BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE WAIMAKARIRI DISTRICT COUNCIL

IN THE MATTER OF	The Resource Management Act 1991 (**RMA** or **the Act**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on the Proposed Waimakariri District Plan (**PWDP** or **the Proposed Plan**)
AND	
IN THE MATTER OF	Hearing of Submissions and Further Submissions on Variations 1 and 2 to the Proposed Waimakariri District Plan
AND	
IN THE MATTER OF	Submissions and Further Submissions on the Proposed Waimakariri District Plan by **Momentum Land Limited** (**MLL**)
AND	
IN THE MATTER OF	**Hearing** of submission on the Proposed Waimakariri District Plan and Variations 1 and 2

MEMORANDUM OF COUNSEL FOR MOMENTUM LAND LIMITED IN RESPONSE TO MINUTE 2: PROCEDURAL ISSUES

Dated: 30 June 2023

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MEMORANDUM OF COUNSEL FOR MOMENTUM LAND LIMITED IN RESPONSE TO MINUTE 2: PROCEDURAL ISSUES

INTRODUCTION

1. This memorandum is filed on behalf of Momentum Land Limited (**MLL**) in response to Minute 2 which addresses (among other matters) the scope of Variation 1 and Clause 16B of the First Schedule.

2. The Minute requests that the Council prepare a memorandum addressing these matters. At paragraph 21 the Minute directs that submitters are to provide a memorandum setting out any difference in opinion to the Council's memorandum. Any response is to include an explanation and rationale for any difference in position or opinion.

3. Accordingly, this memorandum responds to the memorandum filed by Council dated 1 June 2023 (**Council memo**) and the Buddle Finlay legal opinion attached at Appendix 6 to that memorandum (**Buddle Finlay opinion**). Where necessary we also respond to the memorandum filed by Chapman Tripp dated 24 March 2023 (**Chapman Tripp memo**).

MLL SUBMISSIONS ON THE PROPOSED PLAN AND VARIATION 1

4. MLL has an interest in two separate blocks of land containing 41 ha at north Kaiapoi (**Momentum land**) that is zoned Rural in the Operative District Plan and Rural Lifestyle Zone in the Proposed Plan. MLL has filed a submission on Variation 1 seeking that the Momentum land be rezoned to Medium Density Residential Zone (**MDRZ**). MLL also filed a submission on the Proposed Plan seeking essentially the same relief.

5. Part of the Momentum land is identified by the Canterbury Regional Policy Statement (**CRPS**) as Greenfields Priority Area and the balance is identified as Future Development Area. All of the Momentum land is identified by the Proposed Plan as within the Kaiapoi Development Area and the Outline Development Plan Area (North Kaiapoi) that anticipates future residential development of land north of Kaiapoi. The Momentum land is also identified for residential development in the Waimakariri District Development Strategy 2048 (July 2018) (**WDDS**).[1]

[1] For further details regarding these matters refer to the images and plans included within Appendix A of the Stream 1 legal submissions filed by MLL.

Categorisation of the MLL submissions

6. The Commissioners requested that the Council identify five categories of submissions that are potentially affected by the scope issue and the merger issue, as follows:

> (*a) PDP submissions on "relevant residential zones";*
> *(b) PDP submissions on provisions of the PDP substituted by Variation 1;*
> *(c) PDP submissions in relation to land that is now proposed new residential zones in Variation 1;*
> *(d) PDP submissions seeking new residential zones;*
> *(e) IPI submissions seeking new residential zones.*

7. The Council memo, at Appendices 1 to 5, identifies which submissions fall within the above categories. The MLL submissions are identified as falling into category (a)[2] and category (e)[3] above. This categorisation is supported by MLL and accordingly MLL is potentially affected by the scope issue and the Clause 16B merger issue.

THE LAW RELATING TO SCOPE AS IT APPLIES TO SUBMISSIONS ON A VARIATION

8. The Buddle Finlay opinion on this matter is mostly supported. Areas of disagreement are discussed below together with an initial evaluation of whether the MLL submission is "on" Variation 1 using the criteria advanced by Buddle Finlay, inclusive of the amendment discussed below.

Variation 1 contextually different

9. Variation 1 is contextually very different to the circumstances of the case law discussed in the Buddle Finlay opinion and the Chapman Tripp memo, because the variation stems from the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) which directs specified territorial authorities, including the Council, to notify an Intensification Planning Instrument (**IPI**). Variation 1 is the Council's IPI which seeks to implement the directives of the Amendment Act at the district level. This contextual setting is highly relevant to identifying whether a submission falls within the ambit of the variation.

[2] Appendix 1 at row 164 and 165
[3] Appendix 5 at row 26-28

10. The Buddle Finlay opinion refers to the following passage in *Motor Machinists Limited v Palmerston North City Council*[4] (underlining added):

> *[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself 2 aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.*

11. The circumstances of this case can be distinguished from the caselaw authorities that address relatively discrete plan changes and variations. The ambit of such proposals is typically narrow and quite confined.[5]

12. In this case the breadth of the alteration to the status quo entailed by Variation 1 is informed not just by the words used in Variation 1 but also by the purpose of the Amendment Act and the directives it contains regarding preparation of an IPI.

13. In particular, the Amendment Act expressly provides that a specified territorial authority may, when preparing an IPI, create new residential zones.[6] The key point here is that the empowering legislation provides Council a discretion to create new residential zones via an IPI.

14. The ambit of an IPI with respect to new residential zones is relatively wide because it requires the territorial authority preparing the IPI to actively consider whether new residential zones are required in the areas of the district where "relevant residential zones" are located.

15. In this case, the relevant residential zones are Kaiapoi, Rangiora, Woodend (including Ravenswood) and Pegasus.[7] A submission that seeks the inclusion of new residential zones adjacent to these urban areas should be considered within

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[4] *Palmerston North City Council* v *Motor Machinists Limited* [2013] NZHC 1290 at [80]

[5] See for example *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 where the proposal was to vary the noise contour polices of the then proposed Christchurch District Plan; *Palmerston North City Council* v *Motor Machinists Limited* [2013] NZHC 1290 where the proposal was to rezone 7.63 ha from Residential to Outer Business; *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) where the proposal was to support the central Blenheim CBD and to avoid commercial developments outside the CBZ; *Re Palmerston North Industrial and Residential Developments Ltd* [2014] NZEnvC 17 where the proposal was to rezone a discrete area for residential development.

[6] Amendment Act at s77G(4)

[7] Section 32 Report, Variation 1: Housing Intensification at page 9

the ambit of Variation 1 where they satisfy the relevant assessment factors. This point is discussed further below with reference to the MLL submission.

Scope assessment factors and relevance of Section 32 report

16. The Buddle Finlay opinion includes the following assessment factor regarding the s32 evaluation: [8]

> *(iii) whether the request raises matters that should have been addressed in the s32 evaluation and report*;

17. This factor derives from the following quote in *Palmerston North City Council* v *Motor Machinists Limited*:[9]

> *[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change... Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no further s 32 analysis is required to inform affected persons of the comparative merits of that change.*

18. In *Albany North Landowners v Auckland City Council*[10] it was considered the review for the Auckland unitary plan was wide (as a full district plan review) unlike the discrete variations and plan changes in *Clearwater* and *Motor Machinists*. The High Court in *Albany* did not accept that a submission would be out of scope if the relief raised is not specifically addressed in the original section 32 report. The court set out its reasoning as follows (emphasis added):

> *[130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report. I respectfully doubt that Kós J contemplated that his comments about s 32 applied to preclude departure from the outcomes favoured by the s 32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.*
>
> *[131] By contrast a s 32 report is, in the context of a full district plan review, simply a relevant consideration among many in weighing whether a submission is first*

[8] Buddle Finlay opinion at [20]
[9] *Palmerston North City Council* v *Motor Machinists Limited* [2013] NZHC 1290 at [81]
[10] *Albany North Landowners v Auckland City Council* [2016] NZHC 138

> *"on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.*
>
> *[132] To elaborate, the primary function served by s 32 is to ensure that the Council has properly assessed the appropriateness of a proposed planning instrument, including by reference to the costs and benefits of particular provisions prior to notification. Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification. On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.153 To hold otherwise would effectively consign any submission beyond the precise scope of the s 32 evaluation to the Environment Court appellate procedure. This is not reconcilable with the streamlined scheme of Part 4.*

19. The Environment Court[11] in *Bluehaven Management Ltd v Western Bay of Plenty District Council*[12] also expressed reservations about reference to the s32 report as a factor in determining whether a submission is within scope of a plan change. In *Bluehaven* the proposal sought to amend operative provisions of the district plan relating to the Rangiuru Business Park. The theme of submissions in opposition was that the proposal would deviate from the original intended purpose of the business park, which was primarily for industrial activity. The Court made these comments about s32 (underlining added):

> *[34] While accepting the usefulness of an approach which includes an analysis of the relevant resource management issues in the form the Council is required to undertake pursuant to s 32 to comply with clause 5(1)(a) of Schedule 1 to the Act, we respectfully consider that some care needs to be taken in assessing the validity of a submission in those terms. As Kós J expressly recognises, there is no requirement in the legislation for a submitter to undertake any analysis or prepare an evaluation report in terms of s 32 when making a submission. The extent and quality of an evaluation report under s 32 of the Act depends very much on the approach taken by the relevant regional or district council in preparing it. As provided in s 32A, a submission made under clause 6 of Schedule 1 may be based on the ground that no evaluation report has been prepared or regarded or that s 32 or 32AA37 has not been complied with.*
>
> *[35] As held in* Leith v Auckland City Council*, there is no presumption in favour of a planning authority's policies or the planning details of the instrument challenged, or the authority's decisions on submissions. An appeal before the Environment*

[11] Two judge bench comprising Judge Smith and Judge Kirkpatrick

[12] *Blue Haven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191

> *Court is more in the nature of an inquiry into the merits when tested by submissions and the challenge of alternatives or modification.*
>
> *[36] In that sense, we respectfully understand the questions posed in* Motor Machinists *as needing to be answered in a way that is not unduly narrow, as cautioned in* Power*. In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the Clearwater test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.*
>
> *[37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the Clearwater test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.*
>
> *[38] It may be that this issue can be encapsulated by regarding the first test as including an assessment of whether the s 32 evaluation report should have covered the issue raised in the submission. This follows Kós J's wording closely and involves an evaluation of the submission in terms of the issue as it is (or is not) addressed by the proposed plan change and the context in which it arises. In particular, such contextual evaluation should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission. A failure to address the context expressly in the s 32 report may well indicate a failure to consider a relevant matter.*

20. Given the contextual factors present in this case, the formulation proposed in *Bluehaven* is preferred.[13] Adopting this approach, the s32 assessment factor identified by the Buddle Finlay opinion[14] should be amended as follows (deletions shown as strikethrough and new text underlined):

> *In summary, and for the reasons given above, we consider that if a rezoning request relates to land that has not had its management regime (e.g. zoning) altered by Variation 1, then:*
>
> *(a) If that land is not adjacent to land that has had its management regime (e.g. zoning) altered by Variation 1, then it will fall outside the scope of Variation 1.*
>
> *(b) If that land is adjacent to land that has had its management regime (e.g. zoning) altered by Variation 1, then it can be considered as falling within the scope of*

[13] At [60]

[14] Buddle Findlay opinion at [20]

Variation 1 only if, on a precautionary assessment of fact, circumstances, scale and degree, it can be considered as an "incidental or consequential extension of zoning changes" proposed by Variation 1. Factors relevant to consider when making the precautionary assessment include:

(i) the policy behind a variation;
(ii) the purpose of the variation;
(iii) whether the s32 evaluation prepared for the plan change addresses, or should have addressed, the matter raised in the submission; ~~request raises matters that should have been addressed in the s32 evaluation and report;~~
(iv) the scale and degree of difference between the submission request and the variation;
(iv) whether the request gives rise to a real risk that persons potentially affected by changes sought have been denied an effective opportunity to participate in the decision-making process.

21. Finally, we consider the *Bluehaven* dicta quoted above is highly relevant to the present case given the particular statutory context in which Variation 1 arises and the need to consider national policy considerations (in the form of the NPS-UD) that have a direct bearing on the issues raised by MLL's submission.

ASSESSMENT OF THE MLL SUBMISSION AGAINST THE RELEVANT FACTORS

22. The Momentum land is located immediately adjacent to land that is rezoned from General Residential Zone to MDRZ by Variation 1 and therefore the MLL submission satisfies part (a) of the Buddle Finlay assessment factors. We discuss each of the assessment factors at part (b) in the following sections.

The policy behind variation 1

23. As mentioned, Variation 1 is contextually very different to the case law authorities discussed by Buddle Finlay. In the present case, the Council has been directed by the Amendment Act to make changes to the Proposed Plan and the legislation contains highly directive provisions that provide for:

(a) what must be, and what may be, included in the variation,[15]

(b) notified of the variation by a specific date,[16] and

(c) what functions need to be performed when undertaking the variation.[17]

[15] Amendment Act section 77G and Schedule 3, clause 33(3)(d)
[16] Amendment Act, Schedule 3, clause 33(2)(b)
[17] Supra at clause 33(3)(c)

24. The Amendment Act itself does not contain any stated purpose. However, the Cabinet Paper to the Cabinet Legislation Committee dated 30 September 2021 provides insight into the policy intent of the Amendment Act. It seeks approval to introduce the Resource Management (Enabling Housing Supply And Other Matters) Amendment Bill (the Bill) to rapidly accelerate housing supply where the demand for housing is high.[18]

25. The Paper explains that this will be achieved by the Bill by:[19]

    (a) bringing forward the NPS-UD by enabling councils to implement all policies by mid-2023 and

    (b) making medium density the default residential zone in major urban areas by August 2022.

26. The Cabinet Paper records that these amendments to the RMA will allow more homes to be built close to where people live and work. Increasing housing supply is one of the key actions government can take to improve housing affordability in New Zealand's main cities.[20]

27. Accordingly, the policy intent of the Amendment Act is to rapidly accelerate housing supply where the demand for housing is high and improve housing affordability in New Zealand's major urban areas. These outcomes are entirely consistent with key objectives and policies of the NPS-UD that seek the same outcomes. This is important because NPS-UD provides the national policy framework that guides and informs implementation of the Amendment Act, particularly with regard to creation of new residential zones via an IPI such as Variation 1.

The purpose of the Variation 1

28. Given the directive nature of the Amendment Act, it follows that the purpose of Variation 1 is to implement the Amendment Act at the district level by accelerating housing supply and improving housing affordability in areas within the Waimakariri District where the demand for housing is high.

[18] Cabinet paper at paragraph 1
[19] Supra at paragraph 7
[20] Supra at paragraph 8

29. The Amendment Act directs how this is to be achieved. Relevant to MLL's submission, the Amendment Act provides for:

    (a) Inclusion of new objectives in the district plan[21],

    (b) the incorporation of MDRZ into every relevant residential zone;[22] and

    (c) discretion to create new residential zones.[23]

30. The discretion to create new residential zones via Variation 1 is not unfettered and instead is informed by whether the proposal achieves the objectives of the Proposed Plan[24] and whether the proposal gives effect to a national policy statement.[25]

31. The Amendment Act requires to that Variation 1 inserts New Objective 1 and Objective 2 into the Proposed Plan as follows (underlining added):

> *Objective 1*
> *(a) a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.*
>
> *Objective 2*
> *(b) a relevant residential zone provides for a variety of housing types and sizes that respond to-*
> *(i) Housing needs and demand; and*
> *(ii) The neighbourhood's planned urban built character, including 3-storey buildings.*

32. The relevant national policy statement in this case is the NPS-UD. Relevantly, it contains Objective 1, Objective 2 and Objective 6 as follows:

> ***Objective 1**: New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.*
>
> ***Objective 2:** Planning decisions improve housing affordability by supporting competitive land and development markets.*
>
> ***Objective 6:** Local authority decisions on urban development that affect urban environments are:*
> *(a) integrated with infrastructure planning and funding decisions; and*
> *(b) strategic over the medium term and long term; and*

[21] RMA s77G(5)(a)
[22] RMA s77G(21
[23] RMA s77G(4)
[24] RMA s32(1)(b)
[25] RMA s75(3)(a)

> *(c) responsive, particularly in relation to proposals that would supply significant development capacity.*

33. It is noteworthy that the above-mentioned new District Plan Objective 2(i) is consistent with Policy 2 of the NPS-UD which requires that (underlining added):

> ***Policy 2**: Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.*

34. With respect to creation of new residential zones, the purpose of Variation 1 is to implement the above provisions of the NPS-UD by creating sufficient new residential zones incorporating MDRS to provide at least sufficient development capacity to meet expected demand for housing over the timeframes required by Policy 2.

35. It follows that the breadth of the alteration to the status quo entailed by Variation 1 is relatively wide. The context of Variation 1 is quite different because the extent to which creation of new residential zones are necessary will be critically informed by economic evidence relating to housing demand, housing supply and housing affordability within the district.

36. As mentioned by the Council memo, Variation 1 includes two new residential zones at Rangiora (known as Bellgrove and Townshend Fields). The economic evidence for MLL will be that this is insufficient, and that additional residential zoned land is urgently required to provide housing supply and improve housing affordability at Kaiapoi. The MLL submission seeks to address this issue by the creation of a new residential zone at Kaiapoi. On this basis the MLL submission is comfortably within the ambit of the policy intent and purpose of Variation 1.

Whether the s32 evaluation prepared for the plan change addresses, or should have addressed, the matter raised in the submission

37. The Section 32 Report for Variation 1: Housing Intensification (**s32 Intensification Report**) records that the relevant residential zones regarding Variation 1 are Kaiapoi, Rangiora, Woodend (including Ravenswood) and Pegasus on the basis that each meets the 5,000 population threshold.[26]

[26] Section 32 Report for Variation 1: Housing Intensification at page 9.

38. The Overview and Purpose section of the s32 Intensification Report records that context for the Variation 1 evaluation as follows:[27]

> *This s32 responds to the Government's direction. For the variations to the PDP proposed under the NPS-UD and the Amendment Act, the purpose of this evaluation report is not to assess the costs and broader impacts of the proposed changes themselves and the objectives and policies of the NPS-UD, which have already been determined, but rather those matters where the Council has options or alternatives for how best to address the issues. It also identifies the qualifying matters the Council is proposing to use for where alternative density standards are proposed, together with the required assessment under the Amendment Act.*

39. With respect to the issue of housing supply and housing affordability, one of the matters where the Councill has "options or alternatives" is to evaluate the need for new residential zones within Kaiapoi, Rangiora, Wooden and Pegasus. However, that has not occurred in the s32 Intensification report or the separate section 32 Report for Variation 1 – Housing Intensification (Rezoning land in North East and South West Rangiora) (**s32 Rezoning Report**). Instead, both these reports focus on housing land supply issues at Rangiora.

40. The s32 Intensification Report contains a section entitled "New Zoning Enabled Through this Variation"[28] that discusses the justification (at a high level) for rezoning of land at North East and South West Rangiora, and refers the reader to the s32 Rezoning Report for further details. This Report also focuses exclusively on the need for additional residential activity at Rangiora. Put simply, neither of these reports contains an evaluation of the need for additional residential activity at Kaiapoi (or other relevant residential areas within the District).

41. This is despite the commissioner panel appointed by the Environmental Protection Agency on a Covid-19 Fast-Track subdivision resource consent application by Bellgrove Rangiora Limited commenting that:[29]

> *[37] This indicates to the panel that there is an extreme shortage which is driving up the price. The only way of correcting this is to provide more sections, … we are strongly of the view that there is some urgency about the need for supply in the short term and long term. This consent process will not solve the entire problem, but it is a step in the right direction.*

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[27] Supra at page 6
[28] Supra at page 41
[29] Refer to s32 Rezoning Report at page 6. Although the application related to land at Rangiora, the economic assessment discussed by the Panel considered housing supply and affordability issues across the District

42. It is acknowledged that council officers faced very demanding timeframes to prepare Variation 1 for notification and it is not surprising that they focussed on those parts of the district where the shortfall in supply was best understood and where landowners had already furnished the council with technical reports that enabled them to evaluate the merits of rezoning land at Rangiora before notification of Variation 1.

43. MLL approached Council officers to include the MLL land in the notified IPI and was advised in July 2022 that time has run out for Council to include any more land into the Variation.[30] Whilst this is understandable in the circumstances, lack of resources within Council should not determine the scope of permissible submissions on Variation 1.

44. The case for MLL on Variation 1 will be that:

    (a) there is an abject lack of available residential land in and around Kaiapoi to meet ongoing demand caused by current and projected fast growth in the district's population;

    (b) the new MDRS are unlikely to have much impact on district dwelling capacity, at least in the short-to-medium term; and

    (c) additional supply like the Momentum land needs to be enabled for residential activity to meet NPS-UD obligation and to ensure that market supply keeps pace with demand at Kaiapoi.

45. In my view the circumstances of this case are akin to those discussed in above the *Bluehaven* decision and the issue of housing supply at Kaiapoi should have been included in the s32 report for Variation 1.

The scale and degree of difference between the submission request and the variation

46. The difference between MLL's submission request and variation 1 notified can be assessed by reference to land area, anticipated yield and the contribution that the Momentum land makes towards meeting projected housing demand within the District.

47. The s32 Rezoning Report records that the:

[30] Email communication between MLL and Council officers

> *District's population is projected to grow to about 100,000 people by 2051 (35,300 more people that live here today). The District will need an additional 13,600 new dwellings (or 450 new dwellings per annum to accommodate this growth over the next 30 years). The proposed rezoning of 68 ha of land at Rangiora will support a further 1,000 houses.*[31]

48. The case for MLL will be that (a) once the long-term NPS-UD competitiveness marginal 15% is added to this figure, the long-term (thirty-year) demand will be 15,600 extra households and, (b) the Council forecasts of short-to medium-term future demand are conservative relative to recent trends and are likely to understate the true extent of future demand. Even so, for the purpose of the assessment that follows Council figures have been adopted.

49. With respect to land area, the Momentum land contains 41 ha, which is less than the area of land rezoned at North East Rangiora (65 ha) and more than the area of land proposed to be rezoned at South West Rangiora (21 ha). Given that Rangiora and Kaiapoi are approximately the same size, the Momentum request is on par with the land area proposed to be rezoned at Rangiora.

50. Regarding yield, the Momentum land is anticipated to yield approximately 720 new dwellings across the North Block (580 dwellings) and South Block (140 dwellings). Again, this is on par with the anticipated yield (1000 new dwellings) from the land at Rangiora proposed to be rezoned.

51. Applying the Council's figures for projected housing demand, the 720 dwellings supplied by the Momentum land equates to approximately 1.7 years' worth of the projected demand of 450 new dwellings per annum required to meet the Councils long-term growth projections.

52. In these circumstances, the difference between MLL's rezoning request and Variation 1 as notified is considered modest and generally in keeping with the scale and degree of Variation 1.

Whether the request gives rise to a real risk that persons potentially affected by changes sought have been denied an effective opportunity to participate in the decision-making process

53. As discussed above, the purpose of Variation 1 is to implement the Amendment Act at the district level by accelerating housing supply and approving housing affordability where the demand for housing is high. The variation as notified

[31] s32 Rezoning Report at page 3

included proposals to rezone 68 ha of greenfield land identified within the North-East and South-West Rangiora development areas of the Proposed Plan. These areas are also identified for future residential growth in the WDDS 2048 and in the CRPS.

54. Kaiapoi sits alongside Rangiora as the largest urban area in the Waimakairi District. It is generally well-known that the population of the district has grown rapidly over the past 5-10 years and that house prices have increased considerably, especially during recent years.

55. The Momentum land presents features very similar to the greenfield land at Rangiora proposed for rezoning by Variation 1. For example, the Momentum land is immediately adjacent to existing residential areas that are rezoned MDRZ by Variation 1 and, in similar fashion to the Rangiora land, the Momentum land is identified for future residential growth in the WDDS 2048, the CRPS and the Proposed Plan.

56. In these circumstances a reasonably informed member of the public would understand that the Momentum land is an obvious candidate for rezoning to provide additional greenfields residential land at Kaiapio. Such a person would not be surprised by a submission on Variation 1 seeking to rezone this land to MDRZ or consider such a submission to be "out of left field".

57. In these circumstances it is very unlikely that persons potentially affected by the rezoning sought by MLL's submission on Variation 1 have been denied an effective opportunity to participate in the decision-making process.

58. Finally, it is noted that MLL's submission on the Proposed Plan also sought residential rezoning of Momentum land. Members of the public are (or should be) aware that the Proposed Plan process is wide (being a full district plan review) and that they need to review submissions on the PDP and file further submissions if they have any concerns about changes requested by submitters. The only further submission on MLL's Proposed Plan submission is from CIAL. No other further submissions were received by MLL. Exactly the same outcome occurred vis-à-vis MLL's submission on Variation 1. The absence of further submissions on both MLL's submissions (apart from CIAL) supports a finding that no persons in the community will be disenfranchised by the MLL submission on Variation 1.

Overall summary of relevant factors

59. In summary to this point, the MLL submission satisfies each of the five factors identified in the Buddle Findlay opinion and should therefore be considered as comfortably falling within the permissible scope of submissions on Variation 1.

RESPONSE TO THE CHAPMAN TRIPP MEMO

60. The Chapman Tripp memo asserts that Variation 1 has not created any "new residential zones.[32] With respect, this is incorrect - Variation 1 proposes to create two new residential zones at Rangiora.

61. Further, the Chapman Tripp memo asserts that submissions on a variation may only address the changes advanced by Variation 1.[33] With respect, this approach is also incorrect. It is not supported by case law; even cases regarding discrete plan changes allow for "consequential extensions" of proposed zoning changes. We consider the ambit of permissible submissions on Variation 1 is considered broader than those cases for the reasons discussed above.

THE LAW REGARDING THE APPLICABILITY OF CLAUSE 16B OF PART 1 OF SCHEDULE 1 RMA

62. We generally agree with the Buddle Finlay opinion regarding (b) above and have no comment to add regarding whether the MLL submission on the PDP should merge with Variation 1 pursuant to clause 16B.

Dated: 30 June 2023

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Chris Fowler
Counsel for Momentum Land Limited

[32] Chapman Tripp memo, Appendix 1, at paragraphs 8 and 13
[33] Supra at paragraph 14

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2336
[2016] NZHC 138

BETWEEN	ALBANY NORTH LANDOWNERS Plaintiff
AND	AUCKLAND COUNCIL Defendant

[Continued over page]

Hearing: 28 November - 2 December 2016

Counsel:
M Baker-Galloway for Albany North Landowers
T Mullins for Auckland Memorial Park Ltd
S Ryan for Franco Belgiorno-Nettis
R Brabant and R Enright for Character Coalition Inc & Anor
M Savage for Howick Ratepayers and Residents Assoc Inc & Anor
R Enright for The Straits Protection Society Inc and South Epsom Planning Group Inc & Anor
A A Arthur-Young and S H Pilkington for Strand Holdings Ltd
R E Bartlett QC for Summerset Group Holdings Ltd
A A Arthur-Young and D J Minhinnick for Valerie Close Residents Group
H Atkins for Village New Zealand Ltd
R Brabant for Wallace Group Ltd
M Casey QC and M Williams for Man O'War Farm Ltd
R J Somerville QC, K Anderson and M J L Dickey for Auckland Council
C Kirman and A Devine for Housing Corporation New Zealand and Minister for the Enironment
S F Quinn and A F Buchanan for Ting Holdings Ltd
S J Simons and R M Steller for Property Council of New Zealand
R M Devine for Ngati Whatua Orakei Whai Rawa Ltd

Judgment: 13 February 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 13 February 2017 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar
Date: ……

CIV-2016-404-2298

BETWEEN	AUCKLAND MEMORIAL PARK LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2323

BETWEEN	AUCKLAND UNIVERSITY OF TECHNOLOGY Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2333

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2335

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2351

BETWEEN	BUNNINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2326

BETWEEN CHARACTER COALITION INC LTD & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2327

BETWEEN CHARACTER COALITION INC LTD & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2322

BETWEEN STEPHEN HOLLANDER
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2321

BETWEEN HOWICK RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2320

BETWEEN JPR ENTERPRISES & ORS
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2324

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2325

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2349

BETWEEN	THE STRAITS PROTECTION SOCIETY INCORPORATED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2350

BETWEEN	STRAND HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2344

BETWEEN	SUMMERSET GROUP HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2305

BETWEEN	VALERIE CLOSE RESIDENTS GROUP Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2341

BETWEEN	VILLAGE NEW ZEALAND LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2316

BETWEEN	WALLACE GROUP LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2331

BETWEEN	MAN O'WAR FARM LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2302

BETWEEN	SOUTH EPSOM PLANNING GROUP INCORPORATED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

TABLE OF CONTENTS

Introduction

[1] The Auckland Unitary Plan (AUP) is a combined 30 year plan, incorporating for the first time a regional policy statement, a regional plan and a district plan for Auckland in one document. It represents the culmination of a mammoth undertaking by the Auckland Council (the Council) and an Independent Hearings Panel (IHP) over the span of several years. The scale of this task reflects the significance of the AUP to the people and communities of Auckland and beyond.

[2] This Court's relatively discrete involvement has been triggered by 51 appeals and judicial review applications. A central issue for 20 of those proceedings is whether the recommendations made by the IHP on the proposed Auckland Unitary Plan (the PAUP) were within scope of the submissions. If they were not in scope, then affected persons have the right to appeal on the merits of the decisions of the Council based on those recommendations to the Environment Court.

A guide

[3] This judgment answers the following preliminary questions agreed by the parties:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 (the RMA) case law relevant, when addressing scope under the Act?

(e) Did the IHP correctly apply the legal framework in the specified test cases?

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

(*The Preliminary Questions*)

[4] In order to properly understand the decisions made by the IHP and the Council, it is necessary to consider the full context within which they were made. Consequently, the judgment is divided into three key parts. It commences by describing the various parties to the proceeding and the characteristics of each of their particular claims – [5]-[9]. Part B provides the background to the current proceeding, tracing through both the legislative and factual context to the development of the AUP– [10]-[91]. With that background in mind, in Part C I address the Preliminary Questions in the order they are given above – [92]-[302].

PART A: THE PARTIES

[5] The appellant/applicant parties actively involved in the preliminary question proceeding on scope are:

(a) **Albany North Landowners Group (ANLG).** ANLG brings an appeal regarding the decision made by the Council to adopt recommendations of the IHP to zone the ANLG site as Future Urban Zone, which prohibits the subdivision and development of its site. ANLG contend no submission provided scope for the FUZ zoning.

(b) **Character Coalition Inc and Auckland 2040 Inc**. The Character Coalition represents over 55 community organisations in the Auckland area that have a collective interest in protecting the character and heritage of Auckland. Auckland 2040 is coalition of local groups that have expressed concern with the implications of the PAUP. These two societies have brought appeal and judicial review challenges to the decision of the Council to accept the zoning recommendation of the IHP in relation to 29,000 residential properties, which the IHP said was within the scope of submissions requesting changes to residential zoning in the notified PAUP. They argue that the rezoning of the 29,000 properties was out of scope.

(c) **Howick Ratepayers and Residents Association Inc (HRRA).** The HRRA made a submission on the PAUP addressing the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court to challenge the rezoning of 65 properties which it argues were not sought by any submitter or identified by the IHP as being out of scope.

(d) **Strand Holdings Ltd (SHL).** SHL owns property that was affected by the Council's acceptance of the IHP's recommendation to relocate the origin point of the Dilworth View Protection Plane (the Viewshaft), which protects the street view of the Dilworth Terrace houses in Parnell.

The relocated Viewshaft places height restrictions on SHL's property. SHL brings judicial review proceedings alleging that the IHP made an error of law in not identifying this recommendation as beyond the scope of submissions.

(e) **Wallace Group Ltd (WGL).** WGL appeals against the decision of the Council to rezone the property owned at 55 Takanini School Road, Takanini (the site) to a Residential Mixed Housing Suburban Zone. WGL owns a property that directly adjoins the northern portion of the site and the rezoning directly impacts its ability to develop and use its land. The notified version of the PAUP retained the status quo zoning, which was split zoning, with the northern portion zoned Light Industry. WGL argues that there were no submissions seeking a change of the status quo zoning.

(f) **Man O'War Farm Ltd (Man O'War).** Man O'War owns rural property on Waiheke Island that is bounded on three sides by 24 km of coastline. It appeals against the IHP's recommended definition of coastal hazard, namely "land which may be subject to erosion over at least a 100 year timeframe", which was adopted by the Council. The issue in its appeal was whether the definition was within the scope of submissions to the PAUP and/or is void for uncertainty.

[6] The Council was the respondent in all proceedings. Its role in relation to the AUP, which will be discussed at [294], was to accept or reject the IHP's recommendations on the PAUP and to determine the final form of the PAUP.

[7] There were a number of parties that supported the Council:

(a) **The Minister for the Environment (the Minister) and Housing New Zealand Corporation (HNZC).** The Minister (on behalf of Cabinet) and HNZC, along with the Ministry for Business, Innovation and Employment (MBIE), were submitters on the PAUP and presented at the hearings. In this proceeding, the Minister and HNZC supported the Council in respect of the challenges brought by Auckland 2040 and the

Character Coalition to the Council's acceptance of specific residential zoning recommendations. These parties contend that their submissions provided scope to upzone the 29,000 properties said to be out of scope.

(b) **Ting Holdings Ltd**, trading as Ockham Residential (Ockham). Ockham appeared in opposition to Character Coalition and Auckland 2040's appeal and judicial review application. Ockham undertakes large scale brownfield apartment developments and was a submitter on the PAUP. Its submission was one of the submissions relied on by the IHP to provide jurisdiction and scope for the residential rezoning recommendations made.

(c) **Property Council of New Zealand (Property Council).** The Property Council is a not-for-profit organisation that represents commercial, industrial and retail property owners, managers, investors and advisors. It made submissions and further submissions on the notified versions of the PAUP, and presented evidence before the IHP. Throughout the hearings process, the Property Council advocated for residential upzoning and intensification. It argues that the residential zoning recommendations on the properties affected by the Character Coalition and Auckland 2040 proceedings were within the scope of the relief sought in its submissions to the IHP.

(d) **Ngati Whatua Orakei Whai Rawa Ltd (Whai Rawa).** Whai Rawa supported the Council in respect of the Strand Holdings test case. It argued that its submission to the IHP on the Viewshaft brought the IHP's recommendation within scope.

(e) **Summerset Group Holdings Ltd and Equinox Capital Ltd (Equinox).** Equinox have a property interest in the property subject to the WGL appeal. They made submissions on the role of the IHP and the legal principles that should be applied in relation to issues of scope under the Act.

[8] The IHP did not take an active role in the proceedings.

Acknowledgement

[9] I wish to acknowledge the considerable assistance afforded to me by counsel for all parties represented at the hearing of this matter. Given the depth and breadth of those submissions and conversely the requirement for a succinct judgment, I have not been able to cite all argument as fully as might be expected. The relevant themes drawn from submissions should, however, be evident to counsel.

PART B: BACKGROUND AND FRAME[1]

Establishment of Auckland Council, adoption of Auckland Plan

[10] One of the first priorities for the Council after it was established as a territorial authority on 1 November 2010 was to prepare and adopt a spatial plan for Auckland to provide a comprehensive and effective long-term strategy for Auckland's growth and development. This became known as the Auckland Plan, which was adopted on 29 March 2012.

[11] Following the adoption of the Auckland Plan, the Council's next significant planning priority was the development of the AUP consistent with the vision and foundations set out in the Auckland Plan. The AUP was to meet the requirements of the following planning instruments:[2]

(a) *A regional policy statement* (RPS): an RPS achieves the purposes of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region;[3]

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1 A common bundle was produced by the Council without objection and the information supplied therein has formed the basis of this background narrative, along with the relevant legislation.

2 Local Government (Auckland Transitional Provisions) Act 2010, s 122(2).

3 Resource Management Act 1991, s 59.

(b) *A regional plan*: the purpose of a regional plan is to assist the Council to carry out its region-wide functions, including:[4]

(i) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region;[5] and

(ii) Preparation of objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance.[6]

A regional plan must also give effect to national and regional policy statements.[7]

(c) *A district plan*: a district plan is to assist a territorial authority to carry out its district level function, including the establishment of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.[8] The district plan must be consistent with any regional plan.

[12] It was envisaged that, once approved, each of these elements of the AUP would be deemed to be plans or policy statements separately approved by the Council.[9] Out of a concern that the AUP be prepared in a timely fashion, the Council raised with the Government the possibility of legislative changes to provide unique processes for the development of a combined plan for Auckland.

New legislation for development of the AUP

[13] The Government introduced legislation in December 2012, in the form of the Resource Management Reform Bill, which would speed up the processes for developing

4 Section 63(1).
5 Section 30(1)(a).
6 Section 30(1)(b).
7 Section 67(3).
8 Section 31(1).
9 Local Government (Auckland Transitional Provisions) Act 2010, s 122(3).

the AUP. The then Minister for the Environment, Hon Amy Adams, stated in the first reading:[10]

> I am concerned that under existing law Auckland Council estimates that its first Unitary Plan could take up to 10 years to become operative. No one benefits from long, drawn-out, and expensive processes, during which time Auckland's development stagnates in a cloud of uncertainty. Auckland's economy is too important to New Zealand for us to wait up to a decade for the plan to be implemented. Auckland represents some of our most pressing housing affordability issues, and the council needs to be able to make changes to address this issue without long delays.

[14] The expectation was that under the new process the AUP would become operative within three years from notification, instead of the six to 10 years likely under the First Schedule Process of the RMA.[11] On 4 September 2013, Part 4 was inserted into the Act, which allowed for such a process to proceed by adopting a one-off hearing process. The hearing process is discussed in greater detail below at [34] – [51].

Notification of the draft PAUP

[15] At the same time as legislation to create a streamlined process was being considered by Parliament, the Local Board, local iwi and key stakeholders were notified of the AUP and were provided an opportunity to consult with the Auckland Council about it and offer feedback. This occurred between September and November 2012. On 15 March 2013 the draft PAUP was notified and public consultation followed until May 2013.

Section 32 Report

[16] The Council was required to prepare an evaluation report in accordance with the requirements in s 32 of the RMA (the s 32 Report).[12] Such reports involve examination of the extent to which the objectives being evaluated are the most appropriate way to achieve the purpose of the RMA.

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10 (11 December 2012) 686 NZPD 7331.
11 (27 August 2013) 693 NZPD 12851-12852.
12 Local Government (Auckland Transitional Provisions) Act 2010, s 115(d).

[17] The s 32 process ran parallel to development of the AUP from the initiation of the project in November 2010.[13] It involved extensive consultation with the public spanning two years, including with key stakeholders such an HNZC, local boards, Character Coalition and Ockham. The report also refers to engagement with around 16,500 Aucklanders on the draft plan, with feedback analysed by subject matter experts, including the impact on zoning.[14] The Report was notified on 30 September 2013. The new Act also required that the s 32 Report be provided to the Ministry for the Environment for auditing as soon as practicable.[15] That audit occurred in November 2013.

[18] Significantly for present purposes, the s 32 Report addressed urban form and land supply in detail. The central resource management issue to be addressed is identified as the provision of an additional 400,000 new dwellings over the next 30 years to support an additional one million people living and working in Auckland, referring to the need to accommodate these new dwellings in existing urban areas, as well as ensuring that there is a sufficient supply of greenfield land.[16] It notes that the PAUP outlines the expected distribution of dwelling land supply to be 70 per cent in the existing Auckland urban core; that is, 280,000 additional new houses by 2041.[17]

[19] The urban core was to be marked out by the Rural Urban Boundary (the RUB), which was intended to be "a defensible, permanent rural-urban interface and not subject to incremental change".[18] The RUB was contrasted with the status quo Metropolitan Urban Limit (the MUL), which is the tool used to control the speed of peripheral expansion into greenfield areas around Auckland.[19] The MUL is located at the edge of existing urbanised areas while the RUB was proposed to be located some further distance away.

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13 Auckland Council *Section 32 Report – Part 1 for the Proposed Auckland Unitary Plan* (30 September 2013) at 15.

14 At 45-46.

15 Section 126.

16 Auckland Council *2.1 Urban form and land supply – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 4.

17 At 5.

18 At 4.

19 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) at 65.

[20] The s 32 Report considered a number of alternatives as to how to accommodate residential and business growth in Auckland:[20]

(a) The status quo policy of retaining the current RPS policies and approach, using a statutory urban boundary – the MUL, able to be amended by way of plan change;

(b) The preferred alternative – a quality compact Auckland approach using a defensible long term statutory urban boundary – the RUB, with targets up to 70% of dwellings inside metropolitan urban area (as at 2010) and orderly, timely and planned development with the RUB consistent with Auckland's development strategy; and

(c) A laissez-faire approach – an expansive alternative with no growth management tool, relying on plan changes to accommodate growth in whatever form it may present itself.

[21] In relation to each of these three alternatives, the s 32 Report considered their appropriateness, effectiveness and efficiency. It also took into account economic, social and cultural costs, risks and benefits, as well as the environmental benefits and risks of each alternative.

[22] The preferred approach is said to be an approach:[21]

> … combining targets for both intensification and greenfield areas of Auckland, a planned, staged and orderly land delivery and development capacity process, supported by a long-term, a defensible rural urban boundary (the Rural Urban Boundary), is considered to offer a more robust urban growth management process than other options. This approach is considered to be more pro-active, enabling and integrated when compared with retaining the current RPS provisions or taking a less regulated approach. The RUB provisions and targets, the land supply objectives and policies will provide greater certainty to Auckland's communities, infrastructure providers and the development sector about the timing and location of growth, while still ensuring all environmental safeguards are in place.

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20 Auckland Council, above n 1, at 25-33

21 At 34.

[23] The s 32 Report addresses the implications of the initially proposed five residential zones, namely Large Lot, Rural and Coastal settlements, Single Home, Mixed Housing and Terrace and Apartments zones. The report records that the Mixed Housing zone was split into two zones – Mixed Housing Urban (MHU) and Mixed Housing Suburban (MHS) in August 2013.[22] The final description given to these zones in the s 32 Report is noted below at [26].

[24] Capacity modelling based on the March 2013 draft of the PAUP identifies that the capacity for additional residential dwellings is 38,576 on parcels that are vacant and have a residential base zone; 78,584 on parcels that have infill potential and have a residential base zone and 231,004 if all parcels that have a residential base zone are redeveloped to their maximum capacity at the modelled consent category.[23] The s 32 Report observes that no technical reports underpin this information.[24] The Report then states:[25]

> Once the Unitary Plan is notified (post all changes made by Councillors) a final model will be developed, along with the required technical reports and documentation. A large proportion of the Draft Model will be able to be reused, but some aspects will need to be redeveloped to reflect the notified rules and spatial data. It is intended that this information and the model can be used to inform the formal public engagement and hearings process with respect to growth issues generally and location specific questions as appropriate.

[25] It is also noted that the capacity information is not fully accurate because the new MHS and MHU zones will likely decrease and increase respectively the number of additional dwellings that were originally zoned Mixed Housing in the March 2013 drafts, and also that minor changes continue to be made to maps and the rules.[26]

[26] The controls and permitted land use activities for the six proposed residential zones in the notified PAUP are described, namely:

(a) *Large Lot*: Large Lot zones were applied in locations on the periphery of Auckland's urban areas, forming a transition between rural land and

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22 Auckland Council *2.3 Residential zones – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 5.

23 At 7. See also Harrison Grierson and New Zealand Institute of Economic Research *Section 32 RMA Report of the Auckland Unitary Plan Audit* (November 2013) at 48.

24 Auckland Council, above n 22, at 8.

25 At 8.

26 At 9.

urban land. Development on these sites was identified as being limited to one dwelling per 4000 m^2.[27]

(b) *Rural and Coastal Settlements*: The Rural and Coastal Settlement Zone was applied in settlements mostly forming a transition between rural or coastal land and rural production land. Development on these sites was also identified as being limited to one dwelling per 4000 m^2.[28]

(c) *Single House Zone* (SHZ): The SHZ was applied in settlements on the periphery of urban Auckland, in most historic character and conservation overlay areas and in selected parts of Auckland that do not have good access to public transport. It limited development to one dwelling per 500 m^2.[29]

(d) *Mixed Housing Urban* (MHU): This was identified as a key residential zone where change was anticipated. The zone is one of transition where some sites would stay in a similar form of one dwelling per 300 m^2 and other sites would be redeveloped for terraced housing or town houses.[30]

(e) *Mixed Housing Suburban* (MHS): Identified as one of the broadest residential plans in the AUP. The zone would be one of transition with some sites staying in a similar form of one dwelling per 400 m^2 and others being redeveloped for more intensive residential development such as terraced housing or town houses.[31]

The Report states:[32]

> The Mixed Housing Urban and Mixed Housing Suburban Zones make up approximately 49% of residential land. Both zones allow for four dwellings as a permitted activity provided the dwellings meet the density and development controls of the zone.

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27 At 28.
28 At 30.
29 At 32.
30 At 40.
31 At 34-35.
32 At 3.

(f) *Terrace Housing and Apartment Zone* (THZ): The THZ zone was identified as a key residential zone where change is anticipated and encouraged. The zone would be typically applied between the centres and the Mixed Housing Urban zone, and will be one of transition with some sites remaining in the form of one dwelling until sites can be amalgamated or re-developed by either current or future owners. One dwelling per site would be a permitted activity, two to four a discretionary activity, and no density limits would apply where five or more dwellings are proposed and the site meets certain site size and road frontage controls.[33]

[27] After conducting a cost benefit analysis of the proposed zones against the alternatives of (i) the status quo and (ii) removing all rules, the s 32 Report concludes that the package of six residential zones provided for "sufficient variation and housing choice" and that the inclusion of two mixed housing zones "will make a positive impact on housing affordability in the Auckland market".[34]

Notification of the PAUP

[28] The PAUP was then required to be notified and submissions invited.[35] This occurred on 30 September 2013. Under ss 123(4)–(5) of the Act it was not necessary for copies of the public notice of the PAUP to be sent to affected landowners, except for the owners and occupiers of land to which a designation or heritage order applied.[36]

[29] At this point, any person was able to make a submission on the PAUP, and further submissions could be made by any person representing a relevant aspect of public interest, any person with an interest greater than the one the public has, or the local authority.[37] Many of the parties to this proceeding made submissions on the PAUP and some made further submissions. Overall, more than 9400 submissions composed of 93,600 unique requests and over 3800 further submissions containing over 1,400,000 points were made to the IHP.

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33 At 45-46.
34 At 51.
35 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(e).
36 Sections 123(4) and (5).
37 Resource Management Act 1991, sch 1 cls 6 and 8.

[30] The Council, in accordance with the RMA, prepared and notified a summary of the submissions, and forwarded all the relevant information obtained up to that point to the specialist hearing panel, the IHP.[38]

The IHP: Role, Function

[31] The IHP is a specialist panel appointed by the Minister for the Environment and the Minister of Conservation.[39] During the first reading of the Resource Management Reform Bill, Hon Amy Adams described the composition of the IHP, and its general role, as follows:[40]

> The Unitary Plan developed by the council after enhanced consultation will be referred to a hearings panel appointed by me and the Minister of Conservation in consultation with the council and the independent Māori Statutory Board, to ensure that the consideration is properly independent. There will be the usual guidelines applied for making appointments, including a high degree of local knowledge, competency, and understanding of tikanga Māori. The process will involve all the dispute resolution options available in the Environment Court, and provide the board with wide discretion to control its processes to ensure that it is easily accessed and understood by all.

[32] It was envisaged that a one-off hearing process carried out by the IHP would "streamline and improve" the development of the AUP, and ensure Aucklanders would have comprehensive input and a "high-quality independent review of the council plan".[41]

[33] Its functions are set out in full in s 164 of the Act. Those functions include holding and authorising pre-hearing meetings, conferences of experts and alternative dispute resolution processes, commission reports, holding hearing sessions, making recommendations to the Council and to regulate its processes as it thinks fit. The procedure adopted must, however, be "appropriate and fair in the circumstances".[42] The submission and hearing process was also subject to a strict statutory timetable, with limited powers for extension.[43]

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38 Schedule 1, sub-cls 7(1)(a) and (b).
39 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(g).
40 (11 December 2012) 686 NZPD 7331.
41 (11 December 2012) 686 NZPD 7331.
42 Section 136.
43 Sections 123(7)–(9).

The issue of scope emerges

[34] The IHP chose to structure the hearings according to topics based on the way the Council had grouped its submissions, which resulted in approximately 80 hearing topics. The IHP took an approach that generally moved from the general to the specific, dealing first with topics relating to the RPS then moving through to site-specific issues.[44]

[35] The IHP provided interim guidance on certain hearing topics to assist submitters. Relevant guidance on Topic 013 RPS included the following note:[45]

> It is appropriate to enable higher residential densities in and around centres and corridors or close to public transportation routes, social facilities or employment opportunities. A broad mix of activities should be enabled within centres. A wide range of housing types and densities should be enabled across the urban area.

[36] At around this time, it became apparent that the Council in the development of the PAUP had "relied on theoretical capacity enabled by the Unitary Plan, rather on the measure of capacity that takes into account physical and commercial feasibility, which the Panel refers to as 'feasible enabled capacity', and defines as:[46]

> …the total quantum of development that appears commercially feasible to supply, given the opportunities enabled by the recommended Unitary Plan, current costs to undertake development, and current prices for dwellings. The modelling of this capacity at this stage is not capable of identifying the likely timing of supply.

[37] During the panel session on Urban Growth (Topic 013) on 25 February 2015, the IHP directed extensive analytical work and modelling to be done.[47] The IHP convened two expert groups to develop methods to estimate the feasible enabled capacity of the PAUP and of the possible alternatives put to the Panel.

[38] Meanwhile, in July 2015,the IHP also released its interim guidance on "Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)". The interim guidance requested that the parties should ensure any evidence

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44 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 23.

45 Auckland Unitary Plan Independent Hearings Panel *Interim Guidance Text for RPS Topic 013* (23 February 2015) at [11].

46 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.

47 At 47, 49 and 69.

provided for the hearing on the residential topics should address matters included in the guidance.[48] The relevant parts of the interim guidance for present purposes provided:

> 1.1. The change is consistent with the objectives and policies of the proposed zone. This applies to both the type of zone and the zone boundary.
>
> 1.2. The overall impact of the rezoning is consistent with the Regional Policy Statement.
>
> …
>
> 1.11. Generally no "spot zoning" (i.e. a single site zoned on its own).

[39] The two expert groups convened by the IHP met on several occasions in 2015 and prepared a report which was uploaded to the IHP on 27 July 2016. The results of their capacity forecasts identified a severe shortfall in the PAUP relative to expected residential demand. The results in the report are summarised in the IHP's "Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan" (the Overview Report):[49]

> The results …found that the feasible capacity enabled by the proposed Auckland Unitary Plan as notified at 213,000 fell well short of the long-term projections for demand for an additional 400,000 dwellings.

[40] The Council responded to this new information in late 2015 by filing in evidence revised objectives, policies and rules for residential zones that enabled significantly greater capacity. These changes removed density rules for the MHU and MHS zones and relied on bulk and location provisions to regulate amenity, which significantly increased capacity estimates.[50]

[41] The hearings on residential zones (topics 059–063) then commenced on 14–28 October 2015. By this stage the issue of scope had become a major issue. Auckland 2040, Character Coalition, the HRRA and HNZC made submissions challenging or supporting the Council's revised position as in or out of scope.[51]

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48 Auckland Unitary Plan Independent Hearings Panel, *Interim Guidance – Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)* (31 July 2015) at 1.

49 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.

50 Overview Report at 49–50.

51 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing Topics 059 - 063: Residential zones* (22 July 2016) at 28-30.

[42] From the available record, the Council filed revised zoning maps on 17 December 2015 based on more intensive zoning around centres, transport nodes and along transport corridors.[52] The maps outlined certain areas where the zone change was said to be "out of scope". This triggered a request to allow affected home owners to make late submissions and a request the IHP to reject such "out of scope" changes as they apply to Westmere. Auckland 2040 also sent a memorandum seeking interim guidance on the IHP's power to consider "out of scope zoning changes" and asserted that the majority of the changes to zoning that the Council had proposed were "out of scope". HNZC filed a memorandum in reply on 13 January 2016 stating that the Corporation and other government submitters' submissions provided scope for rezoning and that the Council was in error in referring to some rezoning as "out of scope".

[43] On 14 January 2016, the IHP issued a direction refusing to grant the requests for waivers for late submissions (both general and specific) and refusing to reject the Council's material as to its position on residential zoning at that present time. The IHP notes, in summary:[53]

(a) The IHP has a general power to consider out of scope submissions;

(b) The IHP must adhere to an appropriate and fair hearing procedure and act in accordance with principles of natural justice; and

(c) It must be persuaded that it would be appropriate for the matter to be the subject of an out of scope submission.

[44] The Council's proposed zoning maps were uploaded to the IHP website on 26 January 2016. Three weeks later, on 18 February 2016, the IHP issued a further direction clarifying its position. In short, the direction records:[54]

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52 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

53 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (14 January 2016) at 3.

54 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Clarification of directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (18 February 2016) at 1-2.

(a) The panel does not regard itself as having an unlimited power to make out of scope recommendations;

(b) The panel must proceed in accordance with the principles of natural justice, the requirements of the Act and the RMA, including the s 32 requirements;

(c) The submission stage is an important part of the process, as is the identification of significant resource management issues and methods to address them;

(d) The panel has heard evidence for 18 months and is aware of the range of issues that rezoning may raise including accommodating population growth and the effect of intensity on residential amenity; and

(e) The panel is conscious that any person affected by an out of scope recommendation has a full right of appeal to the Environment Court and that it is a safeguard for any person prejudiced by an out of scope recommendation.

[45] However, the Auckland Council then retracted some of the revised zoning maps on 24 February 2016 in areas where the Council considered the changes to be out of scope of any submissions made to the IHP. This resulted in a revised set of Council proposed "in-scope" changes to residential zoning.[55] The Council resolution retracting the maps records:[56]

> That the Governing Body:
>
> c) note that the proposed 'out of scope' zoning changes (other than minor changes correcting errors or anomalies) seek to modify the Proposed Auckland Unitary Plan in a substantial way.
>
> d) note that the timing of the proposed 'out of scope' zoning changes impacts the rights of those potentially affected, where neither submitter

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55 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

56 Auckland Development Committee *Proposed Auckland Unitary Plan – revised zoning maps incorporating the Governing Body decision of 24 February 2016* (Auckland Council, Council Resolution Number GB/2016/18, 24 February 2016) at 170.

or further submitter, and for whom the opportunity to participate in the process is restricted to Environment Court appeal.

e) in the interests of upholding the principle of natural justice and procedural fairness, withdraw that part of its evidence relating to 'out of scope' zoning changes (other than minor changes correcting errors and anomalies).

[46] The IHP responded to the Council's retraction in the following way on 1 March:

> The Hearings Panel has considered this memorandum and notes counsels' advice as to how they may act in accordance with their instructions as set out in the resolution of the Governing Body to withdraw that part of the evidence lodged by the Council relating to "out of scope" zoning changes.
>
> The Hearings Panel will be proceeding with the hearings in accordance with its existing procedures. Parties may present their cases generally as they wish, within the scheduling constraints of this process.
>
> The presentation of personal submissions by submitters and legal submissions by counsel on behalf of submitters is expected to reflect the positions of submitters.
>
> The presentation of evidence by persons who appear as experts must be in accordance with the Code of Conduct for Expert Witnesses. It is essential that a person giving expert evidence does so on an independent basis, and not affected by the position of the submitter calling that witness.

The hearings on rezoning and precincts

[47] Meanwhile, between 15 and 25 February 2016 there were hearings on general rezoning and precincts (Topic 80). HNZC made submissions, but there is no reference to the HRRA, Character Coalition or Auckland 2040 appearing.

[48] On 1 March 2016 the IHP issued interim guidance for Topic 081 Rezoning and precincts (Geographic areas). The purpose of the guidance was to set out the IHP's approach to submissions on proposals for re-zoning and precincts in the Greenfield areas proposed to be located within the RUB.

[49] Hearings then followed between 3 March and 29 April 2016 on Topic 081. HNZC, Auckland 2040, the HRRA appeared before the IHP on these topics; however, there is no reference to the Character Coalition in the hearing records.

[50] HNZC presented first and among other things called the Council's retracted evidence (including mapping evidence) by way of summons and also produced a

combination of new zoning maps for some areas within the region. These are referred to as the "evidence or merits based maps" as they purport to show how the application of HNZC's rezoning principles could be applied across the region. During this presentation the IHP requested HNZC to provide shape files (i.e. spatial mapping) to illustrate the scope for the zoning changes of HNZC's primary submission. This request was confirmed in a published memorandum dated 22 March 2016. These maps, together with another set of the evidence or merits maps, were produced on 6 May 2016. As they are based on HNZC's proximity criteria, they are referred to as the "proximity maps".

[51] Mr Brabant for Auckland 2040 appeared on 24 March 2016 and submitted on the proposed changes to the SHZ and the subsequent proposal for the substantial upzoning of the SHZ. He argued that these changes were outside the scope of submissions, and provided submissions on whether specific changes to the zone wording or mapping were reasonably foreseeable and whether recommending the requested changes would create procedural unfairness.

IHP Recommendations

[52] On 22 July 2016, the IHP provided the Council with its formal report and recommendations, which was subsequently published by the Council on its website on 25 July 2016. On 19 August 2016, the Council publically notified its decisions on the IHP's recommendations.

[53] The following topics, which have been referred to above, are of relevance to the zoning aspects of the present appeal:

(a) Topic 013, Urban Growth;

(b) Topic 016/017, Rural Urban Boundary;

(c) Topics 059 to 063, Residential Zones;

(d) Topic 080, Rezoning and Precincts (General); and

(e) Topic 081, Rezoning and Precincts (Geographic Areas).

[54] Broadly, the IHP's recommendations on these topics address what the Panel identified as the issue of greatest significance facing Auckland: its capacity for growth.[57] It states that:[58]

> The overarching approach to a combined resource management plan for Auckland starts with the development strategy for a quality compact urban form as set out in the Auckland Plan…based on existing centres and corridors…

[55] Consequently, the IHP recommended enabling greater capacity by both allowing for greater intensification of existing urban areas and identifying areas at the edges of the existing metropolis suitable for urbanisation.[59]

[56] The Executive Summary of the Overview Report recorded the following salient recommendations:[60]

> i. Affirming the Auckland Plan's development strategy of a quality compact urban form focussed on a hierarchy of business centres plus main transport nodes and corridors.
>
> ii. Concentrating residential intensification and employment opportunities in and around existing centres, transport nodes and corridors so as to encourage consolidation of them while:
>
> a. allowing for some future growth outside existing centres along transport corridors where demand is not well served by existing centres; and
>
> b. enabling the establishment of new centres in greenfield areas after structure planning.
>
> …
>
> vi. Supporting the Council's submission to remove density controls as a defining element of residential zones.
>
> vii. Revising a number of the prescriptive residential bulk and location standards to enable additional capacity while maintaining residential amenity values.
>
> viii. Promoting better intensive residential development through outcome-based criteria for the assessment of resource consents.

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57 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 9.
58 At 9.
59 At 9.
60 At 10-11.

ix. Supporting numerous submissions seeking more flexible residential zones and mixed-use zones around centres and transport nodes and along corridors to give effect to the development strategy in the Auckland Plan by:

a. enabling housing choice with a mix of dwelling types in neighbourhoods to reflect changing demographics, family structures and age groups; and

b. encouraging adaptation of existing housing stock to increase housing choice.

[57] The IHP observed that, unlike the PAUP, its recommended Plan was consistent with the Auckland Plan target of locating 60 to 70 percent of enabled residential capacity in the within the existing urban footprint.[61] It considered that the PAUP's 70/40 capacity distribution between urban and future urban development was not supported by the evidence. It instead "recommended regional policy statement objectives and policies to promote the centres and corridors strategy and quality compact urban form and … deleted the reference to a predetermined 70/40 spatial distribution of that capacity".[62]

[58] The recommendations made by the IHP in response to each topic hearing need to be seen in light of this. Among other things, the IHP's recommendations on matters such as the RUB, residential zoning and rezoning and precincts are guided by a desire to achieve the targets of the Auckland Plan and RPS.

Topic 013 – Urban Growth

[59] Topic 013 addressed the RPS provisions relating to urban growth, the extent to which the PAUP enabled sufficient development capacity to achieve a quality compact urban form, and whether there should be greater recognition of the character and amenity values of existing neighbourhoods with respect to intensification.[63]

[60] In the Panel's own words, "urban growth issues permeated most topics heard", and thus "the Panel's response to urban growth issues likewise permeates most topics in

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61 At 57-58.
62 At 58.
63 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 013 – Urban growth* (22 July 2016) at 6.

order for the recommended Plan to provide a coherent response to the growth issues facing the Auckland Region."[64]

[61] The Panel recommended a new section B2.4 Residential Growth to address how residential intensification will be provided for. This responded to the Auckland Plan's envisaged need for 400,000 additional dwellings, and the severe shortfall in the PAUP relative to expected residential demand identified by the two expert groups. The Panel considered the AUP should err toward over-enabling. Many of the corresponding recommendations on Topic 013 are listed at [54]-[57], including:[65]

(a) The centres and corridors strategy accompanied by "significant rezoning with increased residential intensification around centres and transport nodes, and along transport corridors (including in greenfield developments)";

(b) Enabling of capacity in residential, commercial and industrial zones, for example by removing density rules in more intensive residential zones; and

(c) Being "more explicit as to the areas and values to be protected by the Unitary Plan (e.g. viewshafts, special character, significant ecological areas, outstanding natural landscapes, and so forth) and otherwise enabl[ing] development and change".

[62] On the matter of residential capacity, the IHP projected demand for 400,000 new sites by 2041, and examined the feasible enabled capacity with the PAUP as notified, PAUP with the Council's modified rules and the IHP recommended Plan. Only the IHP recommended Plan is assessed as providing for the projected demand.

[63] The IHP report on urban growth notes that B2 Urban growth contains fundamental objectives and policies affecting almost all resource management issues in

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64 At 6.
65 At 7.

the region and the Panel's recommendations on this topic influenced its approach to all other hearing topics.[66]

[64] The IHP records that the reference documents relied upon by the IHP includes the 013 submission points' pathway reports and parties and issues reports.

Topics 016, 017 Rural Urban Boundary, 080 Rezoning and Precincts (General) and 081 Rezoning and Precincts (Geographic Areas)

[65] The IHP provided its recommendations on these topics in one report. Previously, on 31 July 2015, it issued interim guidance to all parties about best practice approaches to rezoning, precincts and changes to the RUB. This included observations that zone boundaries need to be defensible and that the IHP would generally avoid spot zoning.[67] It also records all parties generally agreed with this overall approach.[68]

[66] The Panel recommended that the land zoned Future Urban Zone be expanded from 10,100 hectares to approximately 13,000, reflecting that in its view increased residential capacity had to come outside the existing metropolitan limit as well as within.[69]

[67] An extension of the RUB in the Albany area is recommended "where future development would be an extension of the Albany Village" and "[i]t is easily accessible and infrastructure services can be extended readily to the area given its close proximity to the Village".[70]

[68] This report also records that a particular concern for the IHP was the reasonableness of recommended zone changes to persons who were not active submitters. It observes that where the matter could reasonably have been foreseen as a

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66 At 17.

67 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts: Hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas)* (22 July 2016) at 5-6.

68 At 8.

69 At 9.

70 At 13.

direct and logical consequence of a submission point, the Panel has found that to be within scope.[71] I return this statement of approach below.

[69] The Panel's approach to precincts and rezoning precincts is said to be in line with the promotion of a quality compact urban form focusing on capacity around centres, transport nodes and corridors.[72] This led to recommended upzoning around these features, and while the Panel generally avoided rezoning the inner city special character areas (such as Westmere and Ponsonby), it did so in areas "where other strategic imperatives dominate", such as Mt Albert.[73]

[70] The IHP also writes that:[74]

> The Panel's approach to land use controls has been to, as far as practicable, establish a clear and distinct descending hierarchy from overlay to zone to precinct (where applicable) based on relevant regional policy statement provisions.
>
> …overlay constraints…have generally not been taken into consideration as far as establishing the zoning is concerned. That is, the 'appropriate' land use zoning has generally been adopted regardless of overlays. That approach leaves overlays to perform their proper independent function of providing an important secondary consideration, whereby solutions and potential adverse effects can be assessed on their merits. It also avoids the risk of double-counting the overlay issue both at the zone definition and then at the overlay level. In many instances this has resulted in consequential rezoning changes. In Newmarket, for example, the Panel has upzoned the centre to Business - Metropolitan Centre Zone; removed the particular building height restrictions; and relied upon the Volcanic Viewshaft and Height Sensitive Areas Overlay (along with general development controls) to govern individual site structure heights.
>
> As a consequence of the approach to zoning noted above, typically the setting aside of an overlay from a residential site for the purpose of establishing the zoning, has resulted in upzoning of that site by one order of dwelling typology – commonly from Residential - Single House Zone to Residential - Mixed Housing Suburban Zone for instance (indeed, the Residential - Mixed Housing Suburban Zone has become the new 'normal' across many parts of the city). This residential upzoning has most commonly arisen from the uplifting of the flooding overlay, which in no way diminishes the relevance of that, or any other, overlay because of its importance in the hierarchy of controls.

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71 At 18.
72 At 18.
73 At 18.
74 At 18-19.

[71] The panel also accepted a 400-800m walkability metric from key transport nodes, corridors and town centres from HNZC when applying higher density zones in residential areas, considering that in the long term such zoning was appropriate.[75]

[72] Finally, the IHP relevantly observes that in areas with dense HNZC property ownership (such as around Mangere township), it has in-filled upzoning across other properties where HNZC sought higher densities to make a more logical block.[76]

Topics 059-063 – Residential Zones

[73] The relevant overall IHP recommendations relating to residential zoning are as follows:[77]

(a) Provide greater residential development capacity (linked with the spatial distribution of the residential zones);

(b) Greater development on sites as of right, provided they comply with the development standards; and

(c) A more flexible outcome-led approach to sites developed with five or more dwellings in the MHS Zone and MHU Zone and for all development in the THZ.

[74] The IHP notes that:[78]

> This report needs to be read in conjunction with the Panel's Report to Auckland Council – Overview of recommendations July 2016 and Report to Auckland Council – Rural Urban Boundary, rezoning and precincts July 2016 relating to residential zones and precincts, as the combined recommendations provide an integrated approach to residential development – i.e. the various residential zones and the provisions within them and their spatial distribution.

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75 At 19.
76 At 20.
77 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 4-5.
78 At 5.

[75] Further:[79]

> In summary the combination of the zonings and zone provisions would not give effect to the regional policy statement's objectives and policies relating to a quality compact urban form, a centres plus strategy and housing affordability. These are also major policy directives in the Auckland Plan to which the proposed Auckland Unitary Plan must have regard.
>
> It is the Panel's view that the proposed Auckland Unitary Plan did not have sufficient regard to the Auckland Plan and would not give effect to the regional policy statement as notified nor as amended through the submission and hearing process.

[76] As noted, the issues of capacity for residential growth and spatial distribution of residential and mixed zones are addressed in those reports.[80]

[77] Specific relevant anticipated outcomes include:[81]

> i. Overall, the residential development capacity has been better enabled by the changes recommended.
>
> ii. The Panel recommends the retention of the zoning structure of the six residential zones, but has recommended a number of changes to the zone provisions…
>
> iii. The purpose of the Residential – Single House Zone has been amended and clarified to better reflect its purpose.
>
> iv. There are no density provisions for the Mixed Housing Suburban, Mixed Housing Urban and Terrace Housing and Apartment Buildings Zones, but development standards and resource consents are applied, as addressed below.
>
> v. Up to four dwellings are permitted as of right on sites zoned Residential – Mixed Housing Urban Zone and Residential – Mixed Housing Suburban Zone which meet all the applicable development standards.
>
> vi. Five or more dwellings require a restricted discretionary activity consent in the Residential – Mixed Housing Suburban Zone and Residential – Mixed Housing Urban Zone
>
> …
>
> xiii. [a number of] development standards, particularly in Residential – Mixed Housing Suburban, Residential – Mixed Housing Urban and Residential – Terrace Housing and Apartment Buildings Zones, have been deleted; some recommended by the Council and others by the Panel…

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79 At 10.
80 At 7.
81 At 5-6.

[78] This report also dealt with the type of development enabled by each residential zone. The Panel observed that based on much of the evidence, "residential provisions needed to be more enabling and to provide for greater residential capacity." [82] The IHP was influenced by the number of submitters including HNZC, Ockham, and MBIE who "considered that the proposed Auckland Unitary Plan fell well short of implementing this strategic direction of providing greater residential intensification."[83]

[79] The IHP observed that the combination of zonings and zone provisions would not give effect to the RPS's objectives and policies relating to a quality compact urban form, a centres based strategy and housing affordability. The IHP referred to and agreed with the evidence given on behalf of HNZC, which suggested that a "bold and innovative approach" which will provide for residential activities and development would need to include:[84]

> - Moderate increases to the permitted height limits in appropriate locations (being in and around centres, and within walking distance of public transport facilities and other recreational, community, commercial and employment opportunities and facilities);
>
> - Significant reductions in, or removal of, land use density controls (particularly in the Residential – Mixed Housing Suburban and the Residential – Mixed Housing Urban zones);
>
> - A reduction in the currently proposed extensive suite of quantitative development controls, such that a limited number of quantitative controls are retained to address the key matters which have the potential to create adverse effects external to a site, most notably in relation to amenity effects (such as retention of building height, height in relation to boundary and yard, building coverage, impermeable surface controls for instance); with the remainder of controls which relate to potential effects internal to a site being addressed in a more flexible way through the use of design-related matters of discretion and assessment criteria; and
>
> - A simplified yet potentially strengthened, suite of matters of discretion and assessment criteria, particularly in relation to development control infringements (in order to address concerns of neighbours in relation to amenity impacts, and provide clear guidance to processing planner to assist in their assessment), as well as design assessment…

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82 At 8.
83 At 10.
84 At 12.

[80] On the SHZ, the Panel referred to a proposal by the Council to recast the SHZ and to the opposing submissions by, among other Auckland 2040. Preferring in part Auckland 2040's position, the Panel found that the zone applies to:[85]

> i. some inner city suburbs, albeit with the special character overlay;
>
> ii. some coastal settlements (e.g. Kawakawa Bay); and
>
> iii. other established suburban areas with established neighbourhoods (e.g. parts of Howick, Cockle Bay, Pukekohe and Warkworth)."

[81] The IHP also recommended retaining MHS and the MHU:[86]

> The Panel finds that the Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys. The Residential - Mixed Housing Urban Zone will provide for a more intensive building form of up to three storeys, facilitating a transition to a more urban built character over time. The Residential - Mixed Housing Urban Zone also provides for a transition in built character between suburban areas (zoned Residential - Mixed Housing Suburban Zone) and areas of higher intensification with buildings of five to seven storeys in areas zoned Residential - Terrace Housing and Apartment Buildings Zone.

[82] The IHP then recommended the removal of all density provisions in the MHS, MHU and THZ zones, but it rejected an outcome-led approach to development, preferring a combination of a more enabling approach with a rule-based approach.[87] For this purpose, some development standards (e.g. unit size) are however recommended for deletion as they do not serve an urban form purpose.

[83] The Report identified submission point pathway reports 059, 060, 062, 063 and parties and issues reports as relevant to the IHP's recommendation.

Appeal and review rights

[84] The only appeal rights available in respect of the proposed plan are as follows:

(a) The right of appeal to the Environment Court under section 156 or 157 of the Act:

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85 At 13-14.
86 At 15.
87 At 16-17.

(b) The right of appeal to the High Court under section 158 of the Act.

[85] Section 156 and 158 of the Act provide the following rights of appeal (in summary):

(a) Under ss 156 a submitter may appeal to the Environment Court on any decision of the Council accepting a recommendation that was out of scope of the submissions or that rejects an IHP recommendation; and

(b) Under s 158, a submitter may appeal to the High Court on any decision of the Council that accepts an IHP recommendation but only on points of law.

[86] Any decision of the Environment Court may be appealed to the senior courts in the usual way under the appeal provisions of the RMA pursuant to s 308.[88] By contrast, appeals to the Court of Appeal are not available pursuant to s 158.[89]

[87] Section 159 of the Act provides a right to judicially review the decision of the Council:

> **159 Judicial review**
>
> (1) Nothing in this Part limits or affects any right of judicial review a person may have in respect of any matter to which this Part applies, except as provided in sections 156(4) and 157(5) (which apply section 296 of the RMA, that section being in Part 11 of that Act).
>
> (2) However, a person must not both apply for judicial review of a decision made under this Part and appeal to the High Court under section 158 in respect of the decision unless the person lodges the applications for judicial review and appeal together.
>
> (3) If applications for judicial review and appeal are lodged together, the High Court must try to hear the judicial review and appeal proceedings together, but need not if the court considers it impracticable to do so in the circumstances of the particular case.

[88] As noted in s 159(1), the right of judicial review is subject to s 296 of the RMA, which provides:

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[88] Local Government (Auckland Transitional Provisions) Act 2010, s 156(4).
[89] Section 158(5).

> **296 No review of decisions unless right of appeal or reference to inquiry exercised**
>
> If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation—
>
> (a) no application for review under Part 1 of the Judicature Amendment Act 1972 may be made; and
>
> (b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court—
>
> unless the right has been exercised by the applicant in the proceedings and the court has made a decision.

[89] The effect of ss 159(1) of the Act and 296 of the RMA is to prevent a person from bringing a judicial review application where he or she has a right to appeal to the Environment Court against the decision of the Council.

Thresholds for appeal and review

[90] The thresholds for oversight of specialist tribunals are well settled in the RMA jurisdiction.[90] This Court is slow to interfere with decisions of the Environment Court within its specialist area.[91] The same deference should be afforded to the IHP, having regard to, among other things, the scale, complexity and policy content of its task. But as the question of scope also bears on natural justice considerations, close scrutiny by this Court is to be expected.[92]

[91] Accordingly I approach the appellate and review exercises on the following basis. I may test the IHP's scope decisions for error of law, irrelevant considerations or failure to have regard to relevant considerations, procedural impropriety and/or unreasonableness, which includes a conclusion without evidence or one to which on the evidence it could not have reasonably come.[93] The objective of the appeal or review procedures on the issue of scope is to secure both legality and substantive fairness. To

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90 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).
91 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC).
92 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
93 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90.

this end, I must examine the IHP's exercise of discretion on scope so as to ensure it was exercised lawfully and fairly.[94]

PART C: THE PRELIMINARY QUESTIONS

Did the IHP interpret its statutory duties contained in Part 4 of the Act lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

[92] Several issues arising under this question are addressed in the context of the subsequent questions. The focus of this question at the hearing was whether the frame adopted by IHP for the purpose of identifying out of scope recommendations was correct. I outline the legislative frame on scope and the IHP's frame below, before turning to the arguments of the parties.

The legislative frame

[93] Section 144 of the Act sets out the IHP's recommendatory powers:

> **144 Hearings Panel must make recommendations to Council on proposed plan**
>
> (1) The Hearings Panel must make recommendations on the proposed plan, including any recommended changes to the proposed plan.
>
> (2) The Hearings Panel may make recommendations in respect of a particular topic after it has finished hearing submissions on that topic.
>
> (3) The Hearings Panel must make any remaining recommendations after it has finished hearing all of the submissions that will be heard on the proposed plan.
>
> *Scope of recommendations*
>
> (4) The Hearings Panel must make recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA (which relates to designations and heritage orders), as applied by section 123.
>
> (5) However, the Hearings Panel—
>
> (a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan; and

[94] *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.

(b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.

(6) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.

Recommendations must be provided in reports

(7) The Hearings Panel must provide its recommendations to the Council in 1 or more reports.

(8) Each report must include—

(a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and

(b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and

(c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

(9) Each report may also include—

(a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and

(b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.

(10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[94] Mandatory relevant criteria for the purpose of making recommendations are listed at s 145. Key among those criteria are ss 145(1)(d) and (f):

(d) include in the recommendations a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA; and

…

(f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:

(i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2), 165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:

(ii) any other provision of the RMA, or another enactment, that applies to the Council's preparation of the plan.

[95] Section 148(3) also relevantly states:

(3) To avoid doubt, the Council may accept recommendations of the Hearings Panel that are beyond the scope of the submissions made on the proposed plan.

The IHP approach to scope

[96] It is important not to cherry pick parts of the Panel's explanation of its approach to scope and with that qualification in mind, I find that the IHP approach included the following key elements:

(a) Consideration of:[95]

(i) The plan provisions as notified, together with any relevant section 32 reports prepared by the Council;

(ii) The submissions and further submissions;

(iii) Material lodged by the Council and submitters;

(iv) The relevant plan-making provisions of the RMA, especially sections 32 and 32AA and the provisions specifically listed in section 145(1)(f) of the Act;

(v) The Auckland Plan; and

[95] Auckland Unitary Plan Independent Hearings Panel, above n 19, at 28-29.

(vi) The specialist knowledge and expertise of the members of the Panel in relation to making statutory planning documents based on sound planning principles

(b) An acknowledgement of the power to make out of scope recommendations;[96]

(c) The guidance afforded by existing jurisprudence on scope;[97]

(d) The Panel's recommendations generally lie between the provisions of the Unitary Plan as notified and the relief sought in submissions on the Unitary Plan, including consequential amendments that are necessary and desirable to give effect to such relief.[98]

(e) Identifying four types of consequential change:[99]

(i) Format/language changes;

(ii) Structural changes;

(iii) Changes to support vertical/horizontal integration and alignment, to give effect to policy change, to fill the absence of policy direction, and to achieve consistency of restrictions or assessments and the removal of duplicate controls; and

(iv) Spatial changes, for example where a zone change for one property raises an issue of consistency of zoning for neighbouring properties and creates difficulty in identifying a rational boundary.

(f) On changes supporting vertical integration, following a top down approach so that consequential amendments to the plan to achieve integration with overarching objectives and policies, which were drawn

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96 At 28.
97 At 26-28.
98 At 24.
99 At 29-30.

from higher level policy statements. Given the logical requirement for a plan to function in this way, these changes would normally be considered to be reasonably anticipated.[100]

(g) On the issue of spatial consequential changes, where there were good reasons to favour rezoning sought in a submission and good reasons to include neighbouring properties as a consequence, even where there were no submissions from the owners of them neighbouring properties, including the neighbouring properties in recommendations because it saw that the overall process including notification, submission, summarising points of relief, further submission and late submission and further submission windows provided the real opportunity for participation by those potentially affected.[101]

(h) Assessing consequential changes in several dimensions, being:[102]

(i) Direct effects: whether the amendment would be one that directly affects an individual or organisation such that one would expect that person or organisation to want to submit on it.

(ii) Plan context: how the submission of a point of relief within it could be anticipated to be implemented in a realistic workable fashion; and

(iii) Wider understanding: whether the submission or points of relief as a whole provide a basis for others to understand how such an amendment would be implemented.

(i) Framing the assessment of scope provided by broadly couched submissions in response to the resource management issues which can be identified in relation to them and in the context of many other submissions which are relevant to more detailed aspects of the AUP

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100 At 32.
101 At 34.
102 At 30.

provisions. More specifically, the strategic framework of the RPS, submissions seeking greater intensification round existing centres and transport nodes, and submissions seeking retention of special character areas were relied on to assist in understanding how more generalised submissions ought to be understood.[103]

(j) A review of zoning issues by area with reference to submissions on each area.[104]

(k) Identifying remaining out of scope recommendations.[105]

[97] The effect of all of this is exemplified in the following passage taken from the IHP's report to the Auckland Council on the Rural Urban Boundary, Rezoning and Precincts:[106]

> A particular concern of the Panel in deciding whether to recommend rezoning and precincts has been the reasonableness of that to persons who were not active submitters and who might have become active had they appreciated that such was a possible consequence.
>
> **Where the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point the Panel has found that to be within scope.** Where submitters, such as Generation Zero, have provided very wide scope for change the Panel has been guided by other principles – such as walkability; access to multi-modal transport; proximity to centres; and so forth – in finessing such change.

[98] For ease of reference I refer to the IHP test for scope as the reasonably foreseen logical consequence test.

Argument (in brief)

[99] On the Council's view (supported by the 'in scope' parties), a generous approach was needed, given the scale of the planning exercise. The Council submitted that the IHP was not bound by common law principles and could recommend changes that were not expressly sought in a submission provided that the changes reasonably and fairly arise from the submissions and that they achieves the purpose of the Act. Whether a

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103 At 33.
104 At 34.
105 At 34-35.
106 Auckland Unitary Plan Independent Hearings Panel, above n 67, at 17-18 (emphasis added).

recommendation was reasonably and fairly raised or sufficiently foreseeable was an evaluative matter for the IHP and not this Court. Moreover a strict interpretation of scope, requiring precise correspondence between submission and recommendation would be absurd and unworkable, with the prospect of a very large part of the evaluative exercise transferring to the Environment Court contrary to the clear policy of Part 4. It submitted further, in any event, that the IHP adopted a robust methodology in accordance with the express statutory requirements and established principle.

[100] By contrast, several of the "out of scope" parties emphasised:[107]

(a) Contrary to the Council's argument, nothing in the scheme of Part 4 suggests a more generous approach to scope is permissible. The IHP was under a duty to clearly identify and make decisions that were within scope;

(b) It was not sufficient to be satisfied that the recommendation "fairly and reasonably relate" to the submissions. Section 144 requires a clear nexus between the relief sought in submissions and the recommendations – that is the relief must be *necessary* and arising from the submissions based on what a reasonable person would understand from the relief sought in the submission;

(c) The IHP reports do not transparently demonstrate by reference to specific submissions that the requisite nexus was established by the IHP;

(d) While the IHP reports purport to adopt an area by area approach, they do not specify what submissions supported the recommendations to upzone 29,000 properties (this claim is also addressed below in terms of the second question);

(e) A finding of scope to rezone neighbouring properties "where there are no submissions" was clearly erroneous and not saved by the proviso that

[107] Ms Arthur Young for SHL did not join with the other out of scope parties on this issue. Mr Martin Williams for Man O' War largely confined his submission to maintaining that existing jurisprudence provided requisite guidance on scope.

there should not be amendments without a "real opportunity for participation";

(f) The test on the issue of scope laid down in *Countdown*[108] has evolved over time with the more recent expression of the test by Kós J in *Motor Machinists*[109] (discussed below at [126]-[128]) providing greater assistance and demanding more surety about whether the public had a reasonable opportunity to submit;

(g) The IHP had to be satisfied that an affected person was on notice of a potential change to the PAUP. This could only be achieved if any affected person was put on reasonable enquiry about the potential for the change recommended by the IHP (this aspect is addressed more squarely in the context of the test cases below at [165] – [176];and

(h) The IHP erred by relying on generic submissions or the RPS to establish area or site specific zone changes (this claim is addressed below in terms of the third question at [148] – [153].

Assessment

[101] The question of scope raises two related issues: legality and fairness. Legality is concerned with whether the IHP has adhered to the statutory requirement to identify all recommendations that are outside the scope of submissions (at s 144(8) of the Act). The second issue of fairness is about whether affected persons have been deprived of the right to be heard.

[102] I am satisfied that the IHP did not misinterpret its duties on the issue of scope in either respect, having regard to the words and text used at s 144, informed by purpose[110] and context,[111] including the scheme of Part 4 and the relevant parts of the RMA.[112] In short, the IHP approach:

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108 Above n 90.
109 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.
110 Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].
111 *McQuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [18]-[19].

(a) Addresses the relevant statutory criteria;

(b) Is consistent with the RMA's policy of public participation;

(c) Accords with the schemes of Part 4 and relevant parts of the RMA;

(d) Largely conforms with orthodox jurisprudence dealing with scope; and

(e) Is not materially inconsistent with the approach and principles set out in *Clearwater*[113]*/Motor Machinists*[114].

[103] It is necessary to elaborate on each of these points.

The statutory criteria

[104] For present purposes, the key relevant s 144 criteria are:

(a) **Section 144(1)**: The IHP must make recommendations "on" the proposed plan. Proposed plan is defined as the proposed combine plan prepared by the Auckland Council in accordance with ss 121-126; that is the notified PAUP. The significance of this is that the IHP's jurisdiction to make recommendations is circumscribed by the ambit of the notified PAUP.

(b) **Section 144(5)**: The IHP recommendations are not limited to the scope of the submissions on the PAUP. The jurisdiction therefore to recommend changes to the PAUP is not limited by the relief sought in submissions.

(c) **Section 144(8)(a)**: The IHP must identify "the recommendations [on a topic or topics] that are beyond the scope of the submissions made in respect of that topic or those topics". This duty involves three evaluative steps: an assessment of the effect of a recommendation, an assessment of

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112 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* Ltd [2012] NZHC 2156, [2012] NZRMA 552, at [13]; *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92, at [6].

113 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

114 *Palmerston North City Council v Motor Machinists Ltd*, above n 109.

the scope of a submission or submissions and an assessment of whether the effect of the recommendation is beyond the scope of the submission.

(d) **Section 144(8)(c)**: The IHP must provide "reasons for accepting or rejecting submissions", and may do so by grouping the submissions according to provisions or subject matter.

(e) **Section 144(9)(a)**: The IHP may report on "consequential alterations necessary to the proposed plan arising from submissions". While the requirement to report is discretionary, it is implicit that the consequential alterations are a necessary corollary of submissions.

(f) **Section 145(d) and (f)**: In formulating recommendations, the IHP must include a further s 32 evaluation and ensure that the matters specified at s 145(1)(f) are complied with, namely RMA decision making criteria relating to the promulgation of plans. Accordingly, the IHP could not make recommendations without being satisfied about compliance with the listed matters.

[105] It was not suggested that the IHP was under any misapprehension about the ambit of of its powers to make recommendations pursuant to ss 144(1) and 144(5). The focal point of criticism for present purposes is whether the IHP properly interpreted and discharged the duty to identify recommendations that were beyond "scope" in the sense of being satisfied that consequential changes were "necessary" and/or fairly made.

[106] Dealing first with the requirement for "necessary" alterations; no particular definition of "necessary" featured in argument, but Character Coalition submitted that reasonably foreseeable is a lower threshold than necessary. But "necessary" is not an unfamiliar term in environmental law. Dealing with the meaning of "unnecessary subdivision", Cooke P said in *Environmental Defence Society Ltd v Mangonui County Council* "necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".[115] This definition of necessary was subsequently applied to the interpretation of an earlier incantation of s 32 and the evaluation of

[115] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

whether an objective, policy or rule was "necessary" to achieve sustainable management.[116]

[107] I consider this definition of necessary should apply to the meaning of consequential alterations "necessary" to the proposed plan arising from submissions. It adequately meets the natural justice considerations underpinning the scope provisions without unduly fettering the attainment of the Act's purpose by literally limiting the relief to that sought in the submission – an approach to planning processes long rejected by the Courts.[117] As the Full Court in *Countdown* put it:[118]

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

[108] It is tolerably clear that the IHP framed its scope decision employing a similar definition of necessary when it expressed the requirement for the consequential relief to be "necessary" in two ways – that is the consequential changes must be "necessary and desirable" and "foreseen as a direct or otherwise logical consequence of a submission".

[109] I address the issue of fairness when dealing with the common law approach to scope. I first turn to consider the wider context in terms of the duty to identify recommendations that are beyond the scope of submissions.

Policy of public participation

[110] Participation by the public in district and regional plan processes is a long standing policy of the RMA.[119] The First Schedule process envisages an opportunity for participation by affected persons. There must be public notification of a proposed policy statement or proposed plan.[120] Directly affected ratepayers must be served a copy of a

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116 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC) at [25].
117 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 170.
118 At 170.
119 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92.
120 Clause 5(1)(b).

public notice of a proposed plan of by a territorial authority.[121] Regional Councils must send a copy of a public notice and such further information as the council thinks fit relating to a proposed policy statement or plan to any person likely to be directly affected by the proposed policy or the plan.[122] Any notice must, among other things, state that any person may make a submission on the proposed planning instrument.[123] Any person (except trade competitors unless directly affected by a non trade competition effect) may make a submission. The Council must then give public notice of the availability of a summary of submissions and any person may make further submissions in support or opposition to a submission.[124] Public hearings must be held, unless no submitters wish to be heard.[125]

[111] Part 4 of the Act incorporates the Schedule 1 process from the RMA, save that it does not require service of a public notice on directly affected persons[126] and unlike the usual RMA processes, there are no full rights of appeal to the Environment Court except for recommendations that are out of scope or in respect of recommendations rejected by the Council.[127] A process for re-notification of out of scope changes pursuant to s 293 was also removed. Some of the 'out of scope' parties contended that these amendments to the usual process heightened the need for caution and surety about scope. Conversely, it was said by some of the 'in scope' parties that this showed a more relaxed statutory policy toward the involvement of affected landowners. For my part I do not consider that the differences enhance or diminish the policy of public participation. These modifications streamline the process but do not materially derogate from that policy, given also the requirement to identify out of scope recommendations and the right of appeal by any person unfairly prejudiced by such recommendations.[128]

[112] I am satisfied the IHP was cognisant of this policy as is evident from the decision elements described at [96](a)(ii) and (h). Furthermore, the requirement for each recommendation to be a reasonably foreseen logical consequence of a submission point is consistent with the attainment of this policy. It enables robust recognition of the right

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121 Clause 5(1A).
122 Clause 5(1C).
123 Clause 5(2).
124 Clauses 7 and 8.
125 Clause 8B.
126 Section 123.
127 Section 156.
128 Sections 144(8) and 156(3).

to make a submission while ensuring that the public are not caught by changes that could not have been reasonably anticipated.

The scheme of Part 4 and the RMA

[113] The Scheme of Part 4 and relevant parts of the RMA envisage:

(a) A streamlined process in terms of rights of participation by the public;

(b) An iterative promulgation process, commencing with the s 32 analysis of the costs and benefits of the PAUP prior to notification, a central Government audit of the s 32 report, an alternative dispute resolution process, a full hearing process before the IHP, a further s 32 report on proposed changes to the PAUP, recommendations by the IHP, decisions on the recommendations by the Council, and limited rights of appeal; and

(c) Any recommendation will be made having regard to the usual requirements for regional and district planning instruments, including ss 66-67 and 74-75 of the RMA, which require (among other things) compliance with the functions of territorial authorities at ss 30 and 31, the provision of Part 2 (purpose and principles) and the obligation to give effect to higher order planning instruments (e.g. national policy statement, any New Zealand coastal policy statement, any regional policy statement and in the case of District Plans, any regional plan).

[114] The IHP's integrated approach to scope noted at [96](a)(iv), (f) and (g) accords with this scheme and more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA, particularly in the context of a combined plan process. Submissions on the higher order objectives and policies inevitably bear on the direction of lower order objectives and policies and methods, including zoning rules given the statutory directions at ss 66-75 of the RMA.[129] Given that all parts of the combined plan are being developed contemporaneously, it would have been wrong for the IHP to promulgate objectives, policies and rules without regard

[129] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [11].

to all topically relevant submissions, including submissions dealing only with the higher order matters. Provided the lower order recommendation is a reasonably foreseen logical consequence of the higher order submission, taking such an integrated approach to scope was lawful.

Orthodoxy

[115] The reasonably foreseen logical consequence test also largely conforms to the orthodox "reasonably and fairly raised" test laid down by the High Court in *Countdown* and subsequently applied by the authorities specifically dealing with the issue of whether a Council decision was authorised by the scope of submissions. This orthodoxy was canvassed in some detail in the IHP overview report, which I largely adopt. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change.[130] To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[131] The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions**.**[132] It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.[133]

[116] As Wylie J noted in *General Distributors Limited v Waipa District Council* the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[134]

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130 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90.
131 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112.
132 *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].
133 *Westfield (New Zealand) Ltd v Hamilton City Council*, above n 116, at [73]-[74].
134 *General Distributors v Waipa District Council*, above n 91, at [55].

[117] Any differences between the *Countdown* orthodoxy and the IHP's 'reasonably foreseen logical consequence' test are largely semantic. The IHP's concern for natural justice is repeated in a number of different ways in the Reports. The IHP's test is simply one way of expressing an acceptable method for achieving fairness to potentially affected persons.

[118] For completeness, I do not consider the language or scheme of Part 4 envisages a departure from the *Countdown* orthodoxy. The only material point of difference is that Part 4 is more streamlined, but as noted, the policy of public participation remains strongly evident and there is nothing in the legislation to suggest that the longstanding careful approach to scope should not apply.

The Clearwater two step test

[119] Some of the appellants emphasised that the two step *Clearwater* test as applied by Kós J (as he then was) in *Motor Machinists,* not the *Countdown* test, provided the better frame for scope. I disagree to the extent that it is said to depart from the *Countdown* orthodoxy. Given the significance of this aspect to the parties, I will address the *Clearwater* approach in some detail.

[120] The *Clearwater* case concerned whether a submission was "on" a variation to the noise contour polices of the then proposed Christchurch District Plan. William Young J identified his preferred approach as:[135]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly "on" the variation.

[121] A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan and in the *Clearwater* case, the Council sought to introduce a variation (Variation 52) to remove an incongruity between policies dealing with urban growth and

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135 *Clearwater Resort Ltd v Christchurch City Council*, above n 113, at [66].

protection of the Christchurch airport. The proposed plan placed constraints on residential development within specified noise contours. Variation 52 contained no proposal to adjust the noise contours, but the submitter, Clearwater, wanted to challenge the accuracy of the contours on the planning maps. The Court was not concerned with whether the scope of the submission was broad enough to include a particular form of relief (as was the case in *Countdown*, *Royal Forest*, *Shaw* and *Westfield*). Rather, the Court was literally concerned with whether the submission was "on" the variation at all.

[122] Relevantly, William Young J also stated in relation to the second *Clearwater* step:[136]

> It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely differently from the envisaged by the local authority. It may be that the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have the opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

[123] William Young J went on to hold that assuming Clearwater's submission sought a change to the 50 dBA contours, it would have been "on" the variation because "[t]he class of people who could be expected to challenge the location of this line under [the notified proposed plan] is likely to be different from the class of people who could be expected to challenge it in light of Variation 52."[137] By contrast, Clearwater's submission on the 55dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours was not "on" the variation because it was clear that "the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive".[138]

[124] Ronald Young J applied the *Clearwater* steps in *Option 5 Incorporated*, noting that the first point may not be of particular assistance in many cases, but that it is highly relevant to consider whether the result of accepting a submission as on a variation

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136 At [69].
137 At [77].
138 At [80].

would be to significantly change a proposed plan without the real opportunity for participation by affected persons.[139] In this case the Judge placed some significance on the fact that at least 50 properties would have their zoning fundamentally changed without any direct notification "and therefore without any real chance to participate in the process by which their zoning will be changed."[140] Ronald Young J added that there was nothing to indicate to that "the zoning of their properties might change."[141] In concluding that the submission was not on the variation Judge observed that the Environment Court correctly took into account:[142]

a) The policy behind the variation;

b) The purpose of the variation;

c) Whether a finding that the submission on the variation would deprive interested parties of the opportunity for participation.

[125] The Court also noted the appellant's submission was to be contrasted with the more modest intention of Variation 42 which was to support the central Blenheim CBD and to avoid commercial developments outside the CBZ.

[126] More recently, the *Clearwater* test was applied by Kós J, in *Motor Machinists.* This case concerned a plan change about the distribution of business zones. The appellant had sought extension of the "Inner Business" zone to its land. The Environment Court rejected this submission as out of scope. Kós J agreed, observing that a very careful approach must be taken to the extent to which a submission may be said to satisfy both limbs one and two of the *Clearwater* test. The Judge emphasised the importance of protecting the interests of people and communities from submissional side-winds. The absence of direct notification was noted as a significant factor, reinforcing the need for caution in monitoring the jurisdictional gateway for further submissions.[143]

[127] The first limb was said to be the dominant consideration, namely the extent to which there is a connection between the submission and the degree of notified change

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139 *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 at [34].
140 At [35].
141 At [36].
142 At [41].
143 *Palmerston North City Council v Motor Machinists Ltd*, above n 109, at [43].

proposed to the extant plan. This is said to involve two aspects: the breadth of the alteration to the status quo entailed in the plan change and whether the submission addressed that alteration.[144] The Judge noted that one way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If not the submission is unlikely to fall within the ambit of the plan change.[145] The Judge added that incidental or consequential extensions of zoning change proposed in the plan change are permissible provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. The second limb is then directed to whether there is a real risk that persons directly affected by the additional change, as proposed in the submission, have been denied an effective response.[146]

[128] Kós J also disapproved the approach taken by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[147], noting that *Countdown* was not authority for the proposition that a submission "may seek fair and reasonable extensions to a notified variation or plan change".[148]

[129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*, *Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J was therefore very wide.

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144 At [80].
145 At [81].
146 At [82].
147 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* NZEnvC Christchurch C108/06, 30 August 2006.
148 At [70].

[130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report. I respectfully doubt that Kós J contemplated that his comments about s 32 applied to preclude departure from the outcomes favoured by the s 32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.

[131] By contrast a s 32 report is, in the context of a full district plan review, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.[149]

[132] To elaborate, the primary function served by s 32 is to ensure that the Council has properly assessed the appropriateness of a proposed planning instrument, including by reference to the costs and benefits of particular provisions prior to notification.[150] Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge[151] and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification.[152] On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.[153] To hold otherwise would effectively consign

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149 As it is in terms of the substantive assessment – see Resource Management Act 1993, ss 67 75.

150 See Derek Nolan (ed) *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at 3.91.

151 Section 32A.

152 *Leith v Auckland City Council* [1995] NZRMA 400 at 408.

153 I accept that as Environment Court Judge Jackson said in *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [38] that the *Motor Machinists*

any submission beyond the precise scope of the s 32 evaluation to the Environment Court appellate procedure. This is not reconcilable with the streamlined scheme of Part 4.

[133] The important matter of protecting affected persons from submissional side-winds raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 30 year region-wide plan, via the submission process. [154] Take for example a landowner affected by a rule in a proposed plan that will remove a pre-existing right to develop his or her property in a particular way. The RMA does not envisage, via s 32, that he or she would be precluded from seeking by way of submission a form of relief from the proposed restriction that was not specifically considered by the s 32 assessment and report.[155]

[134] A corollary of the foregoing analysis is that the IHP did not err by failing to determine scope strictly by reference to the options considered in the s 32 reports. Rather, the IHP was not constrained by the s 32 reportage for the purpose of establishing whether a submission was "on" the PAUP.

Summary

[135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a

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dicta now creates a situation whereby if a local authority's s 32 evaluation is (potentially) inadequate that may cut out the range of submissions that may be "on" the plan change. But as explained at [129], this dicta was specifically directed to plan changes, not full plan reviews.

[154] See also *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [29]-[40].

[155] Iacknowledge that in *Power v Whakatane District Council* HC Tauranga CIV-2008-470-456, 30 October 2009 an 11th hour proposal to amend height controls was rejected as out of scope, it not being raised by a submission. But as Allan J in that case noted at [43], "[i]n the end, the jurisdiction issue comes down to a question of degree and, perhaps, even impression".

reasonably foreseen logical consequence test which accords with the longstanding *Countdown* "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in *Clearwater* and Kós J in *Motor Machinists*.

[136] Whether the IHP correctly applied the requisite threshold tests in the test cases is addressed below at [165] – [170].

Did the IHP have a duty to:

(a) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

(b) Identify when it was exercising its powers to make consequential alterations arising from submissions?

[137] Character Coalition and Auckland 2040 submit that the IHP, having purportedly resolved scope on an area by area basis, should have identified the specific supporting submissions seeking corresponding relief on that basis. It says s 144(8) expressly directs the IHP to address these matters in its report to the Council. The requirement to identify is also said to accord with the public importance of requiring reasons from decision makers.[156]

[138] The Council (and supporting parties) responded that:

(a) It is absurd and unrealistic to expect the IHP to identify every submission that it relied upon, noting for example that issues of growth and housing capacity involved a very large percentage of the approximately 93,000 submissions on the PAUP;

(b) Sections 144(9) and (10) expressly permit grouping of submissions; and

(c) In any event, the IHP identified the out of scope submissions as it was required to do by s 144(8)(a) and identified submission points relied upon in relation to specific topics.

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156 *Singh v Chief Executive Officer Department of Labour* [1999] NZAR 258.

Assessment

[139] The answer to both questions is no, but more importantly, I see no flaw in the IHP's reporting having regard to the provisions of s 144 in light of the statutory purpose, the scheme of Part 4 and in context. This conclusion should be read together with my conclusions on the legality of the approach taken by the IHP traversed in detail above.

[140] For ease of reference, to repeat s 144(8) states:

> (8) Each report must include -
>
> (a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and
>
> (b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and
>
> (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.

[141] Contrary to the submission made by Character Coalition and Auckland 2040 this section does not expressly or by necessary implication require the IHP to identify and respond to specific submissions. Rather s 144(8) plainly contemplates:

(a) Identification of out of scope recommendations;

(b) Grouping of submissions by topic; and

(c) Responding to those submissions collectively on a topic by topic basis.

[142] This 'group' or collective identification and response approach is supported by:

(a) The discretion (not duty) at s 144(9) to identify matters relating to consequential alterations arising from the "submissions" (plural);

(b) The very clear direction at s 144 (10):

> (10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[143] Approaching the issue purposively and in light of the scheme of Part 4, it is, as Mr Somerville QC submitted, unrealistic to expect the IHP to specify and then state the reasons for accepting and rejecting each submission point. As Ms Kirman helpfully noted there were approximately 93,600 submission points in respect of the PAUP. It would have been a Herculean task to list and respond to each submission with reasons, especially given the limited statutory timeframe to produce the reports (3 years). Furthermore, the listing of individual submissions and the reasons given would inevitably have involved duplication, adding little by way of transparency or utility to interested parties, provided the issues raised by the submissions are addressed by topic in the reasons given by the IHP. Accordingly I can see no proper basis for reading into s 144(8) a mandatory obligation for greater specificity than that adopted by the IHP, namely to identify groups of submissions on a topic by topic basis.

[144] I acknowledge that the IHP reference to having resolved the issue of residential intensification on an "area by area" basis invites speculation as to which submissions or groups of submissions provided the foundation for a planning outcome. As matters have unfolded, this aspect has assumed some significance and with the agreement of Counsel I requested a report pursuant to s 303(5) from the IHP identifying the submissions said to support the outcomes for specific test cases. But it does not follow that the IHP erred by not undertaking this exercise in its reports. The Act plainly envisages resolution of issues by topic not by individual submission or area. The requirement for elaboration at this stage simply provides assistance for the purpose of the appellate and review exercise.

Was it lawful for the IHP to:

(a) Determine the scope of submissions by reference to another submission?

(b) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

[145] It remains unclear to me precisely what specific recommendations these questions purport to address. The questions appear to be based on limbs (B) and (C) of the third alleged error of law raised in the Character Coalition proceeding. It is pleaded:

> There were methodological errors in the Hearing Panel's approach to scope for the SHZ and MHS rezoning of the 29,000 properties. The methodological errors were adopted by Council (third error). The errors of law were:
>
> …
>
> (B) The Hearings Panel interpreted the scope of generic submissions by reference to the scope of non-generic submissions ("More specifically, there are submissions seeking greater intensification around existing centres and transport nodes as well as submissions seeking that existing special character areas be maintained and enhanced. The greater detail of these submissions assists in understanding how the broader or more generalised submissions ought to be understood."). The scope of a submission cannot be understood by reference to another submission, and it is an irrelevant consideration or wrong legal test to do so.
>
> (C) The Hearings Panel interpreted the scope of submissions by reference to the proposed regional policy statement being evaluated and the subject of recommendations in the Report: ("The strategic framework of the regional policy statement also assists in evaluating how the range of submissions should be considered"). It is circular for the Hearings Panel to draft the recommended regional policy statement, then infer scope in light of the regional policy statement as drafted by it. The proper scope of a submission cannot be understood by reference to a recommended regional policy statement and it is an irrelevant consideration or wrong legal test to do so.

[146] Problematically the pleadings do not particularise specific instances of error, although this may be because the pleadings also allege at limb (A) that the Hearings Panel failed to identify submissions that created scope on an area by area basis and for each area failed to identify whether rezoning was in reliance on one or more submissions or on consequential powers.

[147] In any event, I address the stated questions on an in principle basis to the extent that it may assist the resolution of the pleaded claim.

Assessment

[148] The answer to both questions is yes.

[149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

[150] Second, I could not find a reference in the IHP report purporting to adopt an approach of *enlarging* relief sought in submissions solely by reference to the RPS (though ANLG submit that this error underpinned the decision to zone its land FUZ - discussed below at [270] – [278]. The quote by the IHP in the Character Coalition pleading does not suggest that relief sought has been enlarged by the RPS. Rather it simply states that the framework of the regional policy statement assists in evaluating how the range of submissions should be considered. There can be nothing wrong with this as a statement of methodology:[157]

(a) The RPS sets the policy frame for the regional plan and the district plan so any outcome that gives effect to that policy is prima facie permissible and to be anticipated;[158]

(b) Whether any purported outcome based on the RPS is out of scope of the submission will depend on the wording of the submission – it is not unlawful per se reach an outcome on a submission by reference to the

[157] See also discussion at [102], [135].
[158] *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112, at [24], [26].

> RPS[159] – for example the submission may simply seek residential intensification of a zone without specifying the precise form of that intensification, but any form must give effect to the RPS.[160]

[151] Conversely, the consequences of failure to have due regard to higher order objectives and policies when formulating a lower order planning instrument were exemplified by the outcome of the *King Salmon*. The Supreme Court (by majority) stated that:[161]

> Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in section 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location It is these documents that provide the basis for decision making, even though Part 2 remain relevant.

[152] Within the present context, the RPS sits at the head of the hierarchy and drives the direction of both the regional and district plan.

[153] Third, the theoretical concerns raised by the Character Coalition (and others) about over-extending the recommendations by adopting a top-down approach are offset by the self imposed requirement that the planning outcome must be a reasonably foreseen and otherwise a logical consequence of a submission. This provides a clear bulwark against cross pollination of submissions (vertically or horizontally) in a way that is unfair to potential submitters. If for example the relief sought in relation to Devonport has no reasonably foreseeable or otherwise logical consequence for Grey Lynn, then that relief will likely be out of scope in terms of Grey Lynn. But that is an evaluative matter, not an error of law. Framing the scope of general submissions to accord with the RPS and the cross pollination of submissions for the purpose of making recommendations is not per se unlawful.

To what extent are principles (regarding the question of scope) established under the RMA case law relevant, when addressing scope under the Act?

[154] I have addressed this question above at [114].

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159 See discussion in *Clearwater*, above n 113, at [70]-[78].

160 As required by Local Government (Auckland Transitional Provisions) Act 2010, s 145(1)(f) and Resource Management Act 1991, s 67.

161 At [151].

Did the IHP correctly apply the legal framework in the test cases?

The test cases

[155] At the first case management conference on the appeal and judicial review proceedings before this Court, I directed (without objection from any party) that a preliminary question procedure should be adopted in relation to the central issue of whether the IHP recommendations were within the scope of submissions. The form of the questions, together with test cases, was developed by the parties, culminating in the Preliminary Questions noted at [3] and nine test cases:

(a) Mount Albert;

(b) Glendowie;

(c) Blockhouse Bay;

(d) Judge's Bay Parnell;

(e) Wallingford St, Grey Lynn;

(f) The view shaft on the Strand;

(g) 55 Takanini School Rd;

(h) The Albany North Landowner's Group site; and

(i) The Man O'War test case.

[156] At the hearing I also resolved that the upzoning of 65 Howick properties identified by the HRRA should also be addressed as a test case.

[157] The first five test cases (and the Howick properties) concern residential zoning and whether the IHP recommendations to upzone affected areas were within scope of the submissions in respect of those areas. I propose to address these test cases first at a

general level, and then on an individual basis. The remaining test cases are fact specific and will be dealt with individually.

[158] The parties produced agreed statements of fact for each test case, which have been largely adopted by me.

Identification of relevant submissions

[159] As noted at [101], the issue of scope has two related aspects: legality and fairness.

[160] In order to address the first aspect, I base my assessment on the submissions identified by the IHP in the report produced at my request on 20 December 2016. While other submissions appear to confer jurisdictional scope, the submissions relied upon by the IHP provide the basis for the legality of its decision. The second aspect however triggers broader considerations. This assessment is not confined to what the IHP considered conferred jurisdictional scope. Rather, the resolution of questions of procedural and substantive fairness depends on the full context, including the s 32 report, the PAUP, the full public record of submissions and the hearing process.

The Maps

[161] A residual issue highlighted by the 'out of scope' parties is that the IHP refers to having relied on HNZC "839 A + C series maps". There was some confusion as to which set of maps the IHP was referring to, the C series evidence maps or the C series proximity maps. In a subsequent report dated 7 February 2017, the IHP clarified that the "839 A + C series maps" refer to maps produced by HNZC in evidence; that is the maps that illustrated HNZC submission 839 entitled "Rezoning Summary for HNZC Properties and Consequential Amendments". The IHP also noted that it requested HNZC to provide a shape file that joined together its zoning shape file (reflected in evidence) and the Council's in scope evidence version of its zoning shape file. HNZC then lodged that shape file and subsequently maps depicting information in the shape file entitled "Scope Categories A and C – Evidence Zone Map Series (the Maps). In any event, as those maps were not produced with the primary submissions notified to the public they cannot enlarge the scope of the primary submission. The 'out of scope'

parties therefore contend that insofar as the IHP placed reliance on the maps, this evinces jurisdictional error. I do not accept this complaint. The maps are simply spatial representations of HNZC's primary submission. Whether they do so accurately for the purpose of the assessment of scope was an evaluative matter for the IHP. Provided that the potential for the zone changes illustrated by the Maps was made clear in the written submission, the IHP could properly refer to them for the purpose of assessing scope.

Overview of test cases on residential zoning

[162] Character Coalition, Auckland 2040 and HRRA collectively submit (in summary):

(a) A number of the generalised submissions seeking upzoning were so far reaching that they were not "on" the PAUP, as informed by the s 32 process;

(b) The IHP recommendation upzoned more than 29,000 homes previously identified by the Council as out of scope;

(c) While generalised submissions sought residential intensification across the Auckland region, none of the submissions specifically identified these 29,000 homes for residential intensification of the type recommended by the IHP;

(d) The notified plan, the submissions and the summary of submissions did not put the 29,000 affected residents (among others) on reasonable enquiry about the potential for wholesale upzoning of their neighbourhoods, and in particular:

(i) A landowner cannot be reasonably expected to enquire beyond the provisions (including maps), submissions and summary of submissions specifically referring his or her address or neighbourhood;

(ii) The generalised submissions did not specifically refer to the 29,000 affected homes (including the 65 homes identified by the HRRA as out of scope); and

(iii) The submissions were largely inaccessible, particularly as they were not ordered in terms of streets or neighbourhoods.

(e) The 29,000 affected landowners have not had a reasonable opportunity to voice their concerns; and

(f) There is nothing in the IHP reports to show that the IHP turned its mind to the implications for these landowners and notably:

(i) The IHP report does not identify the submissions said to support the upzoning of these properties;

(ii) The formal requirements of s 144(8)(b) in terms of identifying the relevant submissions and the reasons for accepting or rejecting them have not been met, further illustrating a lack of attention given to affected persons; and

(iii) The IHP claims to have addressed scope on an area by area basis but there is nothing in the reports to support this claim.

[163] The Council, HNZC, Ministry for the Environment, Ockham, Property Council and Equinox respond (in summary) that:

(a) A key issue for the PAUP was the extent of the provision for urban intensification to accommodate growth;

(b) The generalised submissions seeking region wide intensification were plainly directed to this issue and therefore within the scope of the PAUP;

(c) The combination of generalised, area and site specific submissions provided ample scope for the IHP recommendations. The Council, for example, identified four categories of submissions that provided scope:[162]

(i) **Category 1** - RPS objectives and policies;

(ii) **Category 2** - objectives a policies for residential zones, removal of overlays etc;

(iii) **Category 3** - patterns of zoning; and

(iv) **Category 4** – upzoning for particular areas or sites.

(d) The test is not whether affected persons were put on "reasonable enquiry" – there is no authority to suggest that a test based on the subjective competency of the affected person to access Council's search engine is mandated, but that test is satisfied in any event;

(e) Preliminary mapping of the spatial extent of the scope of a sample of submissions available to the IHP in relation to the test cases show that the IHP had sufficient scope to recommend the residential zoning relief set out in the test case areas. Specifically, HNZC submitted that submissions seeking changes through narrative description, but in a way that enables identification of whether or not land is affected, are also valid. This included submissions seeking to change zoning applying to:

(i) All land subject to a given use, for example in Ockham's submission 6099-4, which sought to rezone as MHU all areas zoned MHS under the PAUP;

(ii) All land within a specific distance of a particular category of land use or zone, for example in Ockham's submission 6099-7 which

[162] This is the Council's categorisation. Dr Kirman for The Minister for the Environment and HNZC identified six submission typologies which fall within the four categories identified by the Council.

sought a THZ zone for all land within 10 minutes' walk of transport nodes;

(iii) All land within an area of the Region that is described through identifying its boundaries, for example submission 5478-54 by Generation Zero, which sought rezoning of all MHS land to MHU within the area bounded by State Highway 20 to the South, the Southern Motorway to the East, Onehunga railway line to the Southeast, and the Waitemata Harbour to the North; and

(iv) Submissions seeking reinstatement of an earlier zoning proposal, for example, Property Council's submission 6212-22 to reinstate the residential zoning under the 2013 draft Unitary Plan.

(f) In any event, non property specific or generic submissions have always provided scope to enable changes in accordance with orthodox macro level approaches to planning and the RMA's focus on integrated and sustainable management; and

(g) The recommendations were a reasonably foreseen consequence of the issues addressed by the PAUP and the submissions on those issues.

The submissions on residential intensification

[164] The submissions identified by the IHP as conferring scope, together with the Council's publicly notified summary of those submissions are set out in **Appendix A** to this judgment. A selection of submissions identified by the "in scope" parties as providing scope is set out in **Appendix B**. A selection of further submissions is also set out in **Appendix C**.

A helicopter view

[165] The IHP identified a broad spectrum of submissions said to provide scope for the recommendations. Particular emphasis was placed on the Council's "in scope" submissions and the HNZC submissions.

[166] Generally speaking, the IHP's recommendations were plainly within the jurisdictional scope of these submissions on the PAUP. First, there is nothing "left field" about the recommendations or the submissions. The extent and form of urban residential intensification was a major issue raised by the s 32 reports, with the precise extent, form and location of such intensification left open for final resolution through the notified hearing process.[163] These submissions (among other) simply address this major issue by seeking substantially greater provision for residential intensification throughout Auckland. The s 32 reports also identify competing positions, including those of, for example, HNZC, Ockham and Character Coalition, and refer to a "laissez faire" approach as one alternative option to providing for urban growth. Accordingly, it should have come as no surprise to any person genuinely interested in residential intensification and or residential amenity to see the competing positions thoroughly ventilated in submissions on the PAUP.

[167] Second, the submissions relied upon by the IHP and others clearly envisaged comprehensive amendments to the policy framework and consequential changes to the methods (including zones) used to give effect to that policy framework and the potential for substantially increased residential intensification both in areal extent and density. In this regard, I have examined the evidence maps for the test case areas and I am satisfied they fairly illustrate the wide scope conferred by the HNZC submissions, see especially submissions 839-17 and 18 (Appendix B). I am also satisfied, save where I indicate below, the recommended changes broadly fall within the areal extent of the requested changes in the Maps.

[168] Third, there are corresponding and equally comprehensive submissions and further submissions seeking maintenance of the status quo in terms of residential amenity. These submitters were plainly alive to the prospect of changes to residential zones given the pressing issue of urban growth. For example, in response to one of Generation Zero's submissions, Auckland 2040 in further submission wrote that the submission, if allowed, "would permit unrestricted apartment development across all residential areas other than those zoned SH…[and] encourage removal of the existing housing and its replacement with high density and multi storey development."[164]

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163 Auckland Council, above n 14, at 5.

164 See also Appendix C.

[169] I am also satisfied that at a high level of generality, the recommendations made by the IHP were reasonably and fairly raised by the submissions identified by the IHP. The Summary of Decisions Requested (SDR), a publically available summary of submissions made to the IHP, describes the broad effect of the foregoing and other submissions. They alert the reader to the potential for significant changes to the proposed plan as it relates to provision for residential intensification. Indeed, an interested landowner reading, for example:

(a) the HNZC submission summaries would see requests for comprehensive zoning changes throughout Auckland based on proximity criteria together with requests for zoning changes to enable site specific upzoning of its landholdings;

(b) the Ockham submission summaries would see a request for comprehensive zoning changes based on very broad locational criteria, including proximity to transportation nodes and arterial routes located, as well as more general requests to see the size of the SHZ reduced and density controls deleted;

(c) the Auckland Property Investors Association Inc submission summaries would see a request for changes based on locational criteria, including sites within 700m of a railway station and centres; and

(d) the Generation Zero submission summaries would see a general request to make changes necessary to achieve the Auckland Plan and RPS targets elaborated upon below at [170].

[170] In summary, a landowner genuinely interested in preserving local residential amenity when presented with the submissions identified by the IHP (and others) on residential zoning must have appreciated that broad and detailed changes to the nature and extent of residential zoning throughout Auckland were sought by numerous parties, and indeed had been contemplated since the creation of the Auckland Plan. The vision of a quality compact urban form which could house 70% of a projected 1,000,000 new residents by 2040 within the existing metropolis by intensifying primarily near centres

and transport hubs was first signalled in the Auckland Plan, the s 32 reportage, and subsequently in a multitude of submissions, which individually and collectively foreshadowed change. Each envisages change based on cascading levels of intensification, with highest levels of intensification within or close to centres, and along arterial and connecting routes, together with increased provision for residential activity within mixed urban and suburban environments, spreading out from these key hubs. The Housing New Zealand submission is simply an example of the cascading intensification sought by the Council and submitters which would have alerted landowners to zoning requests to enable upzoning of a constellation of residential sites across Auckland. Accordingly, I see no error in the IHP's summary of its approach to scope, particularly its approach to consequential changes outlined at [96].

Accessibility of Council website

[171] I have considered whether the presentation of the summary of decisions sought on the council website may have affected the ability of interested landowners to participate in the submission process. Concerns were raised by Mr Brabant and Mr Enright about the usability of the Council's website and submission summaries. The basic tenor of their submission was that interested landowners would not have been put on notice of changes affecting them because a search for submissions on a particular address, street or neighbourhood would not have triggered notification of, for example, the HNZC or Ockham submissions.

[172] I agree a search on a specific address, street or neighbourhood might not uncover submissions seeking residential intensification at an address, street or neighbourhood. However, I do not accept that this is the standard of enquiry to be expected of a potentially affected landowner on matters as significant as 30 year provision for urban growth and residential amenity. It is not necessary to be precise about the standard, but it must be reasonable in the context of the planning process and the issue under consideration. The present context included a s 32 report signalling that major residential intensification was needed and required major reformation of Auckland residential zones. The central issue raised by the "out of scope" parties is the effect of provision for residential intensification on local character and amenity. In this context, a reasonable level of diligence is to be expected by landowners genuinely interested in

preserving the status quo, whether at a site specific or more general neighbourhood or zone level. It is not sufficient to simply examine the PAUP maps or the summary of submissions on those maps, which as the s 32 report signalled, were based on preliminary assessments of growth only. Rather, a reasonable landowner genuinely interested in preserving, for example, the status quo in terms of local character and amenity should be expected to search more broadly on topics such as urban growth and residential zoning which directly affect residential character and amenity.

[173] The Council noted that the submissions seeking residential intensification were coded to a "RPS", "Urban Growth", "Residential Zones" and Topic "Residential"; Theme "Zoning" and Topic "Central" and Theme "General" and Topic "Cross Plan Matters". A cursory search of topics such as "Urban Growth" and "Residential" quickly brought into frame submissions relief on zoning and intensification, including those seeking wholesale reformation of residential zones to accommodate growth. A more refined, but not arduous search, also revealed changes specifically affecting various neighbourhoods and in particular by reference to the HNZC submission. I am satisfied therefore that the Council summary of submissions was sufficiently accessible to persons genuinely interested in the issues of urban growth, residential intensification and residential amenity to provide sufficient notice of the potential for changes of the kind recommended by the IHP.[165]

[174] I am fortified in this view by the record of further submissions on the submissions underpinning the IHP's urban growth. To illustrate, the Character Coalition, representing over 55 community groups,[166] and Auckland 2040 made comprehensive further submissions in opposition to submissions by several of the abovementioned

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165 The use of the search engine was not a matter of evidence, but I was given a presentation about its use and
it formed part of the common bundle of information (by link) tabled for my consideration.

166 Including the following residents' associations: Birkenhead Residents' Association, Castor Bay Ratepayers' & Residents' Association Inc, Eden Park Neighbours' Association, Ellerslie Residents Association Inc, Freemans Bay Residents' Association, Grey Lynn Residents' Association, Herne Bay Residents' Association, Hill Park Residents' Association, Howick Residents and Ratepayers' Association, Laingholm District Citizens Association, Mangere Bridge Residents and Ratepayers, Milford Residents Association, Mission Bay Residents Association, Mt Albert Residents' Association, Northcote Residents' Association, Orakei Residents Society, Orewa Ratepayer and Resident Association, Point Chevalier Residents Againts THABS Inc., Snells Beach Ratepayer and Resident Assoc, South Kaipara Ratepayers' Association, St Heliers/Glendowie Residents Association, Te Atatu Residents and Ratepayers Association, and Titirangi Residents and Ratepayers Association.

submitters seeking upzoning of residential zones throughout Auckland. The Council summary of decisions requested was obviously sufficiently accessible to trigger submissions by genuinely interested parties.

[175] One further issue put in argument was whether a "subjective" test of notice was appropriate. Mr Bartlett QC for Equinox submitted that it was simply a matter of whether there was a submission, literally construed, that was on point. If so, it conferred jurisdiction. There is support for this approach in *Countdown*, which cautioned about the "danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person"[167]. The Court observed:[168]

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

[176] This has attractive simplicity but I think it is preferable, when dealing with a planning process of the present scale, to be cautious about the extent to which affected persons are fairly on notice of potential for changes that might substantially change, for example, their residential amenity. To that extent I prefer to approach the assessment employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her. It is the type of assessment that Judges must regularly make on behalf of the community in resource management matters.[169]

The Council's change of position

[177] Some emphasis was placed firstly on the Council's December 2015 position signalling the potential for upzoning of 29,000 or 7% of "out of scope" properties and secondly the resolution of the Council to withdraw from supporting changes to enable the upzoning of those properties. The "out of scope" parties submitted that these facts

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167 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 172.
168 At 171-172.
169 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 304-305.

support their argument that the recommendations upzoning those properties were always out of scope and that reasonable property owners relied on the Council's rejection of its own upzoning as out of scope. They contend that as a consequence of the Council's February resolution, affected landowners may have believed nothing further was required of them, compounding the unfairness of allowing unanticipated out of scope proposals to form part of the IHP's considerations in the first place. I was also referred to passages of evidence of an experienced urban planner and convenor of Auckland 2040, Richard Burton, recording that many residents had only come to the realisation that there may be significant changes to their zoning proposed by the Council because "they had not been notified and are only finding out about it through media coverage and word of mouth". While it is conceded that Auckland 2040 was able to argue that the proposed upzoning was out of scope because it was a submitter on the HNZC submission, they submit that this did not cure these process concerns.

[178] The underlying theme of the submissions of the 'out of scope' parties is that the 29,000 upzoned landowners had a reasonable expectation that the PAUP set the frame for residential zoning and the Council resolution of February 2016 affirmed that expectation. But I do not accept that the s 32 report or the PAUP provided a proper basis for such an expectation. I have addressed the relevance of s 32 report and notified PAUP in detail above. They do not purport to fix a final frame for residential intensification and explicitly foreshadow the need for further modelling work. The PAUP could realistically only be seen as a starting point for consideration as clearly evidenced by the wide ranging and voluminous submissions seeking changes to it, including many by the 'out of scope' parties and other submitters seeking maintenance of low density, special character and heritage areas, among other things in the face of proposed intensification. Accordingly, while the February resolution records the then position of the Council, and is a factor to be weighed in terms of the reasonableness of the IHP's assessment on scope, it did not affirm or give rise to any reasonable expectation as to outcome.

[179] I turn now to consider the test cases.

Mount Albert

[180] The Mount Albert test case area includes the residential area bounded by Oakley Creek, Unitec Campus on Carrington Road, Segar Ave, Chamberlain Park, Burnside Ave, Martin Ave, Rossgrove Terrace, Wairere Ave, Alberton Ave, Mount Albert Road, Mount Royal Ave, Richardson Road, Harlston Road, and Ennismore Road. This includes New North Road from Alberton Ave to Ennismore Road.

[181] The test case area includes the Mount Albert town centre located along New North Road and Mount Albert maunga (Owairaka). The Unitec Wairaka campus is located on Carrington Road which is on the fringe of the test case area. A number of primary and secondary schools are also located within or close to the test case area, including Mount Albert Grammar School.

[182] There are also a number of open spaces located close to and in the test case area, which include Phyllis Reserve, Chamberlain Park, Mount Albert War Memorial Reserve, Alice Wylie Reserve, Allendale House and Reserve, Anderson Park and Mount Albert – Owairaka Domain.

[183] The area is within walking distance of a rapid and frequent public transport service network running along New North Road, Carrington Road, and Mount Albert Road along with the western railway line. Two train stations, Mount Albert and Baldwin station are located within the test case area.

[184] In the Notified PAUP, residential intensification and zoning for Mount Albert was provided through the application of the:

(a) THZ to the north of Mount Albert town centre and along Carrington Road and New North Road;

(b) MHU zone adjacent to THZ, and along Woodward Road, New North Road, Carrington Road, Seaview Terrace, and Asquith Ave; and

(c) MHS zone was applied across remaining parts of Mt Albert.

[185] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Volcanic Viewshafts Height Sensitive Area overlays were applied over many residential properties within the Mount Albert test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays. The Mount Albert test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified Proposed Auckland Unitary Plan. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[186] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings. The Decisions version of the Unitary Plan retained a mix of SHZ, MHS, MHU, THZ and Mixed Use, however, the largest proportion of residential land is now MHU.

Argument

[187] The Council contends that all 4 categories of submission (see [163] above]) can be found in relation to Mt Albert, providing a comprehensive basis for the upzoning recommendations:

(a) Category 1 – directed towards the region wide strategic need to intensify, particularly around centres and along transport corridors resulting in greater intensification around the Mt Albert centre and key transport routes such as New North Road, Woodward Road, Richardson Road and Carrington Road;

(b) Category 2 – on objectives and policies, overlays and Auckland wide provisions directed to spatial change and requiring rezoning to ensure consistency with higher order strategic objectives and policies, resulting in (among other things):

(i) increased walking distances to be imposed when applying a higher density residential zoning near transport corridors (e.g. increased use of THZ and MHU around New North Road,

Carrington Road and Woodward Road and around the Mt Albert town centre); and

(ii) Removal of overlays that affected underlying zoning.

(c) Category 3 – on the pattern of zoning, for example the Ockham submission seeking to enlarge THZ on all residential sites within five minutes walk of all main arterials (e.g. New North Road) or the Jacques Charroy submission seeking intensification of the inner suburbs including Mt Albert.

(d) Category 4 – on specific sites, with 186 submission points seeking site specific relief, a significant portion of these sought upzoning (including HNZC submissions affecting 340 properties).

[188] Character Coalition and Auckland 2040 accept the category 3 and 4 submissions based on clear locational criteria provide scope for upzoning. But they submit that:

(a) the submissions are not otherwise sufficiently explicit to clearly signal other or consequential changes of the extent made by the IHP;

(b) only 831 of the 2380 properties upzoned by the IHP were subject to site specific requests; and

(c) without any identification of the submission or submissions relied upon the Council's reliance on submissions affording scope is conjectural.

Assessment

[189] I am satisfied that submissions identified by the IHP provided jurisdictional scope for the recommendations. The listed generalised submissions plainly signal the potential for significant change throughout Mt Albert and the HNZC 'A and C series maps' for Mt Albert (Mount Albert – GIS-4215672-42b, Point Chevalier – GIS-4215672-42b) are illustrative of spatial extent of relief sought by the HNZC submissions.

[190] I am also satisfied that the recommended changes for residential zoning in Mt Albert are reasonably and fairly raised by submissions. Mt Albert was identified at the outset as a centrally located suburb with major transportation infrastructure, and was thus destined for significant residential intensification. Furthermore, I accept the Council's submission that the combination of the four categories of submission seeking upzoning in Mt Albert provided ample notice to persons genuinely interested in residential amenity that the recommended changes were a potential outcome of the submissions. In addition, having regard to the scope to make change afforded by the generalised submissions, I agree with the IHP that the consequential upzoning of properties was a logical consequence of locational and site specific submissions expressly seeking upzoning of approximately 831 properties spread throughout Mt Albert.[170]

Glendowie

[191] The Glendowie test case area includes the residential area bounded by Glendowie Road, Riddell Road, St Heliers Bay Road, Sylvia Road, Yattendon Road, Vale Road, Clarendon Road, Cliff Road and the coastline.

[192] The test case area includes three large open spaces: Churchill Park, Glover Park and Glendowie Park. The Saint Heliers local centre is the closest local centre to the residential area and is located outside the test case area on Tamaki Drive and St Heliers Bay Road.

[193] A number of primary and secondary schools are also located close to or within the test case area: Sacred Heart College on West Tamaki Road, Glendowie College on Crossfield Road, and Churchill Park School (a primary school) on Kinsale Ave.

[194] There are a number of residential properties in parts of the test case area that are within walking distance of a frequent public transport service that runs every 15 minutes along St Heliers Bay Road and Tamaki Drive. Three local connector bus services run at

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[170] This is the figure identified by Character Coalition and Auckland 2040 as representing the properties affected by locational or site specific requests. The total number of affected properties is identified as 2380.

various times during the day through the test case area and link up to the frequent public transport services.

[195] In the notified PAUP, residential intensification and zoning for Glendowie was provided through the application of the:

(a) MHU zone to properties along Yattendon Road, Rarangi Road, Clarendon Road;

(b) The application of the MHS zone to properties along Riddell Road and west of Maskell Street/Waimarie Street; and

(c) A SHZ was applied throughout the rest of the Glendowie test case area.

[196] In the notified PAUP, the neighbourhood shops located on the corner of Waimarie Street/Maskell Street and on the corner of Riddell Road/Maskell Street were zoned neighbourhood centre.

[197] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Significant Ecological Area overlays apply over a number of residential properties within the Glendowie test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays.

[198] The Glendowie test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified PAUP. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[199] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings.

[200] In the Decisions version of the Unitary Plan, Glendowie is predominantly zoned MHS, with smaller areas of SHZ to the north east and MHU to the west.

Argument

[201] The Council submits:

(a) The impact of Category 1 submissions can be seen by the widespread rezoning of SHZ areas to MHS and the rezoning of MHS areas on the outskirts of the test case area to MHU;

(b) The Category 2 submissions by HNZC, particularly relating to the removal of overlays, and other broader submissions on residential objectives and policies, supported the IHP's approach to scope;

(c) Category 3 submissions, for example by Ockham, illustrate scope for the reduction of SHZ within Glendowie and MHU upzoning along St Heliers Bay road;

(d) 27 site specific Category 4 submissions were made in relation to Glendowie, providing a basis for some consequential change.

[202] The Character Coalition and Auckland 2040 contend:

(a) No resident of Glendowie would have likely located the generalised submissions and if he or she had seen them considered they applied to Glendowie given that none of the streets identified by the submissions are Glendowie streets.

(b) With only 27 properties identified there was no scope for consequential changes.

Assessment

[203] In addition to the general submissions identified by the IHP as conferring scope, reliance was also placed on HNZC A+C series maps and 3 site specific submissions.

[204] My general observations at [166]-[168] dealing with jurisdictional scope above apply with equal force to this test case. I have also examined the HNZC evidence A and C Maps for Glendowie (Saint Heliers – GIS-4215672-42b) and, as outlined at [167], I am therefore satisfied that jurisdictional scope was conferred by the generalised submissions.

[205] On the second issue of fairness, the Council emphasised the Category 1 and 2 submissions as providing the requisite scope.

[206] I agree a search of the SDR by reference to urban growth and or residential zones quickly unveils submissions clearly signalling the potential for great changes in residential zoning throughout the Auckland region based on seeking stronger provision for intensification sought and through various locational criteria that may have direct application to Glendowie. The following table includes a sample of these submissions, which should be read in conjunction with the submissions in Appendices A and B.

Submitter	**Submission**	**Summary of the submission**
Community of Refuge Trust (CORT)	CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model. CORT argues the Single House zone promotes the opposite of the Compact City model promoted by the Council. It strengthens property owners' rights to resist intensification. The zone promotes the car use, challenges the development of efficient public transport and supports communities through regulation avoid responsibility for the sustainable growth of the city.	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage. Amend the extent of the Single House zone significantly to less than 10% of the Auckland area.

	Recommendations The zone size is significantly reduced, ideally to less than 10% of the Auckland area.	
Ben Smith	The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected". … In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: – Pertaining to the zoning allocation of the Unitary Plan: – Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. – Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone – Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone.	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL. Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].
Cooper and Associates	Greater proportion of land to be designated as Mixed Housing Urban especially in areas of high land value, adjacent to large natural features and along transit corridors" and a "Greater proportion of land designated as	Increase the extent of the Mixed Housing Urban zone.

	terrace housing/apartments especially in areas of high land value, adjacent to large natural resources (parks, waterfront etc) and along transit corridors. Increasing the height limit of these areas to 8-12 stories will also provide a good middle ground for the development proposition.	

[207] Furthermore, the merits of upzoning generally and questions of scope were thoroughly investigated by the IHP, including with the benefit of detailed submissions and evidence from representative groups such as Character Coalition and Auckland 2040.

[208] The Council properly conceded that there are relatively few area or site specific submissions (categories 3 and 4) referring to Glendowie. The prospect of widespread foreseeable consequential spatial change is not so readily inferred from those entries. Given this, it is difficult to be definitive about the level of specific notice to residents of Glendowie or as Messrs Brabant and Enright put it, where the line for change was to be drawn. But, as Ms Kirman noted for HCNZ, throughout the IHP's process for refining the purpose objectives and rules for the SHZ, both Auckland 2040 and the Character Coalition acknowledged the recasting of the objectives and policies for the SHZ, if accepted would result in significant changes. This strongly indicates awareness of the generalised submissions seeking broad change. For example, legal submissions for Auckland 2040 noted:

> The inevitable consequence of the proposed changes to the SHZ description and the objectives and policies is that the zone could no longer be applied to the majority of the areas currently shown in the PAUP maps as SHZ. If these sweeping changes to the zone provisions were accepted, it follows that either the Auckland Council or other party to the hearings will seek the removal of the existing zoning from the majority of the properties presently zoned SHZ.

[209] Overall, I am therefore satisfied that there was a sufficient basis for the recommendations given the full background to the submission process, and the numerous requests for upzoning based on the Council's categories 1 and 2 submissions, in combination with submissions based on broad locational criteria (for example 700m from town centres, relative proximity to arterial and connecting routes, and other high

amenity areas identified for intensification such as schools and public parks).[171] In this context, there is an air of Shire like unreality to the submission that the residents of Glendowie would not have appreciated that there might be broad changes to their residential landscape. It is also significant that the nature of the upzoning in this test case area is clearly tailored to its environs, with most of the rezoning to MHS. To reiterate, the IHP envisaged that the "Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys."[172] This illustrates that the IHP has not applied open ended submissions *carte blanche* to achieve upzoning. Rather the MHS zone is a compromise between the current SHZ and the more intense MHU and THZ applied in areas that are more directly implicated by the centres and corridors strategy. In balancing the competing agendas of submitters, and achieving consistency with the Auckland Plan and RPS, then, the IHP has proceeded in a manner that could have been reasonably anticipated by Glendowie residents genuinely interested in local residential amenity.

Blockhouse Bay

[210] The area covered by this test case is relatively large, and consists primarily of low-density suburban neighbourhoods. It is an area that has reasonable walking proximity to nine arterial roads with access to public transport, but there are some neighbourhoods and/or streets that do not have close proximity to a town or local centre.

[211] The Blockhouse Bay test case area includes a number of separate neighbourhoods of varying sizes in an established low-density suburban environment. Ten of the chosen neighbourhood areas are close to the coastal environment of the Manukau Harbour and adjoining significant recreation and open space areas. The other identified locations further north are outside walking distance to the transport network. There are however a number of schools across the test case area including Blockhouse Bay Primary, Blockhouse Bay Intermediate, St Dominic's School and Chaucer School, as well as numerous parks including Blockhouse Bay Recreational Reserve, Grittos Domain, Craigavon Park and Miranda Reserve.

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171 See Appendices A and B for elaboration.

172 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 15.

[212] The zoning for the majority of the test case area in the PAUP as notified was SHZ and MHS. Maps prepared by the Auckland Council in December 2015 showing proposed upzoning of some 27,000 residential properties including all of those in the Blockhouse Bay test case area were uploaded to the IHP's website on 26 January 2016. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[213] Following recommendations from the IHP, the majority of the SHZ areas were upzoned to MHS, and the majority of the MHS areas were upzoned to MHU. The THZ zone south of Bolton Street was also enlarged.

Assessment

[214] The IHP identified a number of general and specific submissions said to confer jurisdiction, including the HNZC submission: refer Appendix A.

[215] I was not able to verify close correspondence between the HNZC Maps (Mount Roskill - GIS-4215672-42b, New Lynn - GIS-4215672-42b) and Barton and Wade Streets. But, in any event, as with Mt Albert, I am satisfied that given the depth and breadth of the submissions relating to residential intensification generally and Blockhouse Bay in particular, the recommendations were not beyond the jurisdictional scope conferred by the submissions identified by the IHP.

[216] I am also satisfied that IHP's recommended amendments to the residential zoning are reasonably and fairly raised by the submissions, for the reasons given at [190] and [209] above, but also given that a large number of submissions that specifically identified Blockhouse Bay, including the following:

Submitter	**Submission**	**Summary of the submission**
Helen Geary	Blockhouse Bay. This very average housing quality suburb is mostly zoned single house with very little mixed zoning or intensification planned. Surely all parts of Auckland should experience some intensification, and this could allow some heritage areas to be downzoned. I seek that: Blockhouse Bay have some areas	Rezone some areas in Blockhouse Bay from Single House zone to Mixed Suburban [inferred to mean Mixed Housing Suburban zone] to correspond with down-zoning to Single House zone area of Mt

	upzoned from single house to mixed suburban, to correspond with downzoning to single house zone of areas of Mt Eden (ie. Ashton Road).	Eden (i.e. Ashton Road).
NZIA	THAB would provide additional height/density along New Windsor Road and Blockhouse Bay Road ridges and zoned to support higher densities and align additional density with view and daylight amenity. THAB & MHU would provide additional height/density along Blockhouse Bay Road (south of New Windsor Rd) and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting the neighbourhood to surrounding town centres. Blockhouse Bay Town Centre SH and MHS zoning doesn't make use of proximity to Town Centre. Highly sought after residential area where high land values would support apartment type investment and development. Near Town Centre: Recommend THAB or Mixed Use with conditions that 2+ levels THAB to be provided over any non-residential use(s) below. Significant movement streets linking Town Centres: MHU & MHS provides additional density along Margate Road/Mary Dreaver Street link, Terry Street & Bolton Street with an increase in legibility of 'east/west' visual/movement links within the neighbourhood. Blockhouse Bay North – New Windsor South THAB & MHU provides additional height/density along New Windsor Road, Wolverton Road, Tiverton Road and Blockhouse Bay Road and align additional density with view and daylight amenity. THAB & MHU provides additional height/density along Taylor Street and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting ttle neighbourhood to surrounding town centres. MHU provides additional density along Margate Road/Mulan Street/Mary Dreaver Street/Etc link and the Terry and Bolton Street links with an increase in legibility of the 'east/west' visual/movement links within the neighbourhood.	Rezone land on Blockhouse Bay Road, New Windsor Road and Ballard Avenue, Avondale as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land surrounding Blockhouse Bay Town Centre as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land around Blockhouse Bay and New Windsor as shown in the submission [refer to page 104/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings.
Edward Jones	THAB zone within 350 metres of the Blockhouse Bay Local centre. … The property within 250 metres of the Blockhouse Bay Local Centre is ideally suited to the THAB zone as they are within a short walk of the bus routes to Downtown Auckland,	Amend Terrace Housing and Apartment Zone to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street intersection.

	New Lynn, Onehunga/Penrose and the local retail and community facilities. … I would like to see the THAB zone extended to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street Intersection. If these properties were to be developed as terraced housing or apartments they would balance out the west side of Blockhouse Bay Road forming an impressive entry to the Blockhouse Bay Shopping Centre as you approach from the North. These few properties have the same attributes as those on the opposite side of the road and would be equally suited to a THAB zone.	Retain the Terrace Housing and Apartment Buildings zone where properties are in close proximity to town/local centres and public transport, and in particular 491, 491A and 493 Blockhouse Bay Road Retain the Terrace Housing and Apartment Buildings Zone for the properties at 491, 491A and 493 Blockhouse Bay Road, Blockhouse Bay.

Judges Bay

[217] Judges Bay, Parnell is a small residential neighbourhood within Parnell comprising a number of residential streets. Judges Bay has strong connections to early Auckland settlement that is reflected in its street layout and the presence of special character and historic heritage buildings. It is an inner city suburb, with reasonable proximity to both the Ports of Auckland and the Central Business District (CBD).

[218] The Judges Bay test case area includes properties in the residential area bounded by Judges Bay Road, Taurarua Terrace, Canterbury Place, St Stephens Avenue and Judge Street. Judges Bay is characterised by low-density housing in close proximity to the coastal areas of Judges Bay and Hobson Bay as well as Dove-Myer Robinson Park, Martyn Fields Reserve and Point Park. Judges Bay has historic heritage values and is home to a significant Auckland recreational amenity (Parnell Baths). The identified area in Judges Bay is not serviced by a frequent transport network. The only significant bus route is along Gladstone Road to the west.

[219] The notified zoning of the area was primarily SHZ, with several large blocks of MHS zoning and a block between Gladstone Road and Taurarua Terrace zoned as THZ. Maps prepared by the Council showing proposed upzoning of some 29,000 residential properties including those identified in the test case area of Judges Bay were uploaded of the IHP's website on 26 January 2016. The Council subsequently withdrew the rezonings shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council filed maps which set out its position on proposed rezoning which was to retain the SHZ in the test case area.

[220] In the PAUP decisions version, the MHS zone around Bridgewater Road and Judges Bay Road was expanded, and the SHZ decreased accordingly. The THZ zone was down-zoned to MHU, and the area on the other side of Taurarua Terrace was upzoned from SHZ to MHU.

Assessment

[221] The general submissions identified by the IHP provided jurisdictional scope to upzone properties in Judges Bay, including the HNZC submission as illustrated by the HNZC C series evidence maps (Auckland Central - GIS-4215672-42b, Orakei - GIS-4215672-42b).

[222] I am also satisfied that the recommended changes are fairly and reasonably raised by the submissions. The intensification of the central isthmus, namely the inner city suburbs, of which Parnell and Judges Bay are clearly part, was, like the upzoning of Mt Albert, emphasised throughout the Unitary Plan process. Inner city areas were always more directly implicated in the centres and corridors strategy, given their proximity to the Auckland CBD, and consequently a number of high amenity areas and transport nodes. In addition to the submissions already mentioned, the table below sets out the submissions that clearly signalled the residential areas within the central Isthmus, including Parnell in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Liam Winter	I therefore recommend that the Council considers market demand and viability more explicitly in settling residential zones, rather than simply downzoning where there is opposition to intensification and upzoning where communities are less vocal. Given that intensification is more viable with higher land values, I suggest a return to more aggressive upzoning in the central isthmus and coastal areas to increase housing supply in these high demand areas.	Seeks a more aggressive upzoning in the central isthmus and coastal area to increase housing supply in these high-demand areas.
Helen Geary	Parts of Gladstone Rd parallel to Taurarua Tce are zoned THAB, backing straight on to a single house zone. It is inappropriate and hugely compromising to have heritage housing in this position, in one of the most important heritage residential areas in the city. I see that: this part of Gladstone Rd be rezoned	Rezone parts of Gladstone Road parallel to Tauarua Terrace, Parnell, from Terrace Housing and Apartment Building zone to Mixed Urban zone [inferred to mean Mixed Housing Urban zone] to protect the values of the heritage residential area.

	mixed urban.	
Ho Yin Anthony Leung	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the Central Isthmus to Mixed Housing or Terrace Housing and Apartment Buildings.
Harsha Ravichandran	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the central isthmus to Mixed Housing Urban or to Terrace Housing and Apartment Building zone

[223] As with Glendowie, the nature of the change is evidently proportionate and considerate of the local context, where relatively discrete changes have been made. While some parts of Judges Bay were upzoned following the IHP's recommendations, other parts were downzoned. Moreover, considering the level of intensification that might normally be anticipated in an inner city suburb, a mixture of SHZ, MHS and MHU is relatively deferential to the area's special character and heritage qualities. I have no reason to suspect that the IHP did not have a sufficient basis to make an evaluative judgment as to the nexus of generalised submissions and the upzoning of Judges Bay.

Wallingford St, Grey Lynn

[224] Wallingford Street is representative of a residential cul-de-sac containing 18 residential properties. This street is at the periphery of a significant area of older and mainly special character housing, an area that was proposed to be zoned SHZ when the PAUP was notified.

[225] The majority of the residential buildings are pre-1944 "special character" houses, and the pattern and style of residential development in the adjoining neighbourhood is low-density and mainly older homes, many subject to the Special Character overlay. The identified street is not serviced by a frequent transport network. The closest bus routes are along Richmond Road to the north and Williamson Avenue to the south, each within reasonable proximity of the street. Immediately to the west of Wallingford Street is Grey Lynn Park which consists of several large recreational sports fields and tree-lined park walking tracks.

[226] Maps prepared by the Council in December 2015 showing proposed upzoning of some 29,000 residential properties including the identified properties in the Wallingford

Street test case area were uploaded to the IHP's website on 26 January 2016. The Council subsequently withdrew the rezoning shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[227] However, in the decisions version of the PAUP, the majority of the properties have been rezoned MHU.

Assessment

[228] The general submissions identified by the IHP as illustrated in the HNZC C series Maps (Point Chevalier - GIS-4215672-42b) provide jurisdictional scope for upzoning in Grey Lynn for the reasons already expressed above at [166] – [168].

[229] As to the second issue of fairness, the reasoning at [222]-[223] applies equally here, and moreover multiple submitters sought upzoning of Grey Lynn. The table below sets out the further submissions that provided scope to upzone Wallingford St, Grey Lynn in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Andrew Rice	Please, more intensive housing in the inner city met areas – Ponsonby, Grey Lynn, St Mary's Bay for example. The plan is too soft on high build. Why? It seems a bit of a cop out. If young people are ever to have a chance to buy some place to live within Auckland's inner city then clearly the plan needs more intensification. Allow more high builds would be my main submission.	Further intensify inner city areas, particularly Grey Lynn and St Mary's Bay
Abhishek Reddy	Supported: – Areas of Mixed Use and centres in Newton, Grafton Against:	Rezone tracts of Grey Lynn to provide more of the Mixed Use and Terrace Housing and Apartment Buildings zones.

	– Excessive Single House zoning from Grey Lynn through to Grafton Suggested: More Mixed Use and THAB in places such as: – Around the future Newton rail station, near St Benedicts St – Much of Grafton West, around Seafield View Rd and Park Rd – Tracts of Grey Lynn	
Patrick Fontein	Upzone Auckland's City Fringe. Especially the areas around the new City Rail Loop Stations. Review all areas within 3-5km of CBD to Mixed Use, greater height.	Recognise the need to up zone the city fringe especially around the City Rail Loop stations and introduce more Mixed Use and greater height within 3-5km of the CBD.

[230] While individual properties in Wallingford St are not specified, a reasonably diligent person genuinely interested in preserving residential amenity in Grey Lynn would have been well aware of the potential for upzoning in one of Auckland's most centrally located suburbs.

Howick

[231] The HRRA made a submission on the notified PAUP and addressed the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court challenging the zoning of 65 properties not sought by any submitter or identified by the IHP as out of scope.

[232] The properties subject to the appeal are located along Bleakhouse Road, Ridge Road, Mellons Bay Road, Picton Street, Park Hill Road and Glenfern Road in Howick. In the notified version of the PAUP, the properties were zoned SHZ. In the decisions version of the AUP, the properties were zoned MHU.

Assessment

[233] The IHP relied on general submissions to establish scope. Except for Ridge Road, the HNZC Maps (Half Moon Bay - GIS-4215672-42b) do not appear to correspond to the Howick properties.

[234] Mr Savage for HRRA reviewed the submissions identified by the "in scope" parties as conferring jurisdiction to show that the 65 properties were not expressly captured by them.[173] He also stressed that HRRA was an active and diligent participant in the publically notified process, positively seeking relief that preserved the residential amenity of Howick, including the 65 properties. At no stage was it alerted to the fact that the 65 properties might be subject to the recommended changes. Mr Savage supported this submission by referring to Council reportage on Topic 080 describing the 65 properties as "out of scope". I surmise had HRRA been alerted to that prospect it would have provided tailored submissions to show why these properties ought not to be upzoned.

[235] With respect to the care taken by Mr Savage, the breadth of the relief sought by the full collective of general submissions conferred jurisdictional scope to make zoning changes in Howick. He skilfully emphasised specific aspects of the submissions in order to show lack of relevant scope. For example Mr Savage noted that the HNZC submissions were prefaced by the words:

> "For sites where Housing New Zealand seeks that they be rezoned to Mixed Housing Urban..."

[236] Reference is also made to Tables produced by HNZC which state:

> Housing New Zealand requests rezoning on the identified sites for the following reasons…

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[173] Reference is made to all HNZC submissions, named 839-17 and -18; Adam Weller 3167-8; Habitat for Humanity Greater Auckland Limited 3600-10; Matthew B Avery 5938-5 and -6; Crainleigh 7491-1; Liam Winter 5002; John Coady 7130-2; Cooper and Associates 6042; Auckland Property Investors Association 8969-2; David Madsen 7098-1, -3, -7; Ockham 6099; Mahi Properties 5476. See also the table at [238] and Appendix B.

[237] Mr Savage then makes the point that the 65 properties are not specifically identified.

[238] But this submission belies the full import of the HNZC submission, which sought a coherent zoning framework to accommodate the upzoning of its sites. Other general submissions are dissected by Mr Savage in a similar way to emphasise that they were focused on other areas and not Howick. But their collective and individual thrust was plain – upzoning of residential land to accommodate urban intensification throughout the Auckland region. Some of those submissions are very broadly framed, and by themselves too generic to reasonably signal changes at specific locations. Nevertheless, in reality, the generalised submissions squarely raised the issue of residential intensification, including in Howick. A sample of these types of submissions is noted in the table below (**emphasis added**).

Submitter	**Submission**	**Summary of the submission**
Matthew B Avery	Prioritise High Density Housing to neighbourhoods close to high amenity areas. Part 1, Chapter B, 2.1 Policy 2 states: "Enable higher residential densities and the efficient use of land in neighbourhoods: c. **In close proximity to existing proposed large open spaces**, community facilities, education and healthcare facilities". (The council has FAILED to apply this policy. There are many instances where this zoning has not been applied to land clearly within walking distance of large open spaces. The Council has failed to apply this zoning in particular to the Auckland central suburbs, eg - Grey Lynn, Mount Eden, and to **all coastal amenities**. Central Auckland **and coastal suburbs** must participate in the intensification of Auckland also)	Include coastal properties in areas of intensification, especially areas that are near transport routes (including ferries) and metropolitan and town centres.
Cranleigh	The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity" areas, has not been sufficiently leveraged. If we are to grow the attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity - **areas such as parks and coastlines** are an obvious example of this principle. The PAUP does not deliver on this.	Rezone to provide for more density around areas where there is a high level of amenity, **such as parks and coastlines**, not just around town centres and major transport corridors
Paul Bridget	Furthermore, greater intensity (taller buildings)	Focus greater intensity in high

	should be focussed on existing high amenity parts of the city where high quality intensive developments are likely to be financially viable and people will be prepared to live in apartment style dwellings (eg **Eastern suburb** and central suburb ridgelines, north facing hill slopes and **coastal edges**).	amenity parts of the city, e.g. **Eastern Suburbs**, Central Suburb rigdelines, North facing hill slopes and **coastal edges**.
David Madsen	Housing within 250m from the boundary of the commercial town centres should have the ability to be intensified to a greater level than currently indicated e.g. terraced, apartment type dwellings or mixed zone (commercial/residential).	**Increase intensification within 250m of Town Centres**. Rezone sites further away than this as Single House or Mixed Housing [not specified] zones
John Coady	If good urban design practice is followed, the density of sites adjacent to park land should be more intensive, rather than less intensive, so that an increased number of residents can take advantage of the amenity living next to an open space provides", "A more thorough analysis of residential land adjacent to open space should be undertaken to ensure that lots adjacent to open space (perhaps with bushland being the exception, such as the Centennial Park example cited above) are zoned "mixed housing suburban" or "mixed housing urban" (depending on context), rather than "single housing"" and "Further analyse the potential for other **residential sites adjacent to parkland** to be zoned as mixed housing rather than single housing and rezone as appropriate.	Consider zoning residential sites adjacent to parkland to a Mixed Housing zone rather than a Single House zone.
Adam Weller	I really like the creation of 2 mixed housing zones: urban and suburban. My concern is over the use of Suburban compared to Urban in the Unitary Plan. There needs to be a lot more Mixed Housing Urban or even Terrace Housing around key transport areas, especially in the centre of Auckland…**Howick is one of the worse areas with such a large single house zone, very short sighted and not what Auckland needs at all.**	Provide additional Mixed Housing Urban or Terrace Housing and Apartment Buildings zoning around key transport areas, especially in the centre of Auckland and reduce the amount of Mixed Housing Suburban Zone.

[239] Furthermore, as noted by Mr Somerville, there are numerous further submissions by HRRA opposing the general submissions and supporting submissions seeking among other things, heritage status for Old Howick and pre-1944. Plainly the prospect of change arising from generalised submissions was known to them and presumably residents of Howick genuinely interested in the preservation of local character and amenity.

[240] The central remaining issue is whether the submissions relied upon by the IHP reasonably and fairly raised the prospect of the recommended changes insofar as

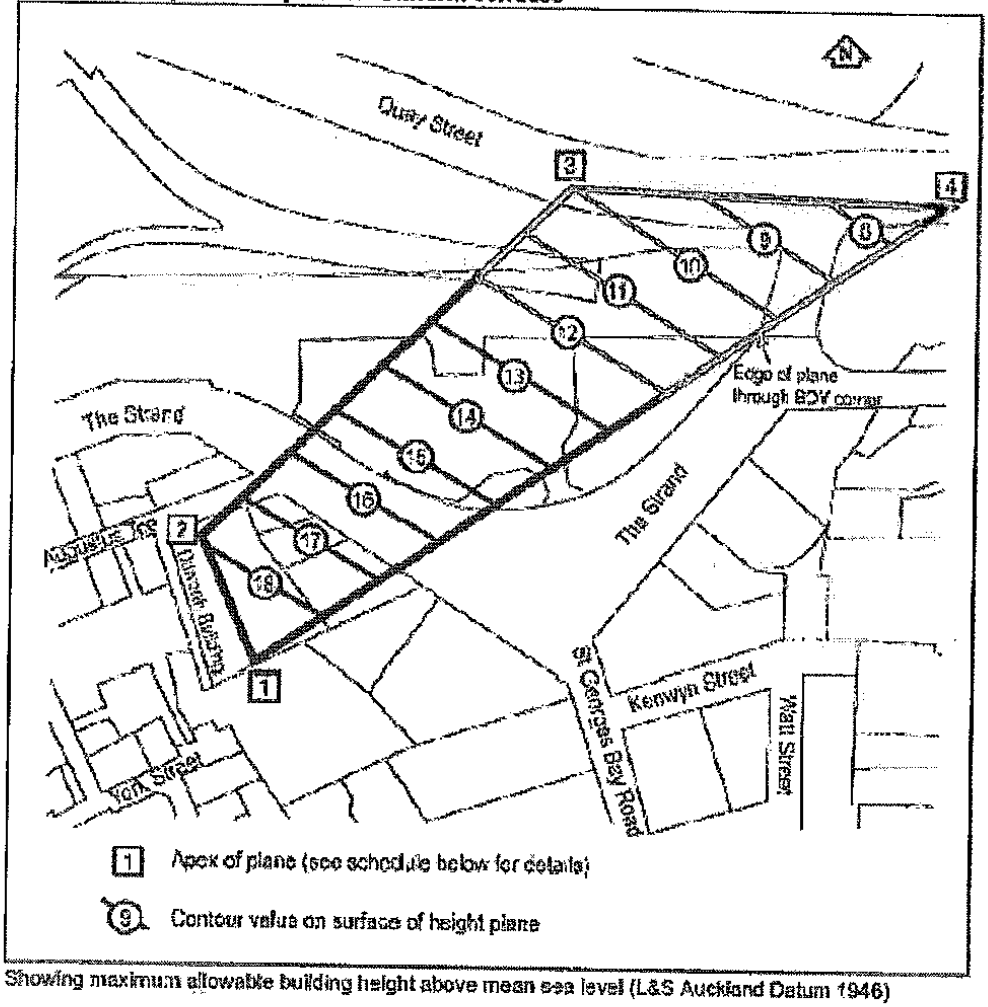
concerns the 65 affected Howick properties. For the reason just mentioned the general submissions identified by the IHP (and others) fairly raised the issues that HRRA are now seeking to re-litigate though specifically in relation to the 65 identified properties. I see no broader unfairness by upholding the IHP decision on scope as it affects those properties.

The Viewshaft on the Strand

[241] The SHL proceedings have been brought by way of judicial review and relate to the recommendation of the IHP and the decision of the Council in relation to the Dilworth terraces view protection plane (Viewshaft)**.** The IHP's Report on hearing topics 050-054 - City Centre and business zones (July 2016) recommended that the "origin point of the viewshaft be relocated on The Strand, as shown in the revised viewshaft diagram accompanying the text of the Unitary Plan." The Council accepted the IHP's recommendation.

[242] The Dilworth Terraces are a row of heritage houses at the top of the escarpment above The Strand. The Notified Plan proposed the inclusion of the Dilworth Terraces View Protection Plan (Proposed Viewshaft). The Proposed Viewshaft is a development control located in 1.4.4.6 of the Notified Plan. The purpose of the Proposed Viewshaft is to manage the scale of development to protect the view of the Dilworth Terraces from the eastern end of Quay Street. The effect of the Proposed Viewshaft is that the height of a building, including any structure on the roof of a building, subject to the Proposed Viewshaft must not exceed the height limits specified on Figure 4: View protection plan for Dilworth Terraces. The Proposed Viewshaft contains Figure 4:

Figure 4: View protection plane for Dilworth Terraces



Showing maximum allowable building height above mean sea level (L&S Auckland Datum 1946)

[243] SHL's property at 117-133 The Strand, Parnell (Property) was not affected by the Proposed Viewshaft. In the Notified Plan, the Property was zoned Light Industry, which imposes a 20 metre height limit on buildings within that zone. Primary submissions on the Proposed Viewshaft were made by Ngati Whatua Whai Rewa Ltd (submission 872); New Zealand Historic Places Trust (Heritage New Zealand Pouhere Taonga) (submission 371); The Strand Bodies Corporate (submission 1615); Dilworth Body Corporate (submission 6152); and Charles R Goldie (submission 6496).

[244] The IHP recommended that the Property be rezoned to Business Mixed Use, which imposes a height limit of 18 metres. The IHP also recommended relocating the

Proposed Viewshaft to The Strand. The IHP did not identify the relocation as being beyond the scope of submissions made in respect of Topic 050.

[245] The Council accepted the recommendation that the Proposed Viewshaft be relocated to The Strand (Decisions Viewshaft). The Property is affected by the Decisions Viewshaft. The Decisions Viewshaft imposes a lower height limit than in the underlying zone in the northern portion of the Property, ranging from 12 metres on the Property's frontage to The Strand to approximately 17 metres on the Property's north-western boundary. Resource consent as a non-complying activity is required to infringe the height limit imposed by the Decisions Viewshaft.

SHL's claim

[246] The first cause of action in the SHL proceedings is that the IHP applied the wrong legal test. SHL claims that:

> [44] In making its recommendation regarding the Proposed Viewshaft, the [Panel] acted pursuant to an error of law in breach of section 144 of the [Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA)].

[247] SHL says that:

(a) the only submissions relevant to the Viewshaft did not seek the relocation of the origin of the Viewshaft "in the manner" of the IHP's recommendation;

(b) as a consequence of applying the incorrect legal test (or misapplying the correct legal test) the IHP made a recommendation that was beyond scope and failed to identify it as such, and therefore:

(c) the IHP made an error of law.

[248] SHL identifies parts of Whai Rawa's submission that relate to the Viewshaft. In particular:

> That changes be made to the PAUP ... and in particular make provision for ... an amendment to the area affected by the Dilworth Terraces Special Height Plane. (submission point 3)
>
> The Dilworth Terraces View Protection Plane (1.4.4.6 and any associated assessment criteria) are reviewed and further investigated in accordance with Council's report and any resulting amendments to the relevant provisions, as a result of the further investigation be implemented. It is recommended that views from the Strand potentially be explored. (Submission point 37.)

[249] The scope issue was addressed at the Topic 050 hearing, in particular in the legal submissions for the Council, Whai Rawa, and the Dilworth Terraces Body Corporate:

(a) the Council's and Whai Rawa's position was that the option of the Viewshaft being moved to The Strand was reasonably and fairly raised in Whai Rawa's submission; but

(b) Dilworth Terraces Body Corporate's position was that the amendments to the Viewshaft proposed by Whai Rawa were beyond the jurisdiction for the IHP to consider because the submission was vague and uncertain and "sought no more than a review of information and the implementation of possible outcomes of that review."

Argument

[250] The Council and Whai Rawa contend that:

(a) The Whai Rawa submission and the SDR sufficiently signalled the potential for the Viewshaft to be shifted to affect the Strand site, with specific reference to:

> Review and further investigate development control 4.6 'Dilworth Terraces View Protection Plane' (and any associated assessment criteria) in accordance with the Council's report and implement any resulting amendments to the relevant provisions. Also explore views from The Strand. Refer to details in submission at page 14/25 of volume 4.

(b) SHL was not diligent about protecting its interests, having made submissions on its property only;

(c) The Viewshaft only partially affects the development of the SHL properties;

(d) Changes of this nature were to be expected, given among other things the prospect of zone changes;

(e) Other submitters actively engaged on the merits of the Viewshaft and Dilworth Terraces Body Corporate, and opposed the Whai Rawa relief sought on jurisdictional grounds (and so demonstrating that affected persons had sufficient notice of the submission); and

(f) If the IHP has erred, the matter should be referred back to the IHP for reconsideration.

[251] SHL contends:

(a) The Whai Rawa submission does not expressly seek relief in the form of removing the Viewshaft from its land;

(b) The Whai Rawa submission was categorised by the theme "City centre zone" while the SHL site was zoned Light Industry and sought rezoning to Mix Use, so had no interest in searching the SDR as it relates to City Centre zone;

(c) At the hearing Whai Rawa proposed three solutions, none of which were addressed in the submission;

(d) The SHL property was the only additional property affected by the by the relocation;

(e) The Council has effectively shifted the burden of the Viewshaft from one owner to another without affording the affected owner an opportunity to be heard; and

(f) To be a logical consequence of a submission, the submission must be clear about the prospect for the recommended change – but there is no specificity in the submission as to what is meant by "amend".

Assessment

[252] The Whai Rawa submission literally seeks that "views from the Strand potentially be explored" and records that Whai Rawa "is keen to work with the Council to resolve this issue and amend the plane accordingly." It therefore provides jurisdictional scope to address identification of views from the Strand and to amend the Viewshaft.

[253] But there is no clear suggestion in the submission that the Viewshaft will be relocated to the SHL site. The SDR also does not provide a clear signal that the Viewshaft may be shifted to the SHL site. If anything, the SDR notations relied upon by the Council suggests a relatively confined scope for change insofar as it summarises the relief as "refine the location and extent of the Dilworth Terraces Height Plane as it applies to the Quay Park Precinct, which is not obviously relevant to SHL, and then the other submission point somewhat vaguely suggests '[r]eview and investigate development control 4.6 "Dilworth Terraces View Protection Plane"… in accordance with the Council's report.*"* It makes no mention of an alternate Viewshaft affecting SHL's land.

[254] Other parties participated in the Viewshaft hearings as primary submitters. But their participation does not suggest that with reasonable diligence SHL would have appreciated the potential affect of the Whai Rawa submission on its property. These primary submitters sought that the proposed Viewshaft be retained in its existing form or deleted. There was nothing obvious in the background reportage or the Whai Rawa submission to reasonably signal to SHL the prospect that the Viewshaft might move to its properties.

[255] It is also relevant that the relocation of the Viewshaft is disenabling of SHL while enabling of Whai Rawa. It reduces SHL's capacity to develop its site while increasing the capacity to develop Whai Rawa's site. I agree with SHL that submissions seeking greater enablement for the submitter at the direct expense of another landowner

should be framed with sufficient specificity to secure the involvement of the affected landowner.

[256] Accordingly, unlike the seachange that was foreshadowed in relation to residential zoning generally, the issues raised by the Whai Rawa submissions were discrete, yet had the acute disenabling effect of relocating the Viewshaft to cover the SHL site. Greater specificity was required in order to fairly put SHL on sufficient notice of the potential effect of the submission on it. It was neither reasonable nor fair to amend the Viewshaft's location to directly affect the SHL site without at least affording SHL an opportunity to be heard.

55 Takanini School Rd

[257] The property at 55 Takanini School Road, Takanini (the Site) is located on the eastern side of Takanini School Road between Popes Road to the north and Manuroa Road to the south. The Site's main frontage is along Takanini School Road. The northern portion of the Site adjoins 3 Popes Road to the north and abuts the southern portion of 296 Porchester Road (WGL's land) to the east. Both the adjoining properties are zoned Light Industry.

[258] The northern portion of the Site was split-zoned under the Auckland Council District Plan Papakura Section as Industrial 1 in the northern portion and Residential 8 in the southern portion.

[259] The Notified PAUP retained the split-zoning of the Site. This reflected the mix of surrounding land use including light industry to the north and predominately residential to the south.

[260] The Site was subject to one submission, that of the land owner Takanini Central Limited ("TCL"). The submission provided:

> i) Rezoning of the southern portion of the site to Mixed Housing Suburban under the PAUP to ensure efficient use of land in accordance with the Residential 8 zoning of the site, and Part 2, Section 7(b) of the Act;
>
> ii) Inclusion of rules equivalent to the Takanini Structure Plan Area 6 for the Residential 8 zone for subdivision and residential development as

stand-alone rules for the southern portion of the site under the PAUP within the Takanini Sub-Precinct A area; and

iii) Inclusion of the rules equivalent to the operative Industrial 1 zone for retail activities, studio warehousing, offices and residential development as stand-alone rules for the site under the PAUP within the Takanini Sub-Precinct A area;

iv) And specifically new rules that have the following effect:

a. Retail activities ancillary to, and part of a permitted activity on the same site are a Controlled Activity provided that retail activities do not occupy more than 30% of the gross floor area of the industry and retail premises combined, or 200 square metres, whichever is the lesser;

b. Studio warehousing development is a Controlled Activity where it complies with development controls such as shape factor, building design and lot layout;

c. Office activities ancillary to an industrial activity on the site and the office GFA exceeds 30% of all buildings on the site or 100m2 is provided as a Restricted Discretionary Activity;

d. Retail activities ancillary to, and part of a permitted activity on the same site that occupy more than 30% of the gross floor area of the industry and retail premises is a Discretionary Activity;

e. Office activities ancillary to an industrial activity that exceeds 30% of all buildings on site or 100m2 is a Discretionary Activity;

f. Residential activities complying with internal noise standards, is a Discretionary Activity.

[261] The TCL submission requested that the dual zoning as notified be retained over the Site, but requested that the southern part of the property be upzoned from SHZ to MHS. The zoning as notified of that part of the property with a common boundary with the WGL land was Light Industrial (the same zoning as the WGL property) and no change was requested to that zoning.

[262] At the hearing a planning consultant giving evidence on behalf of TCL asked that the whole of the site be zoned residential and the IHP in its Recommendation Report agreed with that request, removing the Light Industrial zone. The result creates a direct interface between an industrial and a residential zone to the detriment of the WGL property in respect of permitted uses, development controls and performance standards.

[263] The Council adopted without alteration the recommendation of the IHP, purportedly on the submission by TCL. This uplifted the Light Industry zone on the northern portion of the TCL site. Although this was not requested by the TCL submission, the IHP recommendation did not state that the zoning decision was made outside the scope of any submission.

Submissions identified by IHP

[264] The IHP identified the TCL submission as providing jurisdiction.

Preliminary issue

[265] The Council contended that the WCL appeal was never identified in any minutes or correspondence as suitable for resolution as a test case on scope. It also says that it is not suitable for determining preliminary scope issues, though the reason for this is not stated.

[266] On the merits, the Council submits that the upzoning of the entire TCL site is an example of the application by the IHP making consequential amendments to the PAUP based on the combination of generalised submissions and site specific upzoning. It is noted that two area by area submissions confer scope (HNZC 839-8217 and Suzanne and Alan Norcott 6214-27). It is also noted that WCL was a submitter on the TCL submission but chose not to attend the hearing and conversely was an active participant on Topic 081. The Council was supported in its submission by Equinox (a mortgagee in possession of the TCL site).

[267] Mr Brabant for WGL maintains that:

(a) A decision on scope will resolve the WGL appeal;

(b) TCL sought to retain Light Industry zoning for the northern portion of the relevant site;

(c) The other two submitters did not seek upzoning of the TCL site to Mixed Use;

(d) WGL was lead to believe that TCL was only seeking to upzone the southern portion of its site and that this was confirmed in TCL's expert's primary evidence.

(e) The prospect of upzoning the TCL site was only raised in TCL's expert's supplementary evidence at the hearing date;

(f) The final zoning map produced by the Council did not refer to the upzoning of the northern portion of the site; and

(g) The generic submissions relied upon by the IHP and the Council to establish scope are inapposite as they relate to upzoning of residential zones, not industrial zones.

Assessment

[268] I agree with Mr Brabant that the generic submissions relied upon by the IHP, such as the HNZC submissions addressing residential zones, do not obviously signal the potential for residential upzoning in locations such as the TCL site which were notified as light industrial. I also consider that Mr Brabant makes a cogent point that WCL had no reason to thoroughly review submissions seeking upzoning of residential sites, but the TCL submission does raise the prospect of Mixed Use in an adjacent location. This would appear to confer jurisdictional scope on the basis that rezoning the whole site, instead of only part of it, is a reasonably foreseeable consequence of an integrated planning approach. But, the matters raised by Mr Brabant (though largely in reply[174]) bring