likely to apply even when section 87A is taken into account (at least for consents under sections 9 and 14(1) RMA).

[68] To reconcile section 87A with Part 3 of the RMA, it appears to me that, section 87A(4) RMA, for example, would need to be read as follows:

> (4) If an activity is described in ... a proposed plan as a discretionary activity, then [unless a resource consent for the same activity is already "held"[88] under the operative plan or a previous plan] a resource consent is required for the activity and ...

Similar qualifications need to be read into the other subsections of section 87A.

(3) The Two Plans Scenario

[69] This is the scenario in which a proposed plan has legal effect at the date of the application for resource consent. Sections 87A and 87B appear to have legislated the principle in *Bayley v Manukau City*[89] by expressly requiring that resource consents are required under both an operative plan and a proposed plan for all consents (not only for consents required under sections 9 and 14(1) RMA). Since two consents are now always needed under this scenario it is difficult to see how the status of an activity is altered in a way that triggers section 88A RMA.

[70] If there is a potential conflict where the consent authority considers that resource consent might be granted under one plan but not the other, then the principles in the well-known Auckland cases including *Burton v Auckland City Council*[90] can be applied as explained in *Stokes v Christchurch City Council*[91].

(4) Later Proposed Plan Scenario

[71] Scenario (4) is where the application is lodged but then a proposed plan is notified at some later stage before a resource consent is held. It was to cover this situation that section 88A was originally enacted[92] in 1997. As outlined earlier section

88 See my qualifications above.
89 *Bayley,* above n 34 at [526].
90 *Burton v Auckland City Council* [1994] NZRMA 44?? (HC).
91 *Stokes v Christchurch City Council* [1999] NZRMA 409 (EC).
92 Section 18 Resource Management Act 1997 (1997 No. 104).

88A has been held for some years to keep the status of the application as it was in the operative plan, being the only plan as at the date of the application e.g. *Ngāti Rangi*[93].

[72] In relation to land use activities, the position under the Simplifying Act appears to be that, even after an application is lodged with a local authority and not yet decided (and any appeals resolved), if a relevant proposed plan is notified and a relevant proposal rule has legal effect, then a separate resource consent is needed under that rule (again at least in relation to land uses).

[73] As for the wider range of activities covered by sections 11, 12, 13, 14(2) and 15 RMA an application now needs to be made under, for example, section 87A(4) RMA for a discretionary activity if an activity is described as such in either "... a plan, or a proposed plan", it appears that separate consents are now needed under section 87A RMA for such an activity also. Therefore if a proposed plan is notified and has legal effect before a consent is at least granted under an operative plan then an application and consent will be needed under the proposed plan also.

[74] In practice, especially for an activity such as a water take which is binary – a given volume of water is either taken or it is not – it appears that local authorities tend to treat one application as being for both consents. In other words the application for consent under the proposed plan is purely nominal because local authority accepts the original application as an application under the plan change. I will not comment on the legality of that practice but I do observe that it may cause practical problems: first, the Schedule 4 requirements may not be met for the "second" application; further the status of the second – nominal – application appears to be at the date the relevant proposed rule has legal effect. There are also potential priority of application issues which I will not attempt to resolve here.

(5) <u>The Inoperative Plan Scenario</u>

[75] One other situation can arise: where a proposed plan is to replace an operative plan and between lodgement of the applications for resource consent and issue of the decisions on them, a proposed plan becomes operative (with a change of activity status). The question is "how does a change of status in the new plan affect the former operative plan?" The answer is that it does not, directly. Rather section 86F RMA


93 *Ngāti Rangi,* above n 1.

simply operates to make the former rule inoperative. Consent is no longer required under it.

## F. The operation of section 88A since the Simplifying Act

[76] I turn to ascertain how section 88A now operates in the context of those scenarios.

The meaning of section 88A

[77] Under section 5 Interpretation Act 1999 the meaning of section 88A is to be ascertained by having regard to its text in context and to its purpose. I may also have regard to the scheme[94] of the RMA.

*The words in context*

[78] Read literally, if consents are needed for an activity under both an operative plan and under a proposed plan then section 88A(1)(b)(i) cannot apply to the activity sought under the operative plan because the status of the activity under an operative plan does not change even for activities governed by sections 11, 14(2) etc of the RMA.

[79] One way around this would be to read section 88A as if the word "altered" in section 88A(1)(b) means "nominally altered" because the status of an activity is not altered substantively until the relevant rule has "... ceased to be operative" in terms of the definition of "operative" in section 43AA RMA. Whether that is required depends on the purpose of section 88A and the scheme of the Act.

*The purpose of section 88A*

[80] The primary purpose for section 88A RMA is to protect applicants by avoiding retrospective effect of rules with legal effect in proposed plans, as far as is consistent with the rest of the RMA. The principle against retrospective application of laws is set out in section 7 Interpretation Act 1999. For an example how section 88A gives effect to that principle, consider the situation where an application is made for consent for an activity which is discretionary in a proposed plan (and has immediate effect for example under an order[95] of the Environment Court) but the activity becomes non-complying when the Council makes its decision about the rule in the proposed plan under clause

94 Section 5(2) refers to the "organisation and format of the enactment".
95 Under section 86D RMA.

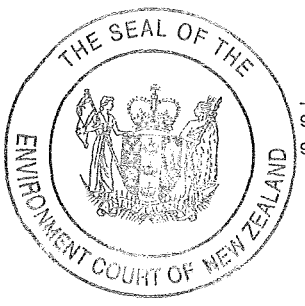
10 of Schedule 1. The effect of section 88A(1) is that the activity should continue to be treated as discretionary despite the change in status.

[81] The next question is whether the purpose of section 88A requires that works both ways: if the status is non-complying in a proposed plan to start with and then as a result of a clause 10 decision it becomes controlled, must it still be treated as the former? One answer for an applicant in this situation is to withdraw their application and re-apply for a controlled use – provided that does not have effects on their standing in any argument as to priority of applications. But that seems unnecessarily cumbersome, especially if they have (at least nominally) two applications before the local authority anyway.

[82] Applying section 88A both ways – i.e. where the status of an activity becomes easier – would "protect" a local authority from applications gaining a lower status under a proposed plan. However, the local authority does not need such protection for two reasons. First, the local authority is (usually) promoting the plan (change) to start with, so presumably it considers the lower threshold of the status of the activity is a good idea even if it has not finally decided that yet[96]. Further, it has the controls in sections 86B to 86D RMA to prevent the relevant rules having legal effect if it wishes. In that case a second resource consent would not be required unless and until the proposed plan actually became operative.

*The scheme of the RMA*

[83] As discussed in part D of this decision, important parts of the scheme of the RMA are sections 86A to 86G (legal effect of rules) and sections 87A and 88 (which introduces the requirements in Schedule 4 RMA). In particular sections 87A and 88 both contemplate separate applications under an operative plan and a proposed plan. Once those requirements[97] of the RMA are recognised, the scope of section 88A can be outlined. While separate consents have always been needed for activities managed by a plan and a proposed plan under sections 9 and 14(1) RMA the position was less clear for other resource consents until 1 October 2009 the Simplifying Act changed that.




96 Under clause 10 of Schedule 1 to the RMA.
97 Qualified where a resource consent is already held when a proposed plan has legal effect.

[84] Since 2009, the application for and grant of consents under sections 11, 12, 13, 14(2), 15 and 15A RMA under a proposed plan need to be considered separately from any application under an operative plan. As a consequence, it now appears that section 88A has little (if any) application to an operative plan.

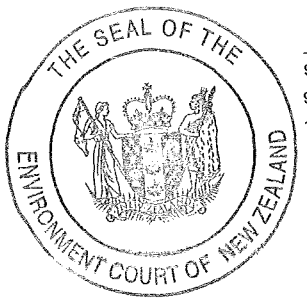
[85] There is a potential objection for this to lead to different results under the operative and proposed plans. For example in the *Ngāti Rangi*[98] situation (before the One Plan's rules became operative) the regional council could have in respect to a like-for-like (renewal ) application:

- refused consent for the discretionary activity under the operative plan;
- granted consent to the controlled activity under the One Plan.

[86] That is similar to the potential problem with land use consents in the relatively unusual situation in which an application under a proposed rule is both for an identical activity or manner of use as in the operative plan and that proposed rule has legal effect. In that situation the priority between plans needs to be considered having regard to the factors identified in *Burton v Auckland City Council*[99]. If the consent authority considers (overall) that consent should not be granted then it could refuse the discretionary application while granting (as it must) the controlled activity application. The applicant could not exercise the latter unless and until the operative district plan becomes inoperative.

[87] Other aspects of the RMA lead to the same conclusion as to the relatively minor role of section 88A. Subsection 88A(2) ensures that regardless of the status of an activity under each plan, the objectives and policies of the other one are to be considered.

[88] The primacy of Part 3 of the Act is reinforced by the fact that offences (in Part 12 RMA) are constituted[100] by non-compliance with sections 9 to 15 RMA but not by anything in section 87A or section 88A. The latter are merely machinery provisions.




98 *Ngāti Rangi,* above n 1.
99 *Burton v Auckland City Council* [1994] NZRMA 544.
100 Section 338(1) RMA.

[89] I accept that the Environment Court has power to make an enforcement order requiring a person to cease[101] an activity that contravenes a rule in a proposed plan, or to do something[102] (e.g. make an application) to ensure compliance with such a rule. Those powers appear superficially apt to ensure compliance with the directions of section 87A RMA. However, any such powers need to be read in the light of the necessary qualifications suggested earlier that make section 87A subject to, in the case of a rule in a proposed plan, any activity operating under an existing resource consent (or, of course, an existing use).

Summary

[90] In re *Waiheke Marinas Ltd*[103] the Environment Court described section 88A as a shield. I respectfully agree. It is not a boomerang which can be turned back on an applicant if a proposed plan makes the status of an activity more difficult than the status in the operative plan. Consequently the words of section 88A should now be read literally, consistent with the purpose and scheme of the RMA so that they are applied separately to the application under the operative plan and then in turn to the proposed plan with legal effect.

[91] Consequently I hold that section 88A now appears to work as follows:

(1) the provisions in section 88A apply to a consent sought under an operative plan as if the word "altered" in section 88A(1)(b) reads "nominally altered";

(2) section 88A also applies to a proposed plan (change) sequence in Schedule 1 RMA of:

- a decision being made under clause 10 – section 88A(1)(ii);
- otherwise e.g. a plan becoming operative under clause 20 – section 88A(2)(iii).

(3) section 88A(1A) needs to be read by adding at the end of the subsection: "… unless the previously operative plan has become inoperative".


101 Section 314(1)(a)(i) RMA.
102 Section 314(1)(b)(i) RMA.
103 *Re Waiheke Marinas Ltd,* above n 41 at [24].

Result

[92] This case comes within scenario (5) in Part E. I hold that *Ngāti Rangi*[104] can be distinguished on the grounds that it was decided before the Simplifying Act came into effect. While *Macpherson v Napier City Council*[105] was apparently decided under the RMA in its post-Simplifying Act form, section 88A was not crucial to the outcome in that Duffy J found that the original application under the operative district plan was wrongly treated as controlled, and that consequently, the status of the proposed (land use) activity was the same under both plans. Her remark about section 88A was therefore obiter when deciding – on a judicial review – to set aside the decision to grant consent on a non-notified basis for a multi-unit development opposite the applicants' property. It appears the question whether two consents might be needed – one under the proposed plan in addition to that in the operative plan appears not to have been raised.

[93] In contrast this proceeding is about an application for a water take under section 14(2) and section 87A RMA as added by the Simplifying Act. The effect of section 87A (as added in 2009) on this proceeding is that separate consents were needed under the WCWARP and the Allocation Plan. However, section 88A RMA is not relevant now because consent is not required under the WCWARP as that is inoperative. Under the Allocation Plan, the application to take has always been discretionary under that plan as notified and as (now) operative. Accordingly I will rule that is the status of the activity. The court will issue its substantive decision shortly.

**J R Jackson**
**Environment Judge**

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

104 *Ngāti Rangi*, above n 1.
105 *Macpherson v Napier City Council*, above n 20.

IN THE HIGH COURT OF NEW ZEALAND AP24/01
AUCKLAND REGISTRY

| | |
|---|---|
| **UNDER** | **The Resource Management Act 1991** |
| **IN THE MATTER** | **of an appeal pursuant to Section 299 of the Act** |
| **BETWEEN** | **KEYSTONE RIDGE LIMITED** |
| | **Appellant** |
| **AND** | **AUCKLAND CITY COUNCIL** |
| | **First Respondent** |
| **AND** | **KEYSTONE WATCHGROUP (INC)** |
| | **Second Respondent** |
| **Date of hearing:** | **8 March 2001** |
| **Date of judgment:** | **3 April 2001** |
| **Counsel:** | R Brabant for appellant<br>W J Embling for first respondent<br>N Paterson in person for second respondent |

392

[redacted]

---

**JUDGMENT OF O'REGAN J**

---

*Solicitors*
*Knight Coldicutt, PO Box 106-214, Auckland*
*Simpson Grierson DX CX 10092, Auckland*
*N Paterson in person*

[1] This is an appeal on questions of law from a decision of the Environment Court. In its decision, the Environment Court allowed an appeal by Keystone Watchgroup against a decision of the Auckland City Council granting consent to the appellant substantially to demolish a former supermarket building, at 3 Keystone Ave, Mt Roskill, and to replace it with three apartment blocks containing a total of 66 residential units.

**Background**

[2] The site of the proposed development, at 3 Keystone Avenue, Mt Roskill, is 50m east of the avenue's intersection with Dominion Rd. It is zoned as Business 2 in the Operative Auckland District Plan ("operative plan"), as are the properties to its west. Traffic flow in the street is approximately 2000-3000 vehicles per day, and the majority of Keystone Avenue, with the exception of the commercial properties to the west, is a typical suburban residential street of well-established houses. All of Keystone Avenue east of the site is zoned Residential 6a. At present, the site is derelict, rubbish-strewn and in a state of disrepair; it is occupied by a supermarket which has been abandoned for 3-4 years and is covered with graffiti.

[3] The appellant submitted detailed plans of the proposed apartment blocks to the Council, and applied for the necessary consent to begin development. Under the operative plan, construction of residential units in the Business 2 zone is a restricted controlled activity. The appellant's proposal also required a number of resource consents under the operative plan. Specifically, the proposal involved discretionary or controlled activities in respect of maximum height requirements, streetscape improvements, earthworks, excavations, parking requirements, stacked parking formation, and the gradient of vehicle access.

[4] The Council granted consent to the developer, Keystone Ridge Limited. Keystone Watchgroup, the second respondent in the present proceedings, appealed to the Environment Court against that decision. Its appeal was successful. In the

present proceedings, the appellant is appealing to this Court under s299 Resource Management Act ("the Act").

**Scope of appeal**

[5] This is an appeal on questions of law only. The scope of the appeal is restricted in the manner outlined by the Full Court of the High Court in *Countdown Properties (Northland) Limited v Dunedin City Council* (1994) NZRMA 145 at 153:

> ... this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise; see *Environment Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-2.

[6] Blanchard J expressed the scope of the appeal in similar terms in *Stark v Auckland Regional Council* [1994] NZRMA 337 at 340:

> The role of this Court is to see that the statute, the district plan and the regional plan have been correctly interpreted, ie that their language has been properly understood and applied, to ensure that all relevant, and no irrelevant matters have been considered, that the decision of the Tribunal is properly based upon the evidence before it and that the decision reached is 'reasonable' in the sense that it was one that could

be arrived at by rational process in accordance with a proper interpretation of the law and upon the evidence.

**Grounds for appeal**

[7] The Notice of Appeal sets out the alleged errors of law as follows:

- As a matter of law, the Court was required to determine whether any regard should be had to Plan Change T003 ('Change 3'), before making an assessment of the proposal under s 104 of the Act, but failed to do so.

- The Court ought to have ruled that no weight should be given to the objectives, policies, rules and other provisions in Change 3, since that Change and its predecessor Variation 164, had been awaiting the hearing of submissions to the Change since June 1997. Those submissions included requests that the Variation and the Change be withdrawn in its entirety.

- As a matter of law, the Court was required to recognise existing use rights and what could be constructed on the site as a permitted activity (s 9 of the Act), and what extent of development the Council would be obliged to give consent to as a controlled activity (s 105(1) of the Act), when assessing the effects on the environment of the proposed activity, but failed to do so.

- When taking into account the effects referred to above [in the preceding paragraph], the Court was wrong to rule, as it did, that when considering the effects of alternative forms of industrial/commercial developments, these would only be the effects of credible developments that could be done as of right and that the possible construction of such a commercial/industrial building as a credible form of development was not addressed in evidence for the appellant.

- The Court erred in its interpretation of Rule 12.9.1.2(d) of the Operative Plan, in holding that stacked parking spaces cannot be "*physically associated*" with a residential unit if separated from the unit by a minimum of one storey and a maximum of four storeys.

- The Court wrongly substituted its own opinion for that of the specialist traffic and transportation engineers and urban design and landscape assessment experts called by the appellant and the specialist traffic and transport engineer called by the first respondent, who were the only independent expert witnesses who gave evidence on matters of traffic management, site access, parking, loading and manoeuvring, urban design and amenity effects.

- Given that pursuant to s 290 of the Act the Court had the power to *confirm, amend or cancel* the first respondent's decision, and in circumstances where the Court:

    (a) recorded evidence and submissions on behalf of the second respondent that the development of apartments was *supported* in principle but that the proposal had been designed beyond the capacity of the site; and

    (b) itself found that the development of apartments in this location and the replacement of the existing derelict supermarket would give rise to positive effects:

    The Court erred in law by not *amending* the decision on appeal so as to allow a lesser form of development, or alternatively issuing an interim decision recording its conclusions on the evidence so that the appellant would have the opportunity to put a modified form of development before the Court for consideration

[8] Mr Brabant indicated to me in the course of his submissions that he did not wish to pursue the penultimate point in light of the recent decision of Chisholm J in *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* (High Court Dunedin, 9 February 2001, AP27/00). I therefore say no more about that aspect of the appeal.

**The decision of the Environment Court**

[9] The Environment Court's decision described the site and its position relative to neighbouring properties, gave a brief history of the site's usage and its present state, and analysed the extent of the proposed development. Consents for various discretionary and controlled activities had to be granted by the Council before the developer could obtain overall consent for the proposed development, and the decision briefly outlined the scope of these activities. The Court also noted the application of Plan Change T003 ("Change 3") to the proposed development.

[10] The Environment Court considered at length the issue of whether these multiple consents should be considered together or individually. It declined to compartmentalise the inquiry and considered the development proposal as a single discretionary activity that had to be considered under s104(1) of the RMA. This approach has not been challenged on appeal.

[11] It was accepted that the development proposal was in line with the operating plan's emphasis on encouraging intensified use of land and on reusing redundant, unused land. However, the Environment Court highlighted the need to be conscious of possible adverse effects on neighbouring properties. The Court considered the application of Change 3 to the consent process. This was particularly relevant as Change 3 was explicitly designed to cover the interaction of business and residential zones, such as the site under consideration in this case.

[12] The Environment Court also considered the correct approach to calculating the appropriate baseline against which adverse effects of a development proposal are to be evaluated. It was held that the appropriate comparison for determining whether consent should be given was what could be done on the land as of right; only developments that were a credible prospect were relevant to this determination. Additionally, the Court did not accept that, when assessing a discretionary activity, it should not consider the environmental effects of a building that complies with development controls.

[13] In examining Keystone Watchgroup's specific objections to the development, the Court held that the apartment block was too large and thus excessively dominated the site. It impinged on the privacy of neighbouring properties, and the developer's attempts to ameliorate this effect were insufficient. The allegation that traffic would worsen markedly was not accepted, but deficiencies in the number, type and layout of parking were regarded as serious. Additionally, the gradient of the entrance to the building was considered to be unacceptably steep and, combined with the parking problem, it was held that this posed a risk to traffic on the street. Allegations that infrastructure would be overburdened, or that lighting or noise would be serious problems, were rejected.

[14] Finally, the Environment Court determined the requisite baseline and evaluated the development proposal against it. The Court did not accept that a large industrial or commercial building could have been constructed as of right, and, given the mixed residential/business nature of the zone, set the baseline considerably lower. It held the site was being overdeveloped and the various adverse effects were serious. When these factors were considered in light of the operative plan and

Change 3, the Court was persuaded that the development would have an adverse effect on the existing environment contrary to sections 5(2)(c), 7(c) and 7(f) of the RMA. Therefore the appeal was allowed and the Council decision to grant consent was set aside.

**First and second ground of appeal: Change 3**

[15] I deal with the first and second grounds of appeal together because they both concern Change 3.

[16] The first ground of appeal was that the Environment Court was required to determine whether any regard should be had to Change 3 before making an assessment of the proposal under s 104 of the Act, but failed to do so. Mr Brabant referred me to paragraph 45 of the Environment Court's decision in which the principles to be taken into account in making such a determination are enunciated. Paragraph 45 says:

> ...In considering the weight that we give to it we take into account the following principles which arise from the various cases:
>
> - The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.
>
> - The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:
>
> (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;
>
> (ii) circumstances of injustice;
>
> (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.
>
> - In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.

[17] Mr Brabant accepted that the principles were correctly identified in that paragraph. However, he then referred to paragraph 46 of the Environment Court decision which says:

> In considering the weight to be given to the proposed Change 3 we have regard to the stage it has reached through the objection and appeal process. We note that it does reflect the general provisions of the operative plan relating to the clear intent of the plan to protect the amenity of residentially zoned properties from the potential adverse effects of activities in the business zones. This requires us carefully to consider the potential effects of the proposal on the adjacent Residential 6a zones, which we will consider in some detail later in this judgment.

[18] Mr Brabant argues that the Environment Court failed to come to a clear conclusion on the issue in this paragraph, as it was required to do, and that a reading of the entire decision of the Court indicates that it did have resort to the criteria and development Controls which were introduced by Change 3 in its decision-making process.

[19] I accept that the Environment Court was required to determine the issue. I note however, that in paragraph 119 the Court specifically says:

> We have regard to Change No. 3, bearing in mind the stage it has reached during the resource management process.

That statement is made in the section of the judgment headed "Exercise of discretion". Of course it reflects the requirements of s 104(1)(e) of the Act. Therefore, the Environment Court appears to have reached a conclusion on the issue, although its reference to "having regard" (which echoes the language of s 104), does not make clear the extent to which the Court gave weight to Change 3 in its decision.

[20] I do not accept that the Environment Court failed to reach a conclusion on the issue, but I find that it ought to have been more specific about the weight it was prepared to give to Change 3, taking into account all the criteria it set out in paragraph 45.

[21] The second ground of appeal is closely related to the first. The appellant argues that the Environment Court ought to have ruled that no weight be given to the

objectives, policies, rules and provisions in Change 3, since that Change and its predecessor, Variation 164, had been awaiting the hearing of submissions since June 1997.

[22] As the Environment Court noted in paragraph 43, Change 3 was publicly notified on 15 November 1999. However, it had been preceded by Variation 164, which had been notified on 23 June 1997. Variation 164 had been withdrawn at the time the District Plan became operative. It was common ground among all parties that Change 3 was, in all material respects, the same as Variation 164. The Environment Court recorded in paragraph 45 that Change 3 had reached the stage where the Council's officers were assessing and preparing reports on the submissions received by the Council, but the Change had not been subjected to independent decision-making and testing through the various processes required by the Act.

[23] The Environment Court recorded that it had had regard to the stage that Change 3 had reached through the objection and appeal process in determining how much weight should be given to it. However, there is nothing in the decision to indicate that the other matters which it identifies in paragraph 45 of its decision were taken into account.

[24] Mr Brabant submitted that the Environment Court ought to have ruled that no weight could be given to Change 3. He referred me to the Council's submissions before the Environment Court, which contended that little weight should be given to Change 3, as it had not yet proceeded through the public submission process. He also referred me to the decision of the then Planning Tribunal in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No.2)* (1993) NZRMA 574 at 580, where the Tribunal had criticised the local authority for not proceeding with a plan change with reasonable expedition. He pointed out that Change 3 was still at an early stage of the process envisaged by the First Schedule to the Act, and noted that the Environment Court had been provided with a summary of the submissions made in relation to Change 3, some of which requested that the Change be withdrawn completely and some seeking that it be changed significantly.

[25] Mr Brabant argued that the fact that Change 3 had not been subjected to testing and independent decision-making was a strong factor against any weight being given to it. He argued that the lapse of time since Variation 164 was first notified made the case similar in some respects to the *Te Aroha Air Quality Protection Appeal Group* case. I do not accept that this case is in the same category as the *Te Aroha* case, given that Change 3 itself was notified in November 1999 and the withdrawal of Variation 164 (for the valid reason of allowing the plan to become operative), and its replacement by Change 3 may have at least partly explained the slow progress in taking it through the process required by the First Schedule to the Act.

[26] Next, Mr Brabant submitted that the case was one where the criterion of "circumstances of injustice" identified by the Environment Court was important. He correctly submitted that, having identified this criterion, the Environment Court did not appear to consider it further. Change 3 had particular significance in this case because it will, if it becomes operative, require that all permitted and controlled business activities on sites within 30m of a residentially zoned property be considered as a restricted discretionary activity. In this case, the development was within 30m of a residentially zoned property and so this change was significant, because under the operative plan (without Change 3), a residential development on the site is a restricted controlled activity with no control on the density of residential units.

[27] Change 3 would, if implemented, also introduce a rule imposing a control at street frontage, referred to as the "building in relation to boundary" rule. This was significant in this case. The proposed development involved using part of the former supermarket building in the new apartment development, and the proximity of the structure to the street frontage meant the new "building in relation to boundary" rule would be breached, and therefore would be a discretionary activity.

[28] Mr Brabant's submission was that the Environment Court had applied Change 3 to the proposal and had given it considerable weight. This, he argued, constituted a significant injustice for the applicant.

[29] Mr Paterson, on behalf of the second respondent, disputed this submission, on the grounds that many of the matters required to be taken into account under Change 3 were significant and relevant to the proposal, even if Change 3 were not considered. I do not accept that this leads to a conclusion that the extent to which weight is given to Change 3 did not have a significant effect on the outcome because the effects identified earlier were, in my view, significant.

[30] Mr Paterson pointed out that the reference to "circumstances of injustice" was not limited to injustice from the applicant's point of view. He said that there would be an equal injustice to Keystone Watchgroup if Change 3 were not taken into account. I do not accept that the "circumstances of injustice" criterion applies only in relation to the applicant, and accept Mr Paterson's argument that if it can be shown that refraining from giving weight to a plan change causes injustice to a party opposing a proposal, that could also be a relevant factor in an appropriate case.

[31] Both the appellant and the second respondent thus claim that taking Change 3 into account, or not considering it at all, would be unjust to them. It is not the role of this Court to decide whether the Environment Court should have accepted that giving weight to, or not giving weight to, Change 3 constituted circumstances of injustice for either of the parties. I must, however, note that the Environment Court did correctly identify the criterion of "circumstances of injustice" as being relevant to the inquiry into how best to utilise Change 3. Following this identification, the Court did not consider it further. This was an error of law, and regardless of whether the appellant or the second respondent is correct in asserting that giving considerable weight to Change 3 or not considering it at all would have been unjust for them, the Environment Court should have considered the point.

[32] The other factor identified by the Environment Court was the extent to which a new measure (Change 3 in this case), or the absence of one, might implement a coherent pattern of objectives and policies in a plan. It referred to *Burton v Auckland City Council* [1994] NZRMA 544. In that case Blanchard J said at 553:

> At the time when the Council made its decisions in the present case its proposed plan was a relative infant, untested by a consideration of submissions from the public. Furthermore, as will be seen, one

> relevant portion is not free from ambiguity. On the other hand, it would be unwise not to recognise that some of the environmental protection provisions in the proposed plan, which are not present in the transitional district plan, are both consistent with the new Act and likely to survive the scrutiny of review of the draft provisions.

[33] The Environment Court also referred to *Lee v Auckland City Council* [1995] NZRMA 241 where the Planning Tribunal gave weight to a proposed plan which was in accord with Part 2 of the Resource Management Act, at least partly because of that fact, whereas the operative plan was one prepared under the previous legislation.

[34] The Environment Court's reference to these two decisions indicates that some weight was given to the approach taken in those cases, although the Court was not specific about what impact they had on its decision.

[35] Mr Brabant argued that the situation which applied in the *Burton* and *Lee* cases was different from that applying in this case. The crucial difference is that in this case Change 3 is a proposed change to an operative plan which has been prepared under the Act and subject to all of the processes mandated by the Act, and is therefore consistent with the provisions of the Act. This contrasts with the operative plans in both *Burton* and *Lee,* which had been prepared under the Town and Country Planning Act 1977. I accept that this is a significant distinguishing factor in this case, which the Environment Court should have considered.

[36] I conclude that the Environment Court did not correctly and comprehensively consider the criteria which it (correctly) identified in paragraph 45 of its decision and that this may well have been a material factor in the outcome of the case. This means that it did not take into account all relevant matters when determining what weight to give to Change 3.

[37] The appellant seeks a finding that the Environment Court ought to have ruled that no weight could be given to the provisions in Change 3. I am not prepared to go that far. Rather, I rule that the Environment Court:

[a] ought to have considered all of the factors it identified in paragraph 45 of its decision that were relevant in this case;

[b] ought specifically to have addressed its mind to the possible injustice to the appellant (and the second respondent if relevant) of giving significant weight, or little weight, to Change 3, in circumstances where it is still in its infancy;

[c] ought to have distinguished the present situation from that in the *Burton* and *Lee* cases because, in this case, the operative plan was itself prepared pursuant to the Act; and

[d] ought to have come to a firm conclusion as to the amount of weight which it determined should be given to Change 3.

[38] I am mindful that the Council's process of dealing with Change 3 will move on and may be further advanced by the time the case is reconsidered by the Environment Court, or it may be withdrawn altogether. I do not think it is therefore appropriate for me to impose a particular conclusion on the significance of Change 3 on the Environment Court and I therefore decline to do so. I do, however, direct that that Court decide this issue in the light of the above findings.

**Third and fourth grounds of appeal: The permitted baseline**

[39] I deal with these grounds of appeal together because they concern the same issue. The Notice of Appeal alleges that the Environment Court was required to recognise existing use rights, what could be constructed on the site as a permitted activity under s 9 of the Act and the extent of development to which the Council would be obliged to give consent as a controlled activity under s 105(1) of the Act when assessing the effect on the environment of the proposed activity, and that it failed to do this. The fourth ground of appeal enlarges on this, alleging that the Environment Court was wrong to rule that when considering the effects of alternative forms of industrial/commercial developments it would consider only the

effects of credible developments and require evidence of what was credible in the circumstances.

[40] Mr Brabant submitted that, in assessing the effect of the proposal on the adjacent land (particularly the visual effect of the building, dominant form of the building in the streetscape, shadowing and privacy impact), the Environment Court did not take into account the effects which would arise from:

- a continuation of uses relying on existing use rights (ie, utilising the existing supermarket building);
- the effects of a development or use permitted as of right; or
- a development in respect of which a controlled activity was required so that the Council was obliged to grant consent subject only to imposing conditions within its power to impose.

[41] Both Mr Brabant and Ms Embling for the Council, referred me to a number of cases in which this issue has been considered. The starting point is the decision of the Court of Appeal in *Bayley v Manukau City Council* [1999] 1 NZLR 568 where the Court said at 576:

> In considering the effect on the environment of an activity for which consent is sought:
>
> The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.

The Court of Appeal referred to Salmon J's ruling in *Aley v North Shore City Council* [1998] NZRMA 361 at 377 that considering a proposal's effect on the environment "requires an assessment to be made of the effect of the proposal on the environment as it exists". The Court of Appeal then commented at 577:

> We would add to [that] sentence 'or as it would exist if the land were used in a manner permitted as of right by the plan'.

[42] The "as of right" formulation was applied in *Low v Dunedin City Council* [1999] NZRMA 280; *King v Auckland City Council* [2000] NZRMA 145; *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 (subsequently upheld on appeal – [2000] 3 NZLR 513); and *Barrett v Wellington City Council*

[2000] NZRMA 481. Those cases concerned application of s 94 of the Act, which relates to the need to notify proposals.

[43] However, in *Smith Chilcott Ltd v Martinez* (High Court Auckland, 4 September 2000, AP74-SW/00), after referring to the *Bayley* case, Salmon J said, at para 22:

> Although the comment was made in relation to s 94, I accept that it has relevance to the exercise of discretion under s 105 and the consideration of effects pursuant to s 104(1)(a). It is appropriate, as Mr Brabant submitted, to consider s 9 in this context. Section 9 prohibits the use of land in a manner that contravenes a rule in a plan unless the activity is allowed by a resource consent or is an existing use. Mr Brabant submits, and I accept, that the consequence is that a use which does not contravene a rule in the plan may be established as of right. That being the foundation upon which the Act proceeds, the effects arising from a lawful activity must be contemplated by the Act as being acceptable and, therefore, not adverse.

[44] The Environment Court considered all of these cases in coming to the conclusion that it needed to consider the case on a holistic basis, looking at the cumulative effect of any non-compliance, rather than looking at each individual non-compliance as a separate issue. As already indicated, that holistic approach was not challenged in this appeal.

[45] However, when considering the appropriate "baseline", the Court commented that it was not persuaded that the *Bayley* case over-ruled the principle set out in *Aley* which had originated in a decision under earlier planning legislation, *Locke v Avon Motor Lodge Limited Ltd* (1973) 5 NZTPA 17. This appears to have led the Court to apply a standard which differed from that set out in *Bayley*.

[46] My view is that *Bayley* requires decision makers to consider the environmental effects of a proposal on the environment not only as it exists but also as it would exist if the land was used in a manner permitted as of right. When the Environment Court decided to consider the baseline in accordance with the principle set out in *Aley*, it failed to take account of the principle enunciated by the Court of Appeal in *Bayley*.

[47] The Environment Court's approach was inconsistent with the approach which it ought to follow, as Salmon J found in the *Smith Chilcott* case as outlined in paragraph [33] above.

[48] Later in its decision, at paras 110-114, the Environment Court considered the submission made on behalf of the appellant in this case that a range of commercial/industrial activities is available on the site as permitted activities, and that these could result in more effects on the amenities of the adjoining residential environment than the development to which the Council gave consent in this case. The Court said at para 113:

> We are required to consider credible developments that could be done as of right, not hypothetical possibilities. There is no evidence before us that would enable us to conclude that the construction of a commercial/industrial building of similar bulk and size is credible.

[49] With respect, this statement is inconsistent with the finding of Salmon J in the *Smith Chilcott* case. In that case Salmon J cited with approval the decision of Chisholm J in *Barrett v Wellington City Council* (High Court, Wellington, CP 31/00, 21 June 2000), where he had outlined the baseline test from *Bayley* and then added, at para 31:

> But I accept that when the Court of Appeal was referring to what could be done on the site as of right, it had in mind *credible* developments, not purely hypothetical possibilities which are out of touch with the reality of the situation.

[50] Salmon J then commented:

> [27] I accept Chisholm J's approach. It would not be appropriate to accept as a permitted development a proposal that is simply not credible. In determining the question of credibility, however, Judges must be wary of getting into issues of financial viability. As Chisholm J. put it, decisions which are not credible are those
>
> > ... purely hypothetical possibilities which are out of touch with the reality of the situation.
>
> [28] I accept that the Environment Court seems to have gone further than the *Barrett* decision would permit by referring to:
>
> > ... credible or likely variations to that environment...

And in saying:

> We think it far more likely that some type of development containing three units but on a much lesser scale is likely to be the more credible outcome. (para 91)

> [29] I accept that in using a "likely" test rather than a "credible" test the Court has erred in law. That error has arguably affected the exercise of its discretion when assessing the extent of the adverse effects suffered by the first respondents.

[51] The error identified by Salmon J in the *Smith Chilcott* case was that the Environment Court took into account adverse effects from the proposal under consideration when those effects would have resulted from a structure which could have been erected on the site without contravening any rule in the relevant plan. The Environment Court had taken these factors into account because it believed that another type of development, on a much lesser scale, was likely to be the more credible or likely outcome, and that that other type of development would not have had the same adverse effects as the structure which could have been built as of right.

[52] In my view, the Environment Court has made a similar error in this case. The Court's statement, that it had no evidence before it allowing it to conclude that the construction of a commercial/industrial building of similar bulk and size was credible, is a mis-characterisation of what was intended by Chisholm J in the *Barrett* case. His intention can be determined from the approach he adopted in establishing the "permitted baseline" in that case – see paras 34-38.

[53] As Salmon J pointed out in *Smith Chilcott,* it is not a matter of what is likely to occur, but a matter of eliminating anything which is, to use Chisholm J's words, "purely hypothetical possibilities which are out of touch with the reality of the situation". This is not a test of likelihood, nor a test which requires evidence as to what will occur or be likely to occur in the absence of the development under consideration.

[54] Rather, it is an issue of judgment for the Court. Given the evidence which the Environment Court had before it about the proposed development, the surrounding area, the site of the proposed development (including the existing building on the site and the existing use rights that went with it), the operative plan

and the developments which fell within the "as of right" category, it could have, and should have, then exercised its judgment to eliminate from the baseline anything which could fairly be categorised as purely hypothetical. Salmon J specifically warned in *Smith Chilcott* that Judges must be wary of getting into issues of financial viability. The Environment Court in this case failed to heed that warning.

[55] Mr Paterson submitted that adoption of the permitted baseline test outlined in *Barrett* and *Smith Chilcott* could mean going back on the Environment Court's decision to deal with the proposal in a holistic way. I do not believe that is correct, and my finding in relation to the permitted baseline is not based on any desire that the holistic approach should be abandoned.

[56] I therefore find that the Environment Court's exercise of its discretion is flawed in this respect, because it failed properly to identify the baseline against which the proposal before it should have been measured. This means that it applied the wrong legal test and failed to take into account matters which it should have taken into account.

[57] The use of the term "baseline" should not be interpreted as imposing undue rigidity on the exercise of the Environment Court's discretion in these matters. It is notable that the words used in *Bayley* were "appropriate comparison", not "baseline".

**Fifth ground of appeal: Stacked parking**

[58] The fifth ground of appeal involves the very specific issue concerning the meaning of the term "physically associated" in rule 12.9.1.2(d) of the plan. This does not appear to have been significant in the overall decision, but I was urged by counsel for the Council to rule on it because of its general importance in relation to developments of this kind.

[59] Rule 12.9.1.2(d) says:

> Favourable consideration may be given to the provision of stacked parking subject to the following criteria:

- Stacked parking occurs when access to a parking space is achieved through another parking space;

- Stacked parking will generally only be allowed in special circumstances in order to alleviate adverse effects when no feasible alternative exists;

- Stacked parking may be allowed for one of the two required parking spaces for any residential development and where each residential unit has two parking spaces physically associated with it.

[60] The Environment Court found that in this case none of the stacked parking spaces would be "physically associated" with particular residential units because they were separated by a minimum of one storey and a maximum of four storeys. The Environment Court rejected the contention that "physically associated" is synonymous with "assigned" or "allocated". The significance of this in the context of the decision was that this meant that the proposed parking did not comply with clause 12.9.1.2(d).

[61] Ms Embling submitted that the correct approach to interpretation was the tiered approach outlined in *Mackenzie District Council v Glacier and Southern Lakes Helicopters Ltd* [1997] NZRMA 569 at 572-574. In essence, that requires initial recourse to the plain ordinary meaning of the words, then to the context, then to the objectives and policies of the plan, then to the purpose and scheme of the Act.

[62] I share the misgivings about this approach expressed by Chambers J in *The Beach Road Preservation Society Inc v Whangarei District Council* (High Court, Whangarei, CP 27/00, 1 November 2000). Even if I had applied that approach, the lack of any clear meaning of the term "physically associated" would have required me to look at the context, something which Ms Embling submitted I should do, notwithstanding her advocacy for the *Mackenzie District Council* approach. She directed me to the reference to "any residential development" in R 12.9.1.2(d) and pointed out that the plan provides for residential development ranging from single dwellings to multi-storey apartment buildings.

[63] If "physically associated" is given the limited interpretation propounded by the Environment Court, the clause could not, in any practical sense, apply to multi-

storey apartment buildings, or certainly not to apartments in the upper storeys of such developments.

[64] Ms Embling suggested an interpretation that required that stacked parks be located on the same site as the residential unit, and that they be identified as associated with the particular unit. That does effectively require me to make a finding that "physically associated" is synonymous with "assigned" or "allocated", something which the Environment Court was not prepared to do.

[65] Mr Paterson supported the Environment Court interpretation and said he thought that that interpretation would still allow for stacked parking in a terrace housing development where there may be two or more floors over a garage but where the garage is in the same vertical tier and all is in one title. Nevertheless that still limits the scope of the phrase in a way that Ms Embling contended is not intended in the plan.

[66] Mr Brabant referred to a decision of the Court of Appeal in *Kingfish Lodge (1993) Ltd v Archer* [2001] NZRMA 1. That case concerned the meaning of the phrase "physical access" in s 129B(1)(c) of the Property Law Act 1952. In that case the Court of Appeal interpreted "physical access" as meaning actual access in practice. However, the statutory context is so different from the current case that I do not believe that this is of great assistance to me, apart from indicating that a practical interpretation of the term "physical" needs to be taken.

[67] Although the term "physical" in this context seems to me to be confusing and unnecessary, on balance I am persuaded by Ms Embling's submission that the restrictive interpretation suggested by the Environment Court is not correct in this context. I am persuaded that the purpose of the limitation on stacked parking is to ensure that, where stacked parking is permitted, the parks affected by the stacking are both associated with the same dwelling so that the inhabitants can arrange between themselves how to deal with the possibility that one occupier's vehicle will block that of another. That objective can be achieved whether the park is located immediately next to, or below, the relevant dwelling unit or not.

[68] Thus, I find that the correct interpretation in this case is that "physically associated" means located on the same site and associated by an identifiable form of allocation which removes the possibility of the parks concerned being allocated to different dwelling units. Accordingly, I find that the Environment Court made an error of law in coming to the interpretation that it did.

**Final ground of appeal: Amending the Council's decision**

[69] The final ground of appeal relates to the Environment Court's decision to cancel the decision of the Council, rather than to amend it. Section 290(2) of the Act gives the Environment Court power to "confirm, amend or cancel a decision to which an appeal relates". In this case, the Environment Court did not expressly consider the possibility of an amendment of the decision under appeal, and Mr Brabant submits that this was an error of law.

[70] The approach adopted by the Court in this case can be contrasted with what Mr Brabant described as "common practice" of the Environment Court in issuing an interim decision outlining any potential concerns for the proposed development, and giving the proponent of the development an opportunity to amend it so that it deals with the concerns raised by the Court and the opponents of the development. He gave as an example the decision of the Environment Court in *Harper v Manukau City Council* (D A63/2000) where the Environment Court said:

> ...We are making this decision interim by recording that the size and scale of the building is not acceptable and the decision of the Council in that regard cannot be confirmed. If all parties agree we are prepared to adjourn the proceedings to see if some compromise can be reached and in that regard the applicant must realise that it must make substantial concessions to the appellants who are entitled to the protection of the plan.

[71] Mr Brabant points out that the opposition of the second respondent in this case was to the scale of the development, but not to the proposed use of the site for residential purposes. Mr Paterson confirmed this, although he emphasised that Keystone considered the current scale of the development to be a major problem.

[72] Mr Brabant further argued that the Environment Court in this case identified a number of positive aspects of the development (at paragraph 115 of the judgment), and that as a matter of law the Environment Court ought to have turned its mind to a decision which did not cancel the original decision of the Council in its entirety, but which amended that decision. He argued that the Environment Court did not have before it any evidence to justify a conclusion that it should cancel the decision in respect of the use of the site for residential purposes, since no party opposed such a usage. In addition, he argued that the concerns about the development consent which were accepted by the Environment Court as being valid, were all matters which could have been dealt with by making changes to the development, so that the Environment Court should have allowed the appellant on opportunity to make such changes.

[73] He expanded this argument by reference to s 5 of the Act, which says that the purpose of the Act is "to promote the sustainable management of natural and physical resources". He particularly emphasised the use of the term "enables" in the definition of "sustainable management" in s 5(2), and argued that the Environment Court should have used its discretion in this case to allow for the possibility of an amendment to the original consent to enable some form of development to proceed.

[74] Mr Paterson argued that it was not appropriate to provide for amendment of the proposed development because it was "so flawed and over-developed that minor development would not fix the problems". He submitted that a completely new proposal would be required to address the deficiencies identified in the Environment Court's decision. Mr Brabant responded by pointing out that fundamental changes were also required in the *Harper* case, but this did not deter the Court from making an interim decision and providing for the possibility of an amended proposal being brought back to the Court.

[75] While I accept that there is some merit in Mr Brabant's argument, I do not think the Environment Court's exercise of its discretion is unreasonable in the sense that it could not have been arrived at by a rational process in accordance with a proper interpretation of the law upon the evidence. I therefore find that there was no error of law in this respect. Nevertheless, some reconsideration of aspects this case

will be required. That reconsideration may lead the Environment Court to conclude that, in the circumstances, an interim decision may be an appropriate outcome if there is a reasonable prospect that the adverse effects from the development, which prevent it from being appropriate for consent, could be sufficiently mitigated in an amended proposal.

**Conclusion**

[76] I therefore conclude that the Environment Court:

[a] did not take into account all relevant matters when determining whether weight could be given to the provisions of Change 3 and failed to distinguish the present situation from that in the *Burton* and *Lee* cases;

[b] erred in its determination as to the permitted baseline, in particular by failing to undertake the approach required to establish that baseline as demonstrated by Chisholm J in *Barrett,* and failing to consider developments which the applicant could have undertaken on the site "as of right", because it believed it needed evidence of "credible" developments. This led it to apply a wrong legal test and to fail to take into account all relevant matters in making its decision;

[c] made an error of law in its determination of the meaning of the term "physically associated" in R 12.9.1.2(b).

[77] I refer the matter back to the Environment Court for reconsideration taking into account the matters which I have identified in this decision. The Court may consider whether it is appropriate to issue an interim decision, with the possibility of an amendment to deal with any adverse effects, once it has undertaken its analysis of the proposal in the light of the findings in this decision.

[78] The appeal is therefore allowed in part. No submission was made to me in relation to orders for costs, and I make no ruling on that issue. If the parties cannot

agree on any question of costs, submissions should be made within 21 days of the date of this decision.

Delivered at 10.00 a.m./p.m. on 3 April 2000.

Maire O'Regan J

**M A O'Regan J**

Decision No. A 7/2001

| | |
|---|---|
| **IN THE MATTER** | of the Resource Management Act 1991 |
| **AND** | |
| **IN THE MATTER** | of an appeal under section 121 of the Act |
| **BETWEEN** | **KEYSTONE WATCH GROUP** |
| | (RMA 771/99) |
| | Appellant |
| **AND** | **THE AUCKLAND CITY COUNCIL** |
| | Respondent |
| **AND** | **KEYSTONE RIDGE LIMITED** |
| | Applicant |

**BEFORE THE ENVIRONMENT COURT**

Environment Judge R G Whiting (presiding)
Environment Commissioner J R Dart
Environment Commissioner R F Gapes

**HEARING** at **AUCKLAND** on 21 to 25 August 2000 inclusive, and 27 to 29 November inclusive.

**APPEARANCES**

R Brabant for Keystone Ridge Ltd.
W J Embling for Auckland City Council
L J B Paterson & N B Paterson for Keystone Watch Group

## DECISION

### Introduction

[1] This is an appeal by Keystone Watch Group ("the appellant") against Auckland City Council's ("the Council") decision to permit Keystone Ridge Ltd

("the applicant") to substantially demolish a former supermarket building at 3 Keystone Ave, Mt Roskill, and to replace it with three apartment blocks containing a total of 66 residential units. It is proposed that the complex consist of 15 two-bedroom units, 36 one-bedroom units and 15 studios, together with associated car-parking and a gymnasium.

[2] The front, 3 storey, block, which is to be sited parallel to Keystone Ave, will include the gymnasium and will be built above the existing semi-basement parking area. The two rear, 4 storey, blocks, will run parallel with the eastern and western boundaries, respectively, and will be built above the rear, ground level, parking area. There is provision for a total of 105 off-street parking spaces, including 7 visitor spaces. There is no separate provision for loading spaces. The sole vehicular access to and from the site will be via the existing driveway on the site's eastern boundary.

**The Site and Environs**

[3] The site is on the southern side of Keystone Ave, some 50 metres east of the avenue's intersection with Dominion Rd. The intersection marks the near, northern limit of the Dominion Rd/Mt Albert Rd suburban shopping centre. The site rises steeply from street level to an existing excavated terrace at the rear. An existing high, 5.4 metre, retaining wall extends the length of the southern boundary. It is topped by a 3-metre mesh and barbed wire fence, separating that part of the site from its rear neighbour, the Dominion Rd Primary School. The existing retaining wall on the site's eastern boundary rises from 2 metres at its street frontage to 5.4 metres at its rear. It is topped by a close-boarded, 1.8 metre high fence separating it from two single-storey houses at 5 and 5A Keystone Ave. Immediately over the site's western boundary is a driveway giving vehicular access to the rear of numerous commercial buildings fronting Dominion Rd.

[4] In the mid-1970s, substantial excavation of the site, which has an area of 2576m$^2$ and a frontage to Keystone Ave of 47.17m, was carried out prior to the construction of a single building, flush with the street boundary and 9.1m in height, for occupation as a supermarket. That use was abandoned some 3-4 years ago. The whole now presents as a derelict and rubbish-strewn site with the building covered with graffiti and posters and in a state of neglect and disrepair.

[5] With the exception of the properties at its intersection with Dominion Rd, Keystone Ave, which is some 340 metres long, is a typical suburban residential street of well-established houses with some minor, relatively recent, in-filling. At its eastern end, where it links with Akarana Ave, is Fearon Park, an extensive recreation reserve, accommodating the Roskill District Rugby Club's rooms, rugby fields, a softball field, and a children's playground. Akarana Ave, in turn, links with Mt Albert Rd. A traffic-calming installation opposite 5 Keystone Ave, generally, marks the break between the short-term, on-street, parking associated with the commercial development to the street's west and the residentially-related parking to its east. Its existing traffic volumes are estimated to be 2000-3000 vehicles per day.

[6] The site is zoned Business 2 in the Operative Auckland District Plan (Isthmus Section) ("the operative plan") as are the properties to its west. Apart from that, and the bank on the northern corner of its intersection with Dominion Rd, the whole of Keystone and Akarana Avenues are zoned Residential 6a. The school to the rear of the site is zoned Special Purpose 2.

**Status of Proposal**

[7] Under the operative plan residential units are provided for as a restricted controlled activity in the Business 2 zone. There is no control on the density of residential activity in the business zone.

[8] In addition, the proposal requires a number of resource consents under the operative plan, which are conveniently set out in the evidence of Mr McCarrison the planning consultant called by the Council. These are:

- Maximum Height
  - A discretionary activity as a development control modification[1] is required to allow the building fronting Keystone Avenue to exceed the 12.5 maximum height limit set out in rule 8.8.1.1 of the operative plan by 0.62 metres.

[1] See Part 4.3.1.2B of the operative plan.

- Streetscape Improvement

  - A discretionary activity as a development control modification to allow the provision of landscaping and tiered planters well above the ground level, on portions of the existing building in lieu of the requirement under the streetscape improvement control 8.8.1.3 which provides that not less than 50% of that part of the site between the road boundary and a parallel line 3 metres therefrom is to be appropriately landscaped.

- Earthworks

  - A discretionary activity under Part 4A.2B to allow earthworks totalling 500m$^3$ which exceeds the maximum 25m$^3$ provided for as a permitted activity.

- Excavations

  - Controlled activity consents under rules 4A.2 and 8.7.1 to allow excavations within 20 metres of a site boundary where the slope below ground level at the boundary exceeds the one vertical to two horizontal line as follows:

    - the excavation on the eastern side exceeds the one in two plane by a depth of 0.8 metres tapering to 0.0 metres over a distance of 35 metres.

    - the excavation on the western side exceeds the one in two plane by a depth of 1.3 metres tapering to 0.0 metres over 15.5 metres.

    - the excavation on the southern boundary exceeds the plane by up to a depth of between 1.30 metres to 0.8 metres.

- Parking

  - A discretionary activity under rule 12.9.1.1 to allow provision of 105 car parking spaces in lieu of the required 132 under rule 12.8.1.1.

- A controlled activity under rule 12.9.1.1A to allow the provision of car-parking spaces for more than 100 vehicles as provided for under rule 12.9.1.1.A.

- Stacked Parking

  - A restricted discretionary activity under rule 12.9.1.1 to allow provision for 25 stacked car parking spaces in lieu of the requirement under rule 12.8.1.3 for the formation of the parking spaces to be in accordance with figures 12.2a and 12.2b of the plan.

- Access

  - A discretionary activity as a development control modification to allow vehicle access to the site at a gradient of one in six in lieu of the requirements under rule 12.8.2.1(c) for the grade of access to be not steeper than one in eight and where it terminates at the road boundary for the provision of a 6 metre wide platform not steeper than one in twenty.

[9] The site is also affected by Plan Change T003 (Change 3) which was notified on 15 November 1999, and which seeks to apply additional controls at the interface between residential and business zones. These controls include making any activity within 30 metres of a residential zone a restricted discretionary activity, and imposing a more restrictive "building in relation to boundary" rule, the breach of which is to be considered as a discretionary activity. The proposal is within the 30 metres prescribed by the former and breaches the latter by a depth of 150 mm along 6.75 metres of frontage. The proposal therefore requires resource consent in terms of Change 3, as follows:

- To allow an activity in a business zone within 30 metres of a residential zone under Plan Change 3 rule 8.7.1. This is to be considered as a restricted discretionary activity under rule 8.7.3.2.

- A discretionary activity to allow the building fronting Keystone Avenue to infringe the proposed building in relation to boundary rule 8.8.1.12 under Plan Change 3 by a depth of 150mm over a length of 6.75 metres.

**Multiple Consents**

[10] Clearly this is a case where multiple consents are sought in a single application. Both the applicant and the Council presented their case on the basis that overall the application is a discretionary activity and accordingly requires, as a whole, to be assessed as a discretionary activity. This is in accordance with the approach taken by Cooke J under the former legislation in ***Locke v Avon Motor Lodge Limited*** (1973) 3 NZPTRA 17. Cooke J had held that where a particular feature of a development proposal made it non-complying (in that case a non-complying side yard), so that a conditional use application was necessary, then the whole use of the property was non-complying. Cooke J stated that a "hybrid concept" would add an unnecessary complication to legislation which was already complicated and said:

> *On a conditional use application the fact that there is only minor non-compliance for the predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.*

[11] The Environment Court, in ***Rudolph Steiner School v Auckland City Council*** (1997) 3 ELRNZ 85, adopted ***Locke*** where it said that a discretionary activity in respect of which the Council has not restricted its discretion is wholly discretionary, and that in exercising the discretion to grant or refuse consent and to impose conditions a consent authority is to have regard to all the matters listed in section 104(1) relevant to the circumstances.

[12] Salmon J in ***Aley v North Shore City Council*** (1998) NZRMA 361 approved the Environment Court's adoption of ***Locke*** in ***Rudolph Steiner School*** and commented at page 377:

> *Just because a plan allows for the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made in overall exercise of discretion under sections 104 and 105 an application of the principles in **Locke** and **Rudolph Steiner** could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.*
>
> *On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists. The "activity for which consent is sought" is in the present instance the building that is proposed not just those aspects of development which have had the effect of requiring a discretionary activity.*

[13] The Court of Appeal in ***Bayley*** added to the penultimate sentence the words *"or as it would exist if the land were used in a manner permitted as of right by the plan"*.

[14] It was on this basis that the appellant submitted that as there is non-compliance, some of which require discretionary activity applications, it is necessary to look at the whole of what the applicant is proposing to do and take a "holistic approach". It was submitted on behalf of the appellant that a failure to meet one or other of the development controls enables a greater intensity of development than is envisioned by the operative plan as a whole. Mr L.J.B Paterson (Paterson Snr) submitted:

> *It is not a case of ticking off items in isolation and saying they have only a minor effect after considering each of the controlled activities but the application as a whole must be considered.*

He submitted the importance of having regard to the cumulative effect of the non-compliance.

[15] In his closing address Mr Brabant took issue with this approach and submitted that this is an appropriate case where the required consents can be dealt with separately. The effect of this is, he said, that the primary consent application for residential units is properly considered as a restricted controlled activity. This is contrary to his opening submission where he said:

> *Overall the proposal requires consent as a discretionary activity.*

[16] Similarly, Ms Embling shifted her stance on behalf of the Council. The evidence adduced on behalf of the Council was on the basis that the development was to be assessed overall as a discretionary activity. Such a shift in stance is understandable from the point of view of the applicant and the Council as it has the effect of compartmentalising the activities for which different consents are required. This may, depending on the circumstances, limit the scope of the consent authorities, and this Court's discretion.

[17] The issue of multiple consents was addressed in ***Bayley v Manukau City Council*** (1999) 1 NZLR 568 (CA) and in two recent decisions of Randerson J in the High Court: ***King and others v Auckland City Council and anor*** (unreported, High Court, Auckland CP519/99, 1 December 1999); and ***Body Corporate 970101 v***

***Auckland City Council and anor*** (2000) 6 ELRNZ 189. In ***King's*** case Randerson J referred to the observation of the Court of Appeal in ***Bayley*** at 579-580:

> *Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.*

[18] Randerson J then went on to say that the approach as expressed in the comments by the Court of Appeal is consistent with the clear statutory intention of the Act to treat the sustainable management of natural and physical resources in a comprehensive manner. He then said:

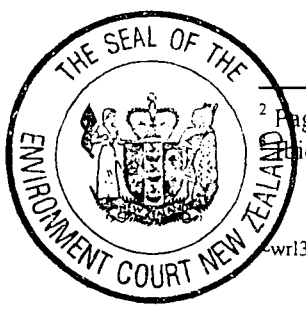
> *I have no doubt in the present case that a compartmentalised approach would not have been appropriate. Indeed, both PDL as applicant and the Council's planning officer accepted that the applications were to be dealt with as a whole and should be treated overall as an application for consent to a discretionary activity.*
>
> ...
>
> *Plainly, this was a case where the consents overlapped in the sense described in* ***Bayley*** *to such an extent that they could not realistically or properly be separated ... for the grant of the consents themselves.*[2]

[19] In ***Body Corporate 970101*** Randerson J said:

> *Where there is an overlap between the two consents such that consideration of one may affect the outcome of the other, it will generally be appropriate to treat the application as a whole requiring the entire proposal to be assessed as a discretionary activity.*[3]

[20] Randerson J's views were approved by the Court of Appeal in ***Body Corporate 970101 v Auckland City Council and anor*** (unreported, Court of Appeal, CA 64/00, 17 August 2000).

[21] We are satisfied that in the present case a compartmentalised approach is not appropriate for the following reasons:




[2] Page 18 and 19.
[3] Ibid. page 192.

- First, the applicant and the Council presented their case on the basis that the development was to be assessed overall as a discretionary activity. The evidence did not therefore specifically address the question of overlap or the manner in which the large number of consents should be dealt with separately.

- Secondly, putting aside the height restrictions under the operative plan and Change 3 (matters which we consider not to be of major significance), discretionary consent is required for the 500m$^3$ earthworks, the failure to comply with the street-scaping improvement control and the shortfall in car-parking and access. There is in our view an overlap in the sense described in ***Bayley*** between the earthworks consent and the streetscape improvement control with the development as a whole. They relate to the proposed construction of the buildings. They enable the designing of a structure that has a greater impact on the environment than would otherwise be the case because of the more intense use of the site. In addition, for reasons given later in this judgment we are not satisfied to the requisite degree that the parking shortfall and access will not have adverse effects beyond the site boundaries.

- Thirdly, there is a close relationship between the discretionary consents required and the other numerous consents required that not to look at it in the round would, to use the Court of Appeal's words in ***Bayley***, "split it artificially into pieces".

**Basis for Decision**

[22] As we consider the proposal should be considered overall as a discretionary activity we are required to consider the matters set out in section 104(1) of the RMA. The following matters are relevant:

- Part II matters – section 104(1) – (subject to Part II);

- The actual and potential effects on the environment – section 104(1)(a);

- The Auckland Regional Policy Statement – section 104(1)(c);

- The relevant objectives, policies, rules and other provisions of the operative plan and Proposed Change 3 – section 104(1)(d);

[23] Following a consideration of the relevant matters set out in section 104(1) we are then required to exercise our discretion pursuant to section 105(1).

**The Operative Plan**

[24] Part II of the operative plan sets out the manner in which the Council is to carry out its functions under the RMA. It addresses the issues that face the city and sets the principal objectives and the strategy of the Council to achieve the "*sustainable management*" of the resources of the isthmus. The relevant issues include those set out in Part 2.2:

- *The need to accommodate ongoing change within the urban area while maintaining and enhancing the quality of the present environment.*
- *The need to encourage intensification of use within the Isthmus while recognising the pressure on existing infrastructure, transportation and utility services that such intensification brings.*
- *The need to manage the physical growth of the Isthmus in a way which recognises the value of the existing resource while providing the flexibility to meet a variety of community aspirations.*
- *The need to ensure that business growth does not compromise the protection and enhancement of the environment.*

[25] Part 2.3 sets out the principal objectives of the Council. Objective 2.3.3 headed "Community" includes such objectives as: the achievement of a healthy and safe living environment; allowing for the development of a range of residential neighbourhoods and environments; the protection and enhancement of residential amenities and allowing maximum flexibility for individual site development without adversely impacting on neighbouring activities.

[26] The residential strategy under Part 2.4 recognises that the existing housing density is low; that the regional aim is to discourage unconstrained urban expansion; and that the intensification of residential areas is permitted where appropriate. The operative plan recognises that people require different types of housing. The business zoned areas make provision for housing that can be provided without the usual development constraints imposed on residentially zoned properties such as minimum open space area and landscape area. The expected outcomes for the strategy are set out in Part 2.5 of the plan which in part says:

> *The community will enjoy flexibility and choice in locations for work, leisure and living, secure in the knowledge that certain levels of amenity will be attained.*

*Overall the strategy will benefit the wider community and will leave a suitable legacy for future generations.*

[27] Part 6 of the plan, "Human Environment", recognises the importance of managing the opportunity for the provision of housing and infrastructure to ensure that an acceptable quality of life is maintained. Part 6.2.3 headed "Housing" recognises the provision of housing to meet the change in requirements of the community while seeking to ensure that residential environmental standards are not compromised. It says in part:

- *Housing meets the fundamental human need of shelter. If it is to perform this role properly it must be economically accessible, physically suitable to the users and sited where it can maximise opportunities for employment and recreation. For example, the housing market must be responsive to socio-economic changes in the district in recent years, which have produced a range of household sizes from extended families to small one and two person households, by providing a suitable range of housing. Resource management policies must also be sufficiently flexible so that the housing market can respond quickly to future shifts in the pattern of demand.*

- *Wide opportunities for housing are provided in the plan. Residential densities are not arbitrarily defined but are related to the maintenance and enhancement of existing standards of amenity. The current amenity and environmental standards within the residential neighbourhoods of the Isthmus will not be compromised by those provisions which open up opportunity.*

[28] Part 6.2.8 headed "Infrastructure" says in part:

- *The urban area provides an environment in which people can live and work. It depends on its infrastructure of transport and network utility services for water supply, drainage, energy and telecommunication and radio communication systems. Without this infrastructure and these network utility services, an acceptable quality of life could not be maintained, and adverse environmental effects could occur.*

[29] Part 8 of the operative plan contains the objectives, polices and provisions relating to business activity. The plan recognises that business activity through its effects can seriously impact on the quality of the environment and measures must be adopted to remove, reduce or mitigate those effects[4]. Part 8.2, headed "Resource Management Issues", recognises the need for transitional measures that promote and encourage sustainable alternative use of redundant industrial land. This is further emphasised in Objective 8.3.1 which seeks to foster the service employment and productive potential of business activity while at the same time ensuring the sustainable management of the natural and physical resources of the city. One of the policies under this objective is:

[4] Part 8.1.

- *By offering incentives for the comprehensive redevelopment of large, vacant, under-utilised or derelict industrial sites within the Isthmus.*

This reflects one of the resource management issues in Part 8.2 of the plan, which says:

- *The need for transitional measures which promote and encourage suitable alternative use of redundant industrial land.*

[30] The use of a "zoning technique" is to allow the district plan to create bundles of activities considered generally appropriate in each zone or area, in recognising the constraints of the environment and that some activities may not be appropriate in every location. As previously mentioned the western end of Keystone Avenue and Dominion Road has been zoned Business 2 to reflect this area's suitability to accommodate the range of activities offered under this zoning. One of the objectives of the business zone is to provide for retailing office and commercial service activity at a medium intensity suburban level[5]. One of the policies emanating from this objective is:

- *By permitting a wide range of business and non-business activities within these centres.*

[31] A further objective is to ensure that any adverse environment or amenity impact of business activity on adjacent residential or open space is prevented or reduced to an acceptable level[6]. The policies emanating from this objective are:

- *By adopting controls which limit the intensity and scale of development to a level appropriate to the zone's proximity to residential zoned properties and open space areas.*
- *By requiring acceptable noise levels at the interface between residential zones and business zones.*
- *By adopting controls which seek to protect residential zones' privacy and amenity.*
- *By adopting parking and traffic measures which seek to avoid congestion and parking problems.*

[32] As previously mentioned the subject site interfaces with two environments in addition to Business 2, being Residential 6a and Special Purpose 2. The Residential 6a zone is the most common classification of land on the Isthmus. Within it,

[5] 8.6.2.1(a).
[6] 8.6.2.1(e).

medium intensity activity such as multi-unit residential development is encouraged. This zone recognises the need for further development while retaining and sustaining a reasonable level of amenity.

[33] The Dominion Road Primary School to the rear of the site and contiguous with the southern boundary is zoned Special Purpose 2 (Education). The school is visually separated from the site due to the difference in ground level and the mature pohutukawa trees and security fence along the southern boundary.

[34] Transport is a major issue for the city and Part 12 of the operative plan is devoted to transportation. It emphasises the need to protect corridors for the provision of regular and efficient public transport services and the plan recognises the need to control activities that may adversely impact on the efficient functioning of the existing traffic network with considerable emphasis on off-site parking for proposed developments.

[35] As previously mentioned residential units are a restricted controlled activity. Rules 8.7.2.1 and 8.7.2.2(3) set out assessment criteria relating to controlled activities of which the following are relevant:

- Site layout with special emphasis on parking and vehicle circulation areas to ensure that the effects of the proposal are internalised and do not impact on the adjacent roadway or adjacent sites;

- Car-parking to be located remotely from residential zoned boundaries or where this is impracticable adequate screening is to be provided to reduce adverse aural or visual impacts on residentially zoned land;

- Internal circulation of the parking areas is to be designed to ensure safe and efficient vehicle circulation;

- Conditions may be imposed to ensure no minor adverse effects on the environment occur as a result of the proposal;

- Where the subject site adjoins other business zoned sites adequate measures to the satisfaction of the Council should be incorporated into the design and/or location to ensure indoor acoustic privacy.

[36] The matters contained in Part 2 of the operative plan establish an approach that is consistent with Part II of the Act and in particular the sustainable management of natural and physical resources. Emphasis is given to securing certain levels of amenity for the community and protecting these for future generations. The provision of housing to meet the change in requirements of the community is recognised in Part 6 of the operative plan while seeking to ensure that residential environmental standards are not compromised. We were told by Mr McCarrison that:

> *It is recognised that apartment complexes within appropriate located business zoned areas in the last five years have enabled provision of a style and character of residential living that is not able to be provided on residentially zoned land.*[7]

[37] The market demand for such residential units is reflected in the popularity of this form of housing. We were also told by Mr McCarrison that:

> *A clear focus and message of the objectives, policies and general strategy of Part II of the district plan and those specific Residential 6a and Business 2 zones is the expectation to provide the opportunity for additional housing; to maintain and improve the amenity of the residential areas and business centres over time.*[8]

[38] Mr Green, the consultant planner for the applicant, had this to say:

> *The plan identifies the investment and infrastructure and existing shopping centres as being significant in the context of the Business Activity 2 zone. In my opinion the introduction into the Business Activity 2 zone of an increased catchment of family units and individuals likely to make use of the nearby shopping centre will do much to revitalise the retail outlets currently in existence and may cause them to improve and diversify the goods and services that they provide to the community. In my opinion this is a sustainable use of an existing resource consistent with the provisions of the district plan.*

[39] We were told that the existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail-centred, are going through dramatic change due to the alteration in the organisation of retailing such as shopping malls, large stores and technology. Thus, the district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate[9]. Residential units, which were a non-complying activity under previous plans, now have restricted controlled activity status in the Business 2 zones of the operative plan.

---

[7] McCarrison, paragraph 5.12.
[8] McCarrison, paragraph 5.25.
[9] See in particular Part 8.2 & 8.3 of the Operative Plan.

[40] We are of the view that the proposal is generally in accord with those relevant parts of the operative plan which aim: to encourage intensification of residential use in parts of the Isthmus; to encourage alternative use of redundant land in appropriate located business zoned land; and to encourage residential development in close proximity to main traffic routes. However, there is a constant thread throughout the objectives and policies of the operative plan which emphasise such matters as: the maintenance and enhancement of the present environment[10]; the protection and enhancement of residential amenities[11]; the achievement of a healthy and safe living environment[12]; allowing site development without adversely impacting on neighbouring activities[13]; and assessing that business activity does not adversely impact on adjacent residentially zoned properties.[14].

[41] Of concern is the effect of the proposal on the amenity of the adjacent residentially zoned land. It is the effect on the amenity of the adjacent residentially zoned land that is at the heart of this appeal. The appellant maintains that the proposal has been designed beyond the potential of the site. The effect of this, the appellant says, is that the bulk, height and density of the proposal has an overpowering effect on the residential amenities of the Residential 6a zone located to the east and north of the site. Further, the effects on visual and oral privacy to the north and east are considerable, as is the effect on parking and traffic congestion in Keystone Avenue. The numerous conditions that the consent was made subject to will it says not sufficiently mitigate or avoid these adverse effects. The non-compliance of the development controls are in each case not of relevant significance on their own says the appellant but their combined effect reflects an over development of the site. One of the appellant's witnesses, Mr G W Pederson, a resident at 20A Keystone Avenue, Mt Roskill said:

> *... I support the development of apartments in principle. However, it is my view that the developer is attempting to over develop this site.*

[42] It is therefore necessary for us to consider what adverse effects will flow from allowing the proposal and, if they are, the extent to which those effects will affect the adjacent residential environment. We deal with this later under the heading "Potential Effects".

---

[10] 2.2.
[11] 2.2.3.
[12] 2.2.3.
[13] 2.2.2.
[14] 6.2.1(e).

**Proposed Plan Change 3**

[43] Plan Change 3 was publicly notified on 15 November 1999. It replaced proposed Variation 164 that had been publicly notified on 23 June 1997 and was withdrawn to allow the district plan to become operative. Both the plan change and withdrawn variation reflected Council's concern to protect the amenity of residentially zoned properties from the potential adverse effects of activities within the business zones. Both the plan change and withdrawn variation require that all permitted and controlled business activities on sites within 30 metres of a residentially zoned property be considered as at least a restricted discretionary activity. The change sets out some ten criteria against which any proposal is to be assessed. These relate to such matters as:

[a] the effect on infrastructure, particularly wastewater and stormwater drainage systems;

[b] compliance with development controls, particularly zonal height, floor area ratio and required parking and noise controls;

[c] the intensity level of the adjacent residential zone for permitted or controlled activities is to be used as a guide but such an intensity assessment does not need to be undertaken for activities which satisfy off-street parking requirements and infrastructure considerations;

[d] the bulk colour and design of buildings;

[e] traffic and parking considerations and the location and design of vehicular access and car-parking;

[f] the cumulative effects of activities, particularly traffic and noise and the proximity to public transport.

The explanation given for the criteria is:

*Some activities and buildings have the potential to adversely affect surrounding residential areas due to building dominance, shadowing reduces access to sunlight, and loss of privacy. Other impacts can include streetscape, visual design, heritage values, noise, traffic and parking, intensity of development and cumulative effects. The Council may impose conditions to ensure that the effect on neighbouring residential zoned properties is addressed and in some circumstances where the effects cannot be mitigated or avoided the activity may be refused consent.*

[44] The plan change provides specific rules and criteria for controlling development at the interface of residential and business zones. Hitherto the plan addressed this issue in only a general way.[15]

[45] The plan change has reached the stage where the Council's officers are assessing and preparing reports on the submissions. It has yet to be subjected to independent decision-making and testing through the various processes required by the Resource Management Act. In considering the weight that we give to it we take into account the following principles which arise from the various cases:

- The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process[16].

- The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:

  (i) The extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;

  (ii) Circumstances of injustice;

  (iii) The extent to which a new measure, or the absence of one might implement a coherent pattern of objectives and policies in a plan[17].

- In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan[18].

[46] In considering the weight to be given to proposed Change 3 we have regard to the stage it has reached through the objection and appeal process. We note that it does reflect the general provisions of the operative plan relating to the clear intent of the plan to protect the amenity of residentially zoned properties from the potential

---

[15] See Objective 8.6.2.1(e) and policies emanating therefrom.
[16] See *Hanton v Auckland City Council* A010/94 3 NZPTD 240 adopted in *Burton v Auckland City Council* 1994 12 NZRMA 544.
[17] See *Burton v Auckland City Council* (supra).
[18] See *Lee v Auckland City Council* W014/94 4 NZPTD 178, 1995 NZRMA 241.

adverse effects of activities in the business zones. This requires us to carefully consider the potential effects of the proposal on the adjacent Residential 6a zones, which we will consider in some detail later in this judgment.

**Auckland Regional Policy Statement**

[47] Chapter 2 of the ARPS is headed "Regional Overview and Strategic Direction" and makes specific reference to "*higher density, infill housing*". It acknowledges under section 2.6.3 that Auckland's low-density urban areas have been wasteful of land ... "*and this has led to inefficient travel patterns and use of energy*". Urban intensification is supported "*so that better utilisation is encouraged of the substantial reservoir of under-utilised land within the urban area. Much of this land is in areas where the existing utility systems and transport network have capacity to service more intensive or infilled development. Intensification can enable more efficient use of physical resources including infrastructure and also shift the emphasis of development of metropolitan Auckland toward an urban form which is more efficient in transport and energy terms*".

[48] There is further comment in section 2.6.3 that infill and intensification needs to be carefully planned "*to avoid, remedy or mitigate adverse effects which can stem from loss of trees and bush, overloading of utility systems (especially drainage and stormwater), traffic congestion and reduction of space around buildings*".

[49] The sentiments of the ARPS are to some extent mirrored in the document adopted by the respondent in June 2000 and called "Growing Our City – Through Liveable Communities 2050". This document sets out a strategy for managing the growth of Auckland City into the new millennium. Using a number of criteria, it proposes to encourage redevelopment in specific locations so as to safeguard identified environmental and amenity features and at the same time ensuring land use development will be integrated with transport planning and infrastructure improvements. Keystone Avenue and the Dominion Road area is identified as being within one of seven strategic growth management areas spread throughout the city. A strategic growth management area is considered to be a place where the existing development pattern and infrastructure is conducive to supporting denser, mixed use, pedestrian friendly environments and where there is easy access to public transport. This area is forecast to be able to accommodate 3311 additional households by 2050 and this in turn reflects the Council's intent of working towards achieving a higher intensity of housing to meet expected population growth.

[50] We agree with Mr McCarrison when he says that in his opinion ... "*the proposed development meets many of the policies of the regional policy statement with regard to the intensified use of the land adjacent to a major arterial road and where the infrastructure can accommodate such development*". This view was underlined by the evidence we heard, and which was not challenged, that Dominion Road is a strategic arterial road providing the opportunity for an efficient private vehicle and public transport system. It is the effects of the proposed activity on the adjacent residential zoned areas that are therefore the important issue in this case. We now turn to the potential effects of the proposal.

**Baseline**

[51] Before discussing the potential adverse effects of the proposal it is necessary to address the submissions of counsel for the applicant and the respondent with respect to what is now become known as the "baseline" against which adverse effects are to be compared. We were referred to ***Bayley*** at 576 where the Court of Appeal said:

> *The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.*

[52] We have already referred to the Court of Appeal's qualification of Salmon J's words in ***Aley***. We have also considered the numerous decisions of the High Court[19] and the Environment Court[20] on this issue. The comments in ***Bayley*** were made in relation to section 94 of the Act. In this case we are dealing with the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a). Salmon J considered the comments had relevance to the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a) in ***Smith Chilcott Ltd***, which was cited with approval by Chambers J in ***Arrigato***.

[53] We consider the proper approach is as stated by the High Court in ***Barrett*** where the Court stated by reference to the Court of Appeal decision in ***Bayley***:

---

[19] Including *McAlpine v North Shore City Council*, M1583/98, Auckland Registry; *Low & ors v Dunedin City Council*, CP51/98, Dunedin Registry; *King & ors v Auckland City Council*, CP 519/99, Auckland Registry; *Barrett v Wellington City Council*, CP 31/00, Wellington Registry; and *Smith Chilcott Ltd v Auckland City Council & Anor*, AP 74-SW/00, Auckland Registry; *Auckland Regional Council v Arrigato Investments Limited & Others, AP 138/99, Auckland Registry.*

[20] *Arrigato Investments Ltd v Rodney District Council*, A115/99; *Martinez & Anor v Auckland City Council*, A32/00; *Contact Energy Limited v Waikato Regional Council & Anor*, A04/00.

> *But I accept that when the Court of Appeal is referring to what could be done on the site as of right it had in mind credible developments, not purely hypothetical possibilities which are out of touch with the reality of the situation. A test based on theory rather than reality would place an intolerable burden on consent authorities.*

[54] We are also mindful of the comments of the High Court in ***King,*** where Randerson J noted that the "as of right" approach assumes that the applicant would proceed with the development to the extent permitted as of right, and that there are no other advantages to be gained from the non-complying aspects of the proposal such as increased density or more intensive use of the site which would not be available if the relevant controls are observed. He further commented at page 15:

> *All of this suggests that some care will be needed by consent authorities in applying the "as of right" principle in* ***Bayley*** *at least until some further guidance is available from the Court of Appeal as to its application in particular cases.*

[55] Although Mr Brabant did not make specific submissions on the point, the expert evidence of the applicant was adduced on the basis that when assessing a discretionary activity, the Court should not consider environmental effects from a building that complies with the development controls.. We are not persuaded that ***Bayley*** overruled the principle stemming from ***Locke*** and reiterated by Salmon J in ***Aley*** (already quoted), that where a proposal requires a discretionary activity consent, then the overall exercise of discretion under sections 104 and 105 could mean that full advantage might not be able to be taken of the maximum provisions set by the rules. With respect we consider the position was correctly and pragmatically stated by the Environment Court in ***Wouldes and ors v North Shore City Council & anor***, unreported, A58/98 where Judge Bollard and his Commissioner colleagues said:

> *In granting consent at first instance, the Council apparently felt that the proposal's overall compliance with the development control guidelines was of major import. Given the detailed nature of the plan, we can appreciate this viewpoint. If a plan is drawn with a degree of elaboration that this one is, a would-be applicant may generally be expected to have comparative confidence in formulating a proposal such as the present. Yet, such a plan cannot be expected to operate as a cast iron guarantee to success, having regard to the full range of matters relevant under section 104(1) in affording due primacy to Part II of the Act. Compliance for such guideline criteria is site coverage, maximum height, height in relation to boundary, yard provision, building length, and so forth, will doubtless assist in the quest of formulating a proposal that will be all the more likely to minimise adverse effects on the environment in accordance with the plan's intent. Even so, we repeat that in discretionary activity cases the plan cannot be expected to operate as an infallible blueprint or mechanism to a given end. Cases may still be expected to occur from time to time where, despite careful attention to the guideline provisions, resultant effects on adjacent owners are nonetheless found to be unsatisfactory in the final analysis.*

[56] The ***Locke*** principle enables a consent authority and, thus the Court, to exercise its overall discretion taking into account all the matters set out in section 104(1) and Part II of the Act. To negate the ***Locke*** principle may well, in certain circumstances, result in the plan rules having primacy over Part II matters. The rules are arbitrary prescriptions which may not in particular circumstances give the protection to the environment which reflects the clear purpose of the Act as enunciated in Part II. In such cases, when the Court is exercising its discretion under section 105, the Part II matters must prevail.

[57] Conversely, in some circumstances, the rules may be unduly restrictive and to apply them would be contrary to the enabling provisions of section 5 and the principles of sustainable development as set out in Part II. Again Part II should prevail.[21]

**Potential Effects**

[58] It was the potential adverse effects of the proposal on the adjacent Residential 6a zones immediately to the east and across Keystone Avenue to the north of the site that was the major concern of the appellant. The appellant was represented by Mr L J B Paterson supported by his son Mr N B Paterson. Mr Paterson Snr is an architect and Mr N B Paterson is a registered engineer. They presented detailed submissions and evidence to the Court. The essence of their case is succinctly encapsulated in the following paragraph of their submissions:

> *It is for this Environment Court to decide whether the applicant has designed, scaled and landscaped his development to be sympathetic to the surrounding residential sites or whether he just designed the biggest blocks and the greatest number of apartments he could.*[22]

[59] They asserted that the size and scale of the proposal will result in a number of adverse effects and the following were addressed at some length in the evidence of all parties:

- The building – its dominance, its visual effects and its effects of overshadowing adjacent properties;

---

[21] See for example such cases as: *Minister of Conservation & Ors v Kapiti Coast District Council,* A024/94; *Price v Auckland City Council,* W180/96, 2 ELRNZ 443; and *Russell Protection Society Inc v Far North District Council,* A125/98.

[22] Appellant's submissions, page 8.

- The effect on the aural and visual privacy of the adjacent dwellings;
- Traffic, including parking, and effects on pedestrian and road usage;
- The effect on infrastructure, particularly sewerage and stormwater;
- The effect of lighting on neighbouring properties;
- Noise.

We deal with each in turn.

**The Building**

[60] In this respect we heard evidence from Associate Professor C A Bird who lectures in Architecture and Urban Design at the University of Auckland School of Architecture. He gave architectural and urban design evidence on behalf of the applicant. Mr S J Cocker, a landscape architect, also gave evidence for the applicant in this respect. For the appellant we heard evidence from both Mr Paterson Snr and Mr N B Paterson and a number of residents. Of particular concern to the appellant were the bulk and the dominance of the building, its visual effects occasioned by its size and inadequate landscaping, and its shadowing effect on those properties to the east. Associated Professor Bird addressed these issues. As to dominance he said:

> *In this context "dominance" might best be described as a quality or characteristic of a building which is perceived by a viewer of that building. Architectural characteristics which may or may not give rise to a perception of dominance include "bulk", "colour", and "design", ... .*

[61] He said that as the proposed development generally complies with the development controls its bulk was contemplated by the plan. He then explained in some detail how the colour and design of the building effectively reduces what would otherwise be an "over-dominant building" to one which is "architecturally and urbanistically appropriate to its site and surroundings".

[62] Mr Cocker discussed the proposed landscaping of the building which he said "will assist in ameliorating the potential impact of the building".

[63] Mr Paterson Snr, himself an architect, pointed out that Keystone Avenue consists mainly of single storey residential buildings. He also pointed out the location of the site in relation to the different types of zone and the topography of the

site and its surrounds. The site is located on a slope extending south towards the top of Keystone Ridge and is thus higher than the residential land to the north. All these factors, he said, added to the dominance of the buildings. He opined that the mitigation attempts, including architectural design measures such as the modulation of the building façades and landscaping, are "woefully inadequate" to ensure that the generated effects of the application are no more than minor.

[64] In assessing the evidence we are mindful that visual perceptions of buildings and such matters as building dominance can be influenced by the subjective disposition of the beholder. We have concluded that the visual effect of the building will be quite significant and the form of the building will be dominant in the streetscape, thus adversely affecting the amenity of this residential neighbourhood.

[65] With regard to overshadowing, Associate Professor Bird acknowledged that in the late afternoon, when the sun is at a low angle, there will be some overshadowing of the properties to the east of the site. Mr Paterson Snr referred to shading diagrams drawn up by the applicant's architect, Mr Brown, and attested that there would be significant shadowing created in the afternoon for most of the year starting from about 4.00pm in most afternoons from the 21 March to 21 September. We agree that the shadowing effect is significant.

**Privacy**

[66] The issue of privacy was addressed by a number of witnesses, in particular, Mr Brown, Mr McCarrison , Mr Paterson Snr, Mr S D Watson and Mr A J Wootton for the appellant.

[67] We find that the surrounding properties will be considerably impacted by lack of privacy. This will be exacerbated by a number of factors including the following:

- The height of the buildings above the predominantly single-storey dwellings;
- The design of the proposal which includes decks facing outwards from the north and east sides of the site;
- The intensity of the development. The density of the proposal is approximately $39m^2$ per unit as compared to the Residential 6a density of $375m^2$ per unit.

[68] Recognising the effect on privacy the applicant has taken measures to mitigate any such effects. The impact to the north is not as bad as to the east. The properties to the north are already overlooked by the public space of the road although not nearly to the extent of the proposed apartments. Further, the dwellings tend to have their private space orientated to take advantage of the views, sun and privacy to the north. In addition, tree and shrub planting and fencing provide some privacy to the front yard areas and rooms of each dwelling that face the street. Additional street planting is also proposed. The properties to the east will be most affected. They will be overlooked from a higher building and the evidence indicated that this is likely to be from 17 units on the eastern side. Recognising this possibility the applicant has taken measures to mitigate any effects including:

- Ensuring a separation distance of approximately 11.5 metres between the eastern boundary and the proposed new residential block running parallel with the eastern boundary;

- By making provision for balconies, 1 metre wide by approximately 7 metres in length, to all units between the glazed areas of the proposed building and the surrounding environs to provide a "buffer zone". The balustrades of the balconies are to be either frosted glass or solid to provide a visual screen. As Mr Brown pointed out the balconies are designed for use more as outlook courts, rather than the significant external space that the traditional suburban deck implies. According to Mr Brown the balconies will allow a graduated shift from interior to exterior that helps blur the boundary and enable the exterior to invade the interior space rather than vice versa;

- It is proposed to plant a 100mm strip at the top of the retaining wall adjacent to the eastern boundary with trees and other vegetation, including pittosporums growing to 5 metres in height. These, it was asserted, will provide some additional privacy and visual amenity in the medium to long term. Quite apart from the questionable practicality of such a proposal, such planting would, of course, have to be with the consent of the owner and occupier of the affected property.

[69] On the evidence, assisted by our site visit, we find that the proposal will result in an increased loss of privacy primarily to the east and, to a lesser extent to the north of the site. We conclude that the increased loss of privacy will be

significant. The mitigating measures proposed will not sufficiently ameliorate the loss of privacy particularly to the east.

**Traffic**

[70] For the applicant, we had the benefit of expert evidence from Ms B Coomer-Smit who has had 13 years experience as a specialist traffic and transportation engineer. She described for us relevant surrounding street details, including that Keystone Avenue is a traditional 20 metre wide suburban street with footpaths, berms and kerb-side parking on both sides, as well as one moving traffic lane in each direction. She also told us that the 'traffic-calming' structure just east of the site, already referred to, was installed to discourage motorists from using Keystone Ave and Akarana Rd to bypass the signalised intersection of Dominion Rd with Mt Albert Rd. She also drew to our attention the fact that Dominion Rd is a well-served public transport route and that the nearest bus stops are only some 2 to 3 minutes walking distance from the site. Based upon peak period traffic counts carried out under her direction in September 1998 and August 2000, she estimated that Keystone Avenue carries around 2000 vehicles per day.

[71] Turning now to the issue of the traffic that is expected to be generated by the development. Ms Coomer-Smit told us that to assist her in her calculations, she had adopted the trip generation rates for medium density housing contained in the New South Wales Roads and Traffic Authority's "Guide to Traffic Generating Developments". She asserted that it was extensively used in New Zealand. Based upon that study, she arrived at a morning and evening peak trip rate of 0.45 per unit and concluded that:

> *The additional traffic to be generated during the peak hours can be equated to one vehicle turning into or from the development every 2 minutes. In terms of the effects of the additionally generated traffic on existing Keystone Avenue flows, the proposed development will add no more than 21 vehicle movements per hour, to any single section of Keystone Avenue. In fact these flows could even be less if one considers that the development is well serviced by public transport and that some of the trips generated by the development could well be public transport trips. ... consequently, ... these small volumes of added traffic flows will be imperceptible to the casual observer, and will have no discernible impact to (sic) the performance of the intersection at Dominion Rd.*[23]

[23] Par. 32

[72] It was her overall conclusion that the development would have no more than minor adverse effects on the function, capacity or safety of the local traffic environment.

[73] Similarly, she told us of the traffic accidents that have been recorded over the past 5 years, of which there was only one reported in each of the past 3 years, and concluded that *the addition of a comparatively small number of traffic movements due to the proposed development will not compromise this road safety history in any way.* [24]

[74] Turning to on-site considerations and dealing first with parking, as already noted, the development provides for only 105 parking spaces compared with the 2 per unit, or 132 spaces, required by the district plan. 28 of the spaces will be at basement level and the remaining 77, of which 25, or 24%, will be stacked, together with 7 visitor spaces, will be at ground level. Responding to the shortfall of 27 spaces, or, 20%, Ms Coomer-Smit reasoned that, based upon an analysis of 1996 census data equating the number of bedrooms against car ownership, *and conservatively assuming that all units have at least one car*, the actual expected parking demand would total 75 spaces distributed as follows:

> Of the 51 one-bedroom or studio units, 46 will have one space and the remaining 5, two spaces; and
>
> Of the 15 two-bedroom units, 11 would have one space and the remaining 4, two spaces.

[75] Regarding the proposed stacked parking, it was her opinion that it was appropriate for this residential development and would result in an efficient use of the site. In that context, she also drew our attention to clause 12.9.1.2(d) of the district plan, which states, in part, that:

> *Stacked parking may be allowed for one of the two required parking spaces for any residential development where each residential unit has two parking spaces physically associated with it.*

[76] It is not clear from the evidence which are intended to be the units that will be assigned two parking spaces. In our opinion, none of the stacked spaces would be *physically associated* with them, being separated by a minimum of one storey and a

---

[24] Par. 25

maximum of four storeys. In other words, we find that "physically associated" is not synonymous with "assigned" or "allocated". Therefore, in that regard, the proposed parking does not comply with the district plan's discretionary clause quoted above.

[77] Ms Coomer-Smit did not, however, draw our attention to the criterion stated in the previous paragraph, namely, that

> *Stacked parking will generally only be allowed in special circumstances in order to alleviate adverse effects, where no feasible alternative exists.*

[78] It was not made clear to us what would constitute *adverse effects* in this context other than the obvious overflow to off-site, kerb-side, parking, and, given the proposed intensity of the development, there certainly appear to be no feasible on-site alternatives.

[79] Returning to the 105 spaces that are proposed, she allotted them as follows:

> *(i) Each of the 15 two-bedroomed units will have two spaces. Of these two spaces per unit, one space will be a stacked parking space.*
>
> *(ii) Ten of the single bedroomed units will have two spaces with one of the spaces being a stacked space.*
>
> *(iii) The remaining 41 units will be allocated a single carpark each.*
>
> *(iv) Seven spaces will be allocated as visitor parking spaces.*
>
> *(v) The remaining seven spaces can either be allocated to a single bedroom unit or can be used as visitor parking spaces.* [25]

[80] And concluded that, *Given the nature of the activity as proposed, and the levels of traffic activities at the site, ... the parking arrangements as intended will provide a suitable and appropriate solution to the vehicle demands that will be generated.*

[81] We note, here, that only the seven visitor spaces would have unimpeded overhead clearance. The remaining 70 spaces at ground level and the serving aisles for all but 11 of them would have a maximum vertical height of approximately 2 metres, insufficient, in our view, to constitute *a suitable and appropriate solution* to the parking allocation problem.

[25] Par. 47

[82] Notwithstanding the district plan's requirement, no dedicated loading space is proposed. Ms Coomer-Smit responded to that omission by suggesting that there is generally little need for such in residential developments *since most loading is minor in nature and can be readily accommodated from a visitor parking space* and, therefore, given that *there will almost always be a practical excess of parking on the site* ... (it would be) *both unnecessary and wasteful ... for a separate loading space to be provided.*[26]

[83] Quite apart from the weekly collection of the contents of 66 wheelie bins, truck-generated movements would include, from time to time, furniture vans, goods delivery, servicing and emergency vehicles, and the like, to meet the needs of the occupants of the 66 apartments. We find it difficult to reconcile that prospect with such a conclusion.

[84] The district plan requires that *no loading space shall be less than 3.5m in width, or such greater width as is required for adequate manoeuvring and that no loading space shall be less than 3.8m in height.*[27] Assuming a weekly 'wheelie bin' rubbish collection, Ms Coomer-Smit noted that a 90 percentile truck would need to park adjacent to the visitor parking spaces to load from the 66 waiting bins assembled there. Having completed that lengthy task, it was her evidence that, in order to leave the building, the truck would then have to perform an awkward 4-point manoeuvre, the successful execution of which would also necessitate the driver having to turn the truck's wheels whilst stationary ie. the available aisle space would be insufficient to meet the minimum 90 percentile truck geometry required by the district plan. Elsewhere, we were told that the rubbish would be collected by private arrangement involving the use of smaller vehicles, but of what dimensions, we know not. Regardless of the size of the collecting vehicle, that part of the site could be obstructed for a considerable time on one day each week. We record here, the appellants' apprehension that the on-site collection process would prove to be so unsatisfactory that the kerb-side siting of at least some bins on collection days would be an inevitable result.

[85] We note in passing, that there are six "rubbish rooms" all located on the ground floor, intended to serve 66 units. There is no provision for the storage of rubbish on any of the three residential floors and access to and fro is by way of stairwells only; there is no provision for elevators. We cannot avoid the conclusion

[26] Par. 49
[27] 12.8.1.3 (e) & (f)

that, overall, the proposed servicing of the 66 apartments is not to such a standard as to persuade us that there will not be off-site effects which will be more than minor. Nor are we able to reconcile it with Clause 12.8.1.3 dealing with the *Size and Access to Parking and Loading Space* provisions which stipulates, at 12.8.1.3 (iv), that *Each loading space shall be adjacent to an adequate area for goods handling and shall be convenient to any service area or service lift.* Nor with the requirement that *Such required parking areas must be kept clear and available at all times, free ... of impediment ...* .

[86] Access to and from the site, which will be security gate-controlled, is intended to be via the existing ramped driveway, which is 5.5 metres wide at its narrowest point and has a grade of 1:6. The district plan requires a minimum grade of 1:4 for residential zones and 1:8 for all other zones. In addition, clause 12.8.2.1 of the district plan requires that ramps terminating on a grade steeper than 1:20 shall be provided with a platform not steeper than 1:20 adjacent to the road boundary, such platform being not less than 4 metres long in the case of residential zones, and not less than 6 metres for all other zones. This requirement is of particular relevance for visitors who will need to leave their vehicles on that 1:6 slope in order to activate the entrance gate. Nevertheless, it was Ms Coomer-Smit's evidence that, even although the site is in a Business 2 zone, the residential character of the development is such that residentially zoned standards would be more appropriate. Again, we are not satisfied that, in view of the magnitude of the development, accommodating, as it will, at least 150 people, so simple a conclusion may be drawn. In any case, with regard to the minimum platform requirement, even the residential standard is not met.

[87] Whilst on the subject of truck-generated on-site movement, we record, in passing, that the first floor plans presented to us show that there is insufficient aisle space for a 90 percentile truck to gain access to two of the three blocks.

[88] Finally, we refer to 'headlight wash' caused after dark as headlight beams from vehicles leaving the site sweep across houses on the opposite of Keystone Avenue. Ms Coomer-Smit acknowledged that they would , and she observed that street planting on that side of the road, in time, would go some way towards alleviating the problem.

[89] Mr S D D Hewett, also a consultant traffic engineer with 13 years experience, appeared on behalf of the city council. His evidence, although not as detailed, closely mirrored that of Ms Coomer-Smit's, although he calculates that, not 75, but 95 on-site spaces would be necessary. He had a survey made in January 1999 of traffic movements at the Dominion Rd/Keystone Ave intersection and he also concluded that the development would have no more than a minor effect on the surrounding road network. With regard to on-site pedestrian safety, a matter not covered by Ms Coomer-Smit, Mr Hewitt drew our attention to a condition attached to the council's consent. It requires that a separate pedestrian access-way from Keystone Ave, of at least a metre in width, shall be agreed upon prior to the beginning of any construction work. As a consequence, it is likely that the effective vehicular entrance width will be reduced to a maximum of 4.5 metres and therefore insufficient for 2-way movement. Also as a consequence, occasional queuing of vehicles seeking to enter the site is likely. He, in turn, was silent on the requirement for a (near) level platform at the driveway's entrance to the site.

[90] Mr Hewitt also acknowledged that two of the ground floor parking bays (the stacked bay, numbered 36 on Plan (SK2) 03, did not meet the minimum district plan requirements. Nevertheless, he asserted that *The technical deficiency for space 36 would not however prevent vehicles manoeuvring into this on site parking space.*[28]

[91] Mr NB Paterson, who is a professional consulting engineer, although without any particular traffic engineering expertise, gave evidence on traffic and other engineering matters on behalf of the appellants. He challenged claims regarding the parking provisions, noting, inter alia, that the existence of the six structural columns at basement level is such that 12 of the 28 parking bays fail to meet even the 90 percentile design standard's overall minimum width of 3 metres. It was also his evidence that 18 of the 77 spaces at ground level would be similarly adversely affected and that the 4-point manoeuvre of the rubbish truck, earlier referred to, would not be possible because of there being insufficient clearance between columns and the first of the visitor spaces. In that context, we note that movement to and from the four bays, numbered 53 to 54, would not be possible whilst the rubbish truck was loading. He further observed that the failure to provide for any 99-percentile cars on site, was an unrealistic reflection of likely ownership patterns.



[28] Par. 27

[92] Mr Paterson went on to challenge, at length, the evidence of the two traffic engineers regarding the traffic that would be generated by the development and its impact upon Keystone Avenue and its intersections with Dominion and Mt Albert Roads. He pointed out that the intersection counts at Dominion Rd by Mr Hewitt's firm were taken in January and therefore were not typical, but appeared to overlook Ms Coomer-Smit's work in that regard. He did not produce the results of alternative studies in support of his assertions, being largely content to conclude that since the development would more than double the number of residential units in Keystone Avenue from the existing 46 to 112, the number of cars, and therefore the total traffic, would increase proportionately. He felt that would inevitably result in a more than minor adverse effect on the environment.

[93] Mr W Fletcher of No. 2 Keystone Avenue, expressed concern about the existing excessive demands on kerbside parking. Likewise, Mr R. Thomas of #5 Keystone Ave, immediately east of the site, expressed concern regarding the impact of the development on the street's amenities, stating that ... *it is near impossible to get street parking most days of the week our garage entry is often blocked by cars parking over it.* (sic) He, and other residents, also drew attention to what they claimed to be the existing hazards and delays involving right-hand turning movements into Dominion Rd and their apprehensions regarding the more than doubling of traffic movements that the development would generate. However, their evidence, in each case, although sincerely held, did not extend beyond generalisations.

[94] Having listened carefully to all the evidence related to off-site and on-site traffic matters associated with the proposal, and having measured that evidence against the relevant provisions of the district plan and our site inspection, and weighted them accordingly, we find that it will result in adverse off-site effects that will be more than minor. In particular, we find that the shortfall and defects in manoeuvring and parking geometry provisions are such that there are likely to be adverse repercussions on the present use and enjoyment of Keystone Avenue's environment arising from the failure, looked at holistically, of the site's capacity to accommodate the traffic needs that would be generated by 66 apartments in the form envisaged. Specifically, there is a substantial under-design in meeting the minimum geometry necessary to accommodate cars and trucks; there is substantial under-design in the weekly assembly and collection of household rubbish; and, given the security gate control proposal, the steep driveway grade and the absence of a pausing platform, in our opinion, there is a potentially hazardous situation for non-occupier-

owned vehicles entering and leaving the site. Looked at together, those defects are such as to point to such an over-development of the site that, solely on traffic grounds, the off-site adverse impact on what, at present, is typical traditional suburban street of modest houses, will be more than minor.

**The Effect on Infrastructure – Sewage and Stormwater**

[95] The system in this Keystone Avenue area at the head of the Meola catchment is a so-called "combined system", in which both stormwater and sewage effluents flow in the same pipes until meeting the Auckland Regional Council trunk sewer. It has been so since the early development of the city pipe networks, some of which date from the early 20th century. The systems were sized initially for sewerage flows only. Unfortunately, stormwater infiltration has added to the effects of development of the city. As a result, the system overflows under peak rainstorms, producing raw sewage flows from the public system on to private properties or watercourses.

[96] The evidence established that this pipe network has a history of flooding at Louvain Avenue intersection, implying that the network is working at full capacity under storm conditions. The Appellant evidenced considerable concern about the infra-structural difficulties pertaining to disposal of the effluent and drew attention to these inadequacies of the city's local disposal system, which may not be rectified for many years.

[97] Mr Peter Bishop, owner of properties at the intersection of Dominion Road and Louvain Avenue, spoke of some overflows from the road cesspits on to his low-lying properties. Such sewage and stormwater had then to be pumped from these sites. He felt that further development should not be allowed until the council drainage system was fixed – which he understood might not be for twenty years.

[98] For the applicant, such overflows and overall "combined system" shortcomings had been acknowledged and extensively addressed in preparation of the design of systems on site. In particular, Mr S A Crawford, consulting engineer of Tonkin and Taylor Ltd evidenced a favourable review of design work performed for the applicant by Mr B D Clode, the consulting engineer engaged to perform the design for the development. Mr Crawford attached to his evidence Mr Clode's design report describing the proposed system. He stated that that the design had been subject to separate reviews by the engineering consulting firms, Beca Carter Hollings and Ferner Ltd, and his own employer, Tonkin & Taylor Ltd. The system

was variously described to us as having a detention tank in the sub-floor basement to collect run-off from the site. It would have an orifice sized in accord with Council guidelines to restrict the rate of the gravity outflow in to the "combined system".

[99] The proposed sewerage system had been designed to take cognisance of experience that shows that sewerage system flows tend to reduce to approximately 5% of total capacity at 12 midnight. That provides a basis for mitigation of the potential problem of this development. Thus, sewerage from the development is to be collected through the peak periods of flow (6–24 hour period), and stored in a tank capable of holding a 48 hour dose of foul sewage for eventual release via a pump system in the early morning hours. The pumps are programmed to switch on at midnight and pump the tank empty in approximately 1–2 hours, discharging to the existing 225 diameter combined sewer via a 150 diameter pipe. Should the pumps be activated at the same time as a rainstorm (pipe full) the float switch in the manhole will automatically shut the system down until, at one of its hourly checks, the electronic control indicates a suitable pumping time. When water levels have returned to the predetermined depths the pumps would automatically reactivate and the tank then pumped dry.

[100] Mr N B Patterson gave evidence of his technical reservations about the proposed pumped design details for sewage and his calculations suggesting need for a larger (72 hour capacity) stormwater tank. In that context, the rainfall tables for Auckland were discussed in evidence by him and by others. A view was put to us, that the rainfall event of the combined duration and intensity he suggested had such an extremely low probability as to be "of biblical proportions".

[101] However, Mr Crawford's evidence stated in conclusion that the proposed Clode design[29]:

> *... is consistent with normally acceptable engineering practice, meets Council design requirements and is generally conservative.*
> *If the above design approaches are adopted, then I consider there will be an improvement on the existing situation....*

[102] We find that the evidence satisfies us that the proposed provisions for the two separate systems on site will dispose of both stormwater and sewage flowing from this site without adverse affect.

[29] Crawford evidence 4.1 and 4.11.

## Lighting

*4.6.J Resource Management Objectives and Policies*

*Objective*

*To ensure that artificial lighting does not have a significant adverse effect on the environment and on the amenity values of the surrounding area.*

*Policies*

- *By controlling the intensity, location and direction of artificial lighting so as to avoid light spill and glare on to other sites.*
- *By controlling where appropriate the use of artificial lighting where it will extend the operation of outdoor activities into night-time hours.*

[103] The operative plan seeks to ensure that artificial lighting does not adversely affect adjoining properties through light spill or glare. The main form of control is via Part 13 of the Auckland City Consolidated By-law, with which the applicant will need to comply. In the present instance all parking areas are located below or screened from neighbouring residential properties. As such the effect of any security lighting in these areas will be limited background wash. As was pointed out by Mr Brown, light levels will be controlled to ensure that residents of the development do not suffer any nuisance as a result of background light levels. As the residential neighbours are at a greater distance from the source of the light it follows that they are unlikely to suffer any ill effects.

## Noise

[104] The operative plan sets the noise requirements for the Business 2 zone and rule 8.8.1.4 sets the noise control limits at the residential zone interface as follows:

| | | |
|---|---|---|
| Monday – Saturday | 7am – 10pm | |
| Sundays and Public Holidays | 9am – 6pm - | $L_{10}$ - 50 dBA |
| At all other times | | $L_{10}$ - 40 dBA and |
| | | $L_{max}$- 75 dBA of the background ($L_{95}$) plus |
| | | 30 dBA whichever is the lower |

[105] During construction of the proposed apartments rule 4A.1.(d) of the operative plan prescribes restrictions generally in accordance with NZS 6803P: 1984 "*The*

*Measurement and Assessment of Noise Constructions, Maintenance and Demolition Work".*

[106] At all times the noise requirements as is set out in the operative plan will need to be complied with.

[107] In our view the evidence clearly establishes that the main period of time when generation of noise may well be of concern is during the construction period. This is particularly so during the excavation of the basement which will include the removal of some rock. This was emphasised by Mr N I Hegley, the acoustic consultant, who gave evidence on behalf of the applicant. Mr Hegley told the Court that until the construction equipment has been selected it is difficult to predict actual noise for residents. He pointed out that in order to ensure compliance with the noise levels the noisier activities will have to be restricted to between the hours of 7.30am and 6pm Monday to Saturday. In the event of any rock removal from the site it will be necessary to construct specific screening to screen the noise to the neighbours and select appropriate rock removal equipment. In order to ensure compliance with the requirements of the district plan during construction, Mr Hegley recommended and the applicant agreed to a condition of consent whereby the applicant is required to provide a construction noise management plan prepared by a registered acoustical engineer. That is to be approved by the Team Leader, Compliance Monitoring, Auckland City Environments. We are satisfied that such a condition will sufficiently mitigate noise during construction.

[108] We agree with Mr Hegley when he said that once the building had been completed there would be very few noise sources. The two potential sources of noise would be from traffic movements on site and activities in the proposed gymnasium that is to be located in the north-eastern corner of the first floor. We accept Mr Hegley's evidence to the effect that noise from the proposed gymnasium would be significantly less than the noise experienced from public gymnasiums as there would not be any organised group activities such as aerobics with loud amplified music. The use of this gymnasium would be casual and for the tenants use only. To ensure that this was the case the applicant agreed to an amendment to condition 3 of the consent conditions as imposed by the respondent which requires the consent holder to submit to the Council for approval a copy of the Body Corporate Rules for Keystone Bridge Apartments by including rules for:

Restricting the use of the gymnasium to tenants of the apartments only;

- Preventing the use of amplified music within the gymnasium.

[109] Mr Hegley considered the traffic noise from cars on the road and for the use of vehicles on the site. He concluded that the design provides sufficient mitigation to ensure that the vehicles on the site would not be a problem to the residential properties and that any increase in traffic noise, which he estimated at 1 dBA, would not be noticeable. We accept Mr Hegley's evidence, which was not contested.

**Assessment of Adverse Effects Against Baseline**

[110] We have concluded that a number of potential adverse effects will be felt off-site from the proposal. Mr Brabant pointed out that reference to the activity rule for the Business 2 zone in the operative plan shows that a range of commercial/industrial activities is available on the site as permitted activities. He submitted that those activities could be lawfully established in substantial bulky commercial/industrial buildings resulting in more effects on the amenities of the adjoining residential environment than the consented development.

[111] In considering credible commercial/industrial activities we are mindful of the evidence of Mr McCarrison where he said:

> *The existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail centred, are going through dramatic change due to the alteration in the organisation of retail, e.g. shopping malls, large stores, and technology. T he district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate. An example of this is residential units, which were a non-complying activity under previous plans but now have controlled activity status in the Business 2 zone of the district plan.*[30]

[112] We also note the words of Mr Green:

> *The intersection with Keystone Avenue and Dominion Road exists almost opposite Jasper Avenue and to the south and to the north are to be found strip shopping as there is further strip shopping on the opposite side of Dominion Road between Mt Albert Road and Jasper Avenue. This commercial enclave constituting the Mt Roskill shopping district. The commercial development in the area appears to date back from the mid to late 1960s, early 1970s with little obvious refurbishment or redevelopment in evidence.*[31]

[113] We are required to consider credible developments that could be done as of right not hypothetical possibilities. There is no evidence before us that would enable

30 McCarrison, paragraph 5.17.
31 Green, paragraph 4.6.

us to conclude that the construction of a commercial/industrial building of similar bulk and size is credible.

[114] Furthermore, we note that, with regard to the effect on privacy, a commercial use would operate primarily during standard business hours whereas the proposed residential units with the continual presence of occupation increases the loss of privacy both in the perception and in reality.

**Positive Effects**

[115] We also recognise that the proposal has a number of positive effects including:

- The introduction of apartment living into the Mt Roskill area. This is an area which stands to benefit in the long term from the resulting influx of residents. Their presence could assist in retaining the commercial viability of the shopping centre. That in turn would have a flow-on and beneficial impact on all parties likely to use those services.
- A derelict supermarket that is commonly agreed to be an eye sore at this time will be replaced by a modern building.
- The location of the site is close to a significant public transport corridor and this provides the opportunity for the use of public transport to and from the site to the principal employment centres of the central business district.

**Part II Matters**

[116] Part II of the Act promotes the sustainable management of natural and physical resources. Accordingly, both the residential and business zoned land in this part of Auckland are a physical resource that require management for existing and future generations.

[117] It is common ground that there are no section 6 matters of national importance. The following section 7 matters are relevant:

the efficient use and development of natural and physical resources (section 7(b)).

- the maintenance and enhancement of amenity values (section 7(c)).
- the maintenance and enhancement of the quality of the environment (section 7(f)).

We consider that the proposal is in accord with section 7(b) in that it will provide an opportunity for the broader community to improve the viability of the Mt Roskill commercial environment. The proposal will also remove an unsightly and derelict structure. Notwithstanding this, we consider that the overall effect on the adjacent residential amenity will be contrary to section 7(c) and section 7 (f).

**Exercise of Discretion**

[118] In the overall exercise of our discretion we have regard to the provisions of the operative plan. We balance those provisions of the plan that the proposal appears to be generally in accord with, against the policies and objectives specifically directed at preventing, or at least reducing to an acceptable level, any adverse impact on residential amenities adjacent to business zones[32].

[119] We have regard to Change No. 3 bearing in mind the stage it has reached during the resource management process. Change No. 3 is of course designed in the instant case to mitigate effects between the Business 2 and Residential 6a interface boundaries.

[120] We have considered the various adverse effects likely to arise from this proposal and have concluded that the effects are such that they will be more than minor and in our view the conditions of consent that are proposed will not sufficiently mitigate such effects.

[121] There is some merit in the criticism by the appellant that the applicant's proposal is an over development of the site, the consequences of which are a number of adverse effects on the adjacent Residential 6a zoned land. The number of minor transgressions of those controls displayed by the proposal underlines this criticism. We have looked carefully at the evidence relating to the potential effects likely to emanate from the proposal both during construction and following its completion. We are of the view that those effects will have an adverse effect on the existing environment contrary to section 5(2)(c) and sections 7(c) and 7(f) of the Act.

[32] See Part 8.6.2.1(e) of the operative plan.

Accordingly, for the reasons given in this decision, we exercise our discretion to refuse consent and allow the appeal.

**Determination**

[122] We accordingly allow the appeal and the Council decision is set aside.

**Costs**

[123] Costs are reserved. We do however indicate that our tentative view is that costs should lie where they fall.

**DATED** at **AUCKLAND** this 11th day of January 2001.


R Gordon Whiting
Environment Judge

BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC 66

ENV-2012-WLG-000038

IN THE MATTER of an appeal under section 120 of the Resource Management Act 1991

BETWEEN NEIL and DIANA KIRTON
Appellants

AND NAPIER CITY COUNCIL
Respondent

Heard: at Napier on 19 February 2013

Court: Environment Judge B P Dwyer
Environment Commissioner K A Edmonds
Environment Commissioner I Buchanan

Counsel/ Appearances:
M Williams for N and D Kirton
M Lawson for Napier City Council

---

INTERIM DECISION OF THE COURT

---

Decision issued: 22 April 2013

A: Appeal allowed

B: Costs reserved

***Introduction***

[1] Neil and Diana Kirton (Mrs and Mrs Kirton/the Appellants) appeal a decision of Napier City Council (the Council) declining a restricted discretionary activity application for subdivision consent. The appeal was made pursuant to s120 Resource Management Act 1991 (RMA).

[2] The only parties to the appeal were the Appellants and the Council. There had been a number of submissions in opposition to the application, but none of the submitters participated in the appeal process.

***Background***

[3] Mr and Mrs Kirton own a property at 113 Fryer Road, Poraiti, Napier (the site) in the Rural Residential Zone of the Napier District Plan (the District Plan). Poraiti is a hillside suburb on the foothills of the Heretaunga Plains. It is characterised by relatively narrow sealed and winding roads, wide grass berms, established housing and a mixture of residential, rural/residential and lifestyle land holdings.

[4] Title to the site contains 1.5ha and is essentially rectangular in shape, except for a long narrow *leg-in* (73m long x 5m wide) extending from the south western corner of the rectangle out to Boyd Road. Although this leg-in gives both legal and physical access to Boyd Road it is not presently used for that purpose and actual access to the site up until the present time has been obtained from Fryer Road by way of a right-of-way out to that road. Mr and Mrs Kirton have a house on the existing title, whose practical access is from the Fryer Road right-of-way.

[5] The subdivision proposal declined by the Council was to subdivide the site into two lots. For ease of explanation, a copy of the subdivision plan is attached to this interim decision as Appendix 1. It will be seen from Appendix 1 that proposed Lot 1 (5005m$^2$) could be generally described as boomerang shaped, plus the addition of the leg-in to Boyd Road which is to provide the access to that lot. Proposed Lot 2 (9990m$^2$) containing the existing dwelling is roughly rectangular in shape and will continue to be accessed via the right-of-way from Fryer Road.

[6] A physical feature of the site is that it is divided into higher and lower portions. Proposed Lot 1 is situated on the lower part of the site and Lot 2 on an elevated plateau. The boundary line between the two proposed lots follows the physical demarcation on the land itself. Although this gives Lot 1 a somewhat unusual shape, there is no suggestion that this precludes practical use of Lot 1.

[7] A potential building site for a dwelling house was identified on Lot 1 as part of the subdivision application and we did not hear any evidence to suggest that it was not possible to erect a dwelling house on the identified building platform. The Appellants hold a Certificate of Compliance issued by the Council pursuant to s139 RMA confirming that an 87.5m$^2$ traveller's accommodation unit could be established in the same position as the identified building platform on Lot 1. (We will return to issues raised by the Certificate of Compliance further in this decision.)

[8] A feature of the subdivision application was a proposal to limit development on the two lots by way of a consent notice to be registered against the new titles. It was proposed that the consent notices would limit development on the lots to a single dwelling on each title together with the right to establish visitor accommodation (a permitted use) on Lot 2 at a future date if the property owner desired. Additionally, the Appellants volunteered a further restriction that combined site coverage of buildings on the two lots would not exceed 1000m$^2$ in footprint area being the maximum permitted site coverage for the one existing lot under the District Plan. Ultimately, it was the consent notice proposal which appeared to us to be at the heart of the Council opposition to the subdivision application and we will return to that issue in more detail.

***The District Plan***

[9] We have noted that the site is in the Rural Residential Zone of the Napier District Plan. We do not propose to recite the relevant rules of the District Plan in great detail in this decision. We found them quite user unfriendly. Because there was no dispute amongst the planners as to the status of the proposal we simply set out the provisions relevant to our considerations in summary form.

[10] Rule 35.15 of the District Plan provides that land development, including subdivision, is a controlled activity provided that:

- It complies with the standards and terms specified in Chapter 66 (Volume II);
- It complies in all respects with the relevant conditions in the Rural Residential Activity Table and Condition Table;
- It is assessed according to the matters set out in Chapter 66 (Volume II) over which the Council has reserved its control.

[11] Rule 35.17 of the District Plan provides that subdivision or development which does not comply with all of the relevant conditions in the Rural Residential Zone Activity Table and Condition Table is a restricted discretionary activity.

[12] The Kirton subdivision does not meet the lot size provisions of Chapter 66 which (in summary) allows subdivision in the Rural Residential Zone down to a minimum lot size of 5000m$^2$ but requires that the minimum average lot size of all lots calculated across the subdivision must be 1.5ha. Obviously, the subdivision of an existing 1.5ha lot into two lots of 5005m$^2$ and 9990m$^2$ cannot meet the minimum average lot size of 1.5ha. The subdivision accordingly falls to be determined as a restricted discretionary activity pursuant to Rule 35.17.

[13] Our considerations as to the applicable matters on which discretion had been reserved under the District Plan, were assisted by the planning witnesses, Mr M P Holder (for Mr and Mrs Kirton) and Mr C J Drury (for the Council). The two witnesses participated in a witness conference and provided the Court with a statement identifying the relevant matters on which they agreed and disagreed and the determinative issues for our consideration in this case. That statement provides the template for our determination.

[14] Before turning to the determinative matters in contention, we identify (in summary) the relevant matters which were not in dispute between the planning

witnesses, being that:

- Effects of the subdivision on the owners of nearby properties, 92, 103 and 121 Fryer Road and 56 and 74 Boyd Road, who had provided written consents to the subdivision proposal, might be disregarded;
- The subdivided lots could be suitably serviced for water supply and wastewater and storm water disposal;
- The site is not subject to any hazards which might lead to erosion, falling debris, subsidence, slippage, or inundation. Provided earthworks were undertaken in accordance with the Subdivision Code (incorporated into the District Plan), subsequent use of the land is unlikely to accelerate, worsen, or result in any material damage to land or structures;
- The productive capacity of the site and its soil resources is low and accordingly the soil resource of the City will not be significantly compromised if consent is granted to the subdivision;
- The proposal is not inconsistent with the Regional Policy Statement;
- Sufficient legal and physical access is available to both lots;
- The existing environment includes the activities identified in the Certificate of Compliance previously referred to.

[15] The planners' witness statement identified the following determinative issues which were in dispute:

- The use of consent notices;
- The scale and intensity of permitted development;
- Precedent;
- Cumulative effects of development on rural character and amenity and the safety and efficiency of the roading network. (The witnesses described these last two issues as the *primary points of contention*[1].)

[16] We now turn to address those issues in that order. Before doing so, we make a brief observation about the provisions of the District Plan.



[1] Para 6, Joint Witness Statement.

[17] The application is for consent to a restricted discretionary activity. It was common ground that in determining to grant or decline consent, our considerations are restricted to the matters over which discretion is reserved in the District Plan (there being no relevant national environmental standards or regulations) and further, that the matters in respect of which we may impose conditions are similarly restricted.

[18] It must be said in this instance, that the matters over which the District Plan purports to restrict the exercise of discretion are so extensive as to make something of a mockery of restricted discretionary activity status in this Plan. We have accepted that the matters identified in the joint statement of the planning witnesses are the relevant matters for our consideration and do not propose to address the array of other matters over which discretion has been restricted which are contained in the District Plan.

***The Use of Consent Notices***

[19] We have noted that the Appellants proposed to restrict the activities which might be undertaken on the subdivided lots by the registration of a consent notice on the title to each lot. The rationale for the consent notices is to be found in the application for resource consent, which provided as follows:

> *Proposed Consent Notice*
>
> *In respect to proposed Lot 1, a residential care facility, a day care, a rural processing activity, travellers accommodation, a supplementary unit or an educational facility could be built on proposed Lot 1 as of right. These activities could potentially have an impact on the roading network and infrastructure within the Boyd Road area. Therefore it is requested that a Consent Notice pursuant to Section 221 of the Resource Management Act 1991 to be issued by Council and registered against the Certificate of Title to be issued for Lot 1 hereon that reads as follows:*
>
> *"That notwithstanding the provisions of the Operative Napier City Council District Plan the following land use activities shall not be undertaken or established (either individually or in conjunction) on the site:*

- *A Residential Care Facility catering for up to 10 residents (not including staff);*
- *Travellers Accommodation;*
- *A supplementary Unit;*
- *Rural Processing Activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m$^2$ in gross floor area or 10% of the site, whichever is the lesser;*
- *A Day Care Centre catering for up to 10 people (not including staff); or*
- *An Education Facility.*

*In respect to proposed Lot 2, the applicant is happy to accept a Consent Notice pursuant to s221 of the Resource Management Act 1991 to be issued by Council and registered against the Certificate of Title to be issued for Lot 1 hereon that reads as follows:*
*"That notwithstanding the provisions of the Operative Napier City Council District Plan, the following land use activities shall not be undertaken or established (either individually or in conjunction) on the site;*

- *A Residential Care Facility catering for up to 10 residents (not including staff);*
- *A supplementary Unit;*
- *Rural Processing Activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m$^2$ in gross floor area or 10% of the site, whichever is the lesser;*
- *A Day Care Centre catering for up to 10 people (not including staff); or*
- *An Education Facility.*

[20] In addition to the above restrictions proposed as part of the application itself, at the Council hearing of the application, the Applicants (through Mr Holder) volunteered a further restriction which would constrain development on the two lots to the total area of development presently permitted as of right under the District Plan on one lot. Mr Holder's evidence in that regard to the Council hearing was:

> *50. To completely resolve any doubt on the point, and if there was concern by the Commissioner over an additional level of*

> *development that might occur following subdivision, the applicant could constrain development to 1000m² in terms of both lots through conditions of consent. That is the resulting development over both could be conditioned to ensure a maximum combined site coverage does not exceed 1000m², as permitted to take place now on the site and confirmed by way of certificate of compliance (in terms of permitted activities).*

[21] We understood that the Appellants continued to offer a similar restriction by way of consent notice as part of this appeal. Our decision proceeds on the assumption that is the case.

[22] It will be seen from the information contained in the application that the rationale behind the Applicants offering this particular restriction on the lots was that the activities excluded by the consent notice have the potential to impact on the roading network and infrastructure within the Boyd Road area. Mr Drury identified limitations on the roading network at Poraiti. He advised that the roads in this vicinity were mostly constructed prior to 1931 to serve a handful of farms and provide access to the foreshore. The roads have apparently been sealed but other than that are considered *seriously substandard*[2] in terms of the District Plan and do not contain provision for pedestrians and cyclists.

[23] There was no dispute between the parties that the adverse effect (including any cumulative adverse effect) which a subdivision might have on the roading network was a matter in respect of which the Council had reserved a discretion. Mr Drury advised that the minimum lot size framework applicable to the Rural Residential Zone was a method by which Council sought to manage the effects of rural subdivision. His evidence was consistent with the Commentary to Objective 33.5 of the District Plan, which notes in a section headed ***Principal Reasons for Methods*** that:

> *A minimum lot size is applied in existing rural settlement and rural residential areas to enable the existing infrastructure to service the*

[2] Para 21, Drury EIC.

*areas without a financial commitment from the Council to provide urban services*[3].

[24] Mr Drury advised that the upgrading of Fryer Road and Boyd Road is not budgeted or planned to occur within the period expiring in 2019.

[25] The issue of traffic to be generated by the subdivision was addressed by a statement of rebuttal evidence from Mr A G Prosser (a traffic engineer called by the Appellants). Mr Prosser had provided a report to the initial Council hearing. His evidence before us was not contradicted by any contrary evidence, although he was cross-examined on aspects of his statement of evidence by Mr Lawson, for the Council.

[26] In summary, it was Mr Prosser's evidence that the volume of traffic generated by the proposed subdivision itself could easily be accommodated by the existing road network in and around the site. Mr Prosser told us that Boyd Road (which would provide the access to Lot 1) could accommodate about 150 vehicles per day (vpd). He estimated that Lot 1 would generate about 8 vpd which would take total vehicle usage of Boyd Road up to about 120vpd. We did not understand that evidence to be challenged. What was at issue was the cumulative effect of the subdivision on the roading network and we will return to that issue in due course.

[27] The purpose of the consent notice proposed by the Appellants was to constrain the extent of potential traffic generating activities which could take place on Lot 1 and in effect limit the use of the two subdivided lots to one dwelling on each, together with a possible supplementary unit on Lot 2.

[28] The Council was opposed to the imposition of a consent notice condition as proposed by the Appellants. It emerged that the Council's position on suitability of the consent notice had three aspects to it, namely concerns about:

- The durability of conditions imposed by way of consent notices generally;
- The vires and appropriateness of the condition proposed in this case;

[3] Page 33.0-14 District Plan.

- Whether the condition satisfied the *Newbury* tests.

*Durability of conditions*

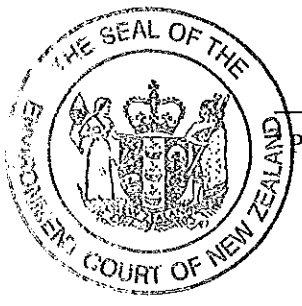
[29] The concern about durability was expressed in the evidence of Mr Drury who noted that an application to change a consent notice can be made under ss127 or 221 RMA (depending on what state a subdivision was at). He said that because an application to change a condition imposing a consent notice may be made *...there is no certainty around the durability of Consent Notices over time*[4]. He said that he would expect it to be difficult to deny a future owner of Lot 1 permission to construct a supplementary unit if that owner needed to care for a dependent relative in the future. It was his view that it would be difficult to see why such an activity would not be subsequently approved when considered in isolation from the original subdivision activity and that an application under ss127 or 221 RMA does not enable reconsideration of the effects of the original subdivision as a whole.

[30] A consent authority's ability to impose conditions on resource consents is founded in s108 RMA which relevantly provides:

> *(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*

(Subsection 2 then goes on to identity a series of specific conditions which may be imposed in certain identified circumstances).

[31] Section 220(1) RMA then identifies a series of specific conditions which may be imposed on subdivision consents (as opposed to other resource consents). It should be noted however, that s220(1) does not purport to limit s108 in any way.




[4] Para 44, EIC.

[32] Finally, s221 RMA relevantly provides:

> ***221 Territorial authority to issue a consent notice***
>
> *(1) Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.*
>
> *(3) At any time after the deposit of the survey plan,—*
>
> *(a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:*
>
> *(b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.*
>
> *(3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).*
>
> *(4) Every consent notice shall be deemed—*
>
> *(a) To be an instrument creating an interest in the land within the meaning of section 62 of the Land Transfer Act 1952, and may be registered accordingly; and*
>
> *(b) To be a covenant running with the land when registered under the Land Transfer Act 1952, and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land.*

[33] Section 221 applies to conditions which are to be *...complied with on a continuing basis by the subdividing owner and subsequent owners*[5]. Any consent notice containing such a continuing condition once registered against the title to land is deemed to be a covenant running with the land, which shall *...bind all subsequent owners*[6].


[5] Section 221(1) RMA.
[6] Section 221(4)(b) RMA.

[34] These identified provisions create a mechanism enabling conditions to be imposed on subdivision consents, which apply on a continuing basis and are binding on subsequent owners of the subdivided land.

[35] The Council's objection to the use of this mechanism by the Kirtons was that the owner of a subdivided lot may, at any time, apply to vary or cancel any condition contained in such a consent notice. (It should also be noted that the Council may similarly review any such condition and seek to vary or cancel it.) The Council contended that the possibility of variation or cancellation meant that the condition was not durable.

[36] This submission appears contrary to the clear intention of Parliament (as expressed s221) that there should be the opportunity to *revisit* such conditions. There appear to be at least two reasons why it is appropriate for there to be such opportunities:

- Firstly, ss221(3) and (3A) in essence, merely provide that *consent notice conditions* are subject to the same rights and powers of review as are all other resource consent conditions which may be reviewed and varied (including change and cancellation) pursuant to ss127 and 128 RMA. It is difficult to see why a condition of a land use consent, which is also intended to be complied with on a continuing basis and which is deemed to run with the land should be variable or reviewable, whereas a condition of a subdivision consent which is intended to run with the title to land is not so variable or reviewable;
- The alternative to having a power of variation or review is that such conditions must be locked in place in perpetuity, notwithstanding any change of circumstances.

[37] The concerns which the Council has expressed in respect of conditions secured by consent notice apply equally to other conditions imposed on resource consents generally. If Councils decline to approve resource consents subject to ongoing conditions on the basis that such conditions might be subject to application

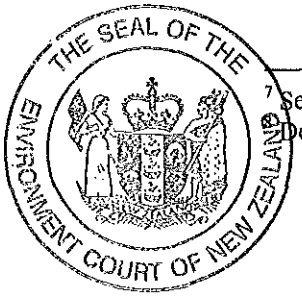
for variation in the future, few if any resource consents (whether subdivision or otherwise) would ever be granted.

[38] Further, it should be noted that there is no guarantee that any potential application for variation of a condition will be successful. Any such application must be undertaken in accordance with the variation and review provisions of RMA where there is provision for participation by previously interested parties (or their successors). Such an application must be determined by a consent authority in accordance with statutory criteria, including the matters in s104 RMA[7], which in turn is subject to Part 2.

[39] In that respect the decision of the Court in *McKinlay Family Trust and Others v Tauranga City Council*[8] is instructive. In *McKinlay*, an Applicant sought consent to subdivide a lot of approximately 1.5ha into three lots. The proposed subdivision was a controlled activity under current planning provisions (as of 2006), but was precluded by a consent notice placed on the title to the lot by the Environment Court in approving a subdivision of land in 2002. The Applicant sought to have the consent notice cancelled on the grounds (inter alia) that the proposed subdivision was now a controlled activity.

[40] In declining to do so, the Court made the following relevant observations:

> [52] *For our part, we have concluded that the ability of people and communities to rely on conditions of consent proffered by applicants and imposed by agreement by consent authorities or the Court when making significant investment decisions is central to the enabling purpose of the Act. Such conditions should only be set aside when there are clear benefits to the environment and to the persons who have acted in reliance on them.*
>
> And further:
>
> [55] *We have concluded that the Council officers* (who had agreed to uplift the consent notice) *have wrongly focused on the current Plan while*




[7] Section 131(1)(a) RMA.
[8] Decision No A 119/2008.

*overlooking the consent notice itself and its purpose. Flexibility as permitted by a plan can always be subject to restraints by consent notice or conditions. Often such constraints justify a development that would otherwise be a step of creeping incrementalism. This wide purpose of consent notices is one clearly recognised by the Council hearing panel in their decision. We agree entirely with the hearing panel decision and consider they correctly appreciated the issues surrounding the release of the consent notice.*

[41] It is apparent from *McKinlay* that the cancellation of conditions imposed by consent notice is not a matter of mere formality and that in considering applications to do so, close consideration must be given to the reason why the consent notice was imposed in the first place and the extent to which other parties had relied on it. We concur entirely with that approach and reject the Council's proposition that a condition imposed by way of consent notice might be inappropriate because it could be subject to an application for variation in the future.

*Vires and Appropriateness of Condition*

[42] The second leg of the Council's position on use of the consent notice was that the consent notice imposed in this case was ultra vires and was an *inappropriate instrument*. The first element to the Council's position on the vires of the consent notice was a contention that where a consent notice purports to preclude a landowner from using land for activities, which would otherwise be permitted under a District Plan, it is in effect creating a *spot zoning* for the land in question. The basis for that contention is that notwithstanding this site is in the Rural Residential Zone, activities which would otherwise be permitted in that zone are excluded by operation of the consent notice.

[43] The implication which we drew from Mr Lawson's submission was that a future purchaser or occupier of the lots might be unknowingly constrained from undertaking activities, which were otherwise permitted in the Rural Residential Zone, as a consequence of operation of the consent notice.

[44] We accept that such a person who had checked the Planning Maps and Rules of the District Plan in isolation, might not be aware of the restrictions which would

apply to these lots. However, one of the obvious purposes of the consent notice provisions of RMA is to enable registration on the title to a lot of an instrument indicating restrictions applicable to that lot, thereby giving due notice to persons who might wish to acquire an interest in it. Such a notice no more creates a spot zone than does a registered private covenant between land owners restricting various aspects of activities which might be undertaken or buildings which might be constructed on land, irrespective of District Plan provisions.

[45] Further, it has long been recognised that in imposing conditions on resource consent applications, consent authorities could apply stricter standards than might otherwise be permitted as of right under the relevant planning instruments. A number of cases have recognised that following the leading decision of the (now) High Court in *Smeaton and Others v Queenstown Borough Council and Others*[9] where Beattie J said:

> *The standards in the particular Ordinance are a general guide to be taken into account when that discretion comes to be exercised under an application for conditional use consent. At that time, certainly more stringent standards could be laid down or less stringent standards also*[10].

[46] The Court in *Smeaton* was dealing with conditional use (now discretionary activity) consent. This Court has accepted that principle in a number of cases, including *Horn v Marlborough District Council*[11] (a non-complying activity case), where Judge Kenderdine observed:

> *We think that in appropriate cases, a non-complying land use consent may include conditions that restrict permitted activities. That is because, as Smeaton holds, the activity is wholly discretionary and must pass vigorous tests to be considered appropriate*[12].

[47] We are not aware of any reason why a similar principle would not apply to restricted discretionary activities, subject only to the caveat that the imposition of such a condition must arise out of a matter in respect of which the consent authority

---

[9] (1972) 4 NZTPA 410 (SC).
[10] At page 421.
[11] Decision No W 30/2005.
[12] At [136].

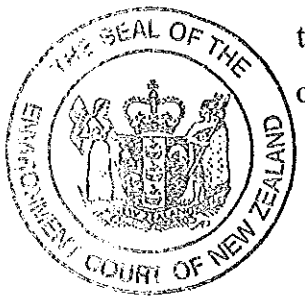
has restricted the exercise of its discretion. In this case, the proposed restriction on otherwise permitted activities seeks to minimise the traffic generating potential of the new lots and there is no dispute that the management of traffic effects is one of the matters in respect of which the Council has retained discretion.

[48] The third leg of Mr Lawson's submission regarding this aspect of the case was a query as to the appropriateness of imposing restrictions on land use as a condition of subdivision consent. He referred to the provisions of s9 RMA and in particular s9(3). He observed that s9 RMA starts from the premise that land may be used for any purpose which does not contravene a district rule and that use of the subdivided lots for activities such as visitor accommodation or a second dwelling is expressly allowed in this case by a district rule, so that such uses are not restricted in terms of s9 RMA.

[49] Mr Lawson went on to contend that:

> 26 *Further, the ultimate sanction in terms of enforceability of consent conditions is enforcement by way of an infringement notice or an information alleging an offence against Section 338 of the Resource Management Act. Section 338(1) creates the offence of contravening or permitting the contravention of (inter alia) Section 9. There is no offence of failing to comply with the conditions of a resource consent or even a failing to comply with a resource consent.*
>
> 27 *It would not be possible to bring a prosecution under Section 338 for the contravention of Section 9 because Section 9 does not actually restrict activities that do not contravene the Rules in the Plan. All of this highlights the inappropriateness of conditions which seek to prohibit what would otherwise be permitted activities within the zone.*

[50] We do not accept Mr Lawson's proposition that failure of a land owner to comply with restrictions of the kind which the Appellants seek to impose by way of the consent notice condition in this case, might not be subject to the *ultimate sanction* of infringement notice or an information under s338. We acknowledge that breach



of the consent notice condition, of itself, might not be a breach of s338(1), but that is not the end of the matter.

[51] Any person (including a consent authority) may apply for an enforcement order requiring a person to cease any activity which contravenes or is likely to contravene a resource consent or alternatively require a person to do something which is necessary to comply with a resource consent. Alternatively, an enforcement officer may serve an abatement notice on any person requiring that person to cease an activity which contravenes a resource consent. In each case, failure to comply with a condition imposed by consent notice could be enforced through the enforcement order or abatement notice provisions of RMA. Also in each case, failure to comply with any enforcement order or abatement notice constitutes an offence against either s338(1)(b) or 338(1)(c) and may accordingly be subject to the ultimate sanction identified by Mr Lawson.

[52] Nor do we accept the proposition advanced by Mr Lawson that conditions may not be imposed on subdivision consents which restrict land use activities. Mr Lawson cited a number of authorities including *Darrington v Waitakere City Council*[13] as examples of the Court's reluctance to do so. However, it is apparent that any such reluctance has been overtaken by time and practice. Conditions restricting land use are commonly imposed on subdivision consents. That is precisely what the Court did in *Horn*.

[53] It appears to us that the determinative issue is whether or not a condition addresses effects arising out of any particular subdivision, it being long recognised that the effects of subdivisions extend beyond just the drawing of lines on paper. In this case the creation of an additional title will potentially enable an increase in traffic generating activities which may be undertaken as of right on the site and the Appellants seek to restrict such an effect.

[54] That approach seems consistent with the approach identified by the Court in *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council*[14]

---

[13] Decision No W68/96.
[14] Decision No C 100/2001.

where Judge Jackson observed that whether it was appropriate to impose a land use condition of a subdivision consent was *a question of reasonableness in the circumstances*[15].

*The Newbury tests*

[55] However, that proposition in turn led to Mr Lawson submitting that the condition to be secured by consent notice was not reasonable and could not satisfy the well known tests identified in *Newbury District Council v Secretary of State for the Environment*[16]. In summary, Mr Lawson contended that:

- There was no resource management purpose for the condition which was suggested solely for the purpose of bringing the proposal within the permitted baseline established by the Certificate of Compliance. We disagree. The purpose of the condition is to restrict the traffic generating activities which might be undertaken on site, traffic effects being one of the matters in respect of which the Council has restricted its discretion;
- The proposed condition does not fairly and reasonably relate to the subdivision for which consent is sought. We disagree with that proposition for the reasons set out in para [53] (above);
- The condition is so unreasonable that no reasonable consent authority could have imposed it because it sought to restrict activities which were otherwise permitted activities and created two titles in the Rural Residential Zone which were subject to different rules than other land in the zone (i.e. the spot zone argument). We disagree with those propositions for the reasons set out in paras [42]-[47] (above).

For these reasons, we consider that the proposed condition would satisfy the *Newbury* tests.

[56] Even if it did not, there was a further hurdle that Mr Lawson had to overcome in advancing the various propositions that he did, namely that the condition in question is an *Augier* condition, volunteered by the Appellants, which would be binding on them even if it could not have lawfully been imposed by the Council.

---

15 At [43].

16 [1981] AC 578, [1980] 1 All ER 731 (HL).

Mr Lawson's response to that proposition was that *...even if a condition is volunteered by an applicant under the Augier principle it may not be enforceable against or may be challenged by a subsequent landowner if the condition does not satisfy the Newbury tests*[17].

[57] We do not accept that proposition. If Mr Lawson is correct there would be no point in any applicant offering (or any consent authority imposing at the request of an applicant) a condition which could not otherwise be imposed by a consent authority. We do not think that is a desirable outcome. By way of example, it is not uncommon for applicants to volunteer conditions which offer environmental compensation or betterment sometimes not directly related to the consent being sought. Such proposals would be meaningless if they could be challenged by a subsequent owner.

[58] Ultimately, we consider that the proposition advanced by Mr Lawson is contrary to authority in any event. We refer to the statement of Randerson J in *Springs Promotions Ltd v Springs Stadium Residents Association*[18]:

> *That case* (Augier) *is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission, is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.*

[59] Such an undertaking must also be binding on successors who take the benefit of such permissions. Section 221(4)(b) RMA, which provides that ongoing conditions secured by consent notice create a covenant running with the land which binds all subsequent owners, provides a statutory underpinning of that principle.

[60] Finally on this issue of vires and appropriateness of the restriction imposed by the consent notice in this case, Mr Lawson had this to say:

> *The "horse trading" of permitted activities inherent in this application does not promote sustainable management of resources and has much wider*

---

17 Page 41, NoE.
18 [2006] NZRMA 101, at [76].

*practice. It should not be encouraged or even countenanced by the granting of this consent.*

[61] We understood Mr Lawson to be expressing a concern that the Appellants were seeking to *buy* consent to their subdivision by trading off other hypothetical rights which they were unlikely to exercise in any event. He suggested that this was becoming something of a common practice in this area, although we heard no hard evidence to support that.

[62] We can appreciate why such a practice might be of a concern to a consent authority however in this case, we see the Appellants' proposals in a somewhat different light than does Mr Lawson. Although the Appellants have expressed their consent notice in terms of excluding a series of identified and otherwise permitted activities, we consider that what they have done in reality is simply to restrict the activities which might be undertaken on the subdivided lots to 1 house on each lot plus the possibility of a supplementary unit on Lot 2. Indeed it may be more appropriate for the consent notice to be worded accordingly. In addition, the Appellants now propose a maximum permitted combined site coverage for the lots of 1000m$^2$. Presumably this is to be allocated equally between the two lots, but there was no discussion of this at the hearing. This needs to be resolved between the Appellants and the Council if consent is granted.

[63] The effects of such a proposal can be readily ascertained and assessed. It appears to us in this instance, that the determinative matter for the Court is the traffic effects of the proposal. The Appellants seek to ensure through use of the consent notice that the traffic effects generated by this subdivision will be limited to those arising out of the development of no more than two houses and one supplementary unit on the site.

[64] We concur with Mr Lawson to the extent that we agree that the Appellants should receive no additional credit in our considerations for having given up what might only be hypothetical or remote possibilities. The important matter for our considerations is that the traffic movements to be generated by the subdivision will be limited by restricting the use of the lots as proposed.

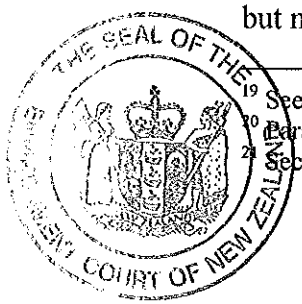
***Scale and Intensity of Permitted Development***

[65] There remained a dispute between the planners as to whether the proposed scale and intensity of the subdivision would generate effects greater than those permitted under the District Plan.

[66] This baseline argument arose out of the Certificate of Compliance obtained by Mr and Mrs Kirton confirming the further additional activities which might be permitted on the site as of right[19]. Mr Lawson suggested that there was a certain artificial element about the Certificate of Compliance in submitting that *...the Applicant has effectively tried to haul its case up by its proverbial boot straps by contending that if you limit all of the activities on the proposed site that would otherwise be permitted within the zone, it falls within the permitted baseline created by buildings such as visitor accommodation facilities, supplementary houses or granny flats and other activities*[20].

[67] A certificate of compliance confirms that a particular *...activity can be done lawfully in a particular location without a resource consent*[21]. We assume that in this case, the Certificate of Compliance was obtained solely for the purpose of establishing a permitted baseline for the purposes of s104(2) RMA, as we were given no evidence at all of any actual intention on the part of Mr and Mrs Kirton to undertake such activities. We accept that there is a certain artificial element about that which presumably gives rise to Mr Lawson's comments about hauling the case up by its proverbial bootstraps, however we see nothing in s139 which precludes certificates of compliance being obtained for just that purpose. In this case the Certificate of Compliance satisfies us that the District Plan permits the establishment of a traveller's accommodation unit and a supplementary residential unit on the site so that we may disregard the equivalent adverse effects of this proposal, should we see fit.

[68] We do not propose to disregard the permitted baseline in our considerations, but nor will we give it any significant weight. There are two reasons for that:




[19] See para [7] above.
[20] Para 12, Respondent's Submissions.
[21] Section 139(3) RMA.

- We have no evidence to determine whether or not the certified activities are *credible* or not at least insofar as the certified tourist accommodation facility is concerned. Although the Council appears to accept the possibility of a supplementary unit we were given no evidence whatever to determine how feasible it was that a traveller's accommodation unit might be established on this site in this locality;
- Secondly, it appeared to us, that the effects of this particular subdivision proposal were so limited as to make application of the permitted baseline something of an *overkill*. We will return to that issue in our discussion of cumulative effects.

***Precedent and District Plan Integrity***

[69] The third determinative issue identified in the planner's statement is that of precedent. This issue was principally articulated in the evidence of Mr Drury for the Council. He acknowledged that effects of precedent are not usually associated with applications for restricted discretionary activity, but contended that because this particular District Plan does not include any non-complying activities *...it should not be discounted that a restricted discretionary activity, in this case, could lead to such issues* (i.e. precedent)[22]. Mr Drury went on to contend that the effects in issue in this case were cumulative effects on rural character and amenity values and on safety and efficiency of the roading network.

[70] Mr Holder rejected Mr Drury's contentions in this regard in both his evidence in chief and his rebuttal evidence. Both he and Mr Williams (in his submissions) referred to the finding of this Court in *Campbell v Napier City Council*[23] that:

> *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.*

[71] Put another way, the Court in *Campbell* found that the precedent effect of granting consent was not one of the matters over which the Council had retained discretion in this District Plan and we concur with that. Mr Williams submitted that

---

[22] Para 94, EIC.
[23] Decision W067/2005, at [65].

as a matter of jurisdiction there was no power to refuse consent to this proposal arising out of precedent concerns. We accept the evidence of Mr Drury and the submissions of Mr Williams in this regard.

[72] In any event, it is apparent that both the Commissioner in the first instance and Mr Drury have conflated the concepts of precedent and cumulative effects. All of the Courts which have addressed these issues have made it clear that a precedent effect is not a cumulative effect. To the extent necessary we refer to the comments of the Court of Appeal in paragraphs 37 - 49 of *Dye v Auckland Regional Council*[24].

[73] The fundamental premise underlying the Council decision and Mr Drury's evidence was that granting consent to this subdivision (with its lower than average controlled activity subdivision size), might lead to further such subdivision applications. It was contended that the grant of such applications would undermine the strategy contained in the District Plan for protecting the amenity and roading network of the Rural Residential Zone in Poraiti.

[74] Even if we were inclined to agree that such a contention was a permissible consideration to be taken into account in this restricted discretionary activity application (and we do not) there was no substantive evidence put before us to support that view. We will return to that matter further but we think that it is significant that in his submissions on behalf of the Council, Mr Lawson avoided reference to the precedent argument advanced by Mr Drury and found in the Commissioner's decision.

[75] Finally on the issue of precedent, Mr Drury contended that plan integrity and the effects of precedent are within the realm of matters that are able to be considered in terms of s104(1)(c) RMA, which provides that in considering an application for resource consent a consent authority must, subject to Part 2, have regard to *...any other matter the consent authority considers relevant and reasonably necessary to determine the application.* Mr Drury contended that precedent was an other matter referred to in s104(1)(c).

[24] [2002] 1 NZLR 337, [2001] NZRMA 513, (2001) 7 ELRNZ 209 (CA).

[76] However, s104(1)(c) is not applicable to consideration of restricted discretionary activity applications. Such applications are determined pursuant to s104C which provides that:

> *(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only* (our emphasis) *those matters over which-*
>
> *(a) a discretion is restricted in national environmental standards or other regulations:*
>
> *(b) it has restricted the exercise of its discretion in its plan or proposed plan .*

Accordingly *other matters* under s104(1)(c) are not relevant considerations in the determination of restricted discretionary activity applications which are confined to the matters identified in subsections (a) and (b) of s104C.

[77] We hold that:

- The precedent effect of granting consent is not one of the matters in respect of which the Council has reserved discretion in determining this restricted discretionary activity application;
- Even if it was a relevant consideration, the evidence did not establish that there would be any such precedent effect.

We accordingly propose to disregard any issues of precedent in our considerations.

***Cumulative Effects of Further Development on Rural Character and Amenity and Safety and Efficiency of the Roading Network***

[78] The issue of cumulative effects related to the effects of the proposal on rural amenity and the roading network.

[79] We had remarkably little evidence before us about potential effects of this proposal on rural amenity, although it was identified in both the Council decision and Mr Drury's evidence as a matter of some moment. Mr Drury appeared to approach his analysis on an assumption that the restrictions proposed by the consent notice

could not be upheld, an approach with which we have disagreed. However, even taking the worse-case scenario adopted by Mr Drury there was little, if any, evidence to support the Council's contention that there would be an adverse effect on rural amenity arising out of this application, either considered in isolation or on a cumulative basis (within the true meaning of that expression).

[80] Mr Drury identified the following adverse effect on rural amenity arising directly from this proposal;

> *I acknowledge that the resultant land use itself will not be foreign to its surrounds, but when we consider the number of lots or house hold units within an 80m radius of the designated building platform on Lot 1, a resultant total of four seems greater than that provided for by the Plan; and in turn, expected by the community.*

[81] Mr Drury did not identify the significance of the 80m radius nor what provision of the District Plan it might offend in some way. Although we have not placed any significant weight on the permitted baseline, the Certificate of Compliance confirms that an accommodation building can be erected on the building platform identified on Lot 1. Mr Drury said that a dwelling on that building platform would be in the foreground of a neighbouring property at 52 Boyd Road, thus exacerbating the effects of greater density in the area.

[82] Effects on the property at 52 Boyd Road need to be assessed in light of the fact that an accommodation building of some sort is allowed on the proposed building platform and in light of Mr Drury's further acknowledgement that development on Lot 1 would more than likely be capable of complying with the requirements of the District Plan as to yards, set-back distances, height, height in relation to boundaries and the provision of open space. Mr Drury acknowledged that there is planting on 52 Boyd Road providing at least some visual barrier between it and Lot 1.

[83] Accordingly, the only evidence before us as to the likely amenity effect of the subdivision was that any dwelling on Lot 1 would be in the foreground of 52 Boyd Road, and would comply with the various bulk and location controls in the

District Plan, but not with some hypothetical 80m radius requirement identified but not substantiated by Mr Drury. Development on Lot 1 would be restricted by the consent notice requirement that the overall footprint of development on Lots 1 and 2 could not exceed that presently permissible on the existing title.

[84] The Council's position on the amenity effect of the subdivision appeared to be summed up in this provision of Mr Drury's evidence:

> *It may be true that 1000m$^2$ of building coverage over a 1.5ha area is not foreign to the Rural Residential zone, but the effects of subdivision and the effects of pure building coverage are not necessarily the same. In his decision ... Commissioner Garland raised the situation of another unit of ownership as an effect of subdivision. I believe an additional unit of ownership is a dimension that must be taken into account in relation to the scale and intensity of development, especially when the consideration of amenity values is entrenched within the matters of discretion and provisions of the Plan. Indeed, it is the separate unit of ownership that establishes the platform for additional development rights, additional vehicle movements, additional vehicle crossings, additional visitors, additional private congregations of people, additional servicing requirements and additional parties to easements; all of which have the potential to risk the qualities and characteristics of an area that contribute to the amenity of nearby parties. Such risk should not be disregarded on the simple basis that the site coverage limit will not be exceeded.*

[85] Again, there was no hard evidence to support many of the contentions raised by Mr Drury and identified in the Council decision. In respect of the identified matters:

- Additional development rights (in terms of total developed area) are to be limited in this case to those presently applicable to the existing site;
- Additional vehicle movements and crossings will be discussed in the following section of our decision relating to traffic issues;
- We accept that there might be some additional visitors and additional private congregations of people with an additional dwelling house, however visitors and private congregations of people are typical incidents

of residential and rural residential activity. Nothing in the evidence which we heard suggested that the addition of one further dwelling house will elevate these incidents beyond a level which might reasonably be anticipated in the zone;

- Finally, in terms of servicing requirements and easements, the agreed statement of the planners recognised that the lots could be suitably serviced in terms of water supply, waste water and storm water disposal and that there was adequate access. If there was any genuine issue as to excessive use of the access ways to the lots, that could be resolved as part of the final conditions of consent by restricting Lot 1 to access from Boyd Road and Lot 2 to access from Fryer Road.

[86] Nothing in the evidence which we heard leads us to the conclusion that there is any reason to decline consent to the subdivision having regard to the effects of the proposal on rural residential amenity.

[87] The final issue for consideration is that of the cumulative effects on the roading network of allowing this proposal. We refer to our comments in paras [22]-[26] (above) regarding this issue. Mr Prosser's evidence was that this subdivision proposal was likely to generate something in the order of 8 vpd which was well within the capacity of the roading network to accommodate. He said that Boyd Road had a capacity of somewhere in the order of 150vpd and that with the Kirton subdivision in place it would be required to carry something like 120vpd.

[88] Mr Prosser was not challenged on that particular aspect of his evidence. The questions which Mr Lawson put to him in cross examination rather related to possible other activities which might be undertaken as of right on other land in this vicinity which also used Boyd Road for access. In particular, Mr Lawson put to Mr Prosser that he did not factor into his calculations the possibility that:

- Home occupations;
- Visitor accommodation units;
- Residential care facilities for up to 10 persons;

were all activities which could be established as of right on properties accessing Boyd Road.

[89] Mr Prosser accepted that was the case and that if such activities were to occur there could be an increase in the volume of traffic on the road. He readily conceded that it would not take much to go from 120vpd to 150vpd (being his assessed road capacity) if the developments in question were established as suggested by Mr Lawson in cross examination. Mr Prosser said that it was his brief to evaluate the Kirton proposal on the basis of the current roading network and existing activities being undertaken in the vicinity.

[90] In his evidence in chief, Mr Drury identified that based on a current average lot size of 1.5ha, a further 22 additional lots could be created in the Poraiti area north of Puketitiri Road as a controlled activity. However, that analysis included 4 large titles within a combined area of approximately 100ha which could provide an additional 66 lots, increasing the subdivision potential of the area to 88 lots based on controlled activity rules. In cross examination, Mr Drury conceded that none of the lots having a minimum area of 3ha (being the minimum required to achieve 1.5ha average subdivision lot size) had access off Boyd Road. He also conceded that on a controlled activity (or restricted discretionary activity) subdivision application the Council had power to take a financial contribution for the maintenance of infrastructure, including road infrastructure.

[91] As we understood the cumulative effects argument advanced by the Council, it was based on the proposition that properties using Boyd Road (in particular) for access could establish certain traffic generating activities as of right, namely, home occupations, residential care facilities, day care facilities and others which had traffic generating potential and which could *use up* the surplus in the present capacity of Boyd Road which Mr Prosser had identified.

[92] In a general sense, we understand the point that Mr Lawson was making, that there are a range of permitted activities which could take place on lots using Boyd Road for access which could require the present surplus traffic capacity of the road.

However, there was no analysis whatever provided which enabled us to assess the likelihood of that happening in fact.

[93] In order to proceed as permitted activities, all of the various activities identified by Mr Lawson in cross examination must comply with a range of relevant conditions. For instance, each one of the activities put to Mr Prosser is required to comply with the relevant conditions of the Rural Residential Zone Activity Table and Condition Table which (inter alia) impose standards relating to density of development, yard sizes, height of buildings, site coverage and noise. No analysis was provided by the Council as to the capacity of properties on Boyd Road which might allegedly undertake such activities to comply with the required conditions. Nor were we given any evidence as to the possibility of Boyd Road being subjected to a rush of such activities being established. We had no evidence of ongoing pressure for subdivision of properties using Boyd Road for access. Had there been such evidence we might have viewed this application differently, however we have simply no evidential basis on which to assess the possibility of, or capacity for Boyd Road properties to be subject to further subdivision or developments of the kind suggested by Mr Lawson.

[94] None of the evidence which we heard established that approval of the Kirton subdivision of itself would have any adverse effect on the safety and efficiency of the roading network. Further, any lingering concerns in that regard may be mitigated by a condition requiring that only Lot 1 of the proposed subdivision may use Boyd Road for access. The site is presently entitled to an access point out onto Boyd Road for the dwelling already established and if such a condition is imposed, only one dwelling will continue to have such access.

***Section 290A***

[95] Section 290A RMA requires us to have regard to the decision which is the subject of this appeal in our considerations. It will be apparent from our earlier comments that we have done so. We disagree with the decision reached by the Commissioner.

***Outcome***

[96] It will also be apparent from our earlier comments that we do not accept the position adopted by the Council in these proceedings. Once the issues of durability/vires of the consent notice and precedent/plan integrity are set to one side, the only issue of substance in this appeal was that relating to possible effects of the proposal on the roading network and we refer to the conclusion which we have reached in that regard in para [94] (above).

[97] We conclude that the appeal must succeed and consent ought be granted to the subdivision, with consent subject to a consent notice as proposed by the Appellants and any other conditions required to reflect the contents of this decision. We allow a period of 20 working days from the date of this interim decision for the parties to discuss and resolve appropriate conditions. If the parties are unable to agree on conditions either party may advise the Court accordingly at the expiry of the 20 working day period and we will determine any issues relating to conditions although we would hope that it will be unnecessary for us to do so.

***Costs***

[98] Costs are reserved, to be resolved after the issue of a final decision.

DATED at WELLINGTON this 22nd day of April 2013

For the Court:

B P Dwyer

Environment Judge

**IN THE HIGH COURT OF NEW ZEALAND**
**BLENHEIM REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WAIHARAKEKE ROHE**

**CIV 2019-406-000009**
**[2019] NZHC 2765**

| | |
|---|---|
| UNDER | the Resource Management Act 1991 |
| IN THE MATTER OF | an appeal from the Environment Court pursuant to s 299 of the Act |
| BETWEEN | MARLBOROUGH DISTRICT COUNCIL<br>Appellant |
| AND | ZINDIA LIMITED<br>Respondent |

Hearing: 20 September 2019

Counsel: J W Maassen and A C Besier for the Appellant
Q A M Davies and J Marshall for the Respondent

Judgment: 29 October 2019

---

**JUDGMENT OF DOOGUE J**

---

**Contents**

## Introduction

[1] This is an appeal against a decision of the Environment Court to cancel an abatement notice issued by the appellant, the Marlborough District Council (Council), against the respondent, Zindia Limited (Zindia).[1]

[2] The notice directed Zindia to cease and not recommence its commercial forestry operations on a forestry block at East Bay, Arapaoa Island (formerly Arapawa Island) in Queen Charlotte Sound (the Forestry Block).

[3] Zindia is operating under a set of six resource consents. The notice did not allege that Zindia was breaching those consents. Nor did it require Zindia to avoid, remedy or mitigate the environmental effects of the land use. The abatement notice was purely concerned with an alleged breach of rule 4.5.4 of the Proposed Marlborough Environment Plan (pMEP) and s 9 of the Resource Management Act 1991 (RMA).

[4] The abatement notice was premised on an understanding that the regional land use consent no. U120345.1 in the Council's register of consents (Consent U120345.1) does not authorise commercial forestry harvesting, now the subject of r 4.5.4.

[5] The notice relevantly states:

> Section 9(2) of the RMA states that no person may use land in a manner that contravenes a regional rule unless the use is expressly allowed by a resource consent, or is an activity allowed by s 20A.
>
> Resource consent U120345.1 applies to the forestry block. However, the resource consent only permits earthworks, culvert installation, construction of a barge ramp in the coastal marine zone, occupation of the coastal marine zone, and land disturbance and vegetation removal in the foreshore reserve adjacent to lot 5 DP394939. Commercial forestry harvesting is not expressly permitted by the resource consent.

[6] This appeal is brought under s 299 of the RMA, which enables any party to a proceeding before the Environment Court to appeal to this Court on a question of law

---

1 *Zindia Ltd v Marlborough District Council* [2019] NZEnvC 30.

in respect of any decision, report, or recommendation made by the Environment Court in that proceeding.

**Questions of law**

[7] In its notice of appeal, the Council has specified the following questions of law for determination by this Court:

> **Question 1:**
>
> Did the Environment Court err in finding that the permitted activity at the time consent was granted of felling and harvesting of trees and associated activities over the entire site and the associated effects on soil conservation and water quality of that use was expressly allowed by Consent U120345.1 under s 9(2)(a)?
>
> **Question 2:**
>
> Did the Environment Court err:
>
> i) In finding that any commercial forestry harvesting; or
>
> ii) Any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure identified in the resource consent application's activity description concerning earthworks and the triggered regional rules;
>
> was expressly allowed by Consent U120345.1 in terms of s 9(2)(a) RMA?
>
> **Question 3:**
>
> Did the Environment Court err in finding that 'bundling' can apply to a permitted activity?
>
> **Question 4**
>
> Did the Environment Court err by failing to attach appropriate significance to the absence of any consideration of the effects of felling and harvesting of trees and associated activities on water quality and soil conservation in the applicant's Assessment of Environmental Effects?
>
> **Question 5**
>
> Did the Environment Court err in finding that the use of the words "for the purpose of forestry harvesting" in the consent application and Consent U120345.1 meant that resource consent expressly allowed for the felling and harvesting of trees and associated activities over the entire site, and addressed the associated effects on soil conservation and water quality, instead of simply stating the objective of the infrastructure for which consent was sought?

**Question 6**

Did the Environment Court err in finding that offered controls on harvesting volunteered as conditions by the applicant to satisfy submitters affected the true scope of the application?

**Question 7**

Did the Environment Court err in setting aside the abatement notice and not adjusting its scope to ensure that the rule of law was served by ensuring those activities requiring consent under rule 4.5.4 of the Proposed Marlborough Environment Plan (pMEP) were obtained before work could recommence?

[8] For the sake of consistency, I adopt these question numbers in this decision. However, I will not address the questions in numerical order. Rather, as will become clear, it is more logical to address Questions 1 and 3 together (which are questions of pure legal interpretation), Questions 2, 5 and 6 together, and then Question 4 and Question 7 separately.

## The Environment Court decision

[9] The Environment Court found that at the time the consent application was made, the Council interpreted the Marlborough Sounds Management Plan (Sounds Plan) as treating the cutting and removal of trees as a permitted activity (under a "vegetation clearance" rule). That is despite the Sounds Plan having a restricted discretionary activity rule (r 36.3) for commercial forestry. Various enabling works (for example, excavation beyond specified limits, culverting, formation of harvesting structures and so forth) were classed as discretionary or restricted activities. The Court found that the consent application was made and proceeded on that basis.[2]

[10] The Environment Court also found that the Council's interpretation that cutting and removal of trees as part of commercial forestry was to be treated as "vegetation clearance" and therefore a permitted activity was incorrect. Rather, the Court found the cutting down and removing of trees from a commercial forest is clearly within the meaning of "commercial forestry". Further, that excluding harvesting from commercial forestry on the basis that cutting down and removing trees is a form of vegetation clearance:[3]

---

2 At [18].
3 At [20].

> ...is a strained and unnecessary construction. That is in the sense that it would attempt to treat those aspects of commercial forestry in isolation from the necessarily ancillary activities that enable it.

[11] The Environment Court interpreted s 9(2) of the RMA as allowing for a pre-existing consent to expressly allow a land use that contravenes a later rule. In doing so, the Court adopted the reasoning in *Arapata Trust Ltd*.[4] The Court found "a land use consent is to undertake land use (as defined by s 2(1) of the RMA) rather than to contravene plan rules per se."[5] Further, the Court noted that "whether or not the consent has that legal effect depends on the substantive effect of the consent."[6]

[12] The Environment Court found first that Consent U120345.1 expressly allows the "formation of… skid sites, roading, and installation of culverts, for the purpose of forest harvesting" which is "substantially the same thing as the pMEP definition specifies as part of 'commercial forestry harvesting'."[7] Hence that Consent U120345.1 expressly allows that land use.

[13] Second, the Court found that Consent U120345.1 "expressly allows for the felling and removal of trees which are directly and immediately adjacent to the consented new access roads and tracks, landing sites, hauler pads and log marshalling site."[8]

[14] The Environment Court then considered whether Consent U120345.1 expressly allows commercial forestry as a land use to any further extent than described in the preceding two paragraphs. The Court found that:[9]

> ...the true nature of commercial forestry at the Forestry Block is a bundle of inter-related land uses. Cutting down and removing trees is part of that bundle. It cannot be undertaken without various enabling land uses, formation of vehicle tracks and log marshalling areas, culverting of watercourses and the formation of barge landing facilities so that logs can be barged to Shakespeare Bay.

---

4 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236 at [23]-[44].
5 *Zindia Ltd v Marlborough District Council*, above n 1, at [39].
6 At [39].
7 At [51(a)].
8 At [51(b)].
9 At [54].

[15] The Court found that where, as in this case, one aspect of the bundle of interrelated land uses is classed as a permitted activity and other activities in the bundle are discretionary, the most restrictive activity classification is applied to all of them including the permitted activity.[10] The reason being that:[11]

> ...it is more consistent with the purpose of the RMA to allow for a properly holistic assessment of the effects of all interrelated land uses so that those effects can be properly managed through consent conditions.

[16] The Environment Court then turned to the issue of whether the consent application is to be properly read as encompassing commercial harvesting or excluding it. The Court referred to both the consent application and Consent U120345.1, which qualify the listed land uses with the words "for the purpose of forest harvesting".[12] The Court found those words "convey an intention to secure a consent that comprehensively permits and regulates harvesting as part of an interrelated bundle of commercial forestry land uses."[13]

[17] The Court's reasoning was first that the application coupled that express purpose with offered controls on harvesting.[14] Secondly, the application attached the harvest plan map.[15] Thirdly, the application appeared to have been treated by submitters as extending to harvesting at least insofar as it allowed opportunity for them to secure related relief.[16] Fourthly, a pre-hearing meeting led to the resource consent applicant seeking specific controls on harvesting for inclusion in the consent.[17] The Court found the agreed conditions were in "the nature of refinements to what was applied for, rather than being a material expansion to the scope of the application."[18]

[18] In conclusion, the Environment Court found no sound resource management purpose being served by an application seeking to encompass harvesting for the purposes only of imposing controls rather than also allowing the harvesting to occur.[19]

---

10 At [55].
11 At [55].
12 At [59].
13 At [61].
14 At [62].
15 At [62].
16 At [64].
17 At [65].
18 At [66].
19 At [70].

As a result, the Environment Court allowed Zindia's appeal and cancelled the abatement notice.

**Role of the High Court on appeal**

[19] Appeals to this Court are not against the merits of the Environment Court's decision. They are limited to questions of law only.[20]

[20] The relevant principles that apply were summarised in *General Distributors Ltd v Waipa District Council:*[21]

> [29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed GDL must identify a question of law arising out of the Environment Court's decision and then demonstrate that the question of law has been erroneously decided by the Environment Court – *Smith v Takapuna CC* (1988) 13 NZTPA 156.
>
> [30] The applicable principles were summarised in *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 153. In that case the full Court – Barker, Williamson and Fraser JJ – noted as follows:
>
> > … this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal –
> >
> > (a) applied a wrong legal test; or
> >
> > (b) came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
> >
> > (c) took into account matters which it should not have taken into account; or
> >
> > (d) failed to take into account matters which it should have taken into account.
> >
> > See *Manukau City v Trustees Mangere Law Cemetery* (1991) 15 NZTPA 58, 60.
> >
> > Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society v Mangonui County Council* (1988) 12 NZTPA 349, 353.
> >
> > Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird*

---

20 Resource Management Act 1991, s 299.

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

*Protection Society Inc v W A Habgood Limited* (1987) 12 NZTPA 76, 81-2.

[21] I adopt these principles for the purposes of this appeal.

**Question 1: Did the Environment Court apply the wrong legal test under s 9(2) of the RMA?**

[22] The Environment Court found that Zindia's vegetation clearance through its harvesting activity across the Forestry Block fell within the exception in s 9(2)(a) of the RMA by being expressly allowed by Consent U120345.1.[22]

[23] The Environment Court assessed harvesting on the Forestry Block on the basis that it had previously been a permitted activity under the Sounds Plan[23] and was now a restricted discretionary activity under r 4.5.4 of the pMEP.[24] The question therefore was whether, on the basis of s 9(2), "a consent expressly allow[s] a rule contravention if the consent was granted before the rule was known."[25] The Court concluded that it did.[26] The Environment Court also concluded that "a land use consent is to undertake land use (as defined by s 2(1) RMA) rather than to contravene plan rules per se."[27]

[24] Section 9(2) provides:

> No person may use land in a manner that contravenes a regional rule unless the use–
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by s 20A.

[25] The definition of "use" is found in s 2 of the RMA. That definition states:

> use,—
>
> (a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—

---

22 *Zindia Ltd v Marlborough District Council*, above n 1, at [7], [35], [36] and [71].
23 At [21].
24 At [14].
25 At [35].
26 At [36].
27 At [39].

(i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:

(ii) drill, excavate, or tunnel land or disturb land in a similar way:

(iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:

(iv) deposit a substance in, on, or under land:

(v) any other use of land; and

(b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river

[26] Mr Maassen, for the Council, submitted that because the Environment Court assessed harvesting on the Forestry Block on the basis that it had previously been a permitted activity, s 9(2)(a) could not apply, contrary to the Court's conclusion. He said only s 9(2)(b) was applicable. This is because Zindia's harvesting activity began after the pMEP came into force. In any case, Mr Maassen submitted that the proper interpretation of s 9(2)(a) — what a resource consent permits — is that a resource consent expressly allows for a breach of a rule; it cannot *expressly* allow a permitted activity.

[27] Mr Davies, for Zindia, submitted the contrary: that a resource consent permits an activity or a number of activities, rather than a breach of a rule. Therefore, the Environment Court was correct to conclude that s 9(2)(a) applied.

[28] The Council relies on *Bayley v Manukau City Council*.[28] That case concerned applications for several resource consents for a housing development. In particular, Mr Maassen submitted that the Court of Appeal in *Bayley* held that "use" has the same meaning as "activity". What the Court actually said was the following:[29]

> Under the zoning of the site in the operative plan residential accommodation is a discretionary activity. The proposed plan zones the site as business 1 and the appellants' properties as main residential. Residential activity in a business 1 zone is a controlled activity and requires a consent as such. *("Activity" is not*

[28] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).
[29] At 570 (emphasis added).

> *a defined term but in general appears to have the same meaning as "use", as can be seen from ss 9 and 10.)*

[29] In my view, this cannot be said to have been a statement of principle, but rather an observation.

[30] Nevertheless, the concept of an activity is relevant to the function of a resource consent and whether it permits a contravention of a rule or the occurrence of an activity. Section 87A of the RMA provides for various classes of activity. These classes are: permitted activities; controlled activities; restricted discretionary activities; discretionary activities; non-complying activities; and prohibited activities.

[31] The distinction between the classes of activity hinges on whether a resource consent is required for a particular activity. Permitted activities do not require a resource consent.[30] Conversely, controlled, restricted discretionary, discretionary, and non-complying activities require a resource consent.[31] Finally, no resource consent application can be made, and therefore no resource consent can be granted, for a prohibited activity.[32]

[32] Mr Davies submitted that the concept of an activity infers "something to be done". He says that if Parliament's intention was to focus on the effects of the breach of a rule, different wording would have been used. He points to s 104 of the RMA in support of this proposition. Section 104 relevantly 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–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> ...

[33] Mr Davies submitted that unless a district plan limits the district authority's discretion, the assessment of the actual and potential effects on the environment of

---

30 Resource Management Act 1990, s 87A(1).
31 Section 87A(2)-(5).
32 Section 87A(6). The only exception to this restriction is if subs (7) applies.

allowing the activity is an exercise that must be taken independently of the district plan. It follows that a resource consent cannot be interpreted as permitting the contravention of a rule in a plan, but rather permitting an activity.

[34] I agree with the Environment Court that *Arapata Trust Ltd v Auckland Council* is informative in this regard.[33] That was a costs decision in respect of proceedings in which the central question was whether a holder of a current but unimplemented land use resource consent requires a further resource consent for the already consented use of land when a new or changed plan provision comes into effect. It should be noted that *Arapata Trust* involved the interpretation of s 9(3)(a) of the RMA which is materially identical to s 9(2)(a) save that it applies to district rather than regional rules. Judge Kirkpatrick relevantly stated the following (original emphasis):

> [30] Section 9(3) imposes a restriction on the use of land in a manner that contravenes a district rule (being any rule in an operative plan or any rule in a proposed plan which has legal effect under s 86B), but subject to an exception in sub-paragraph (a) for a use that is expressly allowed by a resource consent. Similar exceptions are made for existing uses and activities under ss 10 and 10A in sub-paragraphs (b) and (c). It is important to observe that while s 9(3) is expressed as such a restriction, the exception to that restriction in s 9(3)(a) is for a use which is allowed by a resource consent, rather than for the contravention of a rule. Even though it is the contravention of a rule that gives rise to the requirement for a resource consent, the consent is for the use of land.
>
> [31] This aspect of s 9(3) is consistent with other provisions in the Act relating to the nature of resource consents. In s 2 of the Act, "use" in certain sections (including ss 9 and 10) is defined to mean, relevantly among other things, "reconstruct ... a structure ... on ... land." The definition does not refer to "use" in terms of any rule in a plan that may apply to it. As defined in s 87A, a "resource consent" is "a consent to do something" that would otherwise contravene one or other of sections 9 or 11 - 15B of the Act. In this context, *to do something* must mean an activity, which for the purposes of s 9 means a use of land and in terms of the definition of "use" in s 2 means some action in relation to that land.

[35] Judge Kirkpatrick went on to outline the principle behind his conclusion (that a resource consent permitted something to be done rather than the contravention of a rule) stating:

> [36] The consequence of a land use resource consent being considered as a consent which allows a person to use land in a particular way, as distinct from simply being a consent to contravene a particular rule, is that the rules in

---

33 *Arapata Trust Ltd v Auckland Council*, above n 4.

> any relevant operative or proposed plan may change but that use of land is still consented. On that approach there is nothing in s 86B which would alter the effect of a current resource consent under s 9(3)(a).

[36] This conclusion was expressly endorsed by Venning J in *Duggan v Auckland Council*.[34]

[37] I agree with these authorities, and therefore the Environment Court in this case, that the proper interpretation of a resource consent is a permission to do an activity, or in the case of a land use consent comprising multiple activities, to use the land in the way consented. In my view, this is the correct interpretation given both the statutory provisions in the RMA to which I have referred, as well as the changing nature of plans which was addressed in *Arapata Trust*.

[38] For completeness, I briefly address Mr Maassen's submission that Zindia ought to have sought a certificate of compliance in respect of its harvesting activity given it was considered a permitted activity under the Sounds Plan. In other words, Zindia could have obtained certificates of compliance for activities on the Forestry Block that were permitted activities. This was not possible by virtue of the principle confirmed in *Mawhinney v Waitakere City Council* that combined applications for resource consents and certificates of compliance are invalid.[35] This is because a consent comprising multiple activities must be viewed holistically, not broken up into its respective components. Certificates of compliance are available where, and only where, an activity is permitted in all relevant respects. As the Court of Appeal observed, certificates of compliance are "not available as a means of patching up otherwise incomplete resource consent applications."[36]

[39] Accordingly, the answer to Question 1 is no.

---

34 *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317 at [28] and [37].
35 *Mawhinney v Waitakere City Council* [2009] NZCA 335 at [25] and [28]-[29].
36 At [29].

**Question 3: Did the Environment Court err in finding that 'bundling' can apply to a permitted activity?**

[40] Despite my conclusion on Question 1, there remains the question of whether a land use in terms of s 2 of the RMA, and for the purposes of s 9(2)(a), can include a permitted activity (for which a resource consent cannot be granted). This is only possible if, as the Environment Court concluded, a permitted activity can be "bundled" into a resource consent application.

[41] Bundling is a concept which provides that where a particular land use comprises multiple activities all of which each require a resource consent, the least favourable activity classification applies to all of the activities.[37]

[42] Mr Maassen submitted that a permitted activity cannot be bundled into an application for more restrictive activities. Mr Davies submitted the contrary. Both parties cite various authorities in support of their respective propositions.

*The authorities*

[43] *Locke Avon Motor Lodge Ltd* is the earliest case referred to by the parties which dealt with the concept of bundling under the then-applicable Town and Country Planning Act 1953 (TPA).[38] Cooke J was required to consider an appeal by way of case stated from a determination of the Special Town and Country Planning Appeal Board under the TPA and the Christchurch District Scheme. The respondent in that case applied to the Christchurch City Council to add a six-storey block to its commercial accommodation business which was opposed by residents in the area. The Christchurch District Scheme provided that a "predominant use" (which would today be called a "permitted activity"), which did not comply with bulk, location, parking, loading and access requirements, was deemed to be a "conditional use" (which would today be called a "discretionary activity"). Cooke J found that the respondent's application for the proposed building complied with the requirements for a "predominant use" in all but one respect; the building design was off by some two feet

---

37 See *Bayley v Manukau City Council*, above n 28; *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [22]; *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [44].

38 *Locke Avon Motor Lodge Ltd* (1973) 5 NZTPA 17 (SC).

six inches on one boundary. Because of this, Cooke J concluded that the whole application became one for a "conditional use". Cooke J made the following observation:[39]

> The [Appeal] Board evidently acted mainly on the view that it was only concerned with any detraction from the amenities that might result from the non complying side yard. In my opinion that approach is not warranted as a matter of interpretation of the Act and the ordinance. I agree with counsel for the City that a use is either wholly predominant or wholly conditional. The hybrid concept would add an unnecessary complication to legislation already sufficiently complicated and it would tend to limit rights of objection. In a case of ambiguity the legislation should not be so construed. On a conditional use application the fact that there is only minor non compliance with predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.

[44] In *Rudolph Steiner School v Auckland City Council,* the Environment Court held that the principle in *Locke* equally applied to the RMA, particularly in respect of non-restricted discretionary and discretionary activities.[40] In that case, a discretionary activity resource consent was required only because part of the building roof exceeded the maximum building height control by two metres. The Environment Court examined the validity of conditions restricting the nature of the activities for which the building could be used and the hours of that use. The RMA allowed for the restriction of a council's discretion in respect of an activity by classifying it as a "restricted discretionary activity". However, the Court held that unless expressly restricted in a plan, a discretionary activity is wholly discretionary within the limits implied by law.[41]

[45] Both *Locke* and *Rudolph Steiner* were followed by Salmon J in *Aley v North Shore City Council*.[42] That case concerned a judicial review of the North Shore City Council's decision refusing to notify a resource consent application to construct a five-level building, including apartments, car parking and retail space, in an area of predominantly low-rise commercial buildings. The development included a range of activities, some of which were permitted activities and therefore did not require a

---

39 At 22.
40 *Rudolph Steiner School v Auckland City Council* (1997) 3 ELRNZ 85 at 87.
41 At 87.
42 *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC).

resource consent. However, it was the height and bulk of the building that caused concern to the applicants. Salmon J accordingly noted:[43]

> It is important to appreciate that in this case the proposed plan provides that an activity is eligible for permitted activity status subject to compliance with all the controls specified in the plan. A discretionary activity consent is required because in this case the proposal does not comply with all the controls in the plan.

[46] Salmon J ultimately held that a proposed use is either wholly predominant (or permitted), or wholly conditional (or discretionary).[44] A "hybrid activity" was not possible. In other words, where a particular feature of a development proposal renders it non-complying such that a conditional use application is necessary, then the whole use of the property is non-complying notwithstanding the overall use includes permitted activities.

[47] At this point, it is necessary to distinguish between an "activity" and the resource consent application itself which may contain multiple activities (and perhaps multiple classes of activity). Where an application proposes multiple activities, the role of a local authority is to determine whether it is appropriate to grant the application, not necessarily whether it is appropriate to allow any one of the individual activities to occur. In this regard, the local authority must view the application as a whole. As Salmon J noted in *Aley*:[45]

> [t]he 'activity for which consent is sought' is in the present instance the building that is proposed not just those aspects of the development which have had the effect of requiring a discretionary activity consent.

[48] This distinction was more clearly outlined by the Court of Appeal in *Bayley*. In considering a resource consent in which multiple activities were proposed, the Court quoted with approval the above passage from *Aley* and stated that it "would add to the penultimate sentence 'or as it would exist if the land were used in a manner permitted as of right by the plan'".[46]

---

43 At 378.
44 At 377.
45 At 377.
46 *Bayley v Manukau City Council*, above n 28, at 577.

[49] It is this comment on which Zindia primarily relies in support of its submission that it is possible to bundle permitted activities with those requiring a resource consent.

[50] In *Bayley*, the Court went on to discuss the concept of bundling. This concept is most relevant to the question of whether it is necessary to publicly notify a consent application under s 95A of the RMA, which comprises multiple classes of activity. The Court of Appeal commented as follows:[47]

> Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

[51] *Bayley* is therefore authority for the proposition that where a proposed land use encompasses multiple classes of activity, the local authority should consider whether there is sufficient overlap between the activities such that the consent applications for each class of activity be considered together. In such an instance, the most restrictive activity status is applied to all the consent applications. This latter point embodies the principle established in *Locke*.[48]

[52] In *Southpark Corporation Ltd v Auckland City Council*, the Environment Court also considered the application of the *Locke* principle and discussed *Bayley*.[49] The applicants in that case applied for resource consent to construct and operate overhead power lines on sections of a route, as well as certificates of compliance for the remaining sections of the route. The operation of powerlines over private land was deemed to be permitted activity, while that over public roads was deemed to be a

---

47 At 580.

48 Although not relevant to this appeal, *Bayley* is also authority for the proposition that where one of the activities for which consent is sought is a restricted discretionary activity, the *Locke* approach may or may not be appropriate. A decision whether or not it is appropriate depends on how relatively unconfining are the factors to which exercise of the discretion to grant or refuse consent is restricted. See *Bayley v Manukau City Council*, above n 28, at 577.

49 *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350 (EnvC).

discretionary activity. Having analysed *Bayley* and several decisions that followed, the Environment Court stated:

> [15] From those authorities, it is our understanding that while the *Locke* approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where: (a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and (b) the scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and (c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application, but are distinct.

[53] This observation was applicable insofar as the movement from private land to road (and therefore from permitted activity to discretionary activity) was analogous to activities spanning across different zones for the purposes of a regional plan, attracting different classifications. Applying all these principles to the facts in that case, the Environment Court confirmed that in considering a resource consent application comprising multiple activity classes, a local authority is required to consider the cumulative effects on the environment of allowing the activity for which a resource consent is required.[50] The cumulative effect necessarily includes any activity permitted activity. This is because the local authority has to have regard to the matters listed in s 104(1) of the RMA (including the actual and potential effects on the environment of allowing the discretionary activity) and has to exercise the discretion conferred by (the now-repealed) s 105(1) to grant or refuse consent, and if it is granted, to impose conditions. The Court therefore concluded:

> [30] We hold that in deciding the appeal against refusal of the resource consent for the sections of line over road, the Court would be entitled (and obliged) to have regard to any environmental effects of the sections of the line over private land (a permitted activity) to the extent that any effects of the line over road are cumulative on the effects of the line over private land.

[54] Since *Southpark Corporation Ltd*, several decisions have reconfirmed the concept of bundling on the basis of the most restrictive activity proposed.[51] Those

---

50 At [30].

51 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006; *Newbury Holdings Ltd v Auckland Council* [2013] NZHC 1172; *Urban Auckland v Auckland Council*, above n 37.

decisions, however, do not discuss bundling insofar as it may apply to permitted activities.

*Permitted baseline test*

[55] The authorities to which I have so far referred raise a second, interrelated issue, and one which directly relates to the passage in *Southpark Corporation* quoted above. That issue is how the environmental impact of a proposed resource consent application, which contains multiple classes of activity, is to be determined.

[56] In addition to the concept of bundling established in *Bayley*, the Court also held the following in respect of the environmental impact of multi-class applications:[52]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which the consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right.

[57] The test expressed in the final line of this quote has come to be known as the "permitted baseline test".

[58] In *Smith Chilcott Ltd v Auckland City Council*, the Court of Appeal also considered the application of *Bayley* to multi-class resource consent applications.[53] The appellant in that case had obtained resource consents required to construct an apartment building in Herne Bay, Auckland. These consents were opposed by the to-be neighbours. After several appeals to the Environment Court and subsequently to the High Court, the matter reached the Court of Appeal on three specific questions of law. One of these questions was whether, when considering an application for a non-complying activity pursuant to ss 104 and 105 of the RMA, a local authority is obliged to apply the "permitted baseline" test as formulated in *Bayley*.

[59] The Court of Appeal accepted that the permitted baseline test in *Bayley* was formulated in respect of the requirement for public notification, not the determination

---

52 At 576.

53 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA).

of the resource consent application itself. Likewise, it concerned restricted discretionary activities while the consent application before the Court in *Smith Chilcott Ltd* concerned non-complying activities. Nevertheless, the Court held that because the obligation to notify under (the non-repealed) s 94 relates to the activity for which consent is sought (that is, the activity is that which cannot be pursued without consent), the permitted baseline test applied to the substantive determination of resource consent applications.

[60] Shortly after *Smith Chilcott Ltd*, the Court of Appeal had another opportunity to consider the application of the permitted baseline test in *Arrigato Investments Ltd v Auckland Regional Council*.[54] That case concerned developers who applied to the Rodney District Council for resource consent to divide a property into 14 lots. The developers had already obtained consent to divide the property into nine lots. The proposed larger subdivision was therefore non-complying under the district plan. The consent could not be granted unless one of the gateways in (the now-repealed) s 105(2A) of the RMA was passed: that the effects on the environment would be minor; or the activity would not be contrary to the objectives and policies of the relevant plan.

[61] Explaining the effect of the permitted baseline test, the Court of Appeal stated:

> [29] Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[62] In summary, *Arrigato Investments Ltd* confirmed that where a resource consent application proposes various activities some of which are permitted activities, a local authority should not consider the environmental impact of the permitted activities in determining whether to grant the consent.

---

54 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

[63] Since *Arrigato Investments Ltd*, s 104(2) has been repealed and replaced, while s 105 has simply been repealed. Section 104(2) now states that in determining the actual and potential effects on the environment of allowing the activity for which consent is sought, a local authority may disregard any adverse effect of a permitted activity. Therefore, s 104(2) has overtaken the permitted baseline test established in *Southpark Corporation Ltd* and followed in *Arrigato Investments Ltd*.

*Conclusion*

[64] Having reviewed the authorities on the concept of bundling, it appears that, at least from a practical perspective, permitted activities can be bundled with other classes of activity. This is particularly evident from the Court of Appeal's commentary in *Bayley* and also from *Southpark Corporation Ltd,* which concerned resource consent applications for various permitted and discretionary activities, as is the case in the present appeal.

[65] The Environment Court in the present case came to this same conclusion, stating:[55]

> [55] 'Bundling' is a well-established approach in the consideration and determination of resource consent applications under the RMA. According to this approach, where various activities (in this case, land uses) are closely related but have different activity classifications under a relevant RMA plan, the most restrictive activity classification is applied to all of them. Hence, if one land use is a discretionary activity, but all others in the bundle applied for are controlled or restricted discretionary, all default to be determined as discretionary activities. However, the principle that underlies the bundling approach to consenting also extends to where one aspect of a bundle is classed as a permitted activity when the other activities in the bundle are discretionary. In that scenario, it is also more consistent with the purpose of the RMA to allow for a properly holistic assessment of the effects of all inter-related land uses so that those effects can be properly managed through consent conditions.

[66] While the Environment Court did not err in its reasoning, in my view, it is preferable to avoid the use of the term bundling when discussing permitted activities. This is for the following reasons:

---

55 *Zindia Ltd v Marlborough District Council*, above n 1 (footnotes omitted).

(a) Bundling can only occur where a person or entity submits a resource consent application comprising multiple activities (of which there are two or more activity classes). Permitted activities may occur as of right and do not require a resource consent.

(b) Bundling proceeds on the basis of the most restrictive activity. As permitted activities are, by definition, the most permissive of activities under the RMA, these activities would necessarily be excluded from the proposed resource consents if bundled with any other class of activity.

(c) If consent is not granted for a proposed bundle of activities, the applicant is nevertheless able to engage in the permitted activities by themselves or in combination with each other, so long as the criteria for each permitted activity is satisfied.

(d) A local authority is only permitted to refuse consent on the basis of matters over which it retains control.[56] It does not retain control over permitted activities in the same way it does in respect of activities that require a resource consent. This principle was reaffirmed in *Smith Chilcott Ltd* where the Court of Appeal stated:[57]

> The essential point is that the consent authority may have powers to consent depending on its characterisation of the proposed use of the land or activity. Such may be non-complying, discretionary, restricted discretionary or controlled, whichever characterisation it uses. But its power does not go beyond the extent retained so long as it is exercised in accordance with the Act.

Accordingly, a local authority is not able, as of right, to grant a resource consent with conditions in respect of aspects of that consent which constitute permitted activities unless, as is the case in the present appeal, the applicant consents.

---

56 *Bayley v Manukau City Council*, above n 28, at 577.
57 *Smith Chilcott Ltd v Auckland City Council*, above n 53, at 479.

[67] The Environment Court's view on the ability to bundle permitted activities is more accurately a reaffirmation of the observation of Salmon J in *Aley*, cited with approval by the Court of Appeal in *Bayley*, that a resource consent application must be considered holistically. The local authority is not required to determine whether each activity should be granted individually. An application may be declined on the basis it is unacceptable as a whole, notwithstanding that it predominantly comprises permitted activities. This is, however, not equivalent to the concept of bundling even if practically, the same outcome ensues.

[68] Nevertheless, while I consider the Environment Court's terminology to be inappropriate, I do not consider the outcome reached by the Environment Court in considering the resource consent and the discretionary and permitted activities together in a holistic approach to be incorrect.

[69] Accordingly, the answer to Question 3 must be no.

**Questions 2, 5 and 6: the purpose, scope and conditions of Consent U120345.1**

[70] The question at the heart of these proceedings is whether Consent U120345.1 permitted commercial forestry harvesting. Mr Maassen submitted that it did not; Mr Davies submitted that it did. This issue is addressed in Questions 2, 5 and 6, which relate to the purpose and scope of Consent U120345.1. For ease of reference, these questions are:

(a) Did the Environment Court err in finding that any commercial forestry harvesting, or any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure identified in the resource consent application's activity description concerning earthworks and the triggered regional rules, was expressly allowed by Consent U120345.1?

(b) Did the Environment Court err in the application of the concept of purpose in interpreting the Consent U120345.1?

(c) Did the Environment Court err in finding the agreed conditions affected the scope of Consent U120345.1?

[71] I shall first traverse the relevant documentation relating to Consent U120345.1. Then I shall outline the legal principles relating to the interpretation and scope of resource consents, including the impact that the imposition of conditions may have on these two matters. Finally, I will consider Questions 2, 5 and 6 together.

*Consent U120345.1 and related documentation*

[72] Consent U120345.1 is one of several consents the Council granted in respect of the Forestry Block by a decision dated 10 July 2013. Although Zindia was not the applicant for the consents, it is now the consent holder. At the time the consent was granted, the only applicable plan under the RMA was the Sounds Plan.

[73] The description of the activity for which consent was sought on the front page of the consent application stated:[58]

> **Brief description of the activity:**
>
> Formation of a rock barge-loading ramp, skid sites, roading and installation of culverts, for the purpose of forest harvesting.

[74] Page 3 of the application describes the activity as follows:

> 1. Construction of a barge loading site is proposed on the eastern boundary of the Peninsula in Otanerau Bay and shows on the attached map. The barge ramp would be approximately 6 metres wide and extend into the sea approximately 30 metres.
>
> 2. Twenty-two landing sites to place haulers, process tress and stack logs and two mini hauler pads are planned. A mini hauler pad is a place to site the hauler and pull trees. The trees are then moved to a nearby landing site for processing.
>
> 3. A log marshalling site, adjacent to the barge ramp (for the purpose of log storage), 60m x 60m, is proposed.
>
> 4. Upgrading of 4.7km of existing forest tracks and building of 2.1km of new road is proposed.
>
> 5. The installation of up to 15 culverts is planned to smooth the crossing of water courses. Most of the water courses are ephemeral.

[75] The Assessment of Environmental Effects (AEE) that accompanied the consent application made various statements about how effects of harvesting would be

---

58 *Zindia Ltd v Marlborough District Council*, above n 1, at [24].

managed. For example, under the heading "The landing sites, marshalling site and in-forest roading works", it stated:

> *Entry of woody material into water bodies*
>
> Woody material greater than 100mm in diameter will be removed from any permanent water courses or water courses that are capable of moving the material off the subject property. Any trees that may fall into the coastal marine area will, where possible, be machine assisted away. Any trees that fall into the sea will be removed immediately.
>
> *Restoration of vegetation on cleared areas*
>
> Following harvesting the site will be left to allow seed from the current crop of pines to regenerate and revegetate. Any areas that have been subject to earth works will be sown with grass seed. Revegetation will occur within 24 months of clearance.

[76] A harvest plan was attached to the application. In addition, an archaeological report was attached to the application. That report begins:

> P. F. Olsen Limited have been contracted to manage the harvest of a plantation of mature *pinus radiata* on a 222 ha block of land owned by Arapawa Island Forestry Partnership at the entrance to East Bay in the Outer Queen Charlotte Sounds. As part of the Resource Consent process they are required to provide an assessment of the effects of the proposal on sites of cultural significance.

[77] The companion application for the land use consent for activities in relation to the foreshore reserve (that is, consent no. U120345.6) described the activity for which that consent was sought in the following terms:

> **Brief description of the activity:**
>
> To construct an accessway across the Sounds foreshore reserve to transport logs harvested from the adjacent property.

[78] After lodgement, but before public notification, a request for further information was made by the Council. Evidence of this request, which was part of the package notified to submitters can be found in the brief of evidence of Paul Edwin Williams, a Marlborough District Council Officer, in a letter of 5 July 2012 as follows:

> The application to undertake earthworks for the construction of the roads, skid sites, install culverts and form a barge ramp for the harvesting and removal of commercial forest on several titles on Arapawa Island is accepted under s 88 of the Resource Management Act 1991 (the Act).
> …

> Further information:
> …
> (3) Please advise, if possible, what the general pattern of harvesting will be, where it will likely commence and terminate.

[79] Rob Lawrence, the agent for the applicant (who is not the agent for Zindia as the applicant was not Zindia), replied by email on 12 July 2012, stating:

> 3. A number of factors will influence the start and end place. It will be best to be working on the east side during summer as this side will receive less sun and wind and in winter would tend to be cold and wet therefore creating more difficulty from an environmental and operational view point. However, the east side is unthinned and unpruned and will produce a higher volume of lower grade wood compared to the west side that has been thinned. Depending on log prices and demand for logs, we will be encouraged to harvest areas where returns are greatest. At this stage it is difficult to state where we are best to be harvesting without knowledge of the markets. Weather wise, we would be better on the east side in summer and the west side in winter.

[80] The consent application was publicly notified and, as the Environment Court found, some submitters sought conditions for the management of forestry harvesting as set out in the Court's decision:[59]

> (a) one sought, amongst other things, a staged removal programme and revegetation within 6 months of clearance;
>
> (b) another sought protection of his own trees against damage by restrictions on how felling could take place in the vicinity of his property; and
>
> (c) another sought various conditions for management of tree removal, including to require prior consultation with adjacent owners, specific methods for, and a detailed programme of, tree removal and measures to manage gorse regeneration following tree removal.

[81] There was then an exchange of correspondence between Mr Lawrence, the agent for the applicant for the consent, and the submitters leading up to a pre-hearing meeting. The only evidence of what occurred at that meeting is the resulting resource consent and the Council's decision as follows:

> The main issues raised by submitters are (paraphrased) as follows:
> - The future use of the site (to be re-planted or allowed to revert).
> ...
> - Protection of native vegetation areas during harvest.
> - Potential increased flooding and timber residue in gullies.

---

[59] At [29]-[34].

- The preference for harvesting to be staged and take place only in summer.

> After discussions with these submitters and individual letters to each addressing their particular concerns the applicant's forest harvest planners requested attendance at a prehearing meeting. The meeting took place on 27 February 2013 and was attended by four of the submitters. Following this and numerous further contacts by submitters with the applicant's forest harvest planners and the Council processing officer, all rights to be heard in the matter were withdrawn. Some of the withdrawals were obtained as a result of the applicant agreeing to volunteer certain conditions which will form part of the consent granted. It is noteworthy that some of these conditions do not relate directly to the activities for which consent has been sought.

[82] The reasons given in the Council's consent decision make several related references to forestry harvesting. For example (emphasis added):

> The applicant has applied for several resource consents to undertake earthworks for the construction of new access roads and tracks, install up to 15 new culverts, construct up to 22 landing sites, two hauler pads, a log marshalling site and a barge ramp and to occupy part of the coastal marine zone, *all required for the harvesting of a commercial forest* and transport of logs away from the site to Picton's log harbour at Shakespeare Bay.
>
> …
>
> ***Log Marshalling Site***
>
> Such sites are particularly *key parts of the harvest programme* ... where logs are stacked and sorted prior to sea transportation ...
>
> …
>
> *Within a year of completion of harvesting operations* or by August 2020, whichever is the sooner, the applicant undertakes to reposition previously removed topsoil and grass seed in the following growing season.
>
> …
>
> The northwest side of the main ridgeline has a number of dry gullies which have not been planted and today contain the relics of riparian forest which in places widens out to up to 80 metres and is dominated by other more dry land native communities. The applicant has indicated that, subject to safety considerations for ground logging crews, directional felling or bordering pines should enable these riparian margins to be protected.
>
> …
>
> ***Deposition of woody material***
>
> The applicant states that woody material greater than 100 millimetres in diameter will be removed from permanent water bodies or those that are capable of moving such timber off the forest block. Trees on the edge of the coastal marine area (CMA) will be felled with machine assistance back on to

> the property and all trees coming to rest in the CMA will be removed immediately.

[83] Further, Consent U120345.1 describes the consented activities in materially similar terms to how they were described in the consent application (emphasis added):

> …earthworks for the construction of new access roads and tracks, construct up to 22 landing sites, two hauler pads and a log marshalling site, *all required for the harvesting of a commercial forest* on Lots 1 to 7 DP 394939, Lots 2 and 3 DP 5260, Lot 2 DP 10729 and Sec 29 Queen Charlotte District, subject to the following conditions ...

[84] Consent U120345.1 includes several consent conditions that extend beyond earthworks to either relate to or explicitly regulate forestry harvesting. These include (emphasis added):

> 1. The activities shall be undertaken in accordance with resource consent application U120345 date stamped as received by the Marlborough District Council on 21 June 2012, additional information received on 12 July 2012 and 26 July 2012, and *the harvest plan* map marked "Arapawa Forest Harvest Plan" and stamped 'This plan forms part of Resource Consent U120345", unless otherwise required by the following conditions of consent.
>
> …
>
> 6. Slash shall be stored on processing landing sites in a stable manner, on constructed benches to reduce the likelihood of unexpected failure of this material.
>
> 7. *On the completion of harvesting*, landings shall have drainage installed to direct storm water runoff away from earth fill and slash.
>
> 8. *On completion of harvesting* and use of the processing landing sites, as much slash as is practicable shall be pulled back on to the platforms.
>
> …
>
> 10. Temporary hail tracks (skidder tracks) *constructed for any aspect of the harvesting* shall be recovered/pulled back so that the contour of the land is restored as closely as is practicable no more than 60 days after they are *no longer required for harvesting* the part of the block in which they have been installed.
>
> …
>
> 13. The butts of trees shall not be dragged through the bed of any flowing water body.
>
> …

> 22. *Within 12 months of the completion of harvesting operations* or 20 August 2020, whichever is the sooner, the log marshalling area shall be reinstated with previously removed topsoil and sown down with grass seed at the commencement of the first growing season immediately following the commencement of the reinstatement.
>
> …
>
> 24. The consent holder shall take all practicable measures to protect existing areas of native vegetation during the construction of roads and landings and *during log harvesting operations*.
>
> 25. There shall be *no less than 6 months interval between the harvesting of Area A and Area B* as shown on the smaller scale version of the harvest plan referred to in condition 1 and marked "Catchment Areas A & B" and "Properties of Meyer (Clarevale) and Anderson" and stamped "This plan forms part of Resource Consent U120345".

*Interpretation of a resource consent*

[85] Questions 2, 5 and 6 essentially relate to the interpretation of a resource consent and the extent to which extrinsic material may be taken into account.

[86] In *Red Hill Properties Ltd v Papakura District Council*, Rodney Hansen J held that the "traditional approach is that extrinsic evidence is not admissible to construe a document such as a resource consent except for documents expressly referred to in the consent."[60] However, in light of the statutory regime of the RMA which requires specific information to be included in a consent application (s 88) and makes provision for additional information to be provided if required by the consent authority (s 92), documents addressing those aspects of the application "may be referred to in construing the terms of a resource consent whether or not they are expressly referred to in the consent itself."[61] The Judge went further, however, stating that it is desirable when interpreting a resource consent to have regard to "any relevant background information which may assist the tribunal to determine what the consent authority using the words might reasonably have been understood to mean by them."[62]

[87] The expansive approach to interpretation in *Red Hill Properties Ltd* was expressly limited in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*, a decision of the

---

60 *Red Hill Properties Ltd v Papakura District Council* (2000) 6 ELRNZ 157 (HC) at [37].
61 At [42].
62 At [45].

Privy Council which focused on the interpretation of a public document.[63] That decision concerned the operation of a ferry service between Opua and Okiato Point in the Bay of Islands. The respondent had an exclusive right to operate the ferry service and had included in its registration application a timetable indicating crossings every 10 minutes. The appellant sought to operate a ferry service at the same scheduled times, though in the opposite direction. The question before the Privy Council was whether the licence held by the respondent was to operate one ferry only, or whether it extended to the use of two ferries. In determining what the respondent's registration entailed, the Privy Council compared the public document to a contract and stated the following:

> [19] There would be much to be said in favour of this argument if the relevant documents were contained in a contract between the parties which the Court was being asked to construe. If that were so the Court would wish to put itself into the same position as the contracting parties were when they entered into their contract. As Lord Hoffmann said in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at p 912, when one is interpreting a document of that kind one is seeking to ascertain the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract. The parties' knowledge of how the ferry service was in fact being operated from day to day at the time when such a contract was entered into would be part of the background.
>
> [20] But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council under s 52(1) of the Act have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public who consult the register may come from far and near. They may have some background knowledge, but they may have none at all. In *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 at p 962 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence. Moreover, the only information which a regional council is obliged by s 53 to ensure is reasonably readily available to the public is that which gives details of the service which the council has registered. The statute makes the position clear. The register is expected to speak for itself.

---

63 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC).

[88] While *Opua Ferries Ltd* is not an RMA case, its effect was to restrict Rodney Hansen J's statement of principle in *Red Hill Properties Ltd* to information provided as part of the resource consent process (whether as part of the application documents or in response to requests for further information).

[89] Although not expressly applied, this approach was taken by the Court of Appeal in *Gillies Waiheke Ltd v Auckland City Council* where the Court observed:[64]

> [22] It is convenient to begin by first noting that it is common ground – and has been the law for many years in this country – that in planning matters of this kind the scope of the permitted activity is to be determined not just by the bare consent, but also by reference to the supporting documentation which was submitted to obtain that consent...
>
> [23] Secondly, all counsel accepted that the approach to the interpretation of a consent and the accompanying conditions is an objective one. That is, what would the reasonable observer, faced with this information, have made of it?

[90] This was the approach taken by the Environment Court in *Clevedon Protection Society Inc v Warren Fowler Ltd & Manukau City Council*,[65] *Manners-Wood v Queenstown Lakes District Council*[66] and by Churchman J in *Aotearoa Water Action Incorporated v Canterbury Regional Council*.[67]

*Scope of a resource consent*

[91] The scope of a resource consent is equally important in both its interpretation and in a local authority's decision to grant or decline the application in the first place.

[92] Both the Council and Zindia have referred me to the Court of Appeal's decision in *Sutton v Moule* which is often cited for the proposition that "a Council has no jurisdiction to grant a consent which extends beyond the ambit of an application."[68] That case concerned two resource consents which permitted the applicant to use his

---

64 *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385 (CA).
65 *Clevedon Protection Society Inc v Warren Fowler Ltd & Manukau City Council* (1997) ELRNZ 169 at 187.
66 *Manners-Wood v Queenstown Lakes District Council* NZEnvC Wellington W077/07, 12 September 2007 at [25].
67 *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 at [129] and [146].
68 *Sutton v Moule* (1992) 2 NZRMA 41 (CA) at 46.

residential property as a real estate office. The first resource consent was limited to the earlier of ten years, the life of the building, or the real estate business no longer being operated by the applicant. However, the second resource consent, which was granted six years later, omitted this condition. The relevant issue was whether the applicant's second resource consent was beyond the scope of the application and therefore ultra vires. The Court of Appeal found that the ambit of the application was defined and determined by the terms of the application for consent and that the "substance or gist of [an] application is what must count".[69] The Court therefore concluded:[70]

> ...the application made by Mr Moule in June 1987 related in substance and in effect to the use of the land and that the Council was entitled to deal with it on that basis. It follows from this conclusion that the Council's consent was not beyond the scope of the application. No question of the Council's decision in 1988 being *ultra vires* in this respect therefore arises.

[93] The principle established in *Sutton v Moule* was applied in *Clevedon Protection Society Inc* and also in *Manners-Wood* where the Environment Court stated that "a resource consent which purports to grant more than what is sought in the application is ultra vires to that extent."[71] This principle has also been endorsed by this Court in both *Duggan* and *Aotearoa Water Action*.[72]

[94] The observations made by Churchman J in *Aotearoa Water Action* are of particular relevance to the present appeal. That case concerned a challenge by way of judicial review of decisions made by the Canterbury Regional Council to grant consents to two companies to take and use water from an aquifer for the purposes of bottling it for commercial resale. Both companies argued that a prior resource consent permitting them to use water for the scouring of wool also permitted them to commercially bottle and sell the water. The activity description in those consent applications stated: "take water from three wells for meat processing and other purposes." Although the application had been clear that the particular type of industrial activity that the water was intended to be taken and used for was meat

---

69 At 47.
70 At 48.
71 *Manners-Wood v Queenstown Lakes District Council*, above n 66, at [23].
72 *Duggan v Auckland Council*, above n 34, at [34]; *Aotearoa Water Action Incorporated v Canterbury Regional Council*, above n 67, at [124].

processing, the resource consent did not use that term but the generic one of "industrial use".

[95] Churchman J found that on their face, the consents were ambiguous. Therefore, it was necessary to look to the individual applications and relevant supporting documentation.[73] In concluding that commercial water bottling was not within the scope of the resource consents, Churchman J made several pertinent observations. First, he stated:[74]

> A council does not have jurisdiction to grant a consent for more than was applied for. Therefore, in establishing that a consent fell within jurisdiction, it is necessary to analyse exactly what the application was for.

[96] Expanding on this general principle, Churchman J went on to say:

> [128] As a matter of jurisdiction, the purpose specified in the application defines the scope of the application and the CRC had no jurisdiction to grant more than what was applied for.

[97] He then went on to say, in the very next paragraph:

> Even in cases where there is no ambiguity [on] the face of the consent, in ascertaining the scope of the consent, the Court is entitled to have regard to the purpose of the application as specified in the original application and supporting material.

[98] *Aotearoa Water Action* is therefore clear that while a resource consent cannot be wider than the application itself, the purpose of an application can inform its scope (and therefore the scope of the resulting consent).

*The effect of conditions on the scope of a resource consent*

[99] What then is the effect of conditions on the scope of a resource consent? In the present case, Consent U120345.1 contained 27 conditions, some of which addressed the activity of forestry harvesting.

[100] In *Red Hill Properties Ltd*, Rodney Hansen J interpreted the condition in issue by considering its words in their plain and ordinary meaning, having regard to the

---

73 At [147].
74 At [79].

context in which they were used, specifically, the statutory regime of which the consent was a part, the relationship between the parties in that case, and also the terms of the application itself.[75] In other words, the scope of the consent is able to inform the interpretation of the condition and vice versa.

[101] This principle was followed by Randerson J in the High Court in *Gillies Waiheke Ltd v Auckland City Council*.[76] That case was an appeal against conviction under the RMA on the basis the Auckland City Council had incorrectly interpreted the scope of the resource consent in question and the activity for which the appellant had been convicted (earthworks) was expressly allowed under the consent. Although the then-applicable definition of resource consent under the RMA did not include any reference to conditions, Randerson J relevantly stated:

> [23] It is plain from the definition of resource consent that the expression includes any conditions imposed. Consent authorities have extensive powers to impose conditions under s 108 of the Act. There is good reason for the Act to include the conditions of a resource consent in the definition of that expression. The conditions usually define (at least in part) the scope and extent of the consent granted. The proper scope of the resource consent cannot ordinarily be ascertained without reference to the conditions and sometimes to other material such as the application and supporting information lodged with it. A resource consent in open ended terms is rarely granted.

[102] While *Red Hill Properties Ltd* and *Gillies Waiheke Ltd* support the proposition that conditions assist in defining the scope of a resource consent, they cannot extend the scope of the application. In *Shell New Zealand Ltd v Porirua City Council*, the Court of Appeal noted that any amendment to an application is:[77]

> ...reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope.

[103] This principle applies to conditions under a resource consent as, like amendments to an application, they are only imposed after an application has been submitted.

---

75 *Red Hill Properties v Papakura District Council*, above n 60, at [47].

76 *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, A132/02, A133/02, 20 December 2002.

77 *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [7].

[104] It is also possible for a resource consent applicant to voluntarily bind itself to undertakings or conditions, which may narrow the scope of an application.[78] The principle which applies to such conditions, which are sometimes referred to as *Augier* conditions, derives from the Queen's Bench case of *Augier v Secretary of State for the Environment* which was expressly adopted by Allan J in *Frasers Papamoa v Tauranga City Council*.[79] This principle formally applied only to undertakings or conditions which were clear and unequivocal. Today, a condition can be imposed with the applicant's consent pursuant to s 108AA(1)(a) of the RMA, introduced by way of amending legislation in 2017.[80]

*The Environment Court decision in respect of Questions 2, 5 and 6*

[105] Before I address Questions 2, 5 and 6, it is necessary to analyse in more detail the Environment Court's decision in respect of the issues raised by those questions.

[106] The Environment Court was persuaded that Consent U120345.1 expressly allowed forestry harvesting because, in its view, the activity description on the application for Consent U120345.1 meant "substantially the same thing as the pMEP definition" of "commercial forestry harvesting".[81] That definition states:

> **Commercial forestry harvesting** means the felling and removal from the land of trees, for the purposes of commercial forestry, and includes:
>
> (a) excavation or filling, or both, to prepare the land for harvesting (for example, skid, forestry road or forestry track construction or maintenance)
>
> (b) de-limbing, trimming, cutting to length, and sorting and grading of felled trees;
>
> (c) recovery of windfall and other fallen trees;
>
> but does not include the transportation of the trees from the land or the processing of timber on the land.

---

78 Resource Management Act 1991, s 108AA(1)(a).

79 *Frasers Papamoa v Tauranga City Council* [2010] 2 NZLR 202 (HC) at [34], applying *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB).

80 Resource Legislation Amendment Act 2017, s 147.

81 *Zindia Ltd v Marlborough District Council*, above n 1, at [51(a)].

[107] This view was reinforced by the fact that Consent U120345.1 expressly allowed for the felling and removal of trees directly and immediately adjacent to the new roads and tracks, landing sites, hauler pads and log marshalling site.[82]

[108] The Environment Court accepted that, as a matter of principle, a resource consent cannot be wider than the scope of its application, however that this principle should not be applied in an overly rigid way.[83] In this regard, the Court agreed with the Council that any conditions imposed in a resource consent "cannot function to extend the scope of what was applied for".[84] However, the Court noted that "where conditions imposed are well aligned to what the application itself seeks by way of regulatory controls, those conditions can help inform the true scope of the application."[85] The Court was of the view that the conditions imposed in Consent U120345.1 were of this nature; they "were in the nature of refinements to what was applied for, rather than being a material expansion to the scope of that application."[86]

[109] The Environment Court also considered that the Council's submissions "significantly downplay[ed] the relevance of what the application expresses as the purpose of the various land uses it specifies."[87] In the Court's view, the fact that the applicant had stated in the resource consent application that the sought works on the Forestry Block were "for the purpose of forestry harvesting" conveyed an "intention to secure a consent that comprehensively permits and regulates harvesting as part of an inter-related bundle of commercial forestry land uses."[88] Further, the Court found "nothing to clearly convey an intention to exclude harvesting from the scope of the application."[89]

[110] It was also significant, in the Environment Court's view, that the phrase "for the purpose of forestry harvesting" was included in Consent U120345.1, along with conditions relating to forestry harvesting as well as the harvest map.[90]

---

82 At [51(b)].
83 At [57].
84 At [58].
85 At [58].
86 At [66].
87 At [59].
88 At [61].
89 At [70].
90 At [69].

[111] The Environment Court did not, however, place any significant weight on the lack of any AEE assessment in respect of forestry harvesting in the resource consent application, nor the lack of reference to the harvesting method or programme. In the Environment Court's view, this was explained by the fact that "gaps in environmental assessment (sic) in an AEE are not uncommon and do not necessarily go to the scope of the application itself."[91]

[112] Nor did the Environment Court place any significant weight on the fact the applicant wrote to submitters expressly representing that the application did not extend to harvesting. The Court viewed these representations "in the context of the engagement that followed, particularly the pre-hearing meeting that directly led to the applicant seeking specific controls on harvesting for inclusion in the consent."[92] In other words, the Court was satisfied that the applicant's engagement with submitters — on a voluntary basis — and the resulting conditions to which the applicant agreed to be bound, cured any defect in the represented substance of the resource consent application. In the Court's view, the fact submitters withdrew their rights to be heard upon the applicant agreeing to these conditions supported this conclusion.

*Submissions*

[113] I turn now to briefly outline each party's salient submissions in respect of Questions 2, 5 and 6.

[114] Mr Maassen submitted that the Environment Court erred in assessing the scope of the consent application. In particular, he submitted that Consent U120345.1 cannot have expressly allowed forestry harvesting as it was not expressly sought by the applicant. This is evident, he said, given there was no AEE in respect of forestry harvesting.

[115] Insofar as it was always the applicant's purpose to undertake forestry harvesting on the Forestry Block, Mr Maassen submitted that the Environment Court confused the purpose of the activities for which consent was being sought with the

---

91 At [63].
92 At [65].

activities themselves. Rather, he submitted that what defines the scope of Consent U120345.1 is the list of activities identified, not the statement outlining the reasons for which they are required.

[116] In respect of the conditions of Consent U120345.1, Mr Maassen acknowledged that at least one (condition 25) relates to forestry harvesting. However, he further submitted that it was entered into on an *Augier* basis and that a party can voluntarily bind itself to a condition that is not directly connected to the activity for which consent is sought. In any case, the other conditions which refer to harvesting (conditions 7, 8, 10 and 22) only refer to harvesting in the context of defining a date when something has to be done to mitigate the effects of the preparatory works on the Forestry Block. As such, Mr Maassen submitted that the Environment Court erred in finding that the "agreed conditions were in the nature of refinements"; the existence of negotiated conditions outside a regulatory assessment and framework, he submitted, does not fall within the meaning of "expressly allow" in s 9(2)(a) of the RMA.

[117] Mr Davies submitted that it was common ground between the parties that the purpose of the six resource consent applications was to enable commercial forestry harvesting. This, he said, informs the scope of the applications and subsequently, the scope of the consents themselves. This was so given the multiple references to harvesting in the applications and the consents, and the inclusion of a harvest plan.

[118] Further, Mr Davies submitted that the conditions imposed by the Council, though entered into on a voluntary basis, resulted from submissions directly relating to forestry harvesting. These conditions form part of the resource consent and assist in interpreting its scope. In essence, he submitted that it would be illogical for such conditions to be included in the consent if the activity which they seek to regulate was not itself included in the consent.

*Analysis*

[119] The Environment Court's decision is premised on the notion that the land use in Consent U120345.1 is commercial forestry harvesting. I disagree. In my view, the land use in Consent U120345.1 is more properly characterised as preparatory works (with the ultimate goal being commercial forestry harvesting) on the Forestry Block.

[120] Therefore, for the reasons that follow, I am persuaded by the Council's interpretation of Consent U120345.1 and answer Questions 2, 5 and 6 accordingly.

[121] There is no doubt that the purpose of the preparatory works was to prepare the Forestry Block for commercial forestry harvesting. As the authorities to which I have already referred make clear, this purpose is something to which I am able to refer to assist me in interpreting Consent U120345.1. However, none of the authorities support the proposition that purpose trumps all other considerations, particularly the text and any other contents of the application and the resource consent itself. I therefore do not consider it sufficient that the activities in the application for which permission was sought were described as being "for the purpose of forest harvesting".

[122] In my view, it is significant that the applicant for Consent U120345.1 did not expressly seek permission to undertake commercial forestry harvesting — a point which I note has not been squarely addressed by Zindia. Rather, I interpret the application for Consent U120345.1 as only expressly seeking permission to undertake activities ancillary to commercial forestry harvesting, specifically preparatory works on the Forestry Block. I therefore agree with the Council that the Environment Court confused the purpose of the activities for which consent was being sought with the activities themselves. I am unable to artificially import into a resource consent permission to undertake an omitted activity (where such permission has not expressly been sought in the resource consent application) simply because the occurrence of activities in the consent is for the purpose of enabling the omitted activity to occur.

[123] I am fortified in my view given the complete lack of AEE assessment in the resource consent application in respect of forestry harvesting. In this regard, I do not agree with the Environment Court that gaps in AEEs are "not uncommon" and "do not necessarily go to the scope of the application itself". On the contrary, I consider the AEE to be an integral aspect of a resource consent application, a point which was reiterated by the Supreme Court in *Westfield (New Zealand) Ltd v North Shore City Council*.[93] This is because ss 95D (which relates to how a territorial authority should go about determining whether public notification of a resource consent application is

---

[93] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597.

necessary based on potential environmental effects) and 104 (which lists mandatory considerations for territorial authorities when considering a resource consent application) require a territorial authority to consider the actual and potential effects on the environment of allowing the activity and to determine whether these effects are more than minor. This exercise is assisted by the provision of an AEE assessment in a resource consent application.

[124] The AEE in the application in this case considered the environmental effects of the proposed activities at the barge site, the log marshalling site, the landing site and along the proposed tracks and roads. It did not, however, make any mention of the environmental effects of commercial forestry harvesting itself. This cannot be attributed to an omission. Rather, it supports the interpretation of the application (and therefore Consent U120345.1) as being for preparatory works on the Forestry Block only, not for commercial forestry harvesting.

[125] Nor am I persuaded that the resource consent application and Consent U120345.1 included commercial forestry harvesting by virtue of containing a harvest map and a map showing the location of the marshalling site and barge ramp. Viewed in context, these maps simply depict the proposed location of the preparatory works — the activities for which permission was sought.

[126] Turning to the conditions ultimately included in Consent U120345.1, I find two matters particularly pertinent. The first is in respect of those conditions that make reference to forestry harvesting. These are conditions 7, 8, 10, 22, 23 and 25. I agree with the Council that aside from condition 25, none of the other conditions directly refer to the process of harvesting. Rather, they refer to forestry harvesting in the context of providing a timeframe within which the adverse effects of the preparatory works need to be mitigated.

[127] The second matter specifically concerns condition 25. I acknowledge that condition 25 expressly relates to forestry harvesting. However, I do not view this condition as implying forestry harvesting was within the scope of the application and therefore Consent U120345.1. Rather, it is necessary to read condition 25 in light of

the Council's reasons for granting the application, contained in Consent U120345.6. After identifying the issues raised by submitters, the consent states (emphasis added):

> 22. After discussions with these submitters and individual letters to each addressing their particular concerns the applicant's forest harvest planners requested attendance at a pre-hearing meeting. This meeting took place on 27 February 2013 and was attended by four of the submitters. Following this and numerous further contacts by submitters with the applicant's forest harvest planners and the Council processing officer, all rights to be heard in the matter were withdrawn. Some of the withdrawals were obtained as a result of the applicant agreeing to volunteer certain conditions which will form part of the consent granted. *It is noteworthy that some of these conditions do not relate directly to the activities for which consent has been sought*.

[128] In my view, condition 25 is one of those conditions referred to in the final sentence of the quoted paragraph. The same can be said about condition 26 which requires the consent holder to remove or kill all wilding pine trees on Parea Point. Reference to such an activity only appears in condition 26 itself and in the issues raised by submitters. It does not appear anywhere else in the consent application or Consent U120345.1 itself. I therefore agree with the Council that the agreed conditions were not in the nature of refinements to what was applied for, as the Environment Court found.

[129] The consequence of my interpretation of the resource consent application and of Consent U120345.1 itself, having regard to the authorities to which I have referred and the principles they establish, is that Consent U120345.1 extended the scope of the application. The application cannot be said to have sought more than permission to undertake preparatory works on the Forestry Block. The fact that those works were for the purpose of commercial forestry harvesting cannot transform the application from one solely seeking permission to undertake preparatory works into one seeking permission to undertake commercial harvesting itself.

*Conclusion*

[130] The Environment Court erred in its interpretation of the scope of the application for Consent U120345.1 and Consent U120345.1 itself.

[131] Accordingly, the answers to Questions 2, 5 and 6 are as follows:

(a) Did the Environment Court err in finding that any commercial forestry harvesting, or any commercial forestry harvesting beyond that necessary to establish the forestry management infrastructure identified in the resource consent application's activity description concerning earthworks and the triggered regional rules, was expressly allowed by Consent U120345.1? Yes.

(b) Did the Environment Court err in the application of the concept of purpose in interpreting the Consent U120345.1? Yes.

(c) Did the Environment Court err in finding the agreed conditions affected the scope of Consent U120345.1? Yes.

**Question 4: Did the Environment Court err by failing to attach appropriate significance to the absence of an AEE assessment?**

[132] Given my view on the significance of the absence of an AEE assessment on the scope of the resource consent application and therefore on Consent U120345.1, it is unnecessary for me to answer Question 4.

[133] However, I simply note that even if an AEE assessment had been included in the resource consent application, the weight to be placed on it, once it is before the Environment Court, is a matter for that Court.

**Question 7: Did the Environment Court err in setting aside the abatement notice?**

[134] Because I have found that the Environment Court erred in respect of the issues raised by Questions 2, 5 and 6, the answer to Question 7 must consequently be yes.

**Result**

[135] The appeal is allowed.

[136] The abatement notice is reinstated.

**Costs**

[137] I invite the parties to agree on costs but failing agreement, direct that the Council's costs submissions (not exceeding 10 pages) are to be filed within 14 days of the date of this decision, and Zindia is to have 14 days to reply.

---

**Doogue J**

Solicitors:
Tasman Law, Nelson
Gascoigne Wicks, Blenheim

**IN THE HIGH COURT OF NEW ZEALAND**
**HAMILTON REGISTRY**

**CIV-2006-419-91**

| | |
|---|---|
| BETWEEN | MONTESSORI PRE-SCHOOL CHARITABLE TRUST<br>Plaintiff |
| AND | WAIKATO DISTRICT COUNCIL<br>First Defendant |
| AND | RAJ BHANA AND DIANNE BHANA<br>Second Defendants |

Hearing: 3 May 2006

Counsel: D Hayes for Plaintiff
L F Muldowney for First Defendant
A S Menzies for Second Defendants

Judgment: 31 May 2006

---

**JUDGMENT OF BARAGWANATH J**

---

This judgment was delivered by me on 31 May 2006 at 4 pm,
pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors:
Ryan Law, Hamilton for Plaintiff
Tompkins Wake, Hamilton for First Defendant
Harkness Henry & Co, Hamilton for Second Defendant

Counsel:
Mr D Hayes, Hamilton

**Table of Contents**



[1] The operator of two existing Montessori schools in Hamilton challenges the establishment of a third on the ground that a resource consent granted by the local body is unlawful.

[2] The plaintiff Trust is registered under the Charitable Trusts Act 1957 and operates two Montessori Pre-Schools in Hamilton. One in Rimu Street, to the west of the Waikato River between Fairfield Bridge and the railway, requires no further mention. The other is at 56 Cameron Road, just south of the Ruakura Agriculture Research Centre on the other side of the river. Children normally attend from the ages of two to six years when they transfer to Silverdale Normal School which is nearby and has classes of special character using the Montessori method.

[3] The Trust seeks judicial review of a decision by the Waikato District Council on 9 November 2005 to grant resource consent allowing Mr and Mrs Bhana to establish a third Montessori Pre-School on their property south of Hamilton. It adjoins Newell Road, which leads to the airport and is also to the east of the river. The Trust's and the Bhanas' sites are some six kilometres apart.

[4] The resource consent was sought to permit an existing lavender farming and retail operation, a permitted activity as a home occupation involving a small scale

retail business run from home, to be replaced by the proposed Montessori early childhood centre operating in a former café and gift shop. The application was to downsize the lavender retail and remove the café operation, using the existing facilities with extension of the building from 92 sq m by a further 80 sq m. It was envisaged that the pre-school would commence with about ten children and grow over a period of up to two years to 30 children.

[5] The Trust challenged both the decision of the Council to deal with the consent as non-notified and also the ultimate resource consent decision which, by s 104(3)(d) of the Resource Management Act 1991, must not be granted if the application should have been publicly notified and was not.

**The issues**

[6] The case turns on the construction and application of ss 93, 94, 104 and 104D of the RMA. By s 93 a consent authority must notify an application for resource consent unless the authority is satisfied that the adverse effects on the environment will be minor. By s 94 if notification is not required under s 93 the authority must serve notice of the application on all persons who, in the opinion of the authority, may be adversely affected by the activity. By s 104(3)(a) a consent authority must not have regard to trade competition when considering an application. By s 104D a resource consent for a non-complying activity may be granted only if the adverse effects will be minor.

[7] At the beginning of the hearing the parties identified the following issues:

a) Whether there was effective delegation of the Council's powers under ss 93 to its consents manager, Mr Inskeep.

b) Whether Mr Inskeep actually exercised the s 93 power to determine that the adverse effects of the activity on the environment would be minor.

c) Whether, in the exercise of the s 93 decision, it was lawful to take into account conditions likely to be imposed by the consent authority.

d) Whether the plaintiff is in trade competition with the second defendants.

e) Whether the plaintiff is a person who may be adversely affected by the activity within the meaning of s 94.

f) Whether the Council's s 104 decision was lawful.

[8] I can deal shortly with most of these.

**(a) Was there delegation of Council's powers?**

[9] As to (a), s 34A(1) authorises a council to delegate certain functions and powers to an employee. An instrument of delegation to Mr Inskeep dated 25 November 2003 was produced. It was not disputed that it was apt to delegate to him the ss 93-4 decision-making function.

**(b) Was there an exercise of the s 93 power?**

[10] As to (b), Mr Inskeep's evidence that he had personally exercised the Council's s 93 power was confirmed by entries in the Council's printed sheet headed "Public/limited notification checklist". The option of public notification (under s 93) was struck out in handwriting. He made and signed a notation of 28 July 2005 that there should be "limited notification only". Limitation of notification in such manner is an immediate consequence of a decision under s 93. Whether Mr Inskeep should have made such s 93 decision will be considered under (f).

**(c) Was it lawful in exercising the s 93 discretion to take into account likely conditions?**

[11] As to (c), Mr Hayes argued that it is not lawful in the exercise of the s 93 decision to take into account conditions likely to be imposed under s 108 by the consent authority. He cited no authority and did not respond to Mr Muldowney's citation to the contrary of *Bethwaite v Christchurch City Council* (1993) 3 NZPTD 87 (Planning Tribunal, Judge Skelton presiding) at p 8, *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433, 444 Williamson J and *Aley v North Shore City Council* [1998] NZRMA 361, 367 Salmon J. Each supports the Council's argument.

[12] Even if I disagreed with these decisions I would be reluctant in this Court to disturb settled authority in a sphere of practical everyday importance to the disposal of resource consent applications. But I have no doubt that they are correct. It would defy common sense if when making the s 93 decision the consent authority could not have regard to the practical reality of what adverse effects on the environment would be. To determine that self-evidently requires consideration of conditions that would affect such reality.

**(d) Was the Trust in trade competition with Mr and Mrs Bhana?**

[13] The relevance of the next issue, whether the Trust is in trade competition with Mr and Mrs Bhana, is that s 104(3)(a) prohibits a consent authority from having regard to trade competition when considering under s 104 an application for resource consent. Mr Hayes submitted that because the plaintiff is a charitable trust providing educational services it is not in trade.

[14] The Trust's concern expressed in affidavits supporting the application is the loss of pupils to the new school. There can be no doubt that the Trust and Mr and Mrs Bhana are in competition, defined by the Shorter Oxford as "the action of seeking to gain what another attempts to gain at the same time". The further question is whether theirs is "*trade* competition".

[15] "Trade" can bear the narrow meaning of exchange of goods for goods or money or the slightly wider sense of business carried on with a view to profit: *Words and Phrases Legally Defined* (3rd ed) Vol 4 p 312. According to the Shorter Oxford it can also mean:

> a. The practice of some occupation, business or profession habitually carried on, esp. when practised as a means of livelihood or gain; a calling; now usu. applied to a mercantile occupation and to a skilled handicraft, as dist. from a profession, and *spec*. restricted to a skilled handicraft, as dist. from a professional or mercantile occupation on the one hand, and from unskilled labour on the other.
>
> b. Anything practised for a livelihood.

[16] The question is whether what the Trust and Mr and Mr Bhana are doing falls within the term.

[17] That must if possible be judged in accordance the purpose of the RMA: Interpretation Act 1999 s 5(1). That is to promote the sustainable management of natural and physical resources (defined in s 2 RMA as including land and structures): S 5(1) RMA. "Sustainable management" is defined by s 5(2). It includes managing the use of natural and physical resources in a way which enables people and communities to provide for their social, economic and cultural wellbeing while sustaining the potential of the resources to meet foreseeable needs and to avoid or mitigate adverse effects on the environment. Section 104(1)(a) requires a consent authority to have regard to any actual and potential effects on the environment of allowing the activity; by s 3 "effect" includes any positive or adverse effect; those provisions are stated broadly. Offering an alternative outlet for Montessori education can be said both to qualify in general terms as provision for people's social, economic and cultural wellbeing and to constitute competition to an existing provider. But is it "trade"?

[18] "Trade competition" is also to be construed within the wider context of New Zealand law. While there is a good distance to go, there is a clear tendency for it to move towards becoming a seamless whole, each part developing in sympathy

with neighbouring parts.[1] That trend should where practicable be encouraged. The common law has long promoted the public interest against restraint of trade: Burrows, Finn and Todd *Law of Contract in New Zealand* (2nd ed) pp 452-5 [13.1.9-2]. Section 1A of the Commerce Act 1986 has as its purpose:

> …to promote competition in markets for the long-term benefit of consumers in New Zealand.

It is reasonable to infer that s 104(3)(a) has a similar purpose.

[19] In characterising the respective activities as of "trade competition" or not I have concluded that what matters is that there be a competitive activity having a commercial element; not the status of the body carrying on that activity. So it is immaterial that the Trust is a charity. It is unnecessary to consider what might be the case if the services were provided without reward. Here fees are charged both by the Trust and by Mr and Mrs Bhana. Each is carrying on the calling or profession of providing educational services for reward.

[20] I am satisfied that the competition between the Trust and the Bhanas falls squarely within s 104(3)(a). Mr Inskeep and the Council were right to treat it as irrelevant to their respective s 99 and 104 decisions.

[21] I add that Mr Muldowney cited three decisions of the Environment Court: *Kuku Mara Partnership v JGM Ltd* [2003] NZRMA 251, 257-258 [28]-[34] Judge Kenderdine), *Queenstown Property Holdings Ltd v Queenstown Lake District Council* ([1998] NZRMA 143 18 February 1998 Judge Jackson) and *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433, 448-9 [46]-[48] Judge Jackson. None is inconsistent with the approach I have adopted.

**(e) Is the Trust a person who may be adversely affected?**

[22] Such conclusion answers issue (e): whether the Trust is a person who may be adversely affected by the activity within the meaning of s 94. Competition aside, it

[1] See discussion in Burrows *Statute Law in New Zealand* (3rd ed 2003) 369-374.

is not arguable that the Trust could be adversely affected by an activity six kilometres away.

[23] There remains the final issue (f): whether the Council's decision was lawful in terms of ss 104 and 104D.

**(f) Was the decision lawful in terms of ss 104 and 104D?**

[24] The essential question is whether the adverse effects of Mr and Mrs Bhana's school on the environment would be not more than minor. It governs the validity both of the s 93 decision and of the Council's decision under ss 104 and 104D.

[25] The meaning of that concept has been discussed by the Supreme Court in *Discount Brands Ltd v Westfield New Zealand Ltd* [2005] 2 NZLR 597 and by this Court in *Progressive Enterprises Ltd v North Shore City Council* (2005) ELRNZ 421, [2006] NZRMA 72 and in *Northcote Mainstreet Incorporated v North Shore City Council* [2006] NZRMA 137.

[26] In *Progressive Enterprises* I expressed the view that in considering these matters:

> [73] The subject matter points to a need for close appraisal by this Court… At the s 93 stage any real doubt whether the development would have more than minor adverse effects must be resolved in favour of the environment by requiring notification.

[27] In *Northcote Mainstreet* at [110] Lang J decided that amendments to the RMA did not affect the statement of principle by Blanchard J in *Discount Brands*:

> [114]…the information in the possession of the consent authority must be adequate for it: (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. The statutory requirement is that the information before the consent authority be adequate. It 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.

*The information available at the time of notification*

[28] Mr Muldowney pointed to the following information available to the Council when on 28 July 2005 it made its decision on notification:

- Application for land use consent form which describes proposed activity, site, whether other consents required, site plan, map, written report from applicant detailing existing use, proposed building renovations, intended activity, size and scale of activity, hours/days of operation, assessment of environmental effects – building, car parking and traffic, signage;
- Separate information sheet… addressing checklist of significant environmental issues ;
- Internal report from first defendant's environmental health officer dated 3 June 2005 setting out a report on noise effects and proposed conditions of consent ;
- Response to s 92 request dated 7 June 2005 from applicant detailing expected staff numbers, expected vehicle numbers, car parking and floor plan;
- Internal report from first defendant's roading services group assessing roading issues and proposed conditions of consent ;
- Internal report from first defendant's utilities department setting out assessment of drainage/storm water/waste water/effluent issues and proposed conditions of consent ;
- Map showing adjoining land owners who may be potentially affected by the proposed activity ;
- Written approvals from a range of potentially affected neighbours which sets out a covering letter from the applicant with detail of the proposed activity ;
- Advice from Transit New Zealand that the proposed activity will not adversely affect the State Highway network;
- Photographs of the site ;
- Advice from potentially affected neighbour of concerns regarding traffic, noise, amenity;
- Further information from the applicant on vehicle numbers and traffic effects, ages of children and hours of operation;
- Advice from potentially affected neighbour on concerns regarding right-of-way and road generally;

- Extracts from the applicant's building consent application including the car parking layout, floor plan which had a bearing on traffic, rural amenity and noise effects;

- Report from first defendant's utility group that the only site hazard was that of unconsolidated sediments on site.

[29] That material may be thought to satisfy Blanchard J's test. But the Trust challenged it, submitting that the Council's own file raised real doubt as to whether the development would have no more than minor adverse effects.

*Ms Hall's report of 12 September 2005*

[30] Mr Hayes placed at the forefront of his argument a report dated 12 September 2005 prepared by Ms Hall, a Council planner, for the s 104 hearing. He submitted that it established that at that date the application could not be dealt with as non-notified. It follows, he submitted, with stronger force that there can have been no justification for the July decision not to notify.

[31] I have added italicised and numbered headings to the following passages from the report:

> *[(1) Conclusion]*
>
> 2.4 I have reviewed the assessment of effects, and visited the site and I disagree with the applicant's assessment and I believe that the magnitude and extent of the effects are more than minor.
>
> *[(2) Application processed via limited notification because effects more than minor]*
>
> 2.5…this application has been processed via limited notification as the adverse effects are considered to be more than minor…
>
> *[(3) The site: potential to create an out of context area; impact more than minor]*
>
> 4.3… The activity proposed has the potential to create an area which although [it] uses a[n] established building is out of context with surrounding activities due to the additional features such as car parking, outdoor play area and traffic which would not normally be a feature of this environment. The impact of the proposal is considered more than minor for this activity.
>
> …

*[(4) Traffic and safety concerns]*

*9.0.5*… The proposed School has the potential to grow in size and scale in the future, creating traffic congestion and safety concerns on Newell Road. Allowing such an activity within the Country Living Zone has the capability for cumulative adverse effects to arise and place extra pressure on existing infrastructure.

…

*[(5) Effect on rural character and amenity]*

9.0.22 The proposed School is to be located in the rural zone, away from existing infrastructure…

Locating a small School on Newell Road, an isolated area, which is predominantly rural in character adversely affects the rural visual character and amenity due to the density of such buildings.

…

*[(6) Result: Application should be declined]*

**7 RECOMMENDATION**

As a Non-Complying Activity Section 104D states that Council may grant consent or refuse consent to the applicant's proposal, and if granted, impose conditions under Section 108. Having reviewed the applicant's proposal, I recommend that the application be declined subject to the reasons detailed below.

1 The proposed development would adversely affect the visual character and amenity values of the surrounding area as the proposal proposes an educational facility that is not compatible with the density or nature of existing development and in the area.

2 Council are not satisfied that any adverse effects derived from traffic, noise and the appearance of the site are considered to be minor and can be effectively mitigated to ensure that the surrounding community are not adversely affected.

3 In terms of Section 9 of the Operative District Plan, the proposal is not consistent with the objectives and policies relating to the rural zone and in particular Objectives 9.0.3 and 9.0.6. The proposal will not retain rural amenity values as defined by the Objectives and Policies.

3 Having regard to section 104D of the Resource Management Act 1991, the applicant has not adequately demonstrated that the statutory test can be met. The creation of an Early Childhood Centre has the potential to result in a level of density that is not anticipated under the provisions of Section 9 and is likely to result in reverse sensitivity effects. Accordingly, the effects of the development would be more than minor, and inconsistent with the provisions of the Operative District Plan and the Proposed District Plan.

6 The screen planting is not expected to reduce the potential for noise nuisance and visual detraction from the amenity of the neighbouring properties.

7 The Proposed Waikato District Plan was notified on 25th September 2004 and submissions closed on 11th February 2005. The initial Summary of Submissions has been released, however submissions made on the rules contained within the Proposed Plan relevant to this application are still under consideration. Therefore when assessing this application little weight has been given to the Country Living provisions of the Proposed District Plan when determining this application.

*The decision of the Council*

[32] The application was heard on 21 September 2005 and adjourned to enable the applicants to obtain further information. The Hearings Committee of five councillors resumed deliberation on 2 November 2005 reserving its decision. In summarising its decision of 9 November 2005 I have used the headings added to Ms Hall's report.

*(1) Conclusion; (6) Result*

[33] The committee resolved to grant land use consent to the application for a non-complying activity subject to conditions.

*(3) The site: potential to create an out of context area; impact more than minor;*
*(5) Effect on rural character and amenity*

[34] The reasons for decision were that the granting of consent reflected the gradual transformation of the Tamahere area which was in a process of continuous evolution through ongoing subdivision and development. The committee considered that the barn was an existing accessory building complying with the provisions of the rural zone. In terms of visual amenity, it was similar in scale and appearance to other accessory buildings in the neighbourhood. The committee imposed a condition of 1.8 m fencing to reduce the potential for noise nuisance and to avoid visual detraction from the amenity of neighbouring properties.

*(4) Traffic and safety concerns*

[35] The noise was the primary concern of neighbouring property owners. The committee placed a noise and review condition on the consent. They paid regard to existing noise levels at the site which were considerable because of traffic movements and aeroplanes flying overhead. The committee was satisfied that any adverse environmental effects would derive from traffic noise and the appearance of the site. These were assessed to be minor and able to be effectively mitigated by consent conditions. The traffic using the school would entail vehicle movements against existing traffic flows, effects that would be no more than minor.

[36] In assessing the application little weight was given to the Country Living provisions of the District Scheme which had been notified on 25 September 2004 but submissions were still under consideration.

[37] The points raised by Ms Hall were therefore dealt with by the Committee but on an *ex parte* basis – without the "inclusive and democratic procedures" of public participation that attend a notified hearing: see *Progressive Enterprises* [61] and [84].

[38] The remaining question is whether the evidence as a whole raises "any real doubt whether the development would have more than minor adverse effects": *Progressive Enterprises* [73].

*The evidence of Mr Inskeep*

[39] The report was the subject of comment in Mr Inskeep's affidavit in reply. I advised Mr Hayes that if he wished to challenge that evidence he must do so by cross-examination. Mr Hayes elected to call for Mr Inskeep and cross-examine him.

[40] In his affidavit Mr Inskeep challenged as incorrect Ms Hall's statement *[2]* that the application "ha[d] been processed via limited notification as the adverse effects are considered to be more than minor". I accept Mr Inskeep's evidence.

Limited notification is a consequence of a s 93 decision that the effects are considered to be *not* more than minor.

[41] He also challenged Ms Hall's view expressed shortly before the consent hearing (*[1]* and *[6]*) that the adverse effects were in fact more than minor and the application must therefore be declined. He was cross-examined on that point by Mr Hayes. Because of the public importance of a correct decision as to notification I then explored with Mr Inskeep the issues on which Ms Hall and Mr Inskeep were divided. I have concluded that his evidence passes the "close appraisal" test to which it was subjected and that the Council succeeds on the final issue.

[42] The reasons in summary are those provided by the Committee which were elaborated by Mr Inskeep in response to Ms Hall's report.

*(3) The site: potential to create an out of context area; impact more than minor*

[43] The Council's reasons described the Tamahere area as continuously changing and evolving and the consent as reflecting the gradual transformation. Mr Inskeep advised that the existing use of the site as a home occupation for a commercial lavender garden entailed only a slight modification to one side, being a permitted activity by way of bulk and location requirements of the plan. So the effect was already established. The increased number of children (up to 30) and the provision of playground equipment could not significantly jeopardise the environment. The rural environment of Tamahere already has a number of facilities with playground amenities as well as established primary schools and other childcare facilities.

[44] The evidence supports both Mr Inskeep's decision not to notify on the ground advanced by Ms Hall and the Committee's conclusion as to the transformation of the Tamahere area.

*(4) Traffic and safety concerns*

[45] The Committee was satisfied for the reasons they gave that traffic effects would be no more than minor. Mr Inskeep referred to a letter from Transit New Zealand and a report from the Council's technical roading engineer supporting the proposal. There was a substantial basis for both Mr Inskeep and the Committee to reach their respective conclusions on this topic.

*(5) Effect on rural character and amenity*

[46] The Committee's reference to the change of locality has been referred to. Mr Inskeep deposed that proposed amendments to the District Plan will allow higher residential development on a rural residential scale. Mr Inskeep considered that Ms Hall's comments were the expression of an opinion and were interpretative.

[47] There is a solid basis for the Committee's and Mr Inskeep's conclusions.

*Decision*

[48] While the Court will closely appraise a challenged s 93 decision, it is the Council or its delegate which Parliament has nominated as the decision-maker. Provided there is a solid basis for each decision the Court has no justification to interfere with it. The Trust's evidence and argument has not satisfied me that either Mr Inskeep's s 93 decision or the Hearings Committee's rejection of Ms Hall's advice in making its decision under ss 104 and 104D gives rise to real doubt as to its validity.

[49] It follows that the challenge to the Council's decision fails.

**Conclusion**

[50] The application is dismissed.

[51] Memoranda as to costs may be filed by the Council within ten days and the Trust in reply within a further ten days. If Mr and Mrs Bhana seek a separate order as to their costs they must file a memorandum within ten days. The authorities are collected in *Helmbright v Environment Court (No. 2)* [2005] NZRMA 49 and in *Progressive Enterprises Ltd v North Shore City Council* HCAK CIV-2004-404-7139 22 December 2005.

_____

W D Baragwanath J

[HOUSE OF LORDS]

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT APPELLANT

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

INTERNATIONAL SYNTHETIC RUBBER CO. LTD. APPELLANTS

[CONJOINED APPEALS]

1980 Jan. 14, 15, 16, 17, 21, 22; Feb. 28

Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman and Lord Lane

*Town Planning — Planning permission — Conditions — Aircraft hangars used for storage of vehicles—Planning permission to use for storage of synthetic rubber—Whether necessary—Condition attached that buildings to be demolished by specified date—Whether valid—Whether hangars used as "repository" —Whether grant of planning permission extinguishing existing use rights—Town and Country Planning Act* 1971 (*c.* 78), *ss.* 29 (1), 30 (1) [1]*—Town and Country Planning (Use Classes) Order* 1950 (*S.I.* 1950 *No.* 1131), *art.* 3 (1), *Sch.*[2]

In 1941 land in open country was requisitioned by the Crown for use as an airfield. Two large hangars were built. The airfield remained operational until 1947. After 1947 the hangars were used by the Ministry of Agriculture to store food supplies and from 1955 to 1959 they were used for storing civil defence vehicles by the Home Office. The surrounding area was restored to agricultural use and in 1959 family trustees were granted planning permission to use the hangars to store fertilisers and corn on condition that they were removed by the end of 1970. In 1961 the trustees bought the freehold from the Crown and granted a 40-year lease back to the Crown at a nominal rent.

A rubber company, I.S.R., then applied for permission to use the hangars "as warehouses for the storage of synthetic

[1] Town and Country Planning Act 1971, s. 29: "(1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . ."

S. 30: "(1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder— . . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period. . . ."

[2] Town and Country Planning (Use Classes) Order 1950, art. 3: "(1) Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Sch.: ". . . Class X. Use as a wholesale warehouse or repository for any purpose."

rubber" and on May 31, 1962, I.S.R. were given planning permission for the use of the two hangars as warehouses on condition the buildings were removed "at the expiration of the period ending December 31, 1972." Having obtained planning permission, I.S.R. in July 1962 bought the two hangars and the 40-year lease from the Crown at an auction. The particulars of sale at the auction referred to the development plan and the local planning authority's general policy to secure removal of war-time buildings. In November 1970 I.S.R. applied for a 30-year extension of their permission which was due to expire in December 1972. In January 1971 the extension application was refused as it conflicted with the development plan in "an area of outstanding natural beauty."

I.S.R. continued to use the hangars after the end of 1972 and did not remove them. In November 1973 the local authority served two enforcement notices. I.S.R. appealed to the Secretary of State, who after a public inquiry held that the condition for the hangars' removal was invalid under the Town and Country Planning Act 1971 because it was extraneous to the proposed use. The Divisional Court dismissed the local authority's appeal against the quashing of the enforcement notices. On appeal, the Court of Appeal allowed the appeal.

On appeal by the Secretary of State and I.S.R.:—

*Held*, allowing the appeals, (1) that I.S.R. did not require the grant of planning permission for their intended use of the hangars in 1962 since the use by the Home Office of the hangars after 1955 for storing civil defence vehicles was use as a "repository" within the meaning of Class X of the Schedule to the Town and Country Planning (Use Classes) Order 1950 and that therefore their use by I.S.R. in and after 1962 as a wholesale warehouse for the storage of synthetic rubber involved no material change of user but was an existing use (post, pp. 597A–D, 602C–E, 605A–C, F–G, 614F—615C, 624C–E).

Dicta of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, and of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, C.A. disapproved.

(2) That where the grant of planning permission, whether it be permission to build or for a change of use, was of such a character that the implementation of the permission led to the creation of a new planning unit existing use rights attaching to the former planning unit were extinguished; but that in the present case the grant of planning permission in May 1962 did not create a new planning unit, and that accordingly, I.S.R. were not precluded from relying on the existing use rights attaching to the site (post, pp. 597E–F, 598H—599C, 603A, 606E—607B, 617G—618D, 626C–F).

*Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109, D.C. and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, D.C. considered.

(3) That in any event, even if planning permission had been necessary for the use by I.S.R. of the hangars, in the circumstances of the present case the condition for their removal did not fairly or reasonably relate to the permitted development and was therefore void (post, pp. 601D–E, 602F–G, 609F–G, 621F–G, 628G—629B).

*Per curiam.* For conditions attached to the grant of a planning permission to be intra vires and valid the conditions

imposed must be for a planning purpose and not for any ulterior one and they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them (post, pp. 599H—600A, 607F—608C, 618F—619A, 627A–E).

*Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260, H.L.(E.) considered.

Decision of the Court of Appeal [1978] 1 W.L.R. 1241; [1979] 1 All E.R. 243 reversed.

The following cases are referred to in their Lordships' opinions:

*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

*City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169.

*East Barnet Urban District Council* v. *British Transport Commission* [1962] 2 Q.B. 484; [1962] 2 W.L.R. 134; [1961] 3 All E.R. 878, D.C.

*Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636; [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L.(E.).

*Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15, C.A.

*Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

*Horwitz* v. *Rowson* [1960] 1 W.L.R. 803; [1960] 2 All E.R. 881.

*Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549; [1974] 1 All E.R. 193, D.C.

*Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72; [1970] 2 W.L.R. 397; [1970] 1 All E.R. 70, H.L.(E.).

*Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, C.A.

*Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627, H.L.(E.).

*Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; [1960] 2 W.L.R. 484; [1960] 1 All E.R. 538, D.C.

*Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112; [1971] 2 All E.R. 793, D.C.

*Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109, D.C.

*Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.; [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.).

*Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720; [1974] 2 W.L.R. 805; [1974] 2 All E.R. 643, D.C.

*Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

*Trentham (G. Percy) Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506; [1966] 1 All E.R. 701, C.A.

The following additional cases were cited in argument:

*Bendles Motors Ltd.* v. *Bristol Corporation* [1963] 1 W.L.R. 247; [1963] 1 All E.R. 578, D.C.

A *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303; [1964] 2 W.L.R. 507; [1964] 1 All E.R. 149, D.C.
*Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398.
*Cozens* v. *Brutus* [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297, H.L.(E.).
*Emma Hotels Ltd.* v. *Secretary of State for the Environment* (1979) 250 E.G. 157, D.C.
B *Essex Construction Co. Ltd.* v. *East Ham Borough Council* (1963) 61 L.G.R. 452, D.C.
*Halsall* v. *Brizell* [1957] Ch. 169; [1957] 2 W.L.R. 123; [1957] 1 All E.R. 371.
*Howard* v. *Secretary of State for the Environment* [1975] Q.B. 235; [1974] 2 W.L.R. 459; [1974] 1 All E.R. 644, C.A.
*Ives (E.R.) Investment Ltd.* v. *High* [1967] 2 Q.B. 379; [1967] 2 W.L.R.
C 789; [1967] 1 All E.R. 504, C.A.
*Kruse* v. *Johnson* [1898] 2 Q.B. 91, D.C.
*Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412; [1940] 1 All E.R. 425, H.L.(E.).
*LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1975] 1 W.L.R. 138; [1975] 1 All E.R. 374, D.C.; [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.
D *Miller-Mead* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; [1962] 3 W.L.R. 654; [1962] 3 All E.R. 99, D.C.
*Slattery* v. *Naylor* (1888) 13 App.Cas. 446, P.C.
*Slough Estates Ltd* v. *Slough Borough Council (No. 2)* [1971] A.C. 958; [1970] 2 W.L.R. 1187; [1970] 2 All E.R. 216, H.L.(E.).
*Tessier* v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161, D.C.
E *Town Investments Ltd.* v. *Department of the Environment* [1978] A.C. 359; [1977] 2 W.L.R. 450; [1977] 1 All E.R. 813, H.L.(E.).
*Western Fish Products Ltd.* v. *Penwith District Council* (1978) 77 L.G.R. 185, C.A.
*Young* v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163; [1946] 1 All E.R. 98, H.L.(E.).

F APPEALS from the Court of Appeal.

These were appeals by leave of the House of Lords by the appellants, the Secretary of State for the Environment and the International Synthetic Rubber Co. Ltd., from an order dated July 14, 1978, of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) allowing an appeal by the respondents, the Newbury District Council from an order dated February 18, 1977, of the Divisional Court of the
G Queen's Bench Division (Lord Widgery C.J., Michael Davies and Robert Goff JJ.). By that order the motion of the respondents that a decision of the appellant, the Secretary of State for the Environment dated July 24, 1975, be remitted to the Secretary of State for re-hearing and determining together with the opinion or direction of the Divisional Court was dismissed.

H The facts are set out in their Lordships' opinions.

*David Widdicombe Q.C.* and *Anthony Anderson* for the appellant company. There are three issues in this appeal: (1) The validity of the

condition. (2) Whether planning permission was needed in view of Class X of the Use Classes Order. (3) What has been termed "blowing hot and cold." A

(1) It is not disputed that if the condition is invalid the whole planning permission goes. Then the question arises whether an enforcement notice can be served? The answer is in the negative because of the date when it was served. The Court of Appeal held that the condition was valid. In summary, the appellant's contention is that it is invalid because it does not fairly and reasonably relate to the permitted development. The condition must relate to the use of the hangars as warehouses but this condition goes far beyond that. B

(2) This raises the question whether there was any need for planning permission at all. This involves consideration of the Town and Country Planning (Use Classes) Order 1950, article 3, Schedule, Class X. Class X of the Order of 1950 combined Classes X and XI of the Town and Country Planning (Use Classes) Order 1948. This makes it plain that in the Order of 1950 "wholesale" in the expression "use as a wholesale warehouse or repository" is confined to warehouse. "Repository" does not connote storage of articles exclusively for business purposes. C

(3) Where there are existing use rights and planning permission is not necessary, whether the appellants nevertheless are bound by the maxim: qui sentit commodum sentire debet et onus; he who takes the benefit must also take the burden. It is said that the appellants are precluded from relying on existing use rights in Class X as they had taken up and implemented the permission granted to them in May 1962. This is a false point because there is no way of ascertaining which of the two alternatives the appellants acted under, namely, whether they went by way of relying on their existing use rights or under the permission granted to them. In the case of building operations it is plain whether a person is acting under a planning permission for the physical evidence can be seen, namely, the bricks and mortar. Alternatively, where there are existing use rights and also there is planning permission how can it be said that a person has taken the benefit of that permission when he does not need it? D E F

The following statutory provisions give the necessary background to this appeal: the Town and Country Planning Act 1971, sections 22 (1) (2) (*f*), 23 (1) (5) (6), 24 (1) (2) (*b*) (4), 25, 27, 29 (1), 30 (1) (*a*) (*b*) (2), 33 (1) (2), 36 (1) (3), 51 (1) (4), 52 (1) (2), 53 (1), 87 (1) (2) (3) (4), 88 (1) (*b*) (*d*) (3), 89 (1), 91, 170 (1) (2), 246, 266 (1) (*b*) (2) (3) (7), 290.

(1) For a condition imposed pursuant to section 29 (1) the Act of 1971 to be intra vires a local planning authority and valid it must satisfy three tests: (i) it must fairly and reasonably relate to a planning purpose; (ii) it must fairly and reasonably relate to the permitted development, and (iii) it must not be so unreasonable that no reasonable planning authority could have imposed it (see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223). G

The first and second tests stem from the statute: see section 29 which is concerned with the determination of applications for planning permission. As to the second test, section 29 is in Part III of the Act relating to control of development and development is defined in section 22. H

A Section 29 is dealing with control of development in particular cases—the development which is the subject of the application in question, for example. The decision is a decision on the application and in this case any conditions imposed must fairly and reasonably relate to the use of the land in question. Section 30 (1) is helpful as being illustrative of what Parliament intended to come within section 29 albeit section 30 commences with the words, "Without prejudice to the generality of section 29 (1) of this Act. B . . ." It is inherent in section 29 that any condition imposed must relate to the permitted development. To impose a condition as in the present case that at the end of the relevant period the buildings must be removed is to impose a condition which is not connected with the permitted development; it is not related to user. It is pertinent to contrast the language of section 29 with that of section 33 (2) where the planning authority can specify the use for which the building may be used.

C The first reported case relating to imposed conditions is *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572, where Lord Denning laid down the proposition that for "conditions, to be valid," they "must fairly and reasonably relate to the permitted development." The actual decision was reversed on appeal [1960] A.C. 260 on the ground that the development in question was allowed D under a private Act but, as Lord Reid stated in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, Lord Denning's formulation of the law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

Reliance is placed on *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 in that it confirms the three tests and E affords a good example of the third test. The language of section 29 (1) would appear to be in the widest terms but that the power to impose conditions is subject to limitations is made manifest in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. The condition imposed in *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 satisfied all three tests. *Kingston-upon-Thames Royal London Borough* v. *Secretary of* F *State for the Environment* [1973] 1 W.L.R. 1549 supports the three tests. True, the first test is not explicitly mentioned because it was not necessary so to do but the other two are expressly mentioned at p. 1553. In *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 the conditions were held invalid because they could not satisfy the first test.

G (2) The use of the hangars by the Home Office was use as a repository and so was its previous use for the storage of fertilisers and the appellant's use of them is as a wholesale warehouse. All these uses are in the same class—Class X. Therefore there was no change of user involving development requiring planning permission. For the general accepted meaning of "repository," see the *Shorter Oxford English Dictionary*, 3rd ed. (1944), H p. 1707: "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." Havers J.'s definition in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, in confining it to a building used for storage "in the course of a trade or business" was wrong and was un-

necessary for the decision in that case. The appellants have no quarrel with Lord Denning M.R.'s definition in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 provided that the concluding words in brackets are omitted: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe (as part of a storage business)." *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398 does not carry the matter any further. In any event, as *Town Investments Ltd.* v. *Department of the Environment* [1978] A.C. 359 shows, that use by a Government department is a business use.

(3) "Blowing hot and cold." This principle stems from the judgment of Lord Denning M.R. Lawton L.J. held that it was not necessary to decide this question and Browne L.J. disagreed with the Master of the Rolls on this issue. Browne L.J.'s formulation of the principle is correct in that it can only apply in circumstances such as those that pertain in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109.

It is a well established principle of planning law that a person who has been granted planning permission is not prevented from subsequently contending that no such permission was necessary by reason of existing use rights: see *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422; *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; *Miller-Mead* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; *Essex Construction Co. Ltd.* v. *East Ham Borough Council* (1963) 61 L.G.R. 452; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and *Emma Hotels Ltd.* v. *Secretary of State for the Environment* (1979) 250 E.G. 157.

As to the cases relied on by the respondents, *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, these are all distinguishable for those cases concern the creation of a new planning unit in that they involved the erection of new buildings. [Reference was also made to *Western Fish Products Ltd.* v. *Penwith District Council* (1978) 77 L.G.R. 185.]

*John Newey Q.C.* and *Christopher Symons* for the Secretary of State. The role of the Secretary of State in this appeal is: (1) to defend what he understands to be his function in enforcement notice appeals; (2) to justify his conclusions in the present case and (3) to make submissions in relation to the suggestion that equitable estoppel should apply in planning matters.

(1) There is no controversy in relation to this question. Appeals in respect of enforcement notices are governed by section 88 of the Town and Country Planning Act 1971. Before 1960 such appeals lay to magistrates' courts. The magistrates heard the evidence and directed themselves on the law and they reached their conclusions. The Act of 1960 allowed the Minister to give a decision on the merits. In all other respects the position of the Secretary of State is the same as that of magistrates before 1960. Under section 246 appeals lie from the Secretary of State to the High

A Court but only on points of law. If the Secretary of State is wrong on a point of law the High Court pursuant to R.S.C., Ord. 59, will remit the case to the Secretary of State to apply the law correctly to the facts.

On the validity of the condition, there is a slightly different approach from that of the district council. The three tests which must be applied to determine whether the condition is valid are: (i) The condition must come within the wording of section 29 (1) of the Act of 1971 as clarified B and illustrated by section 30: *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72. This would exclude conditions for non-planning purposes. *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 was rightly decided. (ii) The condition must fairly and reasonably relate to the permitted development. It is conceded that the removal of a building may reasonably relate to the C permitted development. (iii) The condition must be reasonable. In relation to the second and third tests the role of the Secretary of State is the same as that of the court on the question of reasonableness. Reliance is placed on the observations of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735.

D Section 33 (2) of the Act of 1971 is a useful provision for the planning authority and also for a developer. It is possible under this section for the planning authority to restrict the use of the land. Without this provision a developer who has permission to erect a building would have no permission to use the building without making a further application for planning permission. But it is a subsection of limited application and E cannot be used by converse reasoning to support the proposition that the local authority can attach a condition to a change of use permission requiring the demolition of a building.

The Secretary of State considered that in the circumstances of the present case, where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of F years was not specifically related to the change of use in respect of which the planning permission was granted and was unreasonable. He therefore concluded that the condition was invalid. The Secretary of State directed himself correctly as to the law and having so directed himself he reached the correct conclusion on the facts. The judgment of the Divisional Court (1977) 75 L.G.R. 608 is supported and in particular the observation of G Michael Davies J., at pp. 611–612, that it would be an injustice to the freeholder if the buildings were removed.

The correct method of ridding land of a non-conforming use is to proceed under section 51 of the Act of 1971. Parliament intended that this procedure should be used and the appropriate compensation paid. Compensation may not necessarily be a large amount. It frequently occurs, H as became the position in the present case, that an applicant has only a leasehold interest in the building concerned and thus a condition requiring the demolition of that building may well amount to a requirement that the applicant commits an act of waste as against his landlord.

As to existing use rights, the Secretary of State, as his decision letter makes plain, expressly directed himself in the terms of Lord Denning M.R.'s dictum in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512. It is conceded that the dictionary definitions of " repository " are against the Secretary of State. But the word has to be seen in its context. The three relevant decisions, *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803; *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 and *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, in relation to " repository " all import the concept of business usage. This is correct. In the Town and Country Planning (Use Classes) Order 1950 a wholesale warehouse is in Class X and a repository in Class XI. The 1950 Order does not define either warehouse or repository and both are placed in the same class—Class X. A wholesale warehouse obviously involves business premises to which goods are delivered and from where goods are despatched. According to the dictionary a " repository " is a place where, for example, archives are kept. But the word " repository " in Class X of the 1950 Order is coloured by the words " wholesale warehouse." It is emphasised that this reference to a wholesale warehouse colours the description of a repository. " Wholesale warehouse " covers the genus.

On " blowing hot and cold," the Secretary of State is greatly concerned at the prospect of the importation of this doctrine into planning law: see *Western Fish Products Ltd.* v. *Penwith District Council*, 77 L.G.R. 185, 200. Planning is concerned with the development of land and planning permission enures to the benefit of land and all persons for the time being interested therein: section 33 (1) of the Town and Country Planning Act 1971.

The introduction of equitable estoppel into the planning system will result in rights and obligations varying according to the persons concerned and depending on such factors as to what certain persons knew or did not know at the relevant time. The Secretary of State fears there would be much uncertainty and that it would work to the detriment of the ordinary citizen and would enormously complicate planning administration. It would raise great difficulties for planning officers and planning committees. See the article entitled " Planning Permissions—Blowing Hot and Cold " in [1979] J.P.L. 815. Reliance is placed on the same cases as those relied upon by Mr. Widdicombe Q.C.

*Peter Boydell Q.C.*, *R. M. K. Gray* and *James May* for the district council. The council accept that in order to uphold the judgment of the Court of Appeal they must satisfy the House on two issues: (i) that there was an error of law on the part of the Secretary of State and (ii) that the Secretary of State was correct in determining that the company had no Class X right.

Having received planning permission on May 31, 1962, at a time when the company had no interest in the land several courses were open to them. One was to appeal to the Secretary of State. The company took with their eyes open this permission for two months later in July 1962 they bought a lease of the land at auction and the permission was referred to in the auction particulars. Before the Divisional Court nothing was said

A about the position of the freeholder for the condition imposed was in the freeholder's favour. The position of freeholders was first mentioned in the judgment of Michael Davies J. in his reserved judgment.

On validity, section 88 of the Act of 1971 concerns appeals against an enforcement notice. The Secretary of State should have exercised his powers under subsections (5) and (6) of section 88. But the Secretary of State put it out of his power to vary the condition because he had held as B a matter of law that it was a void condition. The question at issue here is: what are the functions of the Secretary of State when he is entertaining an enforcement notice appeal of this nature and considering a condition? The Secretary of State has a dual function when he is exercising this appellate jurisdiction, namely (a) he has to consider whether the condition is void in law and if he holds it is not void in law then (b) he goes on to C exercise his functions under section 88 (5) and (6) and considers all the circumstances of the case and whether he should substitute another condition. It is vital to keep separate these two functions for the first is a quasi-judicial function. The second function is the exercise of the highest planning function in this country. This is the heart of the respondent's case. In the present case there has been a confusion by the Secretary of State and the Divisional Court between these two functions.

D The Secretary of State should have held that the condition was not void in law and then gone on to exercise his powers under section 88 and made a decision. If the judgment of the Court of Appeal is upheld then the case should be remitted to the Secretary of State with the direction that the condition is not void in law and he can then exercise his powers under section 88. There is no evidence whatsoever that the Secretary of E State has exercised his powers under subsections (5) and (6).

In determining the validity of a condition there are two tests applicable, not three as suggested by the appellants: (i) Is the condition imposed for a planning purpose? and (ii) is it a condition that no reasonable planning authority could have imposed (the *Wednesbury Corporation* principle [1948] 1 K.B. 223)? Strong reliance is placed on the following example: F a local authority has a piece of land not required for fifteen years when it is scheduled to be the site of a public library. The local authority allow a single-storey building to be erected on the land for use as a warehouse with a condition that it must be removed after fifteen years. After ten years there is a change of use to a cash-and-carry store. On the appellant's argument there could not be imposed a condition for demolition of the building because of the change of use!

G In *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636, 678, Lord Denning considered that the principles applicable to planning conditions are analogous to those applicable in the by-law cases. In those circumstances it follows that the present condition cannot be attacked because it cannot be said that the present action of the respondents is "fantastic and capricious": *Slattery* v. *Naylor* (1888) 13 App.Cas. H 446, 452. The principle laid down in *Kruse* v. *Johnson* [1898] 2 Q.B. 91 can be applied a fortiori to a planning case, namely, that in determining the validity of by-laws made by public representative bodies the court ought to be slow to hold that a by-law is void for unreasonableness.

The *Wednesbury Corporation* case [1948] 1 K.B. 223 shows that the courts are extremely slow to interfere in by-law cases and it follows that very rarely should the Secretary of State interfere with a condition imposed by a local planning authority. A

Cases such as *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735; *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 all suggest that there are but two tests. Further, in the *Kingsway Investments* case [1971] A.C. 72 all their Lordships' speeches equated planning conditions with by-laws and referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91 as containing the principle to be applied. As to the contention that this condition would lead to a loss of rights under section 23 (5) of the Act of 1971, it is true that requiring the removal of a building at the end of a planning period deprives the applicant of his right to resume the former use of the land. The appellants claimed that the rights in question were those enjoyed between 1955-1959. But that does not avail them for they were illegal rights since all that the Home Office had was immunity from proceedings being taken in respect of the contravention of previous planning control because the Crown never received planning permission. In the circumstances there was an abandonment of use before 1955 and the observations of Bridge J. in *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1975] 1 W.L.R. 138, 142F–G are applicable. B C D

As to waste, if a condition is imposed that the recipient cannot carry out then he has a right of appeal against it. This point would equally apply to a question of operations on land or buildings. E

It is further said that the condition was void because if the local planning authority wished to have these hangars removed the correct procedure was for them to have gone under sections 51 or 52 of the Act of 1971. But the fact that the matter could have been dealt with under other provisions is nihil ad rem. It is not a relevant consideration in law that there were other methods available to the local planning authority to achieve the same object but involving the payment of compensation under section 51. Moreover, it is wholly unrealistic in the present case to suggest that because some kind of statutory agreement might have been reached under section 52 it should have been used when no-one considered it relevant and all parties considered the condition to be an acceptable way of achieving the local planning authority's known planning objections. The Court of Appeal were not satisfied that Berkshire County Council might have achieved the objective of the removal of the hangars by proceeding under section 16 of the Berkshire County Council Act 1953. F G

As to the meaning of " repository," it is not every use which fits into a use class. There are many that do not: *Tessier* v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161. The Home Office user was the same sui generis user as that in the *Tessier* case. The Home Office use was not within Class X of the Order of 1950 at all. The Secretary of State was entitled so to hold. H

If the ambit of Class X is as wide as the appellant company contend

A then a museum would come within Class X, but a museum is specifically included in Class XVII. A burial ground is a good example of a repository that does not come within the ambit of Class X. This shows that the dictionary definition of "repository" cannot be imported as a definition into Class X. The word "repository" has been consistently defined by the courts as being a building where goods are kept or stored in the course of a trade or business: see, for example, *G. Percy Trentham Ltd.* v. B *Gloucestershire County Council* [1966] 1 W.L.R. 506, 513, *per* Diplock L.J. Further, the definition of "repository" contained in the Order of 1958 is irrelevant in construing the Order of 1950: see *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, 401, *per* O'Connor J.

The Home Office user as storage of civil defence vehicles necessitated C no traffic to the premises save in the event of a national emergency whilst the user by the appellant company necessitated a great deal of traffic to and from the site. This is what impressed the inspector and the Secretary of State. If there is some element on which the Secretary of State could find as he did then the authorities show that the courts will not disturb his decision without his finding was perverse, in the sense that the evidence could not support it: *Bendles Motors Ltd.* v. *Bristol Corporation* [1963] D 1 W.L.R. 247. Reliance is placed on the observations of Lord Reid in *Cozens* v. *Brutus* [1973] A.C. 854, 861, 862, that it is a question of fact what is the meaning in the ordinary use of the English language of, in the present case, the word "repository." Then it has to be considered in its context. It is to be noted that not only the Secretary of State but all members of the courts below found for the definition of "repository" as contended for by the respondents. "Repository" in the present context E has to be construed in a more limited sense than its ordinary natural meaning. Whether or not a given use falls within a particular use class is a matter of fact and the Secretary of State on that matter of fact will not be disturbed by the courts: *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1976] Q.B. 663.

The purpose of the Use Classes Order is to relieve the developer from F seeking planning permission for what would otherwise be a material change of use and therefore one would expect to find some similarities between the various uses mentioned in a given class. Thus there is a genus in Class XI: "Use as a boarding or guest house, a residential club, or a hotel providing sleeping accommodation." If Class X was concerned with storage per se it would merely have contained the words "a store for any purpose." The issue on the present appeal on this question comes down G to the meaning of the word "repository" as a question of fact. Was the Secretary of State's decision in the present case untenable or perverse or so unreasonable that no Secretary of State could have reached it? The answer is plainly in the negative.

On "blowing hot and cold," the argument can be put in three ways: (1) as it was adumbrated in *Prossor* v. *Minister of Housing and Local* H *Government*, 67 L.G.R. 109. (2) As an application of the maxim, he who enjoys the benefit must suffer the burden. (3) Election.

(1) Hitherto the *Prossor* principle has only applied to building operations. It has not yet been extended to where there has been a change of

development. This issue can be put in three alternative ways: (a) Where a planning permission is sought, granted and implemented, the planning history starts afresh. (b) Alternatively, and more narrowly, the planning history starts afresh where the acceptance and implementation of the planning permission is inconsistent with reliance on earlier existing use rights. In the present case there is an assumption that there was a lawful condition for removal of the hangars. Earlier existing use rights, namely, as a warehouse or a repository are inconsistent with existing use rights— they are inconsistent with the permission of 1962, because once the hangars had been removed clearly there can be no use of the land as a warehouse. This is akin to a waiver. This second formulation of the argument is more restrictive because some of the cases subsequent to the decision in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109, have queried the width of the language used by Lord Parker C.J. in *Prossor*. The key word in both formulations in (a) and (b) is "implemented." (c) This is the narrowest formulation: the planning history starts afresh as under (b) above except where no permission was ever required either because the use was in existence on July 1, 1948, or because there was a deemed permission under the general development order. The respondent relies on formulations (a) and (b).

There are five cases on the principle adumbrated in *Prossor* all of which have been decided within the last ten years whilst the cases relied on to the contrary by the appellants are very much older. Those on which the respondents rely are: *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112; *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1.

True, all the above were cases where some building was permitted by the planning permission. It is also conceded that the principle has not yet been extended to an exclusively change of use case but (i) there seems no reason in principle why the doctrine of *Prossor* should not apply to a change of use case, and (ii) it would make for confusion if one of two kinds of planning act development was subject to the *Prossor* principle whilst the other was not. So many cases are both development by operation and development by change of use. This could lead to complex situations and problems. What was done in the present case was what was contemplated by the Court of Appeal in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1.

(2) Another way of looking at the quasi-estoppel or election in this case is to see it as an application to planning law of the principle that a benefit cannot be taken without associated burdens. The appellant company, having taken the benefit of the 1962 permission, cannot now allege that permission was unnecessary in order to avoid the obligations attached to the permission. The application of the maxim, qui sentit commodum sentire debet et onus to planning cases was discussed in argument in *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303,

A 308, but whether it could be applied in such cases was specifically left undecided (p. 315). The maxim is merely a way of formulating the quasi-estoppel or election which can arise in a wide variety of circumstances of which the present case is one example. Examples of its application, neither of them planning cases, are to be found in *Halsall* v. *Brizell* [1957] Ch. 169 (an obligation to contribute to the maintenance of an easement) and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 (another ease-
B ment case), but there is no logical reason why the principle should be inapplicable to planning cases. There was a discussion of the principle (in the very different context of the Workmen's Compensation Acts) in this House in *Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412 and in *Young* v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163. The question of loss of a planning permission by abandonment (in very different circum-
C stances from the present case) was also discussed in *Slough Estates* v. *Slough Borough Council (No. 2)* [1971] A.C. 958, but the point was left specifically undetermined by Lord Pearson at the end of his speech (p. 971F).

(3) The appellant company's conduct can also be seen as raising a quasi-estoppel or election; the company could have made in 1962 the inquiries which it made in 1972 and the question could then have been
D resolved. The choice between two inconsistent courses, which is a prerequisite of an election, can be based on implied knowledge of the existence of those two courses as well as on actual knowledge. The doctrine is set out in *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed. (1977), p. 313.

In 1962 the appellant company by its actions led the planning auth-
E ority to believe that it was relying on the planning permission granted in 1962 to the exclusion of previous planning permission. If it had been made plain that the company was relying on existing use rights then the local planning authority would have made a discontinuance order with a ten year condition.

As to the argument advanced on behalf of the Secretary of State that
F the principle enunciated by Lord Denning M.R. would cause uncertainty, the contrary was in fact the case, because the 1962 planning permission was a document certain in its terms and available to any purchaser, whereas the rights claimed by the company depended on an examination of uncertain facts said to be established by imprecise evidence, which would have become inevitably more imprecise by the passing of time.

*Newey Q.C.* in reply. The effect of section 88 (7) of the Town and
G Country Planning Act 1971 is to provide that whenever an appellant has appealed, for example on ground (*b*) of section 88 (1), then the Secretary of State has jurisdiction and the effect is the same as if the appellant has actually lodged an appeal under section 88 (1) (*a*). On the Secretary of State receiving an appeal pursuant to section 88, which includes an appeal under ground (*b*), his first function is to decide whether the appeal under
H ground (*b*) is valid or not. If he decides that the appeal under ground (*b*) should be upheld then he quashes the enforcement notice. The effect of that is to place the appellant in a position which cannot be challenged. In the present case if the Secretary of State correctly decided that the con-

dition was invalid then the company is in a completely unchallengeable position. The company has used these hangars for storage since before 1963. If the Secretary of State decided that the company had existing use rights then the enforcement notice must be quashed since the use existed before 1963 and again the company is in an unchallengeable position.

As to tests of legal validity, the difference with the respondents appears to be one of wording rather than of substance. It is said that the Secretary of State mis-directed himself in law but if one peruses the Inspector's report it will be seen that he does not rely on Circular 5–68. It is plain on the documents that the Secretary of State did not mis-direct himself.

It is not necessary for the House to determine the question of waste. But as a general proposition it is a question of unreasonableness for the Secretary of State to consider.

On "blowing hot and cold," in so far as existing use rights are concerned: see section 94 of the Town and Country Planning Act 1971. *Prossor* v. *Minister of Housing and Local Government,* 67 L.G.R. 109, and that line of cases were correctly decided where as in those cases there are building operations. The principle in *Prossor* has nothing to do with estoppel but with the principle that planning rights exist in rem. The test is a practical one: Has a new planning unit come into existence where building operations are involved? If the physical character of the land has been altered substantially so as to create a new planning unit then a new planning history begins.

A mere permission for change of use does not alter the physical nature of the land and does not create a new planning history. If the *Prossor* principle were extended it would lead to great difficulties: see section 22 (1) of the Act of 1971. A building, engineering or mining operation all affect the physical character of the land to create a new planning unit. On the other hand, a change of use can rarely create a new planning unit in the Crown's submission. It is conceded, however, that there are circumstances where this could happen, for example, where permission is granted to change the use of residential premises in single occupation to a multi-occupation use, such as where a house is divided into flats.

*Widdicombe Q.C.* in reply. A perusal of the leases in this case shows that the hangars were not chattels but part of the realty. As to section 88, the key subsection containing the powers of the Secretary of State is subsection (5). Subsections (6) and (7) are machinery to implement the provisions of subsection (5).

As to the three tests for validity of the condition, the second test that the condition "must fairly and reasonably relate to the permitted development" is in the statute. It is an advantage in the administration of planning law to have three and not two tests. The appellants would refer once again to section 29 of the Act of 1971 and of the examples contained in section 30. If the second test is to be treated as separate then the third test has still a reasonable life and scope of its own.

As to *Kruse* v. *Johnson* [1898] 2 Q.B. 91, the appellants join issue with the respondents on the question of byelaw cases having any relevance in planning matters.

It is pertinent to observe that if the language of Class X had read: " wholesale warehouse or store " this would have led to difficulties because it might have been considered to have included a departmental store and therefore the word " repository " was used instead of it. As to *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 the definition adopted there of " repository " appears to have come from *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803. But in that latter case the definition of repository there given was not necessary to the decision. It is further to be noted that in the Use Classes Order 1950 the draughtsman uses the word " business " when he deems it necessary so to do.

The argument put forward on behalf of the Secretary of State in relation to the *Prossor* principle is adopted. Many of the earlier cases such as, for example, *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 were decided by Lord Parker C.J. who decided *Prossor,* 67 L.G.R. 109.

*Boydell Q.C.* in reply. On an examination of those cases in which Lord Parker was party to the decision it will be seen that in none of them was planning permission acted upon, which is the *Prossor* principle.

Their Lordships took time for consideration.

February 28. VISCOUNT DILHORNE. My Lords, on May 7, 1962, the appellants, the International Synthetic Rubber Co. Ltd. (hereafter referred to as " I.S.R.") sent to the Hungerford Rural District Council who were then acting for the Berkshire County Council, then the local planning authority, an application dated May 3, 1962, for permission to use two hangars on what had been Membury Airfield as warehouses for the storage of synthetic rubber. They said that they were prospective buyers of the hangars from the Air Ministry and that as considerable capital outlay would be involved, " it would be appreciated if the planning authorities could see their way to giving their permission to cover as long a period forward as is possible."

I.S.R. were then occupying one of the hangars under a lease granted to them by the Secretary of State for Air for nine years commencing on May 8, 1961.

On May 31, 1962, the Hungerford Rural District Council gave that company permission to use the two hangars as warehouses subject to two conditions, one being that " The buildings shall be removed at the expiration of the period ending December 31, 1972."

The written statement of the Berkshire County Council which accompanied the county map in February 1960, said that:

> " Problems have arisen from time to time regarding the use of buildings on sites relinquished by government departments. These are often suitable in design for industrial or storage use, although frequently their location in open countryside renders them unsuitable in location as permanent centres of employment, and detrimental to landscape amenities. The local planning authority will normally only permit permanent changes of use in localities appropriate in the

light of their general policy objectives for the distribution of employment; otherwise they will seek to secure the removal of the buildings. Temporary periods of changed use may be permitted in particular circumstances."

On July 26, 1962, I.S.R. bought the two hangars and the Secretary of State's leasehold interest in the land under a lease for 40 years which commenced on November 30, 1961.

I.S.R. did not, as they could have done, appeal against the imposition of the condition that the hangars should be removed. On November 4, 1969, they applied for planning permission to make an extension to an existing office on the airfield. They were given permission to do so subject to the condition that at the expiration of the period ending December 31, 1972, the building should be removed.

On November 5, 1970, I.S.R. applied for an extension of the permission to use the hangars as warehouses for 30 years. On January 4, 1971, this application was refused and on June 25, 1971, I.S.R. appealed against this refusal.

The two hangars and the extension to the office were not removed at the expiration of the period ending December 31, 1972, and on November 12, 1973, the hangars and extension still not having been removed, the Hungerford Rural District Council served two enforcement notices on I.S.R. requiring their removal within three months.

I.S.R. appealed against these notices to the Secretary of State for the Environment. Although the case in respect of the enforcement notice relating to the office extension differed in some respects from that relating to the notice applying to the hangars, it was agreed that the result of the appeal as to the notice in respect of the office extension should depend on and follow the result of the appeal as to the notice about the hangars. No separate argument was therefore advanced in connection with the office extension.

These appeals were brought under section 88 of the Town and Country Planning Act 1971 which provides for an appeal against an enforcement notice on any of seven grounds. In this case only the first two are relevant. They are as follows:

> "(1) . . . (*a*) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged; (*b*) that the matters alleged in the notice do not constitute a breach of planning control."

In the notice of appeal relating to the hangars it was asserted, first, that the condition as to the removal of the hangars was void with the result that the permission granted in 1962 was unconditional, and, secondly, that the authorised use of the hangars on July 1, 1948, the date when the Town and Country Planning Act 1947 came into force, was "warehouse/storage" and that the hangars were used for "warehouse/storage purposes throughout the period 1948/62."

If the authorised use of the hangars on July 1, 1948, was "warehouse/storage" and that use had not been abandoned or if the "existing

A use" of the hangars was for "warehouse/storage purposes," it was not necessary to apply for planning permission to use the hangars for those purposes.

The first question to be considered in this appeal appears to me to be: *Was planning permission necessary for the use by I.S.R. of the hangars as warehouses?*

Before making his decision on these appeals the Secretary of State B directed a local inquiry. The inspector who held the inquiry reported on February 5, 1975. His findings of fact were accepted by the Secretary of State and the relevant findings were as follows: that Membury Airfield ceased to be operational in 1947; that from 1947 to 1953 the hangars were used as a storage depot on behalf of the Ministry of Agriculture, Fisheries and Food; that in 1953 the airfield was transferred to the United States C Air Force and the use then made of the hangars is not known; that in 1954 it became a sub-depot of No. 3 Maintenance Unit at Milton; that from 1955 to 1959 the hangars were used by the Home Office for the storage of Civil Defence vehicles; and that in 1959 an 11 year permission was granted for the use of the hangars for the storage of fertilisers subject to the condition that at the end of that period the hangars would be removed.

D The inspector concluded on the facts that there was a clearly established use of the hangars when in Crown occupation prior to 1959 for storage and that the only gap in their use for storage was when they were used by the United States Air Force and that after that, use for storage was resumed. In his view the application for permission to use them for the storage of fertilisers in 1959 was unnecessary and I.S.R. did not E require planning permission to use them for storage as that was their previous use.

The Secretary of State in his decision letter of July 24, 1975, held that when the hangars were used for storage purposes from 1947 to 1953 and again from 1955 to 1959 the hangars formed an independent planning unit. He held that the Home Office use of them was not use as wholesale warehouses nor was it use as repositories coming within Class X of F the Town and Country Planning (Use Classes) Order.

It was not contended by the appellants that the use by the Home Office was use as wholesale warehouses but it was submitted that the hangars were then used as repositories.

By the Town and Country Planning (Use Classes) Order 1948 (which came into force on the same day as the Town and Country Planning Act G 1947) it was provided by paragraph 3 (1) that:

> "Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land . . . shall not be deemed for the purposes of the Act to involve development of the land."

Class X in the Schedule read as follows: "Use as a wholesale warehouse H for any purpose, except storage of offensive or dangerous goods." And Class XI as follows: "Use as a repository for any purpose except storage of offensive or dangerous goods." "Repository" was defined in paragraph 2 (2) of this Order as meaning "a building (excluding any land

occupied therewith) where storage is the principal use and where no business is transacted other than incidentally to such storage." The meaning of " wholesale warehouse " was also defined.

In 1950 this Order was replaced by the Town and Country Planning (Use Classes) Order 1950. The purpose of this Order was to amalgamate certain of the use classes so that a wider range of changes of use might take place without involving development requiring planning permission.

Classes X and XI of the Order of 1948 were amalgamated and Class X in the Order of 1950 read as follows: " Use as a wholesale warehouse or repository for any purpose." In subsequent Use Classes Orders, this has not been altered.

The definitions of " repository " and " wholesale warehouse " were omitted from the 1950 and subsequent Use Classes Orders but, if it had been the intention that these words should bear a different meaning from that they bore from 1948 to 1950, I would have expected that to have been made clear.

In my opinion the definition of " repository " in the Order of 1948 is an excellent definition of the meaning that would ordinarily be given to that word.

The Secretary of State based his decision on a sentence of Lord Denning M.R. in his judgment in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506. Lord Denning had pointed out that under Class X a building used as a repository for storing furniture could be used as a repository for storing archives without getting planning permission and then went on to say, at p. 512: " A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (my emphasis).

In an earlier case *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 Havers J. had said: " ' Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business."

He did not say why he thought that nor did Lord Denning say why he thought that the storage must be part of a storage business. It may be that the conjunction of " wholesale warehouse " and " repository " in Class X of the Order of 1950 led to the view that as use as a wholesale warehouse would be use for a business purpose, use as a repository must also, to come within Class X, be for a business purpose but if this was so, the history of the Order shows, in my opinion, that it was not well-founded. A place may be used as a repository for archives without being used as part of a business, e.g. a muniment room. The merger of Classes X and XI of the Order of 1948 into Class X of the Order of 1950 was not done with the object of altering the meaning to be given to the word " repository " but to extend the changes of use that might be made without planning permission.

All the members of the Divisional Court (Lord Widgery C.J., Michael Davies and Robert Goff JJ.) and all the members of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) agreed that the use of the hangars by the Home Office was not use as a repository.

Despite the unanimity of judicial opinion and despite the strong view

A expressed by Lord Denning M.R. [1978] 1 W.L.R. 1241, 1250, that "no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber" and that of Lawton L.J., at p. 1253, that

> "As a matter of the ordinary modern usage of the English language, . . . no literate person would say that the use to which the Home Office had put the hangars in the 1950s was, or that the company
B are now, using them as a repository"

I feel compelled to say that to describe the use of the hangars when so filled as use for a repository is, in my opinion, a perfectly accurate and correct use of the English language. They were when used by the Home Office used as repositories for fire-pumps and so to describe them is just as correct as it is to describe a burial place as a repository for the
C dead.

The Secretary of State cannot be blamed for holding that they were not used as repositories coming within Class X in the light of what was said in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 but in my view it is wrong to say that to come within that class use as a repository must be use as part of a storage business.

D My conclusion on this part of the case is that the use by the Home Office was use as a repository coming within Class X and that, consequently, unless that use was abandoned—and that was not established—or unless I.S.R. cannot now rely on that use in consequence of "blowing hot and cold," I.S.R. can now, by virtue of Class X, use the hangars as wholesale warehouses without planning permission.

E *Blowing hot and cold*

The respondents contended that the appellant was precluded from relying on existing use rights and Class X as they had taken up and implemented the permission granted to them on May 31, 1962. This contention found favour with Lord Denning M.R. He said, that in 1962 I.S.R. had two inconsistent courses open to them, [1978] 1 W.L.R. 1241,
F 1250–1251:

> "One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only
G because they did not choose to rely on it. They should not be allowed to bring it up again now."

I do not know whether I.S.R. before they applied for planning permission in May 1962 and before they had acquired the hangars could have found out the past history but however that may be, I find this passage from Lord Denning's judgment difficult to reconcile with his
H acceptance of the argument advanced in *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 that the fact that a man applies for planning permission does not debar him from afterwards alleging that he was entitled to rely on "existing use" rights.

Lawton L.J. did not find it necessary to decide this question and Browne L.J. did not agree with Lord Denning on this. A

It was not until the decision in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109 that any support can be found for the proposition that application for followed by the grant and use of planning permission prevented reliance on existing use rights. In that case permission was given for the rebuilding of a petrol station subject to the condition that no retail sales other than of motor accessories B should take place thereon. After the rebuilding second-hand cars were displayed for sale on the site. An enforcement notice was served. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 113:

> "... assuming that there was ... an existing use right running on this land for the display and sale of motor cars, yet by adopting C the permission granted in April, 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

D

The correctness of this decision was doubted by Winn L.J. but not by Lord Denning M.R. in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15. There the planning permission was to build premises twice the size of premises which had been destroyed by fire. Lord Denning doubted whether, having obtained that permission and having taken advantage of it by building the new premises, the appellants could afterwards rely on existing use rights. Winn L.J. did not think E it necessary to decide the case on that ground. He thought that there was no sufficient proof of existing use rights.

These two cases were reviewed in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. In this case Widgery L.J., with whose judgment Lord Parker C.J. agreed, while thinking that the *Prossor* case, 67 L.G.R. 109, was rightly decided, F thought it was a case which should be applied with some little care. In this case planning permission was given for the erection of a building on a clear site and the building was put up. Widgery L.J. said, at p. 1117:

> "Where that happens ... in my judgment one gets an entirely new planning unit created by the new building. The land as such is G merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use, that is to say, immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, it is a use which can be restrained by planning control." H

My Lords, there are a number of cases, of which *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645

A is one, in which it has been held that a grant of planning permission does not prevent it being subsequently contended that no such permission was necessary on account of existing use rights and I do not myself think that the decision in the *Prossor* case, 67 L.G.R. 109, is sustainable on the basis that the obtaining and taking up of planning permission in itself prevents reliance on such rights.

If, however, the grant of planning permission, whether it be permission to build or for a change of use, is of such a character that the implementation of the permission leads to the creation of a new planning unit, then I think that it is right to say that existing use rights attaching to the former planning unit are extinguished. It may be that in the *Prossor* case the erection of the new building created a new planning unit. If it did, and it is not very clear from the report, then in my view that case was rightly decided.

It is clear that in this case the grant of the planning permission in May 1962 did not create a new planning unit and so, in my opinion, I.S.R. were not precluded from relying on the existing use rights attaching to the site.

If, contrary to my view, planning permission was necessary for the use of the hangars by I.S.R., the validity of the condition attached to that permission has to be determined.

*The validity of the condition*

Section 29 (1) of the Town and Country Planning Act 1971 requires a local planning authority when dealing with an application for planning permission to have regard to the provisions of the development plan so far as material "and to any other material considerations," and gives the planning authority power, subject to the provisions of a number of sections (which have no relevance to this case) to grant planning permission, either unconditionally or subject to such conditions as it thinks fit or to refuse permission.

The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Reid said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, this statement of law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed

them: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, *per* Willmer L.J. at p. 248, *per* Harman L.J. at p. 255, *per* Pearson L.J. at p. 261; *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 and *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720.

The conditions in this case were clearly imposed for planning purposes. Did they fairly and reasonably relate to the proposed development? If they did not, it is unnecessary to consider whether they were so unreasonable that no planning authority could reasonably have imposed them. The Secretary of State came to the conclusion that the condition that the hangars should be removed at the end of the period during which their use as warehouses was permitted, did not fairly and reasonably relate to their use as warehouses. The Court of Appeal held that he was wrong.

In 1968 the Ministry of Housing and Local Government published a circular entitled " The Use of Conditions in Planning Permissions " as guidance to the use of the power. In the paragraph headed " Is the condition relevant to the development to be permitted? " the following appears:

> " A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected. It may so spring, for example, if with both buildings on it, the site would be overdeveloped. But the grant of permission for a new building or for a change of use cannot properly be used as a pretext for general tidying-up by means of a condition on the permission."

The attention of the inspector was drawn to this paragraph and it was contended that he and the Secretary of State had reached the conclusion that the condition did not fairly and reasonably relate to the permission granted on the ground that, in view of this statement in the circular, a condition requiring the removal of a building could not be attached to a permission relating to its use. If they had decided this question on this ground, they were in my opinion, wrong. Although it may be that only in exceptional cases could it be held that a condition requiring the removal of buildings fairly and reasonably related to the grant of permission for their use, such cases may occur.

I do not, however, think that the inspector or the Secretary of State decided this question on this ground. The inspector held that:

> ". . . the condition that such substantial and existing buildings as the two hangars should be removed would appear to flow from a general wish to restore the area as a whole rather than from any planning need arising from the actual purpose for which the permission was sought. It was not necessary to that purpose, or to the protection of the environment in the fulfilment of that purpose: it was a condition extraneous to the proposed use."

So he held that the condition was void.

The Secretary of State in his decision letter said:

> "The inspector's conclusions have been considered. It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however, in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable."

This appears to me in substance to be a repetition in different language of the inspector's conclusion. The Secretary of State agreed with him as to the object the local planning authority had sought to achieve. They both emphasised the substantial nature of the existing buildings. The contention that the Secretary of State misdirected himself by holding that a condition requiring demolition of a building could not be attached to a use permission does not appear to me established.

If in the circumstances of this case the condition imposed was not, in the Secretary of State's opinion, fairly and reasonably related to the permission granted, the courts cannot interfere with his conclusion unless it is established that he misdirected himself or reached a conclusion to which he could not reasonably have come. That has not been done.

The Secretary of State held that the condition which in his view was invalid, was not severable from the permission granted and that consequently this permission was void. In my opinion he was entitled so to do and I consequently conclude that the enforcement notices were invalid and also that as the use of the hangars by I.S.R. started before January 1, 1964, no enforcement notice can now be served.

I would allow the appeals and restore the order of the Divisional Court. In my opinion the proper order as to costs should be that no order should be made in respect of the Secretary of State's costs and that the Newbury District Council should pay the appellants' costs in this House and in the Court of Appeal.

LORD EDMUND-DAVIES. My Lords, I seek to do no more than add some short comments on the three main issues involved in these appeals, as I share in the common agreement of your Lordships that the appeals must be allowed and the order of the Divisional Court restored, and this for the reasons advanced in the speech of my noble and learned friend, Viscount Dilhorne.

Of the three issues, the first logically calling for consideration is whether, on the true construction of Class X of the Town and Country Planning (Use Classes) Order 1950, the use by the Home Office of the former aircraft hangars between 1955 and 1959 for the long-term storage of civil defence vehicles constituted use as a "repository." A negative answer to that question has hitherto been given throughout by the

Secretary of State, the Divisional Court and the Court of Appeal. But the true answer, as I think, is that there was a Class X user of the hangars right back to 1950, when the Use Classes Order of that year put "wholesale warehouse" and "repository" uses for the first time in the same user class. It is common ground that the I.S.R. user was as a wholesale warehouse, and the sole dispute on this aspect of the case relates to the nature of the Home Office four years' user. If, as I.S.R. assert, it was as a "repository," it follows that the later user by them involved no material change of user and therefore no "development," and, accordingly, no planning permission was necessary. The issue accordingly resolved itself into the proper meaning of the term "repository." Havers J. said in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810: "'Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business." This was followed by the obiter dictum of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, that: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (Emphasis added). But, my Lords, the relevant words of the Use Classes Order itself are "repository for any purpose," and the qualification judicially imposed was, with respect, contrary both to the Order itself and to the generally accepted meaning of "repository." There is, I hold, no material difference (as far as the Use Classes Order is concerned) between a furniture repository or a repository for archives (cited by Lord Denning M.R. as typical uses of the word) and the use of the hangars by I.S.R. as a wholesale warehouse. It follows, accordingly, that no planning permission was required by them in turning the hangars to such use.

My Lords, as to the earlier issue raised, that relating to the interpretation of sections 29 and 30 of the Town and Country Planning Act 1971, I desire to say no more than that, in my judgment, learned counsel for I.S.R. went farther than he need in submitting that a condition for removal of buildings could *never* be attached to a planning permission restricted to change of use. It is true that such was the view expressed in the ministry circular 5/68, issued in 1968 ("The Use of Conditions in Planning Permissions") and followed by the Secretary of State in the present case. But whether a removal condition may properly be imposed in *some* circumstances, wholly different from those of the present case, may on another occasion call for careful consideration. For present purposes it is sufficient to hold, as I do, that, in the circumstances of the instant case, the condition for removal of the hangars did not fairly or reasonably relate to the permitted development.

The third issue ("Blowing hot and cold") was not advanced at the inquiry and was therefore never considered by the Secretary of State. Nor was it raised in the notice of motion to the Divisional Court, though it was adverted to at the hearing, Michael Davies J. restricting himself to saying (1977) 75 L.G.R. 608, 612: "I do not think that there is any comfort for the appellant [Newbury District Council] in it," and Robert Goff J. expressing himself similarly. In the Court of Appeal it was sympathetically received by Lord Denning M.R. alone. Learned counsel for the

A Secretary of State expressed alarm in this House at the prospect of the view expressed by Lord Denning M.R. receiving acceptance by your Lordships, envisaging as one of the possible results the destruction even of what had long been regarded as established rights of user. I restrict myself to saying that I am in respectful agreement with all your Lordships in holding that, on the facts of this case, the "hot and cold" doctrine should be regarded as having no application.

B

LORD FRASER OF TULLYBELTON. My Lords, these appeals, which were heard together, raise questions of planning law as it affects two hangars built by the Royal Air Force on Membury Airfield during the war. The hangars now belong to the International Synthetic Rubber Co. Ltd. ("I.S.R."), who are the appellants in one appeal. The appellant in the other appeal is the Secretary of State for the Environment. The respon-
C dent in both appeals is Newbury District Council. After the war the hangars were used for storing various things but it is unnecessary to go further back than 1955. From 1955 to 1959 they were used by the Home Office for the long-term storage of civil defence vehicles, including "Green Goddess" fire engines. In 1959 planning permission was given for the hangars to be used for the storage of agricultural products, subject
D to a condition that the buildings were to be removed at the expiration of a period ending December 31, 1970. Thereafter one of them was used for a time for storing fertilisers and agricultural goods. On May 31, 1962, planning permission was granted to I.S.R. by the predecessors of the respondents as planning authority, for use of the hangars as "warehouses." The permission was not expressed to be for a limited period, but it was subject to two conditions, one of which was that "The build-
E ings shall be removed at the expiration of the period ending December 31, 1972." In July 1962 I.S.R., having been granted planning permission, bought the hangars and proceeded to use them as warehouses.

In 1970, when the time for demolition was drawing near, they applied for an extension of the planning permission for 30 years, but their application was refused by the respondents. I.S.R. appealed to the Secretary
F of State against the refusal, and on November 12, 1973, while the appeal was pending, an enforcement notice was served on them requiring them to comply with the condition that the hangars be removed. (A separate enforcement notice was served on I.S.R. at the same time relating to the removal of another small building. This notice was also the subject of an appeal which forms part of the present proceedings, but we heard no separate argument about it and I need not refer to it again.) I.S.R.
G appealed to the Secretary of State against the enforcement notice, and against the refusal to extend the planning permission for 30 years. After a public inquiry, the Secretary of State upheld I.S.R.'s appeal against the enforcement notice on the ground that the condition attached to the planning permission of 1962 was invalid and was not severable from the rest of the notice. But he rejected an argument for I.S.R. to
H the effect that no planning permission had been required in 1962 because the hangars had been in use since 1947 for a purpose in the same use class as wholesale warehouse. He dismissed the appeal against the refusal to extend planning permission for 30 years. The Divisional

Court refused an appeal against the Secretary of State's decision. The Court of Appeal allowed an appeal by the respondents and held that the enforcement notice was valid but they again rejected the argument that planning permission had been unnecessary. It will be convenient to consider that argument first.

*Was planning permission necessary in* 1962 *for use of the hangars as warehouses?*

The Town and Country Planning (Use Classes) Order 1950 provides in paragraph 3 that where a building or other land is used for a purpose specified in the Schedule to the Order, the use of the building or land for any other purpose of the same class shall not be deemed to involve development of the land in the sense of the Town and Country Planning Acts. The result is that planning permission for the change of use within the class is not required. Class X in the Schedule is as follows: "Use as a wholesale warehouse or repository for any purpose." It was common ground that the hangars had been used since 1959 as wholesale warehouses. It was also common ground that if the use of the hangars by the Home Office from 1955 to 1959 had been as "repositories" such use would be within Class X of the Order and that therefore no planning permission would be required to use them as wholesale warehouses. The question in dispute is whether the use by the Home Office for the long-term storage of civil defence vehicles was use as a "repository." The Secretary of State and all the learned judges who have so far considered this question have held that the Home Office did not use the buildings as repositories. It is therefore only with diffidence that I reach the opposite conclusion, as I feel bound to do. In the Court of Appeal, Lord Denning M.R. said that it was a matter of impression depending on the meaning that one gives to the word "repository" in one's own vocabulary: [1978] 1 W.L.R. 1241, 1249. He went on, at p. 1250:

> "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

The other learned Lords Justices agreed with Lord Denning's view and they also expressed agreement with the statement by Lord Denning in the case of *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 as follows: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (My italics). That statement was quoted by the Secretary of State in his decision letter in the present appeal and he naturally and properly relied upon it in making his decision. But the words in italics were not strictly necessary to the decision in the case of *Trentham.* They seem to have been taken from an earlier statement, which was also obiter, by Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810. In my respectful opinion, for the reason which I am about to explain, the words in italics are not correct.

The question is not simply what the word "repository" means in ordinary speech, but what it means as used in Class X of the Schedule

to the Order of 1950. The two meanings are not necessarily identical. In ordinary speech the word is seldom used, but when used it is applied mainly to two things, a furniture repository and a repository for documents. In the latter sense it may be applied either to a building such as the Public Record Office or to places such as a safe or a desk in which a person's will or codicils are likely to be found after his death; in neither case is the storage "as part of a storage business." But the *Shorter Oxford English Dictionary*, 3rd ed. (1944), p. 1707, gives the word a much more general meaning. It gives the first meaning of "repository" as "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." In this Order the meaning is not restricted, because Class X includes repository "for any purpose." It seems to me that buildings used for the long-term storage of vehicles fall clearly within that description. The reason why the draftsman preferred the word repository to the commoner word "store" may be that "store" is sometimes used to include a retail shop such as a "department store."

If it were permissible to refer to the Use Classes Order of 1948, which was repealed and replaced by the Order of 1950, the matter would, I think, be even clearer because in paragraph 2 (2) of the Order of 1948 "repository" is defined as meaning "a building . . . where storage is the principal use and where no business is transacted other than incidentally to such storage." In the Schedule to the Order of 1948, use as a wholesale warehouse and use as a repository were in separate Use Classes, numbered X and XI respectively. But in the Schedule to the Order of 1950 those classes were amalgamated and the definition of repository was omitted. Comparison of the two Orders is of course permissible, but there is no way in which the courts can know for certain what was the purpose of these changes. In any event, what matters is their effect which has to be ascertained by construing the Order of 1950, and not by relying on the explanatory note attached to it which is not part of the Order but is intended merely to indicate its general purport. In these circumstances I do not think it would be legitimate to assume that the meaning of repository was the same in both Orders, or to use the 1948 definition as an aid to construing the Order of 1950. I shall therefore disregard the Order of 1948.

It follows from what I have said that in my opinion the change of use from repositories to wholesale warehouses was a change between two uses, both of which were within Class X. It was therefore not development and did not require planning permission. So, unless I.S.R. are precluded from relying upon the Home Office use of the buildings as repositories, it is immaterial whether the enforcement notice was valid or not.

*Blowing hot and cold*

In the Court of Appeal Lord Denning M.R. held that, even if the hangars had been used as "repositories" by the Home Office, I.S.R. would not now be entitled to rely upon existing use rights derived from that use, because they had accepted and acted upon the grant of planning permission in 1962, which was subject to the condition of removal, and

they could not turn round now and say they did not need planning permission after all. That would be blowing hot and cold and should not be allowed. He applied the maxim of law and equity: "Qui sentit commodum sentire debet et onus." Mr. Boydell said that the planning authority had been prejudiced by I.S.R.'s apparent acceptance of the planning permission with its attached condition for nearly 10 years, and I was at first attracted by the argument. The principle for which Mr. Boydell contended was stated by him thus: "The planning history of a site starts afresh when the acceptance and implementation of planning permission is inconsistent with reliance on earlier existing use rights." I doubt whether that formulation really applies to the circumstances of the present case, because the implementation of the 1962 planning permission can hardly be said to have been inconsistent with reliance on earlier existing use rights during the period before December 31, 1972. During that period there was nothing to show whether I.S.R.'s use of the hangars was in reliance on the planning permission of 1962 or on earlier existing use rights. But apart from that point which arises on the facts of this appeal, I am of opinion that the principle contended for is unsound. It would introduce an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land. To do so would lead to uncertainty and confusion. It would also interfere with the convenient practice whereby prospective vendors or purchasers of land apply for planning permission as a precaution if there is doubt about whether their proposals are already permissible or not. It would, moreover, be inconsistent with a number of decided cases, including *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645.

The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are, in my opinion, when a new planning unit comes into existence as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109. That was a case where planning permission had been given for the rebuilding of a petrol service station and the rebuilding had been carried out. Lord Parker C.J. said, at p. 113:

> "... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

*Prossor's* case was approved in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, 10, where the facts were very similar, and in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 where a new building was erected covering the whole of an area of open land. Such physical alteration will normally be made only in implementation of planning permission for erection of new buildings, but it might be made in implementation of planning permission for a change of use in some circumstances. For example, as was suggested in argument, there

A is the case of a single dwelling house being divided into separate flats by purely internal alterations, for which the only planning permission required would be for a change of use. Accordingly I do not think that the principle should be limited to cases of planning permission for rebuilding, although it will only seldom apply to planning permission for change of use.

For these reasons I do not consider that I.S.R. are precluded from B relying upon their existing use rights derived from the Home Office use of the site. It follows that there is nothing to prevent their continuing to use the hangars as warehouses or, if they choose, reverting to using them as repositories.

*Validity of the enforcement notice*

C Having regard to the opinion which I have already expressed, it is not strictly necessary to consider this matter, but as we were urged by counsel for all the parties to give what guidance we could, I shall express my opinion on the questions that arise.

The power on which the respondents relied to justify the condition attached to the planning permission granted in 1969 was derived from section 17 (1) of the Town and Country Planning Act 1962, but it is D more convenient to refer to section 29 (1) of the Town and Country Planning Act 1971, which does not differ from the earlier enactment in any material respect. Section 29 (1) provides as follows:

> "Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, E in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or *subject to such conditions as they think fit*; . . ."

F The words that I have italicised would appear on their face to confer an unlimited power, but it is plain that the power is subject to certain limitations. If authority for that proposition is needed it is to be found in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. In order to be valid, a condition must satisfy three tests. First, it must have a planning purpose. It may G have other purposes as well as its planning purpose. But if it is imposed solely for some other purpose or purposes, such as furtherance of the housing policy of the local authority, it will not be valid as a planning condition: see *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720. Second, it must relate to the permitted development to which it is annexed. The best known state- H ment of these two tests is that by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 which has been followed and applied in many later cases. Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

One reason, relevant to the instant case, why it would be wrong to secure removal of buildings by the use of a condition unrelated to the permitted development is that it would enable the planning authority to evade its liability to pay compensation for removal under section 51 of the Act of 1971. Thirdly, the condition must be "reasonable" in the rather special sense of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 229. Thus it will be invalid if it is "so clearly unreasonable that no reasonable planning authority could have imposed it" as Lord Widgery C.J. said in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1553.

There was no dispute between the parties that tests substantially in the terms I have set out were those relevant for the present purpose. It may not be strictly necessary to specify the second of these tests separately, as it may be included within the third, but I think it is desirable to set it out as a separate test lest it be overlooked.

It remains to ascertain whether the Secretary of State applied these tests in the present case. Clearly the condition for the removal of the buildings was imposed in furtherance of the authority's planning policy, and it therefore satisfied the first test. I think it also satisfies the third test. The second test raises more difficulty. The reasons for the Secretary of State's decision on this part of the appeal are given in paragraph 8 of his decision letter, which included the following passage:

> "It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid. The allegation that [I.S.R.] failed to comply with the condition is therefore inappropriate. The appeal succeeds on ground (b) and the enforcement notice is being quashed."

Ground (b) is a reference to section 88 (1) (*b*) of the Act of 1971 which provides that an appeal may be taken to the Secretary of State against an enforcement notice on the ground: "(*b*) that the matters alleged in the notice do not constitute a breach of planning control." I am not sure whether paragraph 8 is intended to mean that a condition for removal

of buildings could never, as a matter of law, be sufficiently related to planning permission which was merely for a change of use (as distinct from permission for the erection of buildings), or that on the facts in this case, it was not related to the permission. On the whole I am inclined to think that the former view is correct, because the only circumstance of the case which is mentioned is that planning permission has been sought "merely for a change of use of existing substantial buildings." I am also influenced by the fact that that appears to be the opinion of the Secretary of State's department as set out in the circular 5/68, dated February 6, 1968, issued by the former Ministry of Housing and Local Government with its accompanying memorandum on "The Use of Conditions in Planning Permissions," paragraph 9 of which includes the following sentence:

> "A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that *a new building is to be erected.*" (My italics.)

That statement is, in my opinion, too absolute and the words in italics are not supported by authority. If (as I am inclined to think) it explains the reason on which the Secretary of State's decision was based, then the reason was, in my opinion, erroneous in law. But even if that is so, I am satisfied that, if the Secretary of State had correctly appreciated that a condition for removal of buildings attached to permission for change of use might be valid, he would nevertheless have certainly decided that in the circumstances of this case it was not sufficiently related to the permission and was therefore invalid. There was nothing that I can see about the change of use to a wholesale warehouse which required or justified a condition for removal of the buildings. The reason why the planning authority ordered their removal was to improve or restore the amenity of the neighbourhood by getting rid of ugly buildings. No doubt that was a very proper object, but it had nothing particularly to do with the use of the buildings as warehouses. The fact that the permission was in substance a temporary permission, as the Court of Appeal held, does not seem to me to be relevant to this matter.

Accordingly I am of opinion that, even giving this condition the benevolent treatment to which, like a byelaw, it is entitled, it was invalid. If planning permission had been required for the change of use in 1962, the Secretary of State would have been right in so deciding and also in deciding that, as the condition could not be severed from the permission, the permission itself was invalid, although his reason for doing so was (on my reading of his letter) wrong.

I would allow the appeal by I.S.R. with costs here and below against Newbury District Council. The Secretary of State must bear his own costs throughout.

LORD SCARMAN. My Lords, the House has under consideration two appeals. Both the Secretary of State for the Environment, to whom I shall refer as "the Minister," and the International Synthetic Rubber

Co. Ltd., to whom I shall refer as "the company," appeal against the reversal by the Court of Appeal of the decision of the Divisional Court dismissing the appeal of the Newbury District Council, to whom I shall refer as "the council," from a decision of the Minister allowing the company's appeal against an enforcement notice served on it by the Hungerford Rural District Council as agent for the local planning authority to whose statutory functions and duties the council has succeeded. The council, as local planning authority, seek to uphold a condition imposed by Hungerford Rural District Council upon a planning permission granted to the company on May 31, 1962, to use two ex-R.A.F. hangars as warehouses for the storage of synthetic rubber. The condition was that "The buildings shall be removed at the expiration of the period ending December 31, 1972." The Minister, holding that the condition was invalid quashed the enforcement notice. The Divisional Court agreed. But the Court of Appeal, ruling that the condition was valid, upheld the enforcement notice. This House gave leave to appeal.

The Minister announced his decision by letter dated July 24, 1975. He accepted the facts as found by his inspector after a public inquiry held by him in January 1975. The appeal site comprises two large aerodrome hangars on either side of an unclassified road and enclosed in a perimeter fence at the former Membury airfield some five miles north-west of Hungerford and just south of the M4 motorway. The freehold was vested in the Crown until 1961, when it was returned to the Gilbey family who had owned the land before the war.

The airfield is an area allocated on the county map for service requirements but is surrounded for the most part by land in agricultural use ("white" on the map, indicating that it is not planned to disturb the existing use). The airfield was operational until 1947. From 1947 until 1953 the two hangars were used by the Ministry of Agriculture, Fisheries and Food "as a buffer storage depot." In 1953 the depot was cleared and the airfield transferred to the United States Air Force for their use. The nature of the U.S.A.F. use is not known. In 1954 the Royal Air Force took over the airfield (including the hangars) for use as a sub-depot of No. 3 Maintenance Unit. From 1955 to 1959 the hangars were used by the Home Office for the storage of civil defence vehicles. In 1959 planning permission was granted to Mr. J. S. Gilbey (a member of the family whose land it had been before the war) for use of the hangars for the storage of agricultural products (including fertiliser). Permission was conditional upon the buildings being removed at the expiration of the period ending December 31, 1964—which was later extended to December 31, 1970. A certain Mr. James was allowed to use, and did use, one of the hangars for the storage of agricultural products and fertiliser. In 1961 the company began to use one hangar for the storage of synthetic rubber.

In 1962 there occurred the planning application and permission with which these appeals are directly concerned. On May 3, 1962, the company applied for permission to use the two hangars "as warehouses for the storage of synthetic rubber," declaring (with strict accuracy only so far as one hangar was concerned) that they were already in use for that purpose. On May 31, 1962, planning permission was granted subject to

conditions. The relevant terms of the permission were that the local planning authority permitted:

> "Use of two hangars on Membury Airfield as warehouses . . . subject to compliance with the conditions specified hereunder: 1. The buildings shall be removed at the expiration of the period ending December 31, 1972. 2. . . . [irrelevant to the two appeals]."

The reasons for the conditions were stated to be:

> "1. To accord with the local planning authority's policy regarding industrial development in rural areas. 2. To safeguard the amenities of the area."

The company did not appeal against the conditions. But two months later, in July 1962, it took a long lease of the site, and put both hangars to use as warehouses.

On November 5, 1970, the company applied for planning permission to use the hangars as warehouses for a further 30 years (i.e. until the expiry of their lease) from December 31, 1972. Clearly the company saw their right of use as based on a temporary permission expiring at the end of 1972. Permission was refused, and on June 25, 1971, the company appealed to the Minister.

The company did not remove the hangars by December 31, 1972, but continued its use of them. On November 12, 1973, the local planning authority served an enforcement notice requiring the company to remove them. The company appealed to the Minister against the notice.

After stating the facts, the inspector, who took the public inquiry, concluded:

> " . . . that there was a clearly established use of the appeal hangars when in Crown occupation, prior to 1959, for storage. Foodstuffs were stored from 1947 to 1953, then the hangars were part of a sub-depot for No. 3 Maintenance Unit at Milton, then from 1955 to 1959 they were used for storing civil defence vehicles."

He noted that, after a gap in 1953, when the United States Air Force had the use of the airfield, the storage use was resumed and commented that "The application for permission for storage in 1959 [the Gilbey application] appears to have been unnecessary." Though his report contains a very helpful discussion of what he calls "the legal implications" of the facts, he was careful to leave them to the Minister. He contented himself with two recommendations confined to the planning aspects of the case: the first that, if the Minister decided that there had been a breach of planning control, the condition for removal of the hangars should not be discharged, and the second that the planning appeal should be dismissed.

Three questions arise on these facts. First, was planning permission required when it was granted in 1962? I shall call this the existing use point. Secondly, if it was not, can the company now rely on an existing use right and so avoid the condition imposed, that the hangars should be removed by the end of 1972? I shall call this the estoppel point.

Thirdly, if planning permission was required, was the condition one which the local planning authority could lawfully impose? The first question turns on the true construction of the Use Classes Order 1950—the effective order in 1962. The second and third questions raise points of great importance in the law of planning control and its enforcement.

*Existing use*

The Town and Country Planning Act 1971 (the Act) consolidated the statute law relating to town and country planning in England and Wales. Part III (sections 22 to 53) provides for general planning control, and Part V (sections 87 to 111) for the enforcement of planning control. Section 22 (1) (which reproduces the earlier law) defines development as meaning "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." Subsection (2) provides that certain operations or uses of land shall not be taken to involve development of the land including

> "(*f*) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use thereof for any other purpose of the same class."

This provision has been a feature of the legislation ever since the Town and Country Planning Act of 1947. A Use Classes Order had been made under that Act in 1948. It was revoked and replaced by the Use Classes Order 1950, which is the effective order for the purposes of these appeals. (In its turn it has been replaced by subsequent orders.) Where a building or other land is used for a purpose of any class specified in the Schedule to the order, its use for any other purpose of the same class shall not be deemed to involve development of the land: (article 3 (1)). The Schedule specifies, amongst other classes. "Class X—Use as a wholesale warehouse or repository for any purpose."

The purpose of the Use Classes Order becomes evident when one reaches section 23 (1) of the Act, which provides that subject to the provisions of the section "planning permission is required for the carrying out of any development of land." Since a change of use within a class is not deemed to involve development, planning permission for the change of use is not required. The effect, therefore, of Class X is that premises previously used as a repository for any purpose may be used as a wholesale warehouse; and vice versa. In neither case does the law deem any development to be involved or require the grant of planning permission. A comparison of the Order of 1950 with that of 1948, which it revoked, is, in my judgment, permissible and instructive. The Order of 1950 amalgamated certain use classes to be found in the earlier Order, thus permitting a wider range of changes of use to take place without the requirement of planning permission. The Order of 1948 placed use as a wholesale warehouse in Class X and use as a repository in Class XI: it also included definitions of "wholesale warehouse" and "repository." The Order of 1950 has no definition of either term: but, since the

purpose of the Order is the amalgamation of certain use classes to be found in the Order of 1948, it is legitimate, for the purpose of construing the Order, to note the meaning of these terms in the two use classes which the Order of 1950 has amalgamated into one (the new Class X). The Order of 1948 provided that "wholesale warehouse" means "a building where business, principally of a wholesale nature, is transacted," and that "repository" means "a building . . . where storage is the principal use and where no business is transacted other than incidentally to such storage."

It is common ground that the company uses the hangars as wholesale warehouses. If, therefore, the lawful prior use was that of a "repository for any purpose," planning permission was unnecessary: for there would be an existing use right entitling the company to use them as wholesale warehouses.

It is also common ground (though at one time the council was disposed to deny it) that the Crown use, which began in 1947 and with two "service" breaks continued until 1959, was lawful. The inspector has found and the Minister has accepted that this use was "for storage purposes." In other words, the hangars were buildings in respect of which there had been lawfully established an existing storage use prior to the arrival of the company on site.

The sole issue, therefore, is as to the meaning to be given to the words "repository for any purpose" where they appear in the Order. The company's submission is that "repository" is (as defined in the Order of 1948) a building used for storage, and that Class X includes such use "for any purpose." The Minister and the council submit that the context requires that a limitation be placed on the words "for any purpose," namely a limitation to the purposes of a storage business. This construction found favour with the Divisional Court and the Court of Appeal. Reliance was placed on *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, a decision of the Court of Appeal. In that case the Court of Appeal reached the unsurprising conclusion that use as a farm shed was not use as a repository, Diplock L.J. commenting that nowhere, except in a court of law, did he think it would be argued "with gravity" that ordinary farm buildings are properly described as "repositories." In his judgment, however, Lord Denning M.R. essayed a definition of repository. He said, at p. 512: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." The Court of Appeal applied this definition in this case. After hearing Mr. Widdicombe's submissions for the company (no doubt very persuasive, if his argument in this House be any guide), the Master of the Rolls felt that his "one answer" must be "a matter of impression." So far, I agree. But then he added [1978] 1 W.L.R. 1241, 1250: "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber." I cannot, with respect, agree. I find that neither the standard English dictionaries nor my experience of the English language as writer and student suggest that the qualification "as part of a storage business" is to be embodied in the ordinary meaning of the

word "repository." The primary and literal meaning of "repository" is what anyone acquainted with its Latin origin would expect—a place or receptacle where things are stored. But there is also an old established secondary meaning "A place where things are kept or offered for sale; a warehouse, store, shop, mart": *Shorter Oxford English Dictionary*, 3rd ed., p. 1707, and repeated in subsequent editions. But this meaning is not limited to use "as part of a storage business." It embraces any business use, as distinct, for example, from a repository used for domestic, museum, or academic purposes. Two questions, therefore, arise. First, is "repository" used in the Order in its primary, or literal, sense? Secondly, if not, is the term "use as a repository" a reference to a general business use or to a use limited to that of a storage business?

The language of the class is wide enough to permit the primary, or literal, meaning. But the context, I think, makes the secondary, but well established, meaning the more likely. In this respect, I note that Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, defined "repository" as a building wherein goods were kept in the course of trade or business. Although the various classes scheduled to the Order make strange reading and include some oddly assorted bedfellows, they are classes. The Order being part of the apparatus of planning control, I look for a planning link between the several members of each class: and this is not difficult to ascertain, though the linkage is looser in some classes than in others. So far as Class X is concerned, if each of the two specified uses is a business use, the planning link between them is established without doing any violence to the English language. But I cannot go the step further which was taken by Lord Denning M.R. in the *Trentham* case [1966] 1 W.L.R. 506 and construe the business use as limited to that of a storage business. The words "for any purpose," though consistent with a general limitation of the class to business use, negative the possibility of limiting use as a repository to a specific type of business. The express limitation of "wholesale" upon the warehouse use is to be contrasted with the express extension of the repository use to such use "for any purpose."

The question for decision is, therefore, whether the Crown use of the hangars for storage purposes between 1947 and 1959 was a business use. The word "business" is apt to include official or governmental business as well as commercial business. The relevance of business to planning is that it is associated with a certain character of development and a certain level of activity upon and adjacent to the land, e.g., the type of buildings and the level of traffic movement. As such, it matters not whether the Crown is storing goods in the hangars for the purposes of public business or a wholesaler for his private business purposes or any other commercial enterprise for its business purposes. To quote the Order of 1948, "where storage is the principal use and where no business is transacted other than incidentally to such storage," the nature or purpose of the business for which the repository is used is immaterial for planning purposes. The one essential limitation, which is to be compared with the "wholesale" limitation upon warehouse use, is implicit in the word "repository," namely, that the principal use is storage. So

understood, Class X does embrace the Home Office and Ministry of Food use. Mr. Boydell, for the council, sought to avoid this conclusion by submitting—correctly—that not all uses of land are included in the Use Classes Order. He urged upon the House the proposition that the Crown use was sui generis, (in English, a distinct, unique use) and not covered by Class X. I do not accept his proposition. Properly considered, the Crown use was as much a storage use for its business as would be that of any commercial enterprise for its business.

Accordingly, I think the *Trentham* limitation, "as part of a storage business," was erroneous and that Class X is wide enough to include the Crown use in this case. The Crown did, and the company does, use the hangars for storage, each for the purposes of its business: and no business is transacted on the site save that which is incidental to storage. My conclusion is, therefore, that the planning permission obtained by the company in 1962 was unnecessary. There was an existing use right by virtue of Class X of the Use Classes Order.

*The estoppel point* ("Blowing hot and cold")

The Court of Appeal did not have to decide whether the company by taking up and then exercising the 1962 planning permission had estopped itself from relying on its existing use right; for the court was unanimous that no such right existed. But, as your Lordships are agreed that planning permission was unnecessary, the point does now arise for decision.

In the Court of Appeal, Lawton L.J. found the point attractive, but, since it did not arise, expressed no final opinion. Browne L.J. did not find the point attractive. He said [1978] 1 W.L.R. 1241, 1256:

> "I will only say that as at present advised I am afraid that I do not agree with Lord Denning M.R. on this point, except where the circumstances are as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109 and the cases which have followed and applied that decision—viz. where a new planning unit—and indeed in those cases a new physical unit—has been created."

Lord Denning M.R., however, was prepared to lay down a broad general principle. He said, at p. 1250:

> "*Blowing hot and cold.* In case I am wrong about 'repository' I must turn to the final point, which is this: seeing that I.S.R. accepted the grant of planning permission in 1962 (subject to the condition of removal), can they now turn round and say that they did not need planning permission at all? Being entitled, as they say, to use the hangars for storing rubber without any permission at all. Mr. Widdicombe submitted that they could. He referred to *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 and *East Barnet Urban District Council* v. *British Transport Commission* [1962] 2 Q.B. 484. But Mr. Boydell on the other side referred to *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303, 315; *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.*

v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1552. To my mind the maxim of law and equity applies here: Qui sentit commodum sentire debet et onus. He who takes the benefit must accept it with the burdens that go with it. It has been applied recently in *Halsall* v. *Brizell* [1957] Ch. 169 and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 394. It is an instance of the general principle of equity considered in *Crabb* v. *Arun District Council* [1976] Ch. 179, 187–188 and it is, in my view, particularly applicable in planning cases. At any rate in those cases where the grant of planning permission opens a new chapter in the planning history of the site."

His last sentence is an echo of *Prossor's* case, 67 L.G.R. 109, which, I think, was correctly decided. But, as I shall endeavour to show, it does not follow from the correctness of *Prossor's* case that "the general principle" of equitable estoppel is applicable to planning cases.

As every law student who has read the opening chapters of *Snell's Principles of Equity* (now in its 27th ed. (1973)), knows, equity, as a body of law ancillary to the common law, developed so as to provide a protection for interests in property which was more effective than the remedies available at law. The Court of Chancery acted on the conscience of the legal owner of property. Equitable interests were strictly not proprietary in character, but rights in personam. Although they have developed a proprietary character, they are not enforceable against all the world. The purchaser for value without notice is not bound. In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.

The case law does not support Lord Denning's view. In *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422 Parker J. refused to hold that the plaintiffs, having treated an enforcement notice as a good notice, were estopped from denying its validity. He said, at p. 426: ". . . no person can waive a provision or a requirement of the law which is not solely for his benefit but which is for the public benefit."

In *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 a Divisional Court, which included Lord Parker C.J., referred to "the principle" applied in *Swallow's* case with approval and held that appellants who had obtained a conditional planning permission were not precluded from arguing that it was unnecessary.

Although the point was not argued, this House in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260 implicitly accepted Lord Parker's view: for in that case the appellant company, though it had obtained a conditional planning permission, was granted a declaration that their development was authorised by the Malvern Hills Act 1924 and so did not require permission.

Mr. Widdicombe, for the appellants, referred us to other cases to the same effect; notably *East Barnet Urban District Council* v. *British*

*Transport Commission* [1962] 2 Q.B. 484, in which Lord Parker C.J. was a member of the court.

My Lords, I agree with the view so consistently expressed by Lord Parker C.J. that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law. I forbear to discuss the cases upon which Lord Denning M.R. founded his view to the contrary because Mr. Boydell for the respondents did not seek to rely upon them. Indeed Mr. Boydell based his argument on *Prossor's* case, 67 L.G.R. 109, the principle of which is independent of any equitable doctrine. Suffice it to say of the authorities mentioned by Lord Denning in the passage which I have quoted that, if and in so far as they suggest (and I do not think that they do) that equitable estoppel has a place in the law of planning control, they are incorrect in law and should not be followed.

In *Prossor's* case Lord Parker C.J. enunciated a genuine planning principle. The appellant's predecessor in title had obtained planning permission for the rebuilding of a petrol service station on a by-pass. It was subject to a condition that no retail sales other than the sale of motor accessories should be carried out on the site. The appellant displayed on the site second-hand cars for sale. Being served with an enforcement notice, he claimed an existing use right. Though it was held that he had not established an existing use right, the Divisional Court also held that, by reason of the exercise of the planning permission to rebuild, the appellant was bound by the condition attached to the permission.

The case has nothing whatever to do with equitable estoppel. The permission was for a new operational development of the site, i.e. the rebuilding. Lord Parker C.J. put it thus, at p. 113:

> "The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used. . . ."

*Prossor's* case has been followed in a number of cases. Their effect is accurately summarised by Browne L.J. in the passage from his judgment which I have already quoted. *Prossor's* case was approved by the Court of Appeal in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15 and by the Divisional Court (Lord Parker C.J. presiding) in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. It has never, however, been applied—so far as the researches of counsel have been able to ascertain—to a change of use case. In every case the permitted development which has been held to begin a new planning history has been operational in character: i.e., it altered the physical nature of the land by building, mining, or other engineering works.

Mr. Widdicombe for the company submitted at the outset of his argument—and at that stage he was supported by Mr. Newey for the Minister—that the principle in *Prossor's* case, 67 L.G.R. 109, is not applicable to a "change of use" case, where there is no building or other physical operation covered by the planning permission. Clearly it

will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist, as at a later stage in the argument counsel for the Minister was able to show: e.g., where permission is granted to change the use of residential premises in single occupation to a multi-occupation use. There is in such a case a wholly new departure, a new chapter of planning history. It would be a negation of sound planning if the conditions attached to the multi-occupation use could be avoided merely because prior to such use the premises had the benefit of an existing residential use in single occupation. I conclude, therefore, that *Prossor's* principle is of general application where it can be shown that a new planning unit has been brought into existence by the grant and exercise of a new planning permission. But, where *Prossor's* case does not apply, the grant of an unnecessary planning permission does not preclude a landowner from relying on an existing use right.

Upon the facts of this case, it is, however, not possible to apply the *Prossor* principle. Planning-wise, upon the facts as found by the inspector and accepted by the Minister, there was no departure from the previous use substantial enough to justify the inference that a new unit had been created or a new planning history begun. I, therefore, reject the submission to the contrary made on behalf of the council.

*The validity of the condition*

My Lords, it is strictly unnecessary for me to express a view on the validity of the condition. But the House has heard full argument on the point, and I have reached the clear conclusion that the Minister's decision that the condition was invalid cannot be said to be incorrect in law. I think it right, therefore, to state briefly the reasons for my conclusion.

The Divisional Court agreed with the Minister. But the Court of Appeal upheld the enforcement notice, ruling that the condition for the removal of the hangars was valid. In their view, it fairly and reasonably related to the permitted development, i.e. the temporary use of the hangars as warehouses for the storage of synthetic rubber.

The Court of Appeal was entitled to reverse the Minister only if he could be shown to have made an error in law: section 246 of the Act. The law is, I think, well settled save for one small area of doubt. Mr. Widdicombe, opening the appeal, suggested that the law requires three tests of validity, all of which, he submitted, must be satisfied. Mr. Newey for the Minister agreed with him. Mr. Boydell for the council suggested that there were really only two. The difference between them is semantic not substantial. The three tests suggested are: (1) The condition must fairly and reasonably relate to the provisions of the development plan and to planning considerations affecting the land, (2) it must fairly and reasonably relate to the permitted development, and (3) it must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed. As Mr. Boydell said, test (3) is almost

A invariably wrapped up in the first two: but it is possible, though unusual, that a condition could in an exceptional case satisfy the first two tests but fail the third.

My Lords, I accept the appellant's submission that there are these three tests. The legal authority for the tests is to be found in the statute and its judicial interpretation. Section 29 (1) of the Act, substantially re-enacting section 14 (1) of the Act of 1947, provides as follows:

B "(1) Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, C 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (*b*) may refuse planning permission."

Though the subsection speaks of "such conditions as they think fit," its opening words impose a limitation on the powers of the local planning authority including the discretionary power to impose conditions. In D dealing with the application for permission, it shall have regard to the development plan "so far as material to the application, and to any other material considerations." I construe "material considerations" in the context of the subsection as a reference to planning considerations.

The subsection therefore expressly mentions the first two tests. The third test arises from the application to the planning law of the reasonableness test as enunciated by Lord Greene M.R. in *Associated Provincial* E *Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

This view of the subsection and its predecessor has been accepted by a line of authoritative judicial decisions, the most notable of which are *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* when in the Court of Appeal [1958] 1 Q.B. 554 and *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636. In the *Pyx* F *Granite* case at p. 572 Lord Denning said that "conditions . . . must fairly and reasonably relate to the permitted development." In *Fawcett's* case this House, in effect, adopted the three tests. Lord Cohen (pp. 660, 662) considered that the relevant questions which the court must answer were, as Mr. Megarry Q.C. had submitted, whether the scope of the condition was "unrelated to the policy declared in the outline plan or to any other sensible planning policy." Lord Denning G repeated his formula in the *Pyx Granite* case, adding, at p. 678, with a reference to the *Wednesbury* case, that "they [i.e. the local planning authority] must produce a result which does not offend against common sense." Lord Jenkins, at pp. 684–685, quoted Lord Denning's formulation in the *Pyx Granite* case with approval.

*Fawcett's* case [1961] A.C. 636 renders it unnecessary to cite further H authority, though there is plenty in the books, to establish the three tests. They have been recognised and adopted by the courts and this House.

The small area of doubt which remains is whether a condition for the removal of existing buildings can ever satisfy the tests if the

permitted development is limited to a change of use. The doubt is whether in such a case the condition could *ever* be said fairly and reasonably to relate to the permitted development. Indeed, the Court of Appeal has interpreted the Minister's decision as based on the view that in law no such condition can be imposed upon a "change of use permission." Browne L.J. put their view of the Minister's decision succinctly . . . [1978] 1 W.L.R. 1241, 1253: ". . . it is a holding of law that such a condition can *never* [emphasis supplied] be valid. . . ."

My Lords, if the Minister really did base his decision upon this view of the law, I would agree with the Court of Appeal that he erred in law. The point is not covered by any clear authority. But I would reject such a view of the law as being wrong in principle. First, the acceptance of an inflexible rule would, so far as it extends, preclude the application in change of use cases of the three recognised tests of validity. There would be substituted a rule of thumb for the exercise of the Minister's judgment upon the facts of the appeal.

Secondly, so various are the circumstances and interests affected by a planning permission that I would think it wrong, in the absence of an express statutory prohibition, to assert that, as a matter of law, a condition requiring the removal of buildings already in existence can never fairly or reasonably relate to a permission limited to a change of use. And the statute contains no express prohibition: for section 29 (1) leaves the imposition of conditions to the discretion of the local planning authority (and to the Minister on appeal). The validity of a condition must, therefore, depend in all cases upon the application of the three tests to the particular facts. If the permitted change of use is unlimited in time, it may well be fair and reasonable to require the removal of some existing buildings as a condition of the permission. But, if the permitted change of use should be for a limited period, the reasonableness of the condition may be more difficult to establish. In either case, the planning history, the situation of the land, the circumstances of all those interested in the land, and the existence of other statutory powers to achieve the same planning purpose would be relevant considerations.

In his decision letter the Minister gave the following reasons for holding the condition invalid. He said, in paragraph 8:

> "It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid."

These words do not suggest to me that the Minister committed himself to the view of the law which the Court of Appeal has attributed to him. He noted that permission was sought "merely for a change of use of existing substantial buildings": he considered that the removal condition was "not sufficiently related to the change of use" and was unreasonable. With the greatest respect, the Court of Appeal has

misinterpreted the Minister's reasons. He did not hold that a condition for removal of buildings attached to a "change of use permission" could never be valid. He held that in the circumstances of this case the condition was not sufficiently related to the permitted change of use. The condition certainly related to the development plan and to planning considerations and so satisfied the first test. But did it satisfy the second test? Was it fairly and reasonably related to the permitted development, i.e. a temporary change of use? This was for the Minister in the light of all the circumstances to decide; and he decided it. I would comment only that the Minister, being the ultimate authority on planning questions arising in the enforcement of planning control, is the appropriate authority to determine whether a condition "sufficiently," i.e. fairly and reasonably, relates to the permitted development.

The Court of Appeal was led into error by their belief that the Minister based his conclusion upon a statement to be found in the Ministry of Housing and Local Government Circular 5/68. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1247:

> "The present view of the ministry is contained in a circular which was issued in 1968 and is numbered 5/68, 'The Use of Conditions in Planning Permissions.' It is to the effect that, when an applicant applies for permission to *change the use of an existing building*, the local planning authority, when granting permission, can impose a condition limiting the period of time during which the building may be so used: but cannot impose a condition requiring the building to be *removed* at the end of that time. The crucial sentence in the circular is: 'A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected.'"

I agree that the circular has no legal effect and that, if in the sentence quoted it purports to lay down a rule of law, it is wrong. But how can it be said, as Lord Denning M.R. said, that this sentence in the circular represents "the present view of the Ministry upon the law"? The answer has to be—only if the Minister's letter of decision is to be read as saying so. But, my Lords, it says nothing of the sort.

I conclude, therefore, that the Minister made no error of law. That being so, his view—that a condition requiring the removal of existing substantial buildings was not sufficiently related to the temporary change of use for which permission was granted in this case—is unappealable: see section 246 of the Act.

My Lords, for all these reasons I would allow the appeals. I agree with the order for costs proposed by my noble and learned friend Viscount Dilhorne.

LORD LANE. My Lords, R.A.F. Station Membury was a wartime airfield built on requisitioned farming land. There were, apart from the usual concrete runways, perimeter tracks, hardstandings and so on, two hangars in which repair and maintenance of aircraft could be

carried out. The last aeroplane left Membury in about 1947. The hangars have since then had a chequered history. They are now (albeit functionally useful) an eyesore in otherwise pleasant countryside and, if aesthetic considerations were the only criterion, ought to be removed. The local planning authority (now Newbury District Council) contend that that is also the position in law, and the Court of Appeal have upheld that contention. They have decided that the present owners, the International Synthetic Rubber Ltd. (I.S.R.) are in law obliged to remove the hangars.

The history of the site, so far as it is known and material, is as follows. From 1947 to 1953 the hangars were used as a food storage depot by the Ministry of Agriculture, Fisheries and Food. For brief periods in 1953 the U.S.A.F. and in 1954 the R.A.F. used the airfield for purposes which are not known. From 1955 to 1959 the Home Office stored civil defence vehicles, fire-pumps and suchlike in the hangars. In 1959 planning permission was given for the use of the hangars for storage of agricultural products, subject to the condition that the hangars should be removed by a date later extended to December 31, 1970. In May 1962 permission was granted to I.S.R. as follows: "Use of two hangars on Membury Airfield as warehouses." That was qualified by two conditions:

> "(1) The buildings shall be removed at the expiration of the period ending December 31, 1972. (2) The use shall be confined to storage and no materials shall be stored which give rise to offence by reason of smell." For this reason: "(1) To accord with the local planning authority's policy regarding industrial development in rural areas. (2) To safeguard the amenities of the area."

The freehold title of the site was vested in the Crown until 1961. On November 30, 1961, the site was sold to the former owner and then leased back to the Crown for a period of 40 years. In July 1962 (i.e. after receipt of the permission) the lease was assigned and the hangars were sold to I.S.R. The terms of the particulars of sale imply, surprisingly, that the hangars were being treated as chattels, distinct from the realty. Nothing now turns on that point because the parties are all agreed that the hangars were and are, as one would expect, part of the realty.

Since then I.S.R. has used the hangars continuously for the storage of synthetic rubber. In November 1970 they applied for a postponement of the removal date to 2002. That was refused. By December 31, 1972, I.S.R. had taken no steps to comply with the condition by removing the hangars. In November 1973, therefore, the local authority served an enforcement notice. I.S.R. appealed under section 88 of the Town and Country Planning Act 1971. An inquiry was held in January 1975. The Minister's decision letter was published in July of that year. He allowed the appeal on the grounds that the condition imposed by the local authority was ultra vires and void. He further decided that the condition could not properly be severed from the permission and that the planning permission as a whole was void. If this conclusion is right, there is nothing at present to stop I.S.R. continuing

A to use the hangars as warehouses. This is because they started to use them as warehouses before 1963, and section 87 (1) of the Act of 1971 provides them in these circumstances with immunity. The Minister's view of the matter was upheld by the Divisional Court. The Court of Appeal, however, held that the condition was not ultra vires, that the enforcement notice was lawful and should be obeyed.

The issues are these. First, was any planning permission necessary B in 1962, that is, was there an existing use which absolved I.S.R. from the need for permission to use the hangars as warehouses? Secondly, if such was the case, are I.S.R. debarred from asserting that that is so? This has been referred to as the "blowing hot and cold" point. Thirdly, was the condition requiring the removal of the hangars outside the proper powers of the local planning authority and therefore void? If the first two questions are decided in favour of the appellants, the C third, although remaining important, would not affect the outcome whichever way it was decided.

*Existing use*

The use which I.S.R. assert was sufficient to render planning permission unnecessary in 1962 was the Home Office's storage of civil D vehicles from 1955 to 1959. That is the basis on which the case has been fought throughout.

The Town and Country Planning (Use Classes) Order 1950 provides by paragraph 3 (1) as follows:

> "Where a building . . . is used for a purpose of any class specified in the Schedule to this Order, the use of such building . . . for any E other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Class X of the Schedule is "Use as a wholesale warehouse or repository for any purpose."

The present use is undoubtedly as a wholesale warehouse. If the previous use was as a "repository for any purpose," it follows that no F permission was necessary because permission is only required for development and if the change was only from one Class X use to another there was no development.

All those who have hitherto considered the matter have come to the conclusion that the use by the Home Office as a store for Civil Defence vehicles was not use as a "repository." That being so, one naturally hesitates to differ, but I fear I must. The first meaning of the word G given in the *Shorter Oxford English Dictionary* is "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited or stored." The hangars fell plainly within this definition. The Court of Appeal held that a repository means "a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." If those last six words properly form part of the definition H then the Home Office use did not constitute the building a repository. But are those words justified? Their origin is probably to be found in a judgment of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 "'Repository,' I think, means a building wherein goods are kept

or stored, and I think it must be in the course of a trade or business." No reasons are given for this conclusion. The same view was expressed (obiter) by Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 and reiterated by him in the present case. As to the other point of view, exemplified by the *Oxford English Dictionary*, Lord Denning M.R. said this [1978] 1 W.L.R. 1241, 1249–1250:

> "The one answer I can give to this argument is that it is a matter of impression—depending on the meaning one gives to the word 'repository' in one's own vocabulary. My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

No doubt there are few people, however conversant with the English language, who would use the word "repository" at all. The question is, what does it mean in the Order of 1950? The word "store" might perhaps have been employed, but that would have led to confusion because the word is now commonly used to mean retail shop (e.g., "village store"). To my mind repository simply means a storage place. If there were any real doubt about the matter it would, I think, be resolved by the words which follow, namely "for any purpose." It is difficult to see how those words can possibly mean "for any purpose provided it is a business purpose." That is what the contention of the local authority entails. In my opinion I.S.R. had an existing use right under Class X and no planning permission was necessary.

*Blowing hot and cold*

The local authority contends further that even if the use made of the hangars by the Home Office fell within Class X of the Order of 1950, nevertheless it is not open to I.S.R. to rely on that existing use by reason of their applying for, receiving and using the planning permission of May 1962. In short they cannot now assert that no planning permission was necessary in the face of their 1962 actions.

This contention has been put in a number of different ways. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1250–1251:

> "The truth is that, back in 1962, they had two inconsistent courses open to them. One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only because they did not choose to rely on it. They should not be allowed to bring it up again now."

Lawton L.J. found it unnecessary to decide the point. Browne L.J. felt unable to agree with the dictum of the Master of the Rolls on this aspect of the case, except insofar as it applies to circumstances where a new planning unit has been created. Nor does Mr. Boydell seek to

A argue that the doctrine is of any more than narrow application. He contends, on the strength primarily of the decisions in *Prossor* v. *Minister of Housing and Local Government,* 67 L.G.R. 109 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment,* 32 P. & C.R. 1. that where planning permission is "sought, granted and implemented" (as he puts it) the planning history starts afresh and any previous existing use must be ignored. Alternatively B the planning history starts afresh where "the acceptance and implementation" of the planning permission is inconsistent with reliance on earlier existing right. It is inconsistent here, because the permission together with the condition as to removal of the hangars cannot live with the existing use right. In *Prossor's* case, 67 L.G.R. 109, the local planning authority granted permission for the rebuilding of a petrol C station with a condition prohibiting any retail sales other than of motor accessories. The appellant nevertheless displayed second-hand motor cars on the site. An enforcement notice was served but the appellant claimed that the site had existing use rights for the sale of second-hand cars. The Minister upheld the enforcement notice. On appeal to the Divisional Court Lord Parker C.J. had this to say, at p. 113:

> "... assuming that there was at all material times prior to April 1964 D an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964 the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site ... seems to me to begin afresh on April 4, 1964 with the grant of this permission, a permission E which was taken up and used, and the sole question here is: has there been a breach of that condition?"

The facts in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment,* 32 P. & C.R. 1 were very similar to those in *Prossor's* case. Browne L.J. in delivering the judgment of the court said, at p. 10: F

> "Mr. Payton made some criticism of *Prossor* v. *Minister of Housing and Local Government* ... but ... there is nothing to throw any doubt on the actual decision in that case, which was that where (as in the present case) there has been an application for a new planning permission and a grant of permission subject to an G express condition prohibiting a previous established use, and the new permission has been acted on, the previous use is extinguished."

Taken out of context, those words seem to widen the scope of *Prossor's* case. They must, however, be read against the facts of the case which show that this was an extensive development involving not only the original site but the addition of two adjoining sites and the creation H of access to the highway from the two new sites. It was, in short, the classic *Prossor* situation of a new planning unit being born.

The other cases relied on by Mr. Boydell all tell the same story. *Gray* v. *Minister of Housing and Local Government,* 68 L.G.R. 15 was

another rebuilding case. *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 concerned planning permission to erect a building upon an area of open land, a cleared bomb-site. Widgery L.J. in the course of his judgment in the Divisional Court said at p. 1117:

> "For my part I also think that it [*Prossor's* case] was entirely correctly decided, but I think that in extending and applying it we should tread warily and allow our experience to guide us as that experience is obtained . . . but I am quite confident that the principle of *Prossor's* case can be applied where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land. Where that happens . . . one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved."

Those words seem to me to express precisely and accurately the concept underlying *Prossor's* case, 67 L.G.R. 109. The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one. It may not always be as easy as it was in *Petticoat Lane Rentals* to say whether that has happened. There will no doubt be borderline cases difficult to decide, but that does not affect the principle. We were asked by Mr. Newey to say that the principle can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons for it may have been. No doubt it will usually be a case of permission to build which will attract the doctrine, but I myself would not altogether rule out the possibility that in some circumstances the permitted change of use might be so radical as to fulfil the criteria of *Prossor's* case.

In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended. I.S.R. succeed on this point.

*Was the condition void?*

The Town and Country Planning Act provides:

> " 29 (1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . .

A "30 (1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder—. . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period . . ."

Despite the breadth of the words "subject to such conditions as B they think fit," subsequent decisions have shown that to come within the ambit of the Act and therefore to be intra vires and valid a condition must fulfil the following three conditions: (1) it must be imposed for a planning purpose; (2) it must fairly and reasonably relate to the development for which permission is being given; (3) it must be reasonable; that is to say, it must be a condition which a reasonable local authority properly advised might impose. The first test arises directly C from the wording of the material sections of the Act. The second test comes from the same sections as interpreted by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and approved in this House by Lord Keith of Avonholm and Lord Jenkins in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and by Lord Reid and Lord Guest in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735. The D third test is probably derived from *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, and ensures that the Minister, if he is asked to review the actions of a local authority, may, even if tests (1) and (2) are quite satisfied, nevertheless allow an appeal on much broader grounds, if the effect of the condition would be to impose an obviously unreasonable burden upon E the appellant. Decisions of the local planning authority should not, however, lightly be set aside on this ground. As Lord Guest said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 760–761:

"There should, however, in my view be a benevolent interpretation given to the discretion exercised by a public representative body F such as the appellants in carrying out the functions entrusted to them by Parliament. Courts should not be astute to find they have acted outside the scope of their powers."

In the present case there is no doubt that the removal of these hangars by 1972 together with their use meantime as a wholesale warehouse was the fulfilment of a planning purpose. The idea was in G accordance with the development plan and amply fulfilled the first test.

It is on the second test, whether one treats it as part of test (3) (as Mr. Boydell suggests one should) or as a matter to be considered separately, that difficulty arises. The Court of Appeal has, unlike the Divisional Court, found that the obligation to demolish the hangars after 10 years did truly relate to the permitted development. Since H the permitted development consisted not in permission to build but in a change of use of the hangar to the purpose of a warehouse, it is at first sight hard to see how the conclusions of the Divisional Court can be faulted. As Robert Goff J. said in his judgment, 75 L.G.R. 608, 616:

"I cannot see how a condition that the buildings be removed related to the permitted development in the present case, which was the use of the building as a warehouse for synthetic rubber."

The Court of Appeal took the view that the application by I.S.R. should be interpreted as an application for temporary use of the two hangars as warehouses; and that the permission should be read as permission for temporary use. So interpreted, it is said, a condition which specified a period of temporary use and a condition which required removal of the hangars at the end of that period both related to the permitted development. Assuming that those glosses upon both the application and permission are legitimate, it still seems to me, with respect to the reasoning of the Court of Appeal, that a condition requiring the hangars to be demolished cannot fairly be said to relate to the use of the hangars as warehouses. The fact that the use is to be temporary does not bring the requirement to demolish into any closer relationship with the permitted development. In my opinion the Minister arrived at the correct conclusion, namely that the condition did not relate to the permitted development, was void and therefore failed, taking with it the permission to which it was annexed.

It is not altogether clear on what precise basis the Minister reached his decision. We have been shown a circular emanating from the Ministry in 1968 containing certain guidelines which it suggests should be observed by local planning authorities when considering applications for planning permission. Paragraph 9 of that document states as follows:

"*Is the condition relevant to the development to be permitted?* Unless it can be shown that the requirements of the condition are directly related to the development to be permitted, the condition is probably ultra vires. . . . The condition must be expedient having regard to the development which is being permitted; and where the condition requires the carrying out of works, or regulates the use of land, its requirements must be connected with the development permitted on the land which forms the subject of the planning application."

So far there can be no criticism. These suggestions are simply an amplification of the second test. At the end of paragraph 9, however, come the following words:

"A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected."

That is too sweeping a proposition. No doubt a condition requiring the removal of a building will usually relate to the permission only if the permission has been to erect a new building. There may however be exceptional cases, and some possibilities were suggested in argument, where a requirement to remove could properly be said to

relate to a mere permission to change the use. In short, the test is, does the condition fairly relate to the permission?; not, does the condition spring directly from the fact that a new building is to be erected? It is not clear which test the Minister applied here. The decision at which he arrived was correct whichever test he applied.

Since the decision was correct, the provisions of R.S.C., Ord. 94, r. 12 (5) do not require this House to remit the matter to the Minister for rehearing.

I would allow the appeal and restore the order of the Minister.

I agree with the order for costs proposed by my noble and learned friend, Viscount Dilhorne.

*Appeals allowed.*

Solicitors: *Treasury Solicitor; Herbert Smith & Co.; Sharpe, Pritchard & Co.*

J. A. G.

---

[HOUSE OF LORDS]

RANK XEROX LTD. . . . . RESPONDENTS

AND

LANE (INSPECTOR OF TAXES) . . . . . APPELLANT

1979 July 10, 11; Oct. 25

Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Russell of Killowen and Lord Keith of Kinkel

*Revenue — Corporation tax — Allowance of charges on income — Company's rights to payments from overseas company pursuant to agreements executed under seal — Disposal by distribution to shareholders—Whether payments "due under a covenant"—Whether "annual payments"—Whether company relieved from liability on notional gain arising from distribution of its rights to payments—Finance Act* 1965 (*c.* 25), *Sch.* 7, *para.* 12 (*c*)

Paragraph 12 of Schedule 7 to the Finance Act 1965 provides:

> "No chargeable gain shall accrue to any person on the disposal of a right to . . . (*c*) annual payments which are due under a covenant made by any person and which are not secured on any property."

In 1956 an English company and one of its subsidiaries agreed with an American corporation, X, to engage in a joint venture for the world wide exploitation, outside the United States of America and Canada, of a reproduction process called xerography. Pursuant to the agreement the taxpayer company was formed and X transferred to it all patents, patent applications and licence rights relating to the process. Following two further agreements under seal in 1964 and 1967, in

**BEFORE THE ENVIRONMENT COURT**

Decision No: [2013] NZEnvC 102

ENV-2012-WLG-000097

**IN THE MATTER** of an application for a declaration under s311 of the Resource Management Act 1991 by the HASTINGS DISTRICT COUNCIL

Court: Environment Judge C J Thompson
Heard: In Chambers at Wellington

Counsel: M J E Williams for the Hastings District Council
J S Andrew for the Secretary for the Environment

---

DECISION ON APPLICATION FOR A DECLARATION – NATIONAL ENVIRONMENTAL STANDARD – CONTAMINANTS IN SOIL

---

Decision issued: 10 MAY 2013

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

*Introduction*

[1] The Hastings District Council seeks a declaration in these terms:

1. May the construction and subsequent occupation of a dwelling along with any associated disturbance of the soil ("the activities") on an allotment ("the site") created in accordance with a subdivision consent granted before 13 October 2011 ("prior subdivision consent") be lawfully carried out under section 9(1) of the Resource Management Act 1991 ("RMA") without further resource consent notwithstanding contravention of the NES, and pursuant to sections 9(1)(a) and 43B(5) of the RMA:
   (a) in all such cases, or
   (b) for land within Hastings District, where the prior subdivision consent contains conditions for the purpose of protecting human health upon residential use of the site, and in particular testing by a suitably qualified and experienced engineer following completion of site preparation earthworks on the site (including any necessary remediation) to confirm that the levels of contaminants in the Residential Soil Health Based Guidelines as set out in Rule 15.1.9.18 of the Hastings District Plan are not exceeded on the site, or
   (c) for land in any other district, where the prior subdivision consent contains equivalent conditions for the purpose of protecting human health upon residential use of the site, and including testing by a suitably qualified and experienced engineer following completion of site preparation earthworks on the site (including any necessary remediation) to confirm that the equivalent standards of any other District plan are not exceeded on the site.
2. Where the relevant territorial authority has issued a certificate under s224(c) of RMA pursuant to a prior subdivision consent following completion of site preparation earthworks for the subdivision, are the activities on the site a change in the use of the site to which the NES applies (having regard to regulation 5(6) of the NES) and, if not, may they be lawfully carried out under section 9(1) of RMA without further resource consent notwithstanding the NES:
   (a) in all such cases; or
   (b) where the prior subdivision consent contains conditions to the effect stated in paragraph 1(b) or 1(c).

[2] The NES referred to in the application is, in full, the *National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health*. It was notified in the Gazette on 13 October 2011, hence the reference to that date in the application. I note that Reg 2 of the NES provides that the regulations ... *come into force* ... on 1 January 2012, but s43B(5) RMA provides:

> 43B Relationship between national environmental standards and rules or consents ...
>
> (5) A land use consent or a subdivision consent granted before the date on which a national environmental standard is notified in the Gazette prevails over the standard.

[3] The practical issue behind the application is that within the Hastings District there are a significant number of residential lots (56 is the figure mentioned by Ms Katrina Brunton, the Council's Environmental Consents manager in her affidavit in support of the application) which have been subdivided (in the sense of having received a subdivision consent in terms of s11 and s87(b) of the RMA) before October 2011, but which have not been developed by way of earthworks (eg for foundations) or the construction of buildings. A good number, if not all, of those properties are on land that formerly was horticultural and orchard land and which would be land within the definition in Reg 5(7) of the NES – ie likely to have been contaminated by agrichemicals. The concern is that, now that the NES has been Gazetted, the owners of those properties may be required to have the land tested for such contamination and, if necessary, have it remediated before it may be used for residential purposes. That could well be an expensive proposition, and it is the precautionary course the Council is presently advising developers and landowners to take, to ensure compliance with the NES.

[4] The broadly expressed question is whether the grant of a subdivision consent prior to the Gazetting of the NES authorises activities which might be restricted or prohibited by the NES. A subsidiary question is whether such an exemption might be effective if the subdivision consent itself requires testing for, and remediation of, chemical contamination. That has been the case since Plan Change 28, which dealt with chemical contamination of land, became operative in October 2006, it having been notified in April 2005.

[5] The District Plan provisions do though deal with fewer chemicals than the NES and, in some cases at least, prescribe higher permissible levels of contamination. Where that is so, for activities to which the NES does apply – eg for activities covered by resource consents sought after the Gazetting of the NES, regard must be had to s43B(3) and (4)

> 43B Relationship between national environmental standards and rules or consents ...
>
> (3) A rule or resource consent may not be more lenient than a national environmental standard.
>
> (4) For the purposes of subsection (3), a rule or resource consent is more lenient than a standard if it permits or authorises an activity that the standard prohibits or restricts.

Clearly then, if the resource consent applications had been made after the NES was Gazetted, the NES provisions, being more stringent, would prevail.

[6] It seems to me that there can be no doubt, on any reasonable reading of s43B(5), that a subdivision or land use resource consent granted before 13 October 2011 will, if the two conflict, prevail over the NES. That is, activities authorised by such a consent may lawfully be carried out, notwithstanding that they are dealt with by the NES. The first question must be, do the terms of any given subdivision consent authorise relevant activities which the NES prohibits or restricts?

*Notification of application and interest of other local authorities*

[7] The Council suggested, and the Court agreed, that given that the issues were unlikely to be confined only to the Hastings District, the application for a Declaration should be widely notified so that other interested persons could contribute to the discussions if they wished. To effect that, a copy of the application was served on Local Government New Zealand and the Chief Executives of all territorial authorities in the country. Public notice of it, in a form approved by the Court, was published in the *New Zealand Herald* and *Hawke's Bay Today* and, with the assistance of their secretariats, it was distributed to all members of the Resource Management Law Association, the New Zealand Planning Institute and WasteMinz. In addition, the owners of the 56 sites known to be affected in the Hastings District were served with copies.

[8] In the event, none of the persons served wished to join the proceedings, but the Secretary for the Environment, adopting the role of an amicus, has made submissions through Crown Counsel, Ms Andrew. I am very grateful for that assistance.

*What activities come within the terms of the NES?*

[9] The answer to that question is contained in Reg 5 of the NES. It provides:

> 5 Application
>
> (1) These regulations —
>
> (a) apply when a person wants to do an activity described in any of subclauses (2) to (6) on a piece of land described in subclause (7) or (8): ...
>
> Activities
>
> (2) (not relevant)
>
> (3) An activity is sampling the soil of the piece of land, which means sampling it to determine whether or not it is contaminated and, if it is, the amount and kind of contamination.
>
> (4) An activity is disturbing the soil of the piece of land, which—
>
> (a) means disturbing the soil of the piece of land for a particular purpose: ...
>
> (5) An activity is subdividing land, which means subdividing land—
>
> (a) that has boundaries that are identical with the boundaries of the piece of land; or
>
> (b) that has all the piece of land within its boundaries; or
>
> (c) that has part of the piece of land within its boundaries.
>
> (6) An activity is changing the use of the piece of land, which means changing it to a use that, because the land is as described in subclause (7), is reasonably likely to harm human health.
>
> Land covered
>
> (7) The piece of land is a piece of land that is described by 1 of the following:
>
> (a) an activity or industry described in the *HAIL* is being undertaken on it:
>
> (b) an activity or industry described in the *HAIL* has been undertaken on it:
>
> (c) it is more likely than not that an activity or industry described in the *HAIL* is being or has been undertaken on it.
>
> (8) If a piece of land described in subclause (7) is production land, these regulations apply if the person wants to — ...
>
> (b) sample or disturb —
>
> (i) soil under existing residential buildings on the piece of land:
>
> (ii) soil used for the farmhouse garden or other residential purposes in the immediate vicinity of existing residential buildings:
>
> (iii) soil that would be under proposed residential buildings on the piece of land:

> (iv) soil that would be used for the farmhouse garden or other residential purposes in the immediate vicinity of proposed residential buildings:
>
> (c) subdivide land in a way that causes the piece of land to stop being production land:
>
> (d) change the use of the piece of land in a way that causes the piece of land to stop being production land. ...

I should note here that the acronym *HAIL* expands to *Hazardous Activities and Industries List*, a document published by the Ministry for the Environment and which may be updated from time to time. Its latest iteration seems to be that of October 2011. If the land in question is *HAIL* land and it is proposed to undertake activities covered by the NES, then the requirements of Reg 8 must be met for the activity to be *permitted* – or a resource consent for a *controlled, restricted discretionary* or *discretionary* activity must be obtained – see Regs 9 to 11.

[10] The immediately relevant activities would be those in:

- Reg 5 4(a) – disturbing the soil of the piece of land for a particular purpose
- Reg 5(5) – subdividing land
- Reg 5(6) – changing the use of the piece of land to a use that is reasonably likely to harm human health.

In the context of this application, the activities mentioned in Regs 5(5) and 5(6) will, almost certainly, be authorised by a subdivision consent. But activities within Reg 5(4)(a) will, commonly, not be within the terms of a subdivision consent. In the context of this application, generally a subdivision consent does not authorise the construction of a house – if it does, it will actually be both a subdivision and a land use consent. The construction of a house on land subject to a subdivision consent will generally be a *permitted* activity, subject to compliance with prescribed requirements, conditions and permissions. Notwithstanding that, the excavation required for the foundations of a house, even if it is a *permitted* activity, will require ... *disturbing the soil of the piece of land for a particular purpose* ... and that is captured by the NES.

[11] The distinction between the two types of consent is concisely discussed in the judgment in *Meadow 3 Ltd v van Brandenburg and QLDC* (CIV-2007-409-001695 High Court Christchurch, 30 May 2008). At para [21]ff there is this passage:

> [21] ... It is typical in comprehensive developments for there to be the need for more than one type of resource consent. In this case there plainly had to be at least a land use consent and a subdivision consent.
>
> [22] The RMA creates a separate regime for land use consents and subdivision consents, subject to the qualification that there can be a degree of overlap.
>
> [23] A land use consent is a consent to depart from s9. All uses of land are permitted unless a rule in a plan or a proposed plan states otherwise.
>
> [24] A subdivision consent permits a departure from s11. The reverse presumption applies. With limited exception (some matters are specifically excluded from s11) no survey plan may deposit under the Land Transfer Act without following the s11, survey plan, s223, s224 deposited plan process.

The judgment goes on to remind the reader that if the subdivision consent imposes ongoing obligations on the owners for the time being, the council is required to issue a consent notice which by s221(4) is deemed to create an interest in the land and to form an ongoing covenant.

[12] I agree with Ms Andrew's submission that there are difficulties with the Council's suggestion that the *Meadow 3* decision can be distinguished on the basis that the Hastings District Plan allows earthworks for residential development, on land for which a subdivision consent has been granted, as a *permitted* activity. As the judgments in *Housing New Zealand Corporation v Auckland CC* (2007) 14 ELRNZ 52 and *HB Land Protection Soc v Hastings DC* [2009] NZRMA 485 confirm, resource consents do not, and cannot, approve permitted activities included within the development proposed. In any event, any allowance for relevant earthworks would have to be specific and express.

[13] Following that view, I concur with the Secretary's position on this aspect, as set out in para 42 of Ms Andrew's submissions:

> It cannot be correct that the construction and occupation of a dwelling created in accordance with a pre-notification subdivision consent is permitted pursuant to ss9(1)(a) and 43B(5) "in all such cases." An assessment is required to determine whether the construction and occupation is "expressly allowed" by a particular resource consent granted prior to notification of the NES.

For that reason, it follows that I would not make a Declaration in terms of 1(a) of the application – there is no answer which applies ... *in all such cases.*

[14] Taking the subdivision consent that is Exhibit B to Ms Brunton's affidavit as an example, it relates to the subdivision of land for 26 residential lots, a recreation reserve lot, and two road lots, at Arbuckle Road, Hastings. Included in what is authorised to be done on the land are:

- the construction of water, sewer and storm water services (including separate connections to the individual lots) – condition 5
- the construction of roads (including street and traffic signage and lighting) – condition 21
- the planting of street trees – condition 28
- general earthworks, including proposed ground levels – condition 31
- contouring of the site of the recreation reserve – condition 54

Unquestionably, all of those works will require the disturbance of soil, in some cases profoundly so. For those activities, the subdivision consent will prevail over the NES. But it is silent about the activities required to construct a house on any of the 26 residential lots, and does not authorise any such activity, expressly or implicitly.

[15] It is the Council's understanding and submission that it was intended that subdivision consents granted prior to the advent of the NES were intended to prevail. It points out that the Ministry for the Environment's Users Guide to the NES says this:

> A land-use consent or subdivision consent granted before 1 January 2012 will prevail over the NES. If an application for consent has been lodged, and a decision on whether to notify it was made before 1 January 2012, then the consent prevails over the NES (RMA s43B(5)). Notwithstanding this, if an activity [removing or replacing a fuel storage system, sampling the soil, disturbing the soil, subdividing land, and changing the use of the land] covered by the NES occurs after 1 January 2012 on HAIL land for which a consent for another activity has been granted, then the NES requirements must be met. The most common example of this situation is where a subdivision consent has been granted and the land remains production land but is later developed in a way that means the land stops being production land.

As a first comment, and as a matter of statutory interpretation, I am not sure I can agree with the Users Guide in its fixing of the *operative date* as I January 2012. Section 43B(5) is clear – for a resource consent of either kind to prevail over the NES, it must have been granted before 13 October 2011 –the date of notification in the Gazette.

[16] My second comment is that I agree with the thrust of the Council's submission, but the critical point is the answer to the question: *What did the subdivision consent actually authorise?* If it did not, in its terms, authorise the construction of a house (which the examples exhibited to Ms Brunton's affidavit appear not to do) then it cannot prevail over the NES in the sense that the construction will necessitate soil disturbance that is beyond what is authorised by the subdivision consent, and is within the activities captured by the NES.

[17] So it follows also that I would not make a Declaration in terms of 1(c) of the application either – in each case the same fact dependent question has to be asked – *what did the subdivision consent actually authorise*?

[18] The Hastings District Plan, operative since 2003, addresses the issue of possible harmful effects of residential developments being put in place on soil contaminated by chemicals used on it in the past. Section 15, dealing with subdivisions, contains this *Issue*:

- **The potential for land being subdivided for residential use, particularly in New Urban Development Areas, to contain levels of historic persistent chemical residues that may result in potential adverse health effects for the future occupants.**

  Assessing the potential for adverse effects to human health from historic persistent chemical residues in the soil at the time of subdivision provides an opportunity for environmental effects to be avoided or remedied before the land use changes to a more sensitive use such as residential activities.

  The proposed New Urban Development Areas identified in Section 2.4 of the Plan are typically on land currently or previously used for agricultural or horticultural purposes. In some instances, agrichemical spraying of horticultural crops over a number of years; or animal drenching or dipping in the same location over prolonged

periods, may have resulted in elevated levels of arsenic, lead, DDT or copper persisting in the underlying soil. This issue generally relates only to historic agrichemical use, as three of the four substances of concern; arsenic, lead and DDT have not been available for use since 1975, but where used are likely to persist in the soil.

In most instances the concentrations of residues persisting in the soil are unlikely to pose a risk for future residents. Soils in 'hot spot areas' (under animal yards, sheep dips or spray mixing points), or areas that have been subjected to spray regimes involving the chemicals of concern for prolonged periods, however could cause chronic health effects to future residents if those residents are subjected to long term exposure (over a number of years) to the residues in that soil.

Accordingly, it is important to ensure residential subdivisions are occurring on land that is suitable for residential use and will not put residents' health at risk from long term exposure to the historic persistent soil residues of concern.

[19] That recognised Issue is addressed in Policy SPD 25:

- **SDP25 To avoid, remedy or mitigate the adverse effects of the subdivision of land for residential purposes, where soils have the potential to contain historic persistent chemical residues that may result in potential adverse health effects for the future occupants.**

  Explanation

  Where historic persistent chemical residues (eg copper, arsenic, DDT, lead) are present in the soil above accepted concentrations, they may give rise to adverse health effects from prolonged exposures if land is developed and used for residential activities. Subdividers will therefore be required to ensure that historic persistent chemical residues are at levels suitable for residential land uses at the time of subdivision, or that suitable remediation will occur to achieve safe residue levels, or if residues are not reduced that other measures are taken to ensure future residents will not be exposed to those residues.

  National Environment Standards are proposed to be introduced to address the effects of historic persistent chemicals on a nationwide basis. If those National Environmental Standards are less restrictive than the standards and assessment criteria in the Hastings District Plan, a Plan Change will be considered to address any inconsistencies.

[20] The Plan's regime is given practical effect, for some areas of the District at least, in Rule 15.1.9.18:

**15.1.9.18 (A) POTENTIAL CONTAMINATION FROM AGRICHEMICAL RESIDUES –RESIDENTIAL DEVELOPMENT**

a) For any subdivision or development of new urban areas in Arataki, Goddard Lane, Williams Street and Lyndhurst (as identified in Appendix 2.4-1) intended for residential use, soil testing must be carried out and the developer shall demonstrate that the soil concentrations (to a depth of at least 75mm) comply with the residential soil health based guidelines in Table 1 below. Reference will be had to Specific Assessment Criteria in 15.1.10.2(14).

*Outcome*
*Risk to human health from historic persistent chemical residues in residential soil is avoided*

**TABLE 1: Residential Soil Health Based Guidelines (mg/kg dry weight)**

| | Arsenic | Copper | Total DDT[1] | Lead |
|---|---|---|---|---|
| Guidelines | 30 | 2,300 | 25 | 400 |

Notes:
1. Total DDT isomers 2, 4-DDE, 2,4-DDD, 2,4-DDT, 4,4-DDE, 4,4-DDD and 4,4-DDT.
*Source: Pattle Delamore Partners Ltd – November 2004*
*Website Reference:* http://www.hastingsdc.govt.nz/environment/pesticides/index.htm
and/or
*TRIM reference: STR-7-03-04-17*

[21] Mr Williams' point that the Hastings District Plan, prior to the advent of the NES, contained a *contaminated soils* regime is plainly correct, in respect of arsenic, copper, DDT and lead contamination dealt with in this Rule. But that regime will not prevail if the activities authorised by the relevant RMA consent are not those dealt with by the NES, nor if the Plan's regime is less stringent than that of the NES in the case of *post-Gazettal* consents: - see s43B(3).

[22] The question contained within para 2 of the application brings s224(c) into play. That section provides:

> 224 Restrictions upon deposit of survey plan
>
> No survey plan shall be deposited for the purposes of section 11(1)(a)(i) or (iii)] unless — ...
>
> (c) There is lodged with the Registrar-General of Land a certificate signed by the chief executive or other authorised officer of the territorial authority stating that, it has approved the survey plan under section 223 (which approval states the date of the approval), and all or any of the conditions of the subdivision consent have been complied with to the satisfaction of the territorial authority and that in respect of such conditions that have not been complied with—
>
> > (i) A completion certificate has been issued in relation to such of the conditions to which section 222 applies:

(ii) A consent notice has been issued in relation to such of the conditions to which section 221 applies:

(iii) A bond has been entered into by the subdividing owner in compliance with any condition of a subdivision consent imposed under section 108(2)(b); and

(d) There is lodged for registration with the Registrar-General of Land a consent notice in respect of any conditions of a kind referred to in paragraph (c)(ii); and ...

[23] I cannot see that the issuing of a s224 certificate alters the situation. The certificate does no more than authorise the Registrar-General of Land to accept the subdivision plan as being compliant with the statutory requirements, and then to issue Certificates of Title for the resultant lots. A certificate cannot, and does not purport to, override the requirements of the NES.

[24] Ms Andrew's submission was that the question is whether the *change of use* occurs at the time of the subdivision, or at the time the houses are complete and occupied. It was suggested that the point should be determined in the light of Reg 5(6) – bringing into play the factor of possible harm to human health. In terms of a *change of use* though, I would add this. *Use* is defined in a very wide way in s2 RMA. In the context of a subdivision of rural land, once roads and accessways are formed and sealed, building platforms are contoured, and drainage and other services are installed, it seems to me that the *use* of the land has changed. The use is no longer agricultural, or whatever it once was – it has become residential land, even if it awaits the arrival of house(s) and their residents. In those respects, reference can be made to Reg 5(8)(c) and (d). If the land in question is *production land* (see definition in s2, RMA), the NES regulations will apply if the intention is to subdivide the land in a way which causes it to stop being production land, or if the use of the land is changed in a way that causes it to stop being production land. In this instance (but it will not always be so) the change of use occurred can be said to have occurred at the time the subdivision is effected.

[25] Against those views of the correct interpretation of the NES and the Statute, I would make declarations in these terms:

1. The construction and occupation of a dwelling and any associated disturbance of soil on an allotment created in accordance with a subdivision consent

granted before 13 October 2011 may be lawfully carried out under s9(1) of the Resource Management Act 1991 without further resource consent notwithstanding contravention of the NES if, and only if, the subdivision consent specifically authorises the disturbance of soil for the purpose of constructing and occupying the dwelling.

2. That will be the case whether or not the Territorial authority has issued a certificate under s224(c) of the Resource Management Act 1991.
3. Where the subdivision consent in question contains conditions for the purpose of protecting human health upon residential use of the site, it will be an issue of interpretation in each case whether *the change of use* occurs at the time of subdivision, or when the house(s) are complete and occupied.

[26] I am very grateful to Mr Williams and Ms Andrew for the comprehensive and helpful submissions they have made. And I should say also that I acknowledge the difficult and, as they will see it, unfair situation that the owners of the affected pieces of land have found themselves in simply because, for whatever reason, the actual construction of houses on those sites did not proceed before the NES was *Gazetted*. But I cannot see any principled interpretation of the Act and the NES which will avoid the consequence that the NES must be complied with in the development of those sites.

Dated at Wellington this 10th day of May 2013

C J Thompson
Environment Judge

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2005-485-85**

| | |
|---|---|
| BETWEEN | SPRINGS PROMOTIONS LIMITED<br>Appellant |
| AND | SPRINGS STADIUM RESIDENTS ASSOCIATION INCORPORATED<br>First Respondent |
| AND | AUCKLAND CITY COUNCIL<br>Second Respondent |

Hearing: 21 June 2005

Counsel: D A Kirkpatrick and T J Rainey for Appellant
M J E Williams for First Respondent
W S Loutit and S H Smith for Second Respondent

Judgment: 7 October 2005

---

**RESERVED JUDGMENT OF RANDERSON J**

---

This judgment was delivered by me on 7 October 2005
at 9.00 am, pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Cairns Slane, PO Box 6849, Auckland
Mark Burns, PO Box 47169, Ponsonby, Auckland
Simpson Grierson, Private Bag 92518, Wellesley Street, Auckland
Counsel: M E Williams, PO Box 106215, Auckland
D A Kirkpatrick, PO Box 5844, Wellesley Street, Auckland

**Introduction**

[1] Western Springs Stadium in Auckland has been the venue for speedway racing, concerts and other recreational activities for many years. It is said that the first racing instituted in the stadium took place as long ago as 1929 and was well established by 1945. But while speedway racing and other activities have been enjoyed by many, allegations of excessive noise arising from these activities have been made by local residents over a significant period.

[2] The stadium site is owned by the Auckland City Council and activities there are promoted by the appellant Springs Promotion Limited (SPL) under an agreement with the Council.

[3] Matters came to a head in December 2004 with the making of an interim enforcement order in the Environment Court requiring SPL to comply with the noise controls stipulated under the Council's operative District Plan. That level is currently set at 85dBA ($L_{10}$). Concerned about its ability to comply with the noise limits, SPL applied for the discharge of the interim enforcement order or alternatively for a variation of it to permit its activities to continue.

[4] One of the primary grounds for SPL's application to discharge or vary the enforcement order was its assertion that it was entitled to existing use rights which, it claimed, would permit it lawfully to conduct activities at the stadium at noise levels exceeding the 85dBA limit imposed by the District Plan. The first respondent, a residents' association formed in June 2002, opposed SPL's application for a variation of the enforcement order on the ground, amongst other things, that any existing use rights (if established) had been relinquished or waived by SPL and its predecessors and that it was no longer possible in law for SPL to rely on any such rights.

[5] The Environment Court declined SPL's application and, in its decision, indicated there might be an arguable case to support the assertion by the Residents' Association that any such rights had indeed been relinquished.

[6] Although the 2004/2005 speedway season is now long since over, SPL has appealed against the refusal of its application seeking clarification of three points of law which, SPL says, will be helpful to the parties and the Environment Court in further proceedings pending before the Environment Court to determine whether a final enforcement order should be made.

[7] The questions of law specified in SPL's notice of appeal are:

i) Does the activity of speedway at Western Springs Stadium arguably have existing use rights pursuant to s 10(1) of the Resource Management Act 1991?

ii) Can existing use rights be relinquished other than by discontinuance in terms of s 10(2) of the Act?

iii) Are existing use rights a lawful authority for a use of land which contravenes a rule in the District Plan?

[8] In view of certain concessions made by Mr Williams on behalf of the Residents' Association, the argument before me focused principally on the second issue. However, it will be necessary briefly to refer to the other two points of law as well.

**Should this Court Entertain the Appeal?**

[9] As a preliminary, Mr Williams submitted that this Court should not entertain the appeal given that speedway racing is not currently operating and because the Environment Court has yet to hear the substantive application for an enforcement order when the facts would be fully examined. Mr Williams also submitted that if there were any errors of law they were not material to the outcome.

[10] Both SPL and the Council supported the appeal being entertained, expressing the view that any guidance this Court could give the parties and the Environment Court on the legal issues affecting existing use rights was likely to be helpful.

[11] I accept that the issues between the parties will not be resolved by this appeal and have yet to be determined finally by the Environment Court. Nevertheless, I agree with the submission made by SPL and the Council that resolution of the legal issues raised by the appeal is likely to be helpful to the parties and the Environment Court in determining the substantive issues yet to come. Accordingly, I will proceed to determine them.

**Factual Background**

[12] SPL was incorporated in June 2002. At all relevant times, the stadium has been located within the district of the Auckland City Council. The Council did not have a district plan until some time in the 1950s when the Town and Country Planning Act 1953 came into force. Under the 1991 District Scheme, the stadium was designated as a sports centre "to facilitate the public enjoyment of active sports, entertainment and public spectacles". The District Scheme stated that the Council would control the noise from speedway operations by incorporating performance standards in the conditions of any lease of the stadium. The underlying designation of the stadium in the 1991 District Scheme was Recreation 5 (Active Sports). I was informed there were no noise controls under the Recreation zones at that time.

[13] In 1993 the Council publicly notified its proposed District Plan (Isthmus Section) under the 1991 Act. The proposed plan included Concept Plan C05-08 relating to the stadium. The noise level controls for speedway were set at 90dBA but with a signalled reduction to 85dBA by 31 December 1994.

[14] A number of submissions (including some from residents) were made in relation to the Concept Plan. The Council appointed Mr Ross Gee as a Hearings Commissioner to consider the submissions. He conducted a hearing on 5 December 1994 and made recommendations to the Council in a written report dated 9 March 1995. According to Mr Gee's report, Western Springs Stadium Limited was the lessee of the stadium at that stage. The report referred to evidence from the director of Western Springs Stadium Limited (a Mr Bonner) to the effect that, while efforts were being made to reduce noise levels, the current level of 95 dBA could only just be met and that it would not be possible to comply with the proposed 85 dBA limit.

Mr Gee's report referred explicitly to assertions the speedway had existing use rights but took the view it was not appropriate for him to deal with that issue in the proceedings before him which were concerned only with the provisions of the Concept Plan for the stadium.

[15] After considering the submissions Mr Gee recommended that the noise level should reduce to 85dBA as proposed but recommended the new limit should not come into effect until 1 April 1996. Mr Gee had this to say about existing use rights:

> It was noted in the planning report that recent noise level measurements show that two classes of events meet the 85dBA level while a further two classes exceed this level by less than 5dBA. However, the lower maximum level proposed will not apply to "existing uses" in terms of section 10 of the Act and consequently should not, as claimed by Mr Bonner:
>
> > "mean that we could not comply and would have to close down a sport enjoyed by a regular number of race fans."
>
> However, the new limit will apply to those speedway activities in the stadium which do not have existing use rights.

[16] One of the residents who made a submission to the council in relation to the Concept Plan was a Ms Bookman. She lodged a reference to the Environment Court which was determined by a consent order issued on 18 June 1998. The memorandum filed in support of the consent order was signed by Ms Bookman and by counsel for Western Springs Speedway and the Council. In terms of the consent order, the Concept Plan for the stadium provided for the new 85dBA level to come into effect on 1 April 1996. But the following new Development Control was added:

> The promoter shall prepare and comply with a Noise Management Plan for motor racing at Western Springs which shall set out how motor racing will be managed to ensure that the noise levels specified in (a) and (b) above are implemented, monitored and enforced. The Noise Management Plan shall be submitted to and approved by the Council prior to the commencement of the 1998/99 racing season, and thereafter annually prior to each racing season. Before approving the Noise Management Plan the Council shall consult with directly affected local residents via their representative Community Board(s), the Auckland Zoo, the Museum of Transport and Technology (MOTAT) and the promoter.
>
> The Council shall enforce the noise controls set out in this Concept Plan.

[17] Clearly, the then operator of the speedway agreed to prepare annually a noise management plan which would manage racing to ensure that the noise limits in the

Concept Plan were implemented, monitored and enforced. The noise management plan required Council approval after the Council had consulted local residents (via their Community Boards), specified institutions in the area, and the speedway promoter. The Council also agreed to enforce the noise controls set out in the Concept Plan.

[18] In May 2004, the Residents' Association applied for an enforcement order requiring SPL to cease all motor racing activities at the stadium and not to recommence such activities until it was demonstrated to the satisfaction of the Court that motor racing activities could be undertaken in compliance with the requirements of the District Plan. A substantial number of affidavits were filed in relation to that application but it is unnecessary for present purposes to traverse that material in detail.

[19] A fixture for a substantive hearing was set for 1 February 2005 but on 23 November 2004, the Residents' Association applied for an interim enforcement order. After hearing the parties, Environment Judge C J Thompson (sitting alone under s 279 of the Act) ordered that SPL take all necessary steps to comply with the noise limits in the Concept Plan and to comply with those noise limits thereafter.

[20] On 22 December 2004 SPL applied for the discharge of the interim enforcement order or alternatively for an order varying it so that SPL would be required to take all necessary steps to ensure that speedway activities did not exceed a level of 90 dBA. The grounds for the application were stated to be:

> 1. There has been a material change in the circumstances in that Springs Promotions Limited and Auckland City Council have now agreed to a variation of the Promotion Agreement to allow speedway to exercise its existing use rights under section 10 of the Act.
>
> 2. Springs Promotions Limited has undertaken further testing which confirms that it is not possible to operate speedway and comply with the noise boundary limit requirement of the current Concept Plan.
>
> 3. Negotiations between the other parties in this matter have failed and if an alternative noise limit is not implemented speedway operations will have to cease altogether.

[21] As to the first ground, it is not in dispute that the Council had entered into a promotion agreement with SPL which obliged SPL to comply with the provisions of the District Plan including the noise limits for the stadium. The promotion agreement is not in evidence but, in a memorandum dated 23 December 2004 filed in the Environment Court, the Council's lawyer informed the Court:

> … the Second Respondent's intention is to vary the First Respondent's responsibilities under the promotion agreement by requiring it to comply with its obligations under the Resource Management Act 1991, as opposed to complying with the terms of the District Plan. Such an amendment to that agreement would simply recognise that should existing use rights be established, then the noise limits protected by those rights will be enforceable under the promotion agreement, rather than the noise limits contained in Concept Plan C05-08 of the Auckland City (Isthmus) District Plan.

[22] With the agreement of all parties, I was informed that the variation described in the Council's memorandum applied only to the 2004/2005 racing season and has now expired. I was further informed that the promotion agreement had reverted to its original form. That is, SPL is obliged by the agreement to comply with the noise limits in the District Plan. I was also informed that the promotion agreement itself was to expire at the end of June 2005 but that renewal provisions existed. Whether it has been renewed is not clear.

[23] As to the second ground for its application, SPL's General Manager D O Stewart deposed that, having analysed records from the 1970s and 1980s prior to the implementation of the Concept Plan, it was clear to him that since 1979/80 when mufflers were introduced for racing cars, the speedway had never been quieter than about 90dBA. He added that the speedway had never complied with the noise level of 85dBA. An acoustic consultant, Mr C W Day, deposed that it was impossible for SPL to operate under its usual speedway format and still comply with the 85dBA noise limit. In his view, only about five cars at best could take part in a race which would usually have about 15 to 21 vehicles entered. He stated that SPL could operate the speedway if the noise level were increased to the previous level of 90dBA. Noise levels had generally been in the range of 85-95dBA.

[24] Judge Thompson heard SPL's application for a variation on an urgent basis on 23 December 2004. A hearing was conducted with counsel attending by telephone. The Judge delivered a decision the same day declining the application.

**The Decision Under Appeal**

[25] In at least two places in his decision, Judge Thompson referred to the possibility of SPL having relinquished or surrendered any existing use rights. In paragraph 4 he stated:

> There is, so I am told a promotion agreement made between those parties, a term of which obliges the first respondent to comply with the terms of the District Plan including, of course, the noise limits. That agreement, and the annual Noise Management Plans which the Speedway has produced might, on the face of it, appear to incorporate a relinquishing of existing use rights. Mr Williams submits that it would.

[26] Then, in paragraph 5 the Judge stated:

> I refrain from comment about the Council's position in coming to such an arrangement for the express purpose of evading the terms of its own District Plan. I imagine persons who, for instance, have arranged their affairs on the basis of what the Plan says may have views that will be aired in due course. But, arguably, there may be a more fundamental issue here. Section 10 speaks of a use that was …*lawfully established before the rule became operative.* The case law seems clear that one should look at the *lawfulness* of the use as at the day before the rule became operative. The District Plan, and thus the Rule, became operative in 1999. Mr Stewart's own evidence makes it clear that the Speedway was not complying with the noise limits (effective, as mentioned, since 1 April 1996) at that time. Indeed he says it has never complied with them. The promotion agreement required, so I am told, compliance with the Plan, not with whatever pre-existing limits there may have been. If that is so, then arguably the Speedway has surrendered its previous position and was not …*lawfully established before the rule became operative* and has no enforceable existing use to rely upon.

[27] The Judge was careful to make it clear that he was not reaching any conclusion on the existence or otherwise of existing use rights or indeed on whether SPL had relinquished or surrendered any such rights. He acknowledged SPL's submission that it had never lost whatever existing rights it might have had and concluded he could not be satisfied on that issue either way.

[28] The Judge recognised that this was an issue which required resolution at a full hearing. He added that he could not be satisfied, in the context of an application for an interim enforcement order, about the character, intensity and scale of any existing use for speedway purposes but said "There is enough material before the Court to raise factual questions about that".

[29] The Judge went on to say:

> Without the issue of existing use rights to support it, SPL would be asking me to vary the terms of the interim order to provide for a noise limit of 90dBA, it would, in effect, be asking me to vary the terms of an operative District Plan without compliance with the Plan Change procedures of the First Schedule to the RMA.

[30] After recording that SPL had rejected a compromise offered by the Residents' Association (that would have permitted three races per meeting at up to 90dBA) the Judge stated:

> [9] I have to say that I am left, at this stage of knowledge, with an abiding impression that SPL has not been taking its obligations seriously, and that until very recently the Council has tacitly condoned that. Both parties have had 10 years to do something serious about compliance, and it is difficult to have sympathy with their protestations that they are now, suddenly, being told to comply. That is the more so when there is enough in the material before the Court, going back at least as far as 1994, to at least tentatively indicate that compliance is possible.

[31] The Judge concluded:

> [10] The present situation is clear enough. The interim order does no more than require SPL to comply with the District Plan (the possibility of existing use right excepted). Indeed the original application was criticised as being pointless because that is really all it sought. If the council has now collaborated in an arrangement intended to revive existing use rights, the success or otherwise of that can be decided at the substantive hearing. Whether the interim order remains or goes makes little difference to the underlying position.
>
> [11] If what the respondents really want is to change the relevant terms of the District Plan, then they should do so properly and openly. The public participation process was followed in setting the present limits – the report of the Council's Commissioner is now before the Court and records a great deal of input from many sources. They should not be changed without an equal opportunity for participation.

[32] Finally, the Judge expressed the view that the interim order was justified and that the original justification for the order remained. He considered the equitable balance was on the side of the Residents' Association and that there was no proper ground to vary or discharge the interim order.

**First Ground of Appeal – Does the Speedway activity at the Stadium arguably have existing use rights pursuant to s 10(1) of the Act?**

[33] Mr Williams conceded on behalf of the Residents' Association that, as a matter of law, there was an arguable case for the existence of existing use rights in relation to the speedway although Mr Williams did not concede that any such rights existed in fact. Nor did Mr Williams accept that the Judge had made any error of law in this respect.

[34] The focus of the argument advanced by Mr Kirkpatrick on behalf of SPL was on the Judge's statement that "one should look at the lawfulness of the use as at the day before the rule became operative". Mr Kirkpatrick submitted that the Judge was wrong on this point because s 10(1)(a)(i) of the Act also referred to uses lawfully established before a proposed District Plan was notified. In other words, Mr Kirkpatrick submitted, the focus in the present case should have been on uses lawfully established before the council notified its proposed District Plan in 1993.

[35] Mr Kirkpatrick is undoubtedly right on this point and it was not disputed by Mr Williams. I expect that in giving a decision under considerable urgency, the Judge simply overlooked the reference to the date of notification of a proposed plan in s 10 or did not consider it material to mention.

[36] In fact, the starting point is s 9 of the Act which relevantly provides:

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by section 10 or section 10A.
>
> …

(3) No person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is—

(a) Expressly allowed by a resource consent granted by the regional council responsible for the plan; or

(b) Allowed by section [20A] (certain existing lawful uses allowed).

…

(5) In subsection (1), " land" includes the surface of water in any lake or river.

[37] Under the Act, "land" may lawfully be used if:

i) It does not contravene a rule in a district plan or a proposed district plan; or

ii) It is expressly allowed by a resource consent; or

iii) It is an existing use under ss 10, 10A or 20 of the Act.

[38] In the present case, SPL relies on s 10 which relevantly provides:

**10 Certain existing uses in relation to land protected**

(1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—

(a) Either—

(i) The use was lawfully established before the rule became operative or the proposed plan was notified; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

(b) Or—

(i) The use was lawfully established by way of a designation; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.

(2) Subject to sections 357 and 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

(a) An application has been made to the territorial authority within 2 years of the activity first being discontinued; and

(b) The territorial authority has granted an extension upon being satisfied that—

(i) The effect of the extension will not be contrary to the objectives and policies of the district plan; and

(ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.

[39] The essence of s 10 is to permit existing uses of land to continue in certain circumstances notwithstanding that the use would otherwise contravene a rule in a district plan or a proposed district plan. The section reflects a statutory policy which recognises that, in certain circumstances, it would be unfair or wrong to require an existing use of land to cease or to be subject to more restrictive control by a subsequent change or proposed change to a district plan. Substantial sums of money might have been invested in an existing activity or people may have otherwise ordered their affairs on the basis that there were no relevant controls or on the basis of the controls then existing. In some cases, as SPL submits here, an activity might not be able to continue at all or only in a restricted form in consequence of a change to a district plan which would render an existing activity non-complying.

[40] There are two essential conditions under s 10 which must both exist before existing use rights may be established. These are:

i) The relevant land use must have been lawfully established before the relevant rule became operative or the proposed plan was notified; and

ii) The effects of the use must be the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified.

[41] In the present case, assuming there were no relevant controls on noise prior to the 1993 notification of the Council's Proposed District Plan, then the first condition is satisfied if SPL establishes that speedway racing was lawfully taking place before 1998 (when the noise limit control became operative) or before the date in 1993 when the proposed plan was notified. Here, of course, SPL asserts that speedway racing was lawfully established long before either of those dates.

[42] To satisfy the second condition, SPL must establish that the effects of the current speedway racing are the same or similar in character, intensity and scale, to those which existed before the rule became operative or the proposed plan was notified. This condition reflects a statutory policy that the effects of existing uses may not be expanded beyond a level which is the same or similar in character, intensity and scale to those existing before the relevant date. In *Russell v Manukau*

*City Council* [1996] NZRMA 35, Elias J discussed the approach to existing use rights and accepted that it was open for the Planning Tribunal to conclude that the effects of a commercial use in a residential area had increased in character, intensity and scale to such an extent that the rights were lost. The facts there were different from the present case because there had been several different planning documents since the use was first established. So some care needs to be taken with the Judge's comments at p 41 of the decision which should be read against that factual background.

[43] In my view, the correct approach in the present case is to consider the effects of the use at the point immediately before the proposed plan was notified and to compare those effects with those arising from the use thereafter to determine whether they are the same or similar in character, intensity and scale. Some reasonable evolution within the statutory confines is permitted as Elias J pointed out in *Russell v Manukau City Council.* The matter is essentially one of degree.

[44] In the present case, the use itself (speedway racing) is permitted by the District Plan but only within the noise limits specified by the Concept Plan rules. So the admitted contravention of the District Plan lies in SPL's activities exceeding those limits. Unless allowed as an existing use under s 10, the speedway racing is lawful only if SPL complies with the relevant noise limits.

[45] If, on the other hand, existing use rights are established, then they may be relied upon indefinitely so long as the effects of SPL's activities remain the same or similar in character, intensity and scale to those existing before the relevant date and subject to discontinuance under s 10(2).

[46] Where the use of land has been discontinued for a continuous period of more than 12 months after the relevant rule became operative or the proposed plan was notified, then under s 10(2) the ability to rely on existing use rights is lost unless two conditions are satisfied:

i) An application has been made to the territorial authority within two years of the activity first being discontinued; and

ii) The territorial authority has granted an extension of time upon being satisfied of the two matters identified in s 10(2)(b) (i) and (ii).

[47] I add that reliance on existing use rights does not require that the activity in question take place continuously. An activity which occurs annually such as the speedway racing at issue here, may be the subject of existing use rights even though it does not occur throughout the year. The only limitations imposed by s 10 are that the activity should remain at the same or similar character, intensity and scale as existed prior to the relevant date and that the activity not be discontinued in terms of subsection (2): *Leith v Auckland City Council* [1995] NZRMA 400, 409-410.

[48] Although the Judge was in error on one aspect of existing use rights, I accept Mr Williams' submission that any error in that respect was not material to the decision because it did not depend on the existence or otherwise of existing use rights. The Judge was correct to conclude it would not be right to reach any conclusion on the existing use issue in the context of an interim application and his decision is not challenged on any other ground. Nor is there any appeal against the interim enforcement order made on 6 December 2004.

**Second Ground of Appeal – Can existing use rights be relinquished other than by discontinuance in terms of s 10(2) of the Act?**

[49] On this point, Mr Kirkpatrick, supported by Mr Loutit for the Council, submitted that ss 9 and 10 of the Act create a statutory code in relation to existing use rights and that such rights, if established, cannot be lost except by discontinuance under s 10(2). Mr Kirkpatrick further submitted that while a private agreement (such as the promotion agreement in the present case) would give rise to certain rights and obligations between the parties to that agreement, the existence of any existing use rights could not be affected. Any such rights were to be established or lost solely by operation of law under s 10.

[50] Mr Williams on the other hand submitted that existing use rights could be extinguished by subsequent planning steps taken by a party which were inconsistent with reliance on a former right. He also submitted that the equitable principles of

waiver and estoppel applied equally in the planning context as they do under the general law. He submitted there had been a waiver of any existing use rights or, alternatively, that SPL was estopped from relying on any such rights by virtue of the consent order made in 1998 which, amongst other things, required the preparation of an annual management plan and compliance with the 85dBA noise level in the District Plan. As well, Mr Williams pointed to the promotion agreement between the Council and SPL under which SPL agreed to comply with the 85dBA noise limit.

[51] In approaching the second ground of appeal, I intend to address three separate but related issues:

i) What is the nature of existing use rights under the Act?
ii) Are the provisions of the Act relating to existing use rights a statutory code?
iii) Is it appropriate to introduce notions of private law or equity into a public law field and, if so, in what circumstances?

*What is the nature of the existing use right under the Act?*

[52] The right to use land under the Act enures for the benefit of the owner or occupier of the land for the time being. In that sense, any right to use land in accordance with the Act runs with the land according to the tenor of the right. That right may arise in any of the three ways identified in [37] above.

[53] Where the use does not contravene a rule in a plan or proposed plan, then it may be exercised as of right by any owner or occupier. If a land use consent is granted then (with one exception in relation to lake or river beds) it attaches to the land and may be enjoyed by the owners and occupiers for the time being: s 134(1). The same applies to an existing use established under s 10 because, like s 9, the section is not directed to any particular owner or occupier but to the nature of the use.

[54] The Act provides specifically for the surrender of resource consents in s 138(1). The holder of a resource consent may surrender the consent, either wholly

or in part, by giving written notice to the consent authority. In certain circumstances, a consent authority may refuse to accept the surrender (s 138(2)).

[55] There is no equivalent surrender provision for existing use rights under s 10. Rather, the section provides that existing use rights may be lost through discontinuance under s 10(2). As well, existing use rights may be lost through changes in the character, intensity or scale of the effects which go beyond those permitted as occurred in *Russell v Manukau City Council*. Given the careful attention to detail in these provisions, it is reasonable to conclude that the legislature did not intend that existing use rights could be lost by means outside the statute.

[56] It follows that, where existing use rights are established, they continue for the benefit of subsequent owners or occupiers of the land subject only to the potential for loss through discontinuance under s 10(2) or through changes in the character, intensity or scale of the effects of the use outside the parameters of s 10(1)(a)(ii).

[57] In the present case, if SPL had complied with the noise limits in the Council's district plan for a continuous period of more than twelve months, then discontinuance of any existing use right to exceed those levels would have occurred under s 10(2), subject to the grant under that provision of any extension of those rights.

*Are the provisions of the Act relating to existing use rights a statutory one?*

[58] The Act has been said to be a comprehensive code on resource management issues. That has been made clear at the highest level by the Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [20]. As is well known, the Act has a single broad purpose of promoting the sustainable management of natural and physical resources: s 5(1). The use of land is but one of the resources embraced by the Act but it is one of the most important.

[59] But despite the breadth of its reach, the Act is not comprehensive in respect of all matters touching land. For example, the Act stands alongside the Land Transfer Act 1952 and the Property Law Act 1952 and, in some areas, there are

express linkages with that legislation (for example, in Part X of the Act relating to subdivision). As well, there are some difficult areas of interface. An example is in the law of nuisance. It has been held that a claim for nuisance may still be available notwithstanding compliance with the rules in a plan: *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, 611. And s 23 of the Act states specifically that compliance with the Act does not remove the need to comply with other legislation and rules of law which exist independently of the Act. That includes other legislation such as the Building Act 2004 as well as common law principles touching on the use of land to the extent they are not modified or overridden by the Act.

[60] Although it is fair to describe the Act as comprehensive, it is going too far, with respect, to describe it as a code if that is intended to mean that it excludes the application of the common law in the area and replaces it with a set of statutory rules that are the exhaustive and exclusive source of the law. In *Faulkner v Gisborne District Council* [1995] 3 NZLR 622 at 631, Barker J preferred to describe the Act as representing "an integrated and holistic regime of environmental management" rather than a code. The difficulties in this field are well illustrated by the helpful discussion by Professor Burrows QC in his work *Statute Law in New Zealand* (3rd Ed) Lexis Nexis 2003 Chapter 16 at 375-383.

[61] In my view, it is more accurate to say that, in general, the Act provides comprehensively for resource management issues and, in respect of some specific topics, provides a complete code. An important example is Part VI of the Act which governs the making and determination of applications for various types of resource consents.

[62] Key elements in determining whether the Act provides a complete code on any specific topic are the extent of detail in the relevant provisions; whether the provisions expressly or impliedly leave open the possibility of the application of law from other sources; whether other statutory provisions or rules of common law on equity bear on the issue; and whether there are any other indicators of statutory intention. In the end, it is a matter of statutory construction against the background of the general law.

[63] Approached in this light, it is clear that ss 9, 10, 10A and 20 of the Act were intended to constitute a code to address the issue of existing use rights. The provisions of s 10 in particular are detailed and comprehensive. They do not leave open, either expressly or impliedly, the application of other sources of law to this topic. Importantly, there are no other statutory provisions nor principles of common law or equity touching on how existing uses may be established so as to authorise activities which would otherwise be unlawful or how such rights might be lost. The inevitable conclusion is that Parliament intended ss 9 and 10 of the Act to be a comprehensive code dealing with the circumstances in which existing use rights may be established and those in which the rights may be lost. Although of no direct relevance to this appeal, the same may be said of the existing use provisions in ss 10A and 20 even though they operate in a more limited way than the rights under s 10. The rights may be established only pursuant to those statutory provisions.

*Is it appropriate to introduce notions of private law or equity into a public law field and, if so, in what circumstances?*

[64] It does not necessarily follow from my conclusion that the Act provides a comprehensive code in respect of existing use right issues that there is no room for private law doctrines such as waiver, estoppel or election. But there are compelling reasons for caution in introducing principles of this type into a field of public law such as resource management.

[65] The first and most important reason is that private law affects individuals whereas public law of this type affects the world at large. It is axiomatic that a contract binds only those who are parties to it. An estoppel is based on an express or implied representation which generally binds only the party making the representation. And because existing use rights and resource consents run with the land and are not personal to any one owner or occupier, there is a powerful argument in favour of the proposition that future owners or occupiers are not bound by the agreements or representations of their predecessors.

[66] But what is the position where a current owner or occupier takes a step or enters on a course of conduct or makes an express or implied representation that

could suggest existing rights are no longer to be pursued? The House of Lords has addressed this issue on at least two occasions. In *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, it was held that existing use rights to use former airforce hangars for storage purposes were not lost by reason of the storage company applying for planning permission for the use under the Town and Country Planning Act 1971 (UK). It had been contended that the company was precluded from relying on existing use rights as it had taken up and implemented the planning permission granted. The House specifically rejected Lord Denning MR's finding in the Court of Appeal that the company was precluded from relying on the existing use rights by opting for planning permission. The existing use rights would be lost under the UK legislation only if an entirely new "planning unit" was established, for example, by the creation of a new building which created an entirely new planning history.

[67] Importantly for present purposes, their Lordships explained why it was inappropriate to introduce doctrines such as estoppel in to the field of planning law. Lord Fraser did so at 606:

> It would introduce an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land. To do so would lead to uncertainty and confusion. It would also interfere with the convenient practice whereby prospective vendors or purchasers of land apply for planning permission as a precaution if there is doubt about whether their proposals are already permissible or not.

[68] Lord Scarman made a similar point at 616:

> Equitable interests were strictly not proprietary in character, but rights in personam. Although they have developed a proprietary character, they are not enforceable against all the world. The purchaser for value without notice is not bound. In the field of property law, equity is a potent protection of private rights, operating on the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.

[69] And, at 617:

> My Lords, I agree with the view so consistently expressed by Lord Parker CJ that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law. I forebear to discuss the cases on which Lord Denning MR founded his view to the contrary because counsel for the local planning authority did not

> seek to rely on them. Indeed he based his argument on *Prossor's* case, the principle of which is independent of any equitable doctrine. Suffice it to say of the authorities mentioned by Lord Denning MR in the passage which I have quoted that, if and in so far as they suggest (and I do not think that they do) that equitable estoppel has a place in the law of planning control, they are incorrect in law and should not be followed.

[70] Lord Scarman took up the same theme again in *Pioneer Aggregates Limited v Secretary of State for the Environment* [1985] AC 132 where a mining company had been granted planning permission to extract limestone from a quarry. After carrying out that activity for a substantial period, the company wrote to the local planning authority giving notice that quarrying would cease at the end of that year. Later, a new owner of the site wished to resume quarrying but the planning authority took the view that the earlier planning permission had been abandoned. The House of Lords rejected that contention holding that the Town and Country Planning Act 1971 (UK) was a comprehensive code of planning control under which grant of planning permission enured for the benefit of the land and all persons for the time being interested in it. It followed that a valid permission capable of implementation could not be abandoned by the conduct of an owner or occupier of the land.

[71] In delivering the leading judgment, Lord Scarman again firmly rejected the notion of private law principles being introduced into planning law. Specifically in relation to the issue of abandonment, the House of Lords decided that there was no such general rule in planning law. Lord Scarman stated at 140:

> But I am satisfied that the Court of Appeal in the Slough case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion.
>
> Planning control is the creature of statute. It is an imposition in the public interest of restrictions on private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in Newbury DC v Secretary of State for the Environment [1980] 1 All ER 731, [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. Planning law, though a comprehensive code imposed in the public interest, is, of course, based on land law. Where the code is silent or ambiguous, resort to the principles of private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by

> application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

[72] In Australia, appellate courts in Victoria and New South Wales have applied *Pioneer Aggregates* in determining that permits granted under planning legislation could not be abandoned and that they could not be revoked, modified or cease to have effect otherwise than in accordance with the relevant statutory provisions. In *Park Street Properties Pty Ltd v. The City of South Melbourne* [1990] VR 545 at 554-555 the Appeal Division of the Supreme Court of Victoria held that s 24 of the Town and Country Planning Act 1961 (Victoria) should be construed as meaning that a permit once granted continues to have force, effect and operation until revoked or modified in accordance with the section. In agreement with Lord Scarman in *Pioneer Aggregates* there was no rule of abandonment in Victorian planning legislation and "considerable uncertainty and confusion would arise in the realm of conveyancing were the duration of a permit to be governed simply by the actions of a permitee".

[73] The reasoning in *Pioneer Aggregates* was also adopted more recently by the New South Wales Court of Appeal in *Auburn Council v Nehme* (1999) NSWCA 383 in holding at [18] to [24] that a valid consent under the relevant legislation which had not lapsed and was capable of being implemented, could not be extinguished by the abandonment of the use.

[74] Mr Williams relied on several decisions which in my view can be readily distinguished. The first was the decision of the English Court of Appeal in *Pilkington v Secretary of State for the Environment* [1974] 1 All ER 283 decided before the decisions of the House of Lords in *Newbury* and *Pioneer Aggregates.* In *Pilkington*, the issue was whether the grant and implementation of a later planning consent meant that it was no longer possible practically to implement an earlier consent consistently with the later consent. The Court of Appeal held it was no longer physically possible to carry out the earlier consent consistently with the later

one. At 288, Lord Widgery CJ stated that the decision of the Court was not based on any abandonment of the earlier permission nor on any election on the part of the appellant. This case does not have any relevance to the present.

[75] Reference should also be made here however to another decision of the English Court of Appeal which suggested a qualification to the principles established in *Pioneer Aggregates*. In *Cynon Valley Borough Council v Secretary of State for Wales* (1986) 85 LGR 36, the issue was whether planning permission for a fish and chip shop could be resumed when, in the meantime, planning permission for an antique shop in the same premises had been granted and implemented. While acknowledging that *Pioneer Aggregates* meant that the first permission could not be abandoned, the Court held that it was fully implemented or spent and that fresh planning permission was needed if it were to be resumed. Delivering the judgment of the Court, Balcombe LJ acknowledged that the decision made a "significant qualification" to the principles in *Pioneer Aggregates.* The distinction between abandonment and a case where planning permission is implemented or spent is hard to discern. But the case is clearly distinguishable from the present because the use of the site at Western Springs has remained consistent throughout.

[76] Next Mr Williams relied strongly on the decision of the Environment Court in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. Judge Willy held that an estoppel by representation arose in consequence of a statement by parties to a consent order of their intention to construct a new single family dwelling on a site once the existing historic house was removed. This statement was included in the consent order as one of its "terms, conditions or undertakings". The parties making the statement were found to be estopped from applying to subdivide the site to establish more than one dwelling. The decision makes no reference to *Newbury* or *Pioneer Aggregates* but proceeds on the basis of a decision by Sir Douglas Frank QC sitting as a Deputy Judge in the Queen's Bench Division in *Augier v Secretary of State for the Environment* (1978) 38 P and CR 219 (QBD). That case is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission, is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.

[77] There are obvious differences between *Mora* and the present case. *Mora* was concerned with a specific representation made by one party to the Court and the other parties. It was relied upon to settle an appeal and was incorporated into a consent order as a "term, condition or undertaking". I view *Mora* as an example of the exceptional case envisaged by Lord Scarman where reliance on a principle of private law is necessary in order to give effect to the purpose of the legislation. It is difficult to conceive how the Environment Court could proceed effectively if parties giving specific undertakings or making specific representations as a foundation for its orders are not to be held to their word. But *Mora* should not be taken as authority for any more general proposition beyond its specific factual setting.

[78] Mr Williams also referred to *Sutton v Moule* [1992] 2 NZRMA 41 (CA) but the issues in that case were first, whether a second planning consent application should be treated as a fresh application or as an application to vary an earlier consent for the same activity and secondly, whether the later consent was to be read as a new consent or as supplementing the earlier one. The case has no relevance to the present.

[79] I respectfully adopt Lord Scarman's reasoning and conclusions in *Pioneer Aggregates* on this issue and hold that the application of private law doctrines in the field of resource management law is generally inappropriate except in exceptional cases of the kind described by Lord Scarman in the passage cited at [71] above.

[80] Leaving aside the fundamental differences between public and private law, the introduction of the latter would introduce unwanted and unnecessary complexity in the field of resource management law. One only has to consider for a moment the issues which could potentially arise if, parties began to debate issues of waiver or estoppel with territorial or regional councils or in the Environment Court. In *Auckland Harbour Board v Kaihe* [1962] NZLR 69 (CA), Gresson P described the basic differences between the doctrines of waiver and estoppel at 88:

> There is a distinction between waiver and estoppel even though the facts of a particular case might admit of the application of either doctrine and make it unnecessary to have regard to such differences as there are. Estoppel is based on the principle that it would be inequitable to allow a person who by a representation or by conduct amounting to a representation has induced

> another to act as he would not otherwise have done to deny or repudiate the effect of the representation. Waiver is something different. It must be an intentional act with knowledge: Lord Chelmsford L.C., in Darnley v London, Chatham and Dover Railway (1867) L.R. 2 H.L. 43, 57. It must be intentional in the sense that it indicates either expressly or by implication an intention to dispense with an existing condition. It looks chiefly to the conduct and position of the person who is said to have waived whereas in the case of estoppel it is not essential that the person sought to be estopped should have had knowledge or intention. In the case of waiver some distinct act must be done to constitute a waiver: Parke B. in Doe d. Nash v Bush, 1 M. & W. 402, 406; 150 E.R. 490, 492, and Williams J. in Perry v Davis (1858) 3 C.B. (N.S.) 769, 777; 140 E.R. 945, 948; but conduct short of positive acts is sufficient to found an estoppel.

[81] Numerous issues would need to be canvassed if an estoppel argument were raised in the present case. It would be necessary to traverse on the facts whether there was an express or implied representation; what was the nature of that representation; who made it and to whom was it made; who relied upon it and whether any such person or persons altered their position to their detriment in consequence; and who might now rely on the representation. As well issues might arise as to whether any estoppel was intended to be permanent or temporary or whether, upon reasonable notice, any party bound might be entitled to resume their prior position notwithstanding the representation (as to which see the discussion in *Spencer Bower Estoppel by Representation* (4th Ed) Lexis Nexis (UK) 2004, Chapter XIV paras 3.1 to 3.3).

[82] Similar complexities would arise in relation to the issue of waiver. For example, was there a distinct act or course of conduct which could constitute a waiver; was that act undertaken intentionally with knowledge of the relevant implications; was the act of waiver intended to be permanent; and who would be bound by the waiver?

*Conclusions on the second ground of appeal*

[83] My conclusions on this ground of appeal may be summarised as follows:

i) The Resource Management Act, and in particular, ss 9, 10, 10A and 20 constitute a comprehensive code on the issue of existing use rights.

ii) Existing use rights in relation to the use of land may only be lost by discontinuance in accordance with s 10(2) or where the effects of the use are no longer the same or similar in character, intensity and scale to those which existed before the relevant rule became operative or the proposed plan was notified.

iii) Common law principles or equitable doctrines such as waiver, estoppel or election generally have no application under the Resource Management Act except in exceptional circumstances of the kind described by Lord Scarman in the *Pioneer Aggregates* case.

iv) Existing use rights enure for the benefit of the owner or occupier of the land for the time being so that the agreements, representations or conduct of a current owner or occupier will not in general bind subsequent owners or occupiers.

v) Civil remedies, for example, to enforce a contract will be separately available to the parties to the contract in courts of general jurisdiction. Whether the parties choose to exercise those rights is a matter for them.

[84] I add that my conclusions are directed to the application of common law or equitable doctrines in relation to substantive rights. It is well established that procedural rights may be waived in certain circumstances. Section 281 of the Act makes specific provision for waiver of rights of that kind. And, in the course of litigation, a party may be bound by an unequivocal election between two inconsistent courses of action: see *Spencer Bower Estoppel by Representation* above at XIII 1.12. The application of equitable doctrines in that context may be viewed (as with *Mora*) as an exception justified as being necessary to give effect to the legislation by enabling the Environment Court to operative effectively.

*What are the consequences of these findings in the present case?*

[85] Because the facts of the present case are not fully before this Court and will require full exploration in the Environment Court, I am loathe to express any firm conclusions and will confine myself to issues of law or principle.

[86] The full terms of the promotion agreement between the Council and SPL are not before this Court and I have no evidence it is still in existence or of its precise terms. If it is still in force, it will be enforceable in the courts of general jurisdiction at the discretion of either party and according to its tenor. It is asserted by the Council and SPL that the agreement is binding only between themselves. Whether that is so, this Court cannot determine without reference to the terms of the agreement.

[87] Although a private agreement is enforceable only by those bound by it, the position is different under the Act. The Act and plans made under its authority bind the world at large and the Council is bound to enforce them: s 84(1). But the Council may only enforce the rules of a district plan to the extent permitted by law. If SPL is able successfully to establish and keep within existing use rights which authorise activities at the stadium generating noise at levels in excess of those permitted by the relevant plan, the only powers available to the Council under the Act are those available for breach of ss 16 or 17 of the Act (to which I shortly refer).

[88] The agreement underlying the consent order in 1998 is binding only upon Ms Booking, the Council and the then promoter of the stadium. The underlying agreement does not bind SPL and could not constitute any representation or waiver by SPL. But, to the extent that the Concept Plan then became operative for the stadium, its terms apply to future owners or occupiers subject to any existing use rights which may be established and to the duties under ss 16 and 17.

[89] In the end, the duty under s 16 on occupiers of land to adopt the best practicable option to ensure that the emission of noise does not exceed a reasonable level and the duty under s 17 to avoid, remedy or mitigate adverse effects may assume some importance in the Environment Court hearing yet to come. Mr Kirkpatrick properly acknowledged that any existing rights established are subject to the duties under ss 16 and 17. In those circumstances, the existence or otherwise of existing use rights may be no more than a factor in the Environment Court's overall considerations.

**Third Ground of Appeal – Are existing use rights a lawful authority for a use of land which contravenes a rule in a District Plan?**

[90] This ground may be briefly disposed of. Mr Williams properly accepts that there can be only one answer to this question and that is in the affirmative. Existing use rights are just as much a legitimate means of establishing lawful authority for the use of land as is a resource consent.

[91] Mr Kirkpatrick's point was that the use of expressions in the Environment Court's decision such as the suggestion that the Council had entered an arrangement with SPL "for the express purpose of evading the terms of its own District Plan" did not recognise that, to the extent that SPL could establish existing use rights, its activities were lawful and could not be the subject of enforcement action by the Council so long as SPL's activities were within those rights.

[92] I accept that to the extent that the Environment Court's remarks did not recognise this possibility, they are not supportable as a matter of law. These remarks were not however material to the Environment Court's decision to decline the variation.

**Result**

[93] The appellant has established errors of law in the Environment Court's decision but none was material to the outcome. It follows that the appeal will be dismissed.

[94] This decision does not determine the future of speedway racing at Western Springs Stadium. It provides guidance on the subject of existing use rights arguably available to Springs Promotions Limited. Whether those rights exist and the appropriate noise levels at the Stadium are matters yet to be determined by the Environment Court.

[95] If counsel are unable to agree on costs, counsel for the respondents are to file and serve memoranda within 14 days of this decision and the appellant within 14 days after receipt of the respondent's submissions.

A P Randerson, J
Chief High Court Judge

Decision No. A049/2002

| | |
|---|---|
| IN THE MATTER | of the Resource Management Act 199 1 |
| AND | |
| IN THE MATTER | of two appeals under clause 14 of the First Schedule to the Act |
| BETWEEN | **WINSTONE** AGGREGATES LIMITED |
| | (RMA 162/95) |
| AND | AUCKLAND REGIONAL COUNCIL |
| | (RMA 174/95) |
| | Appellants |
| AND | PAPAKURA DISTRICT COUNCIL |
| | Respondent |

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner J R Dart
Environment Commissioner R F Gapes

HEARING at AUCKLAND on 1,2,3,4 & 5 December 1997 and 18,19 & 20 February 1998

APPEARANCES

Mr F G Herbert for the Papakura District Council
Mr J M Savage for the Auckland Regional Council
Mr D A Nolan for Winstone Aggregates Limited
Mr J Kingston for the K L Richardson Estate

DECISION

***Introduction***

[1] This is a final decision in relation to the references lodged by Winstone Aggregates and Auckland Regional Council regarding provisions of the Papakura District Plan (Urban and Rural Section). The references sought amendments to the

District Plan to provide greater protection to areas containing mineral resources from encroachment by potentially conflicting land uses.

[2] In September 1998 Winstone appealed the interim decision to the High Court. That appeal has been adjourned sine die.

[3] The references were heard by us in December 1997 with the Court issuing an interim decision on 14 August 1998[1]. As a result of extensive ongoing discussions between the parties, further investigations, and further expert information obtained; the parties were able to reach an agreement consistent with the ruling of the Court's interim decision. On 25 September 2001 a Memorandum of Consent, signed by all parties, with a draft Consent Order attached, was filed with the Court. The Court issued a further interim decision on 22 November 2001[2], confirming the provisions contained in the draft consent order. In that interim decision we said:[3]

> *In the lengthy memorandum of counsel filed with the proposed consent order counsel for Winstone indicated some concern with the terminology used by the Court in the interim decision. We have considered the issues raised by counsel. We are of the view that: because of the importance of this matter to the parties; because of the considerable sums of money expended by the parties by way of further enquiry and investigation; the negotiations leading to the settlement; and in deference to counsel's detailed submissions; we consider it behoves the Court to address those matters in a final decision.*

***Winstone's Concern***

[4] Mr Nolan's concerns were founded on the Environment Court's terminology, particularly its indication that effects should be "internalised". Mr Nolan considered that the basic requirement under the RMA in relation to effects is to avoid, remedy or mitigate those effects to the extent required by the overall purpose of the RMA as set out in section 5, and the duties in sections 16 and 17 of the Act. He was of the view that this may, or may not in all cases, result in an intemalising of effects within a site boundary.

[5] Mr Nolan was of the view that the wording of the RMA does not refer to or require any intemalisation of effects as a matter of general principle, or that reverse sensitivity provisions of the type proposed are only appropriate where it is not reasonably possible to intemalise effects. He contended that references to internalisation are an unnecessary gloss to the clear wording of the RMA; which,

---

[1] Decision No. A96/98
[2] Decision No. A128/01.
[3] Paragraph 8.

instead, uses the specific language of "avoiding, remedying or mitigating" effects[4]. He submitted that those obligations may require a proponent to demonstrate the reasonableness of its proposals, for example, with regards to noise mitigation, in terms of any costs/inconvenience on the proponent, compared to the effects that would otherwise be caused to adjoining landowners. Moreover, that such an examination is not the result of a statutory obligation to intemalise effects.

[6] Mr Nolan was also particularly concerned that neither the consent order, nor the interim decision be adopted as authority for the principle that there is a general requirement to intemalise effects under the RMA.

**Passages of the Interim Judgment that Cause Concern to Winstone**

[7] The passages in the first interim decision that gave rise to Mr Nolan's submissions are:

> *We remind ourselves that we are currently considering a reference, rather than an appeal for resource consent. The statute requires different things of a territorial authority in the formulating of a district plan. Nevertheless, we are of the view that in promoting the sustainable management of natural and physical resources, particularly having regard to s.32(1)(c), the adverse effects of quarrying should, as far as possible, be confined to the site within which those activities causing the effects are carried out. We consider that this is in accord with the purpose of the Act. When Part II of the Act is taken as a whole, there is a clear mandate for controls to be included in plans which will prevent undue adverse effects and reduction in amenity values.'*

And:

> *We consider that in controlling undesirable effects, territorial authorities should impose restrictions to internalise adverse effects as much as* ***reasonably*** *possible. It is only where those effects cannot be reasonably controlled by restrictions and controls aimed at internalisation, that the sort of restrictions on other sites (as sought by the appellants) might be appropriate. Those are relatively rare circumstances and will vary from site to site.'*

And:

> *That the districtplan should contain objectives, policies and methods to control the effects of quarrying, is not in dispute. It is whether those objectives, policies and methods should be directed at internalising all of the adverse effects, or whether a combination of those restrictions should be combined with restrictions constraining the* use *of land owned by adjacent landowners. We have already held that we are of the view that adverse effects should be internalised where possible, but that such restrictions should be reasonable. In the event of adverse effects escaping from the site after the imposition of reasonable controls, then restrictions constraining*

[4] Sections 5, 16 & 17
[5] Paragraph 97.
[6] Paragraph 98.

> *adjacent landowners can and should be implemented. It is only when reasonable controls for the containing of effects at the boundary of the quarry site have been implemented can it be property and adequately assessed that the perimeter of effects extends beyond the quarry zone thus making it necessary to impose restrictions on adjacent landowners.*[7]

And:

> *After a careful evaluation of the evidence, we are satisfied that there has not been a full consideration of options for noise management, and that the best practicable option may not have been selected. We agree with Mr Hart that further work is required to establish what are the best practicable options. Before we reconsider justifying the imposition of restrictions on residents' rights to use their own land, we need to be satisfied that all reasonable andpracticable steps have been taken to internalise effects.*[8]

[8] In summary, Mr Nolan's submissions asserted that the passages appear to be philosophically inconsistent with other cases that have addressed reserve sensitivity issues, and seem to create a new duty under the RMA by requiring the intemalisation of adverse effects. This he says is inconsistent with the duty to avoid, remedy or mitigate adverse effects.

[9] First, we say that as a Court of first instance any decision, even of principle, has no binding effect. Secondly, there appears to be little or no difference on matters of principle between our approach and that submitted by Mr Nolan. He appears, to us, to be reading more into our decision than was intended, by asserting it creates a new duty under the RMA. As a Court of first instance we are required to make decisions on a wide variety of factual circumstances. By far the majority of our decisions are fact specific. Analysts must therefore be weary of elevating comments made in respect of specific fact situations to matters of principle.

[10] Perhaps the wording of our decision has given rise to Mr Nolan's concerns. We regret if there is any lack of precision and any apparent failure to tether our reasonings to the Act. We therefore propose to set out the basis upon which we made our decision and then endeavour to clarify our decision as it related to the fact specific circumstances.

***Reverse Sensitivity as an adverse "effect"***

[11] Section 3 of the Act defines "effect" as:

---

[7] Paragraph 101.
[8] Paragraph 145.

> 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 orpermanent effect; and*
>
> *(c) Anypastpresent, or future effects; 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.*

[12] The concept of reverse sensitivity has not been defined under the Act, although it has been recognised in case law, and it is well settled that reverse sensitivity is an effect on the environment. In ***Auckland Regional Council v Auckland City Council***[9] Judge Sheppard defined the concept as:

> *The term "reverse sensitivity" is used to refer to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those other activities.*

[13] In the present circumstances the "reverse sensitivity" at issue was the restriction on activities within the vicinity of the quarry sensitive to the effects of the quarry, such as subdivision, residential uses and educational facilities. Thus if reverse sensitivity is an "effect" under the Act, then there is a duty to "avoid, *remedy, or mitigate*".

**The Basis of our Decision**

[14] The starting point is section 5 of the Resource Management Act 1991. It states:

[9] Decision No. A0 1 0/97

***5. Purpose***

*(I) The purpose of this Act is to promote the sustainable management of natural andphysical 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 the activities on the environment.*

[15] Section 5 sets out the purpose and principles of the Act, which is to promote the sustainable management of natural and physical resources. Section 5 is accorded primacy and has been described as the "lodestar"[10]. Thus, section 5 guides the functions of regional and territorial authorities in plan-making and policy decisions[11], and, when territorial authorities are making decisions as to whether to grant or refuse resource consent applications[12].

[16] There has been some debate about the ambiguous meaning of the word "while" within the context of s5(2), and whether it is used conservatively or loosely. In other words, whether "while" is used as a subordinating conjunction, or a co-ordinating conjunction.

[17] If "while" is used as a subordinating conjunction meaning "if ', or "as long as" then sustainable management can only occur if the matters in subsections (a) (b) and (c) are secured.

---

[10] Lee v Auckland City Council [1995] MZRMA
[11] Sections 31 and 32 RMA
[12] Sections *104* and 105, and s108 if consent is granted.

[18] If "while" is used as a co-ordinating conjunction meaning "at the same time as", then sustainable management can occur if the matters in subsections (a), (b) and (c) have equal value to, and therefore in any decision-making process are afforded the same weight as, the matters set out in the words preceding "while" and prefaced by the word "managing".

[19] In ***Peninsula Watchdog Group Inc v Waikato District Council***[13], the Tribunal was invited to form an opinion on the word "while". Counsel in that case submitted that the correct interpretation to be given to the word "while" in s5(2) was that human values are conditional upon ecological values[14]. The Tribunal declined to address the meaning of the word "while" in s 5(2) and adopted the reasoning of Grieg J in ***NZ Rail v Marlborough District Council***[15]. The Tribunal was of the view that the case should be decided on the basis of submissions, and the evidence before it, rather than on an academic analysis of s5.

[20] ***In*** the ***NZ Rail*** case, Greig J held that:

> *This Part of the Act expresses in ordinary words of wide meaning the overall purpose **and** principles of the Act. It is not, I think, a part of the Act 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 meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.*[16]

[21] In ***North Shore City Council v Auckland Regional Council",*** the Environment Court in the application of s5, adopted the reasoning in ***Trio Holdings Ltd v Marlborough District Council***[18], and held that:

> *The method of applying section 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 Act 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.*[19]

---

[13] Decision No. AO52/94 (Planning Tribunal)
[14] Fisher, D *"Clarity in a Little 'While'* ", Terra Nova, 11 November 1991, pp50-51
[15] [1994] NZRMA 70 (High Court)
[16] Page 87.
[17] [1996] 2 ELRNZ 305; [1999] NZRMA 59.
[18] [1996] 2 ELRNZ 353
[19] Page 94 supra.

[22] The application of section 5(2)(c) cannot fulfil the overall purpose of sustainable management, if the section is interpreted in such a way as to give primacy to the ecological values over the management function. To do that would not *always* fulfil the purpose of sustainable management, but may in some cases. What is required is a consideration of all aspects of the case, and then a weighing of factors in order to evaluate which will best achieve the purpose and principles of the Act.

[23] One of the fundamental elements of sustainable management is controlling the adverse effects on the environment, which is provided for by section 5(2)(c), the key words being "avoid, remedy, or mitigate". In ***Mangakahia Maori Komiti v Northland Regional Council***[20], it was held that "each paragraph of s5 is to be accorded full significance and applied accordingly in the circumstance of the particular case so that the promotion of the Act's purpose may be effectively achieved".

[24] While in the wording of the subsection the words "avoid, remedy, or mitigate" follow a continuum, we are of the view that the grammatical construction is such, that the words are to be read conjunctively and with equal importance.

[25] Accordingly, whether emphasis is given to avoidance, remedying or mitigation will depend on the facts of a particular case and the application of section 5 to those facts. A judgment is required to be made which *"allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance* **or** *proportion in the final outcome"*[21].

[26] ***In*** some cases mitigation of an adverse effect is sufficient. In other cases avoidance may be required. An example of the latter is ***Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council***[22]. The then Planning Tribunal held that even with the strict conditions of consent contemplated, in

---

20 Decision No. A107/95 Planning Tribunal
21 North Shore City Council supra.
22 (No. 2) (1993) 2 NZRMA 574.

conjunction with the enforcement provisions of the Act, properties adjacent to a proposed rendering plant would be likely to be affected by unintentional, but unavoidable, emissions of offensive odours from the proposed plant. The Tribunal said:

> *For both applications the decisive issue is odour emission. The odour from the rendering process is offensive and can be nauseating. Occupiers of properties in the Rural Al and Rural B zones in the vicinity of the site are entitled to be free from having to experience that odour. Proprietors of businesses on properties in the vicinity of the site are entitled to be able to conduct those businesses without their patrons or customers being deterred by experiencing renderingplant odour.*
>
> *Occupiers, business people and their patrons should be free of rendering plant odour at all times without condition or qualification. It would not be sufficient for the proprietor of a rendering plant to demonstrate that emission of rendering plant odour which reached adjacent properties was the result of an unforeseen or random accident or malfunction. Nor would it be sufficient for the proprietor of a rendering plant to demonstrate that the best practicable option had been taken to avoid emission of odour which might reach adjacent properties. Defences available under s.342 should not be a sufficient response where a rendering plant has been established out of zone on land where that activity is not* a *permitted activity.*[23]
>
> *However, avoidance of adverse effects is more consistent with the purpose of the Act than enforcement proceedings after adverse effects have been experienced. Further, the evidence did not satisfy us that the plant would be designed and built to prevent adverse effects on the environment.*[24]

[27] The Tribunal considered that an escape of rendering odour would have a high potential impact on the social, economic, aesthetic and cultural conditions, and the amenity values of the area. As the proposal did not provide the full duplication of systems needed to avoid emanations of objectionable odour the consents were refused. In the Tribunal's judgment, such potential effects deserved such weight, against the grant of the consents sought, that it must prevail. The Tribunal came to a fact specific judgment after balancing and weighing the factors required to give effect to the single purpose of the Act.

[28] Two further examples of where the Court emphasised the need for avoidance are two cases involving this division of the Court. They are ***P H van den Brink (Karaka) Limited v Franklin District Council*** [25] and ***Hill v Matamata-Piako District Council***[26]. ***In*** the former case the adverse effects emanating from a poultry processing plant were noise and odour. The applicant, who was the appellant, led technical evidence to the effect that those adverse effects could be confined on site,

---

[23] Page 582 and 583.
[24] Page 583.
[25] 1997 NZRMA 552.
[26] Decision No. A65/99.

albeit at cost, and proposed conditions accordingly. The emphasis was on odour, which, like the Tribunal in the ***Te Aroha*** decision, we found on the evidence to be objectionable.

[29] In the latter case, which concerned chicken broiler sheds, the emphasis and focus was again on odour. Again, on the evidence we found it objectionable. Again, the technical evidence was that conditions could be imposed that would eliminate odour.

[30] On the evidence in those cases the Court came to the conclusion that it was appropriate and reasonable for the adverse effects causing concern to adjacent neighbours to be intemalised on site. In other words, the emanation of those adverse effects outside the site boundary was to be avoided.

[31] While all of those cases stressed the need to avoid adverse effects by putting in place systems to avoid emanations of the adverse effects, they were all fact specific.

[32] The word "intemalised" was used in ***Machinery Movers Limited v Auckland Regional Council***[27]. ***In*** that case the full division of the High Court quoted principle 16 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development, Rio de Janeiro 3-14 June 1992, [1992] International Legal Materials 876, 879. New Zealand is a signatory to the Declaration. Principle 16 states:

> *National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*[28]

[33] In our view the avoidance of adverse effects by the imposition of systems means that the cost of avoidance is borne by the organisation that generates them. It is a matter of judgment as to whether in a particular case the adverse effects are such that the cost of avoidance should be totally intemalised. It is a question of what is reasonable in the circumstances.


[27] [1994] 1 NZLR 492.
[28] Ibid page 502.

[34] While we have focused on avoidance there are many cases where mitigation measures to reduce adverse effects are all that is required. There are many examples that include noise and dust mitigation measures as well as, of course, many others.

**What We Meant**

[35] **In** our interim decision we were directly concerned with the potential conflict between quarrying activities, and other land use activities, sensitive to adverse effects, that it is well-known can emanate from quarries.

[36] It was proposed that an aggregate resource protection area (or buffer zone) extending 500 metres from the boundary of the present and future operations of the quarry be imposed. This was to be on land owned by entities other than the quarry owner. The proposal was vigorously opposed by one of the landowners, affected, namely the K L Richardson Estate.

[37] Considerable evidence relating to significant adverse effects, and systems to control them, was given over a period of 8 days. The evidence also addressed the difficulty of confining those effects within the quarry boundary. The evidence did indicate that many of the effects could be confined on site, albeit at some considerable cost. For example, measures could be taken to prevent dust annoyance; measures could also be taken to prevent sediment entering waterways; and measures could be taken to confine noise and vibration.

[38] It was clear from the evidence that the most difficult and costly effects to confine are noise and the effects of blasting. We accordingly heard extensive and detailed expert evidence relating to both noise and vibration.

[39] The evidence suggested that noise and vibration could be confined on site at cost. In other words could be intemalised. We accordingly defined the issue as *"to what extent is it reasonable to expect a quarry operator to internalise those effects".*[29]

[40] As we said *"this involves a careful consideration of the evidence, including an assessment of the practical mitigation measures available with present technology, and the economics of implementing those measures".*

[29] Paragraph 80 of Interim Decision No. A96/98.

[41] One of our concerns about a buffer zone over private land is that it imposes restrictions on the land which it overlays. When that land is owned by the quarry operator, there is no problem. When it is not, then there is a problem and a potential conflict. In this case, the Richardson Estate land was zoned Rural Residential in the then proposed district scheme. That part of the Estate's land contained within the buffer zone would be affected considerably by the implementation of the buffer zone. The evidence established that this could have serious economic effects. Therefore, indirectly, the Richardson Estate would be bearing the cost of the adverse effects emanating from the quarry.

[42] Accordingly, before we were prepared to countenance the imposition of a buffer zone, we required evidence to satisfy us that all reasonable attempts had been made by the quarry operator to impose systems which could avoid adverse effects beyond the quarry boundary. The appropriate way of doing this in our view was to set noise standards and vibration standards at the quarry boundary, thus reflecting the reasonable restraints that should be imposed on the quarry operator. What is reasonable, is a question of fact in the circumstances of each particular case. There are many factors to be considered including such as the cost to the quarry operator.

[43] The application of section 5(2)(c), therefore, must necessarily involve a consideration of all aspects of a proposal within the broader context of sustainable management dependent upon the factual matrix of each circumstance. This calls for an assessment to be made in terms of the scale and degree of those effects and their significance or proportion in the final outcome[30]. It is a pragmatic approach to sustainable management, and also one that is designed to achieved an outcome that is fair and reasonable in each particular circumstance.

[44] The word "intemalisation" was used in the interim decision with a qualification. For example the following phrases:

> *. . . the adverse effects of quarrying should, as far as possible, be confined to the site within which those activities causing the effects are carried out."*
>
> *... internalise adverse effects as much as reasonably possible.*[32]
>
> *...adverse effects should be internalised where possible, but that such restrictions should be reasonable. In the event of adverse effects escaping from the site after*

---

[30] *North Shore City Council v Auckland Regional Council* Decision No. A86/96
[31] *Winstone Aggregates v Papakura District Council,* Decision No.A 96/98; Para 97,
[32] Ibid; Para 98

> *the imposition of reasonable controls, then restrictions constraining adjacent landowners can and should be implemented.*[33] (Emphasis added)

[45] What is to be considered, is the extent to which the associated adverse effects of mining aggregate resources should be reasonably internalised so as to avoid the need to restrict the use of land owned by others. This incorporates "the polluter pays" approach.[34]

[46] "Reasonable Intemalisation" is part of the method of applying with the Act's requirements to "avoid, remedy, or mitigate", and is not intended to be interpreted as a separate duty. In considering the imposition of a buffer zone we formulated what, for the sake of simplicity, can be viewed as a two step process. The first part of the consideration is to require emitters to take all reasonable steps to intemalise effects. Only those effects which cannot be reasonably intemalised provide the basis for constraints on nearby land-use activities. This method thus incorporates "the polluter pays" approach, in conjunction with a practical evaluation of who can reasonably mitigate. This is analogous to the duty to "avoid, remedy or mitigate", in that if an effect cannot be avoided, then, the emitter must remedy or mitigate through conditions of consent. "Intemalise" is not to be interpreted as to "intemalise at all costs".

[47] A determination of what is reasonable is dependent upon a careful consideration of the evidence, including an assessment of the practicable mitigation measures available, and the economics of implementing those measures.

**Determination**

[48] **In** the present case, after consideration of all of the evidence incorporating the various conflicting factors as above, we are satisfied that not all of the adverse effects of the quarry, particularly those of noise and vibration, could reasonably and

---

[33] Ibid; Para 101

[34] *Machinery Movers v Auckland Regional Council* [1994] 1 NZLR 492 (High

economically be contained within the site. Accordingly, in such circumstances we consider the imposition of an ARPA Zone (Reverse Sensitivity Buffer Zone) as being appropriate to the extent set out in the consent order.

**DATED** at **AUCKLAND** this 26th day of February **2002.**

For the Court:


R Gordon Whiting
Environment Judge

**BEFORE THE ENVIRONMENT COURT**

Decision No [2014] NZEnvC 96
ENV-2013-WLG-000056

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

**BETWEEN** WILHELMUS ZWART and AVIS ZWART
Appellants

**AND** THE GISBORNE DISTRICT COUNCIL
Respondent

Court: Environment Judge C J Thompson
Environment Commissioner A C E Leijnen
Heard: at Gisborne on 14 - 15 April 2014: site visit 16 April 2014
Counsel: J C Bunbury for G M Gedye – applicant
D J Sharp for appellants
G R Webb for the Gisborne District Council

---

**INTERIM DECISION OF THE COURT**

---

Decision issued: 30 APR 2014

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

*Introduction*

[1] In a decision dated 27 June 2013 the Gisborne District Council granted land use resource consents to Mr Graeme Gedye to build and operate a funeral home on the property at 601 Nelson Road, on the western outskirts of Gisborne City. Mr Gedye currently operates a stonemasonary business, providing headstones, benchtops and other granite supplies from a building on the site.

[2] The proposed funeral home will provide a range of services, including office and consultation facilities, the receiving and preparation of deceased persons for burial or cremation, embalming facilities, viewing rooms, a chapel (large enough for some 350 mourners) for the conduct of funerals, and reception areas for light refreshments afterwards. There will also be parking, landscaping, fencing and utility areas on the site. It is proposed that the headstone and granite supply business will continue in the workshop, which is to be extended.

[3] Mr Gedye also expresses an intention to build and operate a cremator on the site but, at the time of applying for the other consents in 2013, did not seek the necessary air discharge consent from the Council to enable that to be done. We understand that such an application was made on 14 February 2014 but the Council required further information from the applicant and, unsurprisingly, has not yet been able to make a decision about it. We shall return to that topic. There were suggestions also of a need to have a discharge consent for wastewater and trade waste from the embalming processes; a stormwater discharge consent to deal with stormwater from the buildings' roofs and hardstand areas, and a means of providing the required amount of fire-fighting water, as the property will not have reticulated water. We shall return to those also.

[4] In describing the background to the application, Mr Gedye confirms that from 1999 to 2005 he was employed by the one existing funeral home in Gisborne, managing their subsidiary monumental business. That also involved him, from time to time, in helping with the transport of deceased persons and other activities connected with the business.

[5] Mr Gedye advises that the average number of deaths per annum in Gisborne is approximately 400, of whom Mr Gedye estimates somewhere between a half and a third will have their funerals in churches, marae, or other venues. That would give a figure of between 200 and 270 funeral services per annum, or 4 – 5 per week, being conducted in funeral directors' premises, and the proposal is, of course, expected to gain its share of that business. To give some context to the issues, assuming that it succeeds in gaining one half of it that would mean that on average there would be 2 or 3 funerals per week at the site. Mr Gedye expects that the business will employ between three and seven staff.

*The site and its surroundings*

[6] The site is some 5232m$^2$ in area and is directly opposite the Taruheru Cemetery, which is the only cemetery operated by the local authority. On the cemetery is the only crematorium presently operating in Gisborne. The building is owned by the Council, and leased by the existing funeral director which owns and operates the cremator. It is a cremator only – funeral services are not held there – and its operation is a *permitted* activity on the cemetery land.

[7] Beside the applicant's land on Nelson Road is an area presently noted as *Heritage Reserve* in the Gisborne District Combined Regional Land and District Plan. We are informed that the site is in fact set aside for future expansion of the cemetery. That expansion is a distant prospect – said to be possibly 50 to 100 years away. The Zwart land runs along the western boundary and rear (northern) boundary of the application (Gedye) site and extends behind the cemetery expansion area. The Gedye property is on land that was subdivided from the Zwart land. Apart from the cemetery, the surrounding area is rural or semi-rural in its uses. There are large-scale glass houses on the Zwart property, and an even larger glasshouse and growing operation (Leaderbrand) nearby at the bend to the west on Nelson Road. There is also a sawmill and timber merchant business some distance away to the east on Nelson Road. Otherwise, there are lifestyle properties, pastoral farming, and horticulture.

[8] As might be imagined from this description, the area is a transitional one, moving from the urban periphery to open countryside, with the very large cemetery a significant, even dominating, presence at this end of Nelson Road.

[9] The landform generally is flat and low lying with drainage being an issue, particularly from buildings and sealed areas.

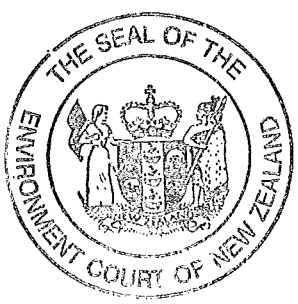
*Zoning and Planning Status*

[10] The planners consulted by the appellants and the applicant agree that the land is zoned *Rural Residential* under the Gisborne District Plan. It is outside the *Reticulated Services Boundary*, which is a method to require that relevant activities within the urban area are connected to the Council's reticulated services, so this site is not connected to reticulated water, or to the City's wastewater services. The land is not within the *Land One* overlay, meaning that it is not regarded as vulnerable to instability and erosion. The Taruheru Cemetery opposite the site is, as one might expect, zoned *Cemetery Reserve*.

[11] The proposed activity is a combination of industrial and commercial operations – under Rule 21.9.4.4 it is a *discretionary* activity, so the application is to be considered under s104, s104B and Part 2 of the RMA.

*The parties' positions*

[12] The applicant has a resource consent for the existing stonemasonary business, and points out that the proposed buildings will all fit within the Plan's recession plane contained in Rule 21.8.3. As the funeral home can operate without a cremator, the balance of the proposal does not require an air-discharge consent. He notes that, in terms of ratio of the building sizes, the proposed space for the cremator is very small and, apart from its 7m chimney, it is physically insignificant in the overall picture. The supply of fire-fighting water will be dealt with by providing tanks sufficient to hold the required 45,000 litres - (if the buildings are equipped with sprinklers – which they will be) and it is proposed that stormwater attenuation be dealt with at the building consent stage.



[13] Overall, Mr Gedye points to the advantages for the community in having a choice of provider for such services, and the employment and servicing opportunities that will be provided by the new business, and to the obvious convenience in having such a business very close to the city's cemetery.

[14] The Council is content with its decision, but did not call any evidence at the hearing before us. A number of Council officers were summonsed by the applicant and gave evidence on matters within their fields of operation.

[15] The appellants have a number of issues with the proposal. They regard the site as *too small* to accommodate all that the applicant wishes; they believe that it will have effects on their visual amenity and on the character of the area and that it will be *... detrimental to the appellant's [sic] interest.* They express concerns about traffic congestion and danger caused by overflow parking on the berms along Nelson Road, and about noise generated by traffic and by activities such as haka and bagpiping accompanying some funeral ceremonies.

[16] They have particular concerns about smoke and particulate discharges from the cremator but that is not, as we are about to discuss, part of the proceeding before us.

[17] Mr and Mrs Zwart regard the conditions imposed on the consent granted by the Council as being insufficient to mitigate the adverse effects they believe will be caused. They wish to see the Council's decision overturned, or at least that what they regard as improved conditions put in place, to mitigate the adverse effects to an acceptable degree. We shall discuss their concerns in more detail in considering the possible adverse effects of the proposal.

*Section 91 – integrated consideration – the required resource consents*

[18] Section 91 RMA provides:

> Deferral pending application for additional consents
>
> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—

(a) Other resource consents under this Act will also be required in respect of the proposal to which the application relates; and

(b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.

(2) Where a consent authority makes a determination under subsection (1), it shall forthwith notify the applicant of the determination.

(3) The applicant may apply to the Environment Court for an order directing that any determination under this section be revoked.

[19] There is certainly a general view that all necessary resource consents should be sought at the same time, so that the effects of any one proposal can be comprehensively considered (see, eg: *Affco NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224). But that need not invariably be so if, for instance, a proposal can be broken down into discrete and independently operable parts, and a reasonable assessment can be made of one or some of those parts without having to consider overlapping or cumulative effects. Here, while para (1)(a) applies, in that (at least) one other resource consent will be required to give the proposal full effect by operating the crematorium, the funeral home could operate independently and without the cremator being installed. As Mr Gedye will apparently be unable to use the cremator at the cemetery, he would, he says, be required to take bodies to Hastings to be cremated unless and until he has access to his own cremator. That would certainly be time consuming and inconvenient for him, and not, we imagine, something that grieving families would welcome.

[20] But we can, nevertheless, assess the effects of a stand-alone funeral director's operation, as proposed, without a cremator. Given that the issue of a s91 adjournment was not squarely raised by any party in advance of the hearing it seemed wasteful of time and resources to not proceed to hear what we could. We did so on the basis that the issue of a cremator was not before us because there has been no Council-level decision about one and so, of course, no appeal to this Court.

[21] In discussing the issues further, we should be understood as dealing with the application as the Council did – without considering a cremator or any issues of

discharges to air of smoke, particulates, or odour. If and when the Council is able to make a decision about such an application, that will be a stand-alone issue.

[22] All wastewater from the premises, including diluted chemicals from the embalming process, is to be disposed of in a two-step process. The first will be its collection, on site, in a tank. Then, as required, that tank will be emptied by a contractor, and then disposed of into the City's sewerage system off site. All of that is quite straight forward and such parts of it as may not be a *permitted* activity can be authorised by an unexceptional resource consent.

[23] There was a suggestion however, which we understand originated from within the Council, perhaps informally, that a further resource consent might be required to cover a possible accidental spillage from the holding tank, or during the process of transferring the tank's contents to the contractor's tanker. In other words, it would be a resource consent to anticipate non-compliance of an unknowable kind and degree, and *legitimise* it. We did not have a satisfactory response to our inquiries about this possibility, and we do not take it further.

[24] We mentioned at para [12] that it was Mr Gedye's expressed intention to deal with stormwater attenuation at the point of seeking and obtaining a building consent – in other words quite independently of the resource consent process. That had some superficial appeal until at least the extent of the building and sealed surface coverage, and the nature and degree of the landscaping required to deal with visual issues became apparent. Attempting to set conditions around the landscaping issues without knowing how stormwater can be managed is not realistic, and it seems rather likely that the practicalities of stormwater management could be compromised by pre-set and incompatible landscaping requirements. In short, the two issues need to be dealt with in a coordinated way, meaning that stormwater attenuation should be dealt with at the resource consent stage of the process.

*Section 104(1)(a) – effects on the environment – positive effects*

[25] It has to be acknowledged that locating a funeral home directly across the road from the City's only cemetery has a certain symmetry about it in terms of the

efficient use of resources. As well, a choice of provider of funeral services could readily be seen, in s5 RMA terms, to help enable people to provide for their … *social … and cultural wellbeing*. There will be additional employment opportunities also which, although not huge, will also add to … *economic … wellbeing*.

*Section 104(1)(a) – adverse effects - traffic and carparking*

[26] We begin this discussion by reminding ourselves that the Act defines *amenity values* as:

> … 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.

[27] For present purposes, we take it as a given that mourners attending a funeral on the premises will travel by car. The District Plan requires 1 carpark per $5m^2$ of meeting rooms which, on the building plan's most recent iteration, would mean c68 parks are required. As laid out on that most recent iteration, parking on site will cater for some 58 cars, plus room for a hearse and three *family* cars at the portico. Mr Andrew Prosser (a traffic engineer called by the Appellants) adopted a ratio of 2-3 persons per car as being a suitable estimation for a funeral home. So, for a capacity attendance of 350 at a funeral it would be reasonable to expect between 116 and 175 cars. We note that the planner witnesses agreed, as do we, that it would not be reasonable for that requirement for on-site parking to be met by this sort of proposal.

[28] The cemetery across the road has no, or very little, provision for parking on site. Occasionally, we understand, a piece of open (as yet unused) ground at its western side, with access off Nelson Road, is opened for informal parking if a particularly large crowd is expected at an internment. Short of that, overflow cemetery parking is along the grass berms on either side of Nelson Road, and it is expected that will also be the case for the proposal. The berm immediately outside the site, and extending past the cemetery extension site, is not wide enough to take cars parked at $90^{\circ}$ to the road, but it can take parallel parking with, at worst, only a slight intrusion onto the sealed surface. The berm on the cemetery side is amply wide for $90^{\circ}$ parking, and extends some 400m away to the south-east.

[29] There is a question about people having to park some distance along Nelson Road and then, there of course being no footpaths, using the sealed road surface to walk back to the site – both because other parked cars may not allow sufficient room to walk along the berm behind them or, particularly in poor weather, there may be reluctance to get *Sunday Best* shoes marked with mud.

[30] We accept that the parking along the berms, while generally quite acceptable, could give rise to some safety concerns on a piece of road which has a 100kph speed limit. Two possible solutions were raised. First, that there be a permanent speed reduction on this stretch of Nelson Road to 50 kph. We are not sure that is likely to be very effective, nor necessary.

[31] The better solution appeared to us to be that suggested by Mr Prosser that a traffic management plan (TMP) be adopted, so that it can be put in place when there is a funeral which is thought likely, or in the event proves to, to draw a crowd large enough to require parking to extend beyond the capacity of the on-site parking and onto the berms of Nelson Road. The outline of such a management plan would consist of management regimes to (we refer to Mr Prosser's para 57 and Figure 3):

- set a temporary speed limit of 50kms;
- gated positioning of speed limit signs;
- funeral signs supplementary to the speed restriction signage to signify the nature of the event;
- no parking signs to manage sight lines;

And we would add:

- an *on ground* manager to encourage appropriate arrangement of parking (eg: 90 degrees; parallel; off the carriageway);
- we would also suggest that a qualified person(s) be on site at all times where there is the potential for an overflow of parking to occur so that the TMP could be implemented efficiently when demand requires;
- methodology for implementation, layout, assignment of responsibilities etc which would be the norm for a TMP.

[32] Mr Gedye, as a former Police Officer with some years experience in the Traffic Safety Branch, would be ideally placed to operate such a plan[1]. He will be able, in consultation with the family or friends of the deceased, to estimate the likely attendance at a funeral, and will be on site to ensure that the appropriate signage is displayed and other steps taken to minimise risk to traffic and pedestrians.

[33] The preparation and operation of such a plan should form a part of the resource consent, and we shall return to that shortly.

[34] That plan will also need to address the practicalities (perhaps by way of a protocol or something similar) of coordinating the timing of funerals at the site with internments at the cemetery from funerals conducted elsewhere, to avoid a *double-up* of parking requirements on Nelson Road. The control of ceremonies at the cemetery is provided for in the Council's by-laws, and is effectively delegated to the Sexton.

*Adverse effects – noise*

[35] As mentioned, concerns were expressed about noise, such as from haka being performed, or bagpipes being played, as part of a funeral ceremony. This issue can be shortly dealt with. At most, a haka will last for minute or two – a lament on the pipes perhaps a little more, and either of those will occur in a minority of the perhaps two or three funerals each week.

[36] Against that, it is to be recalled that this is a rural-residential area, where rural activities are everyday events. A neighbour using a chainsaw to produce a season's firewood from a felled tree may easily take half a day, or more, to do so. A tractor-mounted post driver could be in use all day replacing a damaged or aging fence. Complaints of the possible adverse effects on amenity of the rare, brief and transient sound of a haka, or bagpipes, in such a receiving environment is, with respect to the appellants, rather difficult to give weight to.



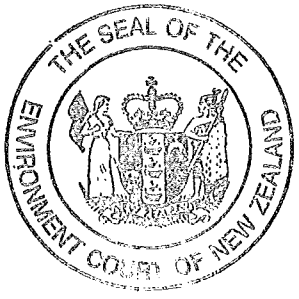
[1] Accepting he will need to gain the appropriate certification which both he and Mr Prosser agreed would be appropriate.

*Adverse effects -visual amenity*

[37] The proposal will certainly visually fill the site – the buildings and hard seal will cover the major part of it. That said, the design of the buildings (so far as can be confirmed from the plans presented) are, as noted, single storey and well within height-to-boundary requirements. As the preparation for, and the hearing itself progressed, a better appreciation of the landscaping requirements seemed to emerge. In the end, Mr Gedye was happy to comply with the suggestions of the landscape architect engaged by Mr and Mrs Zwart, Ms Debra Stewart.

[38] We have to say at this point that it became apparent that the plans submitted for the Court to consider were well short of what is expected. Mr Gedye had prepared them himself and submitted two iterations as the hearing progressed which were, in his words, *to scale but he did not know to what scale.* This meant that other witnesses could not scale them. As we examined the opportunities for landscaping it appeared that if the District Plan parking requirements were applied as directed by that document, there should be ample opportunity for landscape planting. Due to the nature of the plan it was simply not possible to check this in the context of the hearing. It is not the Court's role to secure information in the appropriate form – it is the role of the Council when the matter is submitted for its consideration and the applicant in preparation for the hearing. We have to say that had the Council insisted on professionally drawn plans, and a clear and complete application, its assessment could have been more accurate, and the issues much easier to identify and deal with. Having made that point we felt comfortable, based on the work the experts have now completed, and the answers they gave in evidence, that we can proceed to a determination. However, our remaining concerns are reflected in the way we will seek to conclude the matter.

[39] We agree that with good landscaping, visual amenity of the surrounding properties can be preserved to a satisfactory degree and that too should be a matter addressed in the consent conditions.



*Permitted baseline*

[40] Section 104(2) provides:

> When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

This is the concept known as the *permitted baseline*, meaning that there is a discretion to take into account only effects which are greater than those produced by activities permitted as of right by the Plan. Here, we are conscious that permitted activities could result in buildings of a size and footprint at least comparable with what is proposed, and which could also be higher and of a more utilitarian appearance. Also, noise of an industrial kind could well be at least comparable. While not decisive, those are to be borne in mind in considering adverse effects. We agree though that it would be difficult to think of a permitted activity which would produce a concentrated volume of traffic comparable to that of the proposal.

*Section 104(1)(b) – planning documents*

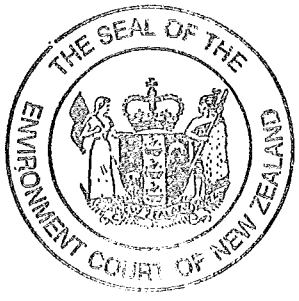
[41] There are no applicable national standards or other similar documents. The Regional Policy Statement, it seems to be agreed between the planning witnesses, is a high-level document, given effect to by the Combined Regional Land and District Plan, which is operative.

[42] The planning witnesses agreed that the provisions of the Rural Residential Zone provide for the assessment of non-rural activities subject to the criteria set out in Policy 21.4.2. They also acknowledge the synergies that could be developed by locating a funeral home and a crematorium in close proximity to the district's main cemetery.

[43] The two planners agree that the most relevant District Plan objectives and policies for the land use application are:

21.3 General Objectives (All rural zones)

1. Enable subdivision, use and development in all rural zones provided that adverse environmental effects can be avoided, remedied or mitigated.
2. Maintain rural amenity values.



3. Sustainable management of the life supporting capacity of the soils on the Poverty Bay Flats.
4. Enable peri-urban living in appropriate areas, and at densities where the adverse effects of this activity can be avoided, remedied or mitigated.
5. Locate structures and plant trees in such a manner as not to cause adverse environmental effects across property boundaries.

21.3A Objectives (Rural Residential)

6. To provide for peri-urban development on the fringes of the Gisborne Urban Area and the fringes of the rural townships, where the adverse effects of this activity can be avoided, remedied or mitigated.
7. To preserve areas on the fringes of the Gisborne Urban Area where sustainable quality future residential development may be appropriate.

21.4 General Policies (All rural zones)

1. When preparing plans or considering applications for plan changes, resource consents or designations in all rural zones regard shall be given to the following general policy as well as any specific policy relating to the zone: …
   - ...
   - the location, scale and nature of the proposed activity and its effect on the balance of the land and on adjoining properties;
   - alternative methods and locations available to carry out the works or activities;
   - physical constraints to the site such as separation by rivers or roads, site configuration and layout;
   - any adverse effect that the activity may have on existing rural activities;
   - ...
   - whether covenants, buffer zones or separation distances between activities would assist in mitigating adverse environmental effects.
2. To manage the effects of landuse in rural zones which may not be of a rural nature by ensuring that the amenity values of the rural environment and surrounding properties are maintained with particular regard to:
   - traffic generation whereby:
     * the level of traffic generated by the activity must be able to be accommodated without compromising the safety of traffic and residents on the District's roads;

* given the nature of adjacent roads that all entry, exit and manoeuvring of vehicles onto a public road can be conducted safely;
* adequate on-site vehicle parking and manoeuvring areas are provided for all developments;

- noise;
- visual impact ensuring that:
  * to manage the effects of landuse in rural zones which may not be of a rural nature the scale of the structure is appropriate for the use and the environment in which it is located;
  * activities are of an appropriate scale and intensity for the area in which they are located;
  * structures, areas and activities visible from public places are screened;
  * the type of construction materials are not inappropriate to the environment in which they are located.

3. Tall vegetation and structures should retain, where possible, the adverse environmental effects they generate within the property boundaries. …

[44] Policy 21.6A Rural Residential, contains a number of provisions. Perhaps the most relevant here, which is a matter not covered by the earlier noted policies, is the following:

> 12. To enable peri-urban subdivision, use and development on the fringes of the rural townships, Gisborne Urban Area, and the areas adjacent where subdivision below one hectare is considered: …
>
> - Preferably in areas in close proximity to the urban area in order to reduce commuting distances.

[45] These provisions are all very much aimed at visual and other rural amenity values, and to some extent consolidation of activities which we have discussed at some length, and we need not repeat that here. We consider that, with the steps we will require by way of layout and landscaping, without solid fencing and with open fencing embellished with good plantings, effects on rural amenity can be well mitigated, to the point of acceptability. Traffic is undeniably a matter that will require considered and ongoing management. We are though confident that the kind of Traffic Management Plan to be required will manage those issues also.

*Part 2 factors*

[46] There are no Treaty issues arising under s8, nor any matters of *national importance* under s6. We do however need to have ... *particular regard* to at least some s7 matters: ...

> *(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.*

[47] The issues in paras (c) and (f) are largely matters of amenity, which we have already discussed. The matters in (b) and (g) are efficiency issues – the symmetry of having such an operation immediately opposite the City's cemetery has been mentioned, and maximising the use of a piece of the urban-rural interface land without harm to the surrounding environment is also efficient, and takes account of the finite characteristics of such land.

*The Council's decision – s290A*

[48] Section 290A requires us to ...*have regard to* the Council's decision, and we have done that. It will be apparent that we agree that the proposal, properly formulated, should not produce adverse effects of a kind or degree that mean it should not proceed; nor does it conflict with the relevant planning documents or Part 2 of the Act. In some respects however the evidence we heard, and which the Council did not, leads us to conclude that on some aspects significantly more detail is required before the necessary resource consents, and their conditions, can be resolved.

*Overall conclusions*

[49] As a concept, we see no reason, in either an effects-based approach, or in considering compatibility with the planning documents, to decline consent to a generic funeral director's operation along the lines proposed.

[50] But the application was so inchoate, and was being adapted so significantly as the hearing progressed, that a conclusive decision one way or the other is not presently possible. What is required, to enable us to make a final evaluation and decision is, at least:

- A site traffic movement and carparking plan confirmed as to accuracy and compliance by a traffic engineer.
- A landscaping plan, incorporating stormwater attenuation, prepared and confirmed by a qualified landscape architect and a water engineer respectively.
- Confirmation of whether a stormwater discharge consent is actually required.

We think it goes without saying that those requirements will only be possible when the design and dimensions of the building(s) have been finalised. Further, these requirements need to be considered together to effect a practical, workable layout and make the best of shared opportunities in the design layout; eg, placement of trees relative to parking spaces, location of groundwater attenuation, pervious paving, and the like. Low impact environmental design is a common feature of site designs and was considered a feature which should be encouraged according to Mr Robert Budd (the Council's Stormwater specialist, summonsed by the applicant) and we agree with him.

*Result*

[51] We ask that those matters be attended to, taking into account the matters we have set out, and that counsel then confer to produce a matching set of conditions for approval, by Friday 6 June 2014. The Court will then be able to decide whether, as a matter of formality, the appeal should be declined.

*Costs*

[52] Costs are reserved. Any application should be lodged within 15 working days of the issuing of our final decision, and any response lodged within a further 10 working days.

Dated at Wellington this 30th day of April 2014.

For the Court

C J Thompson
Environment Judge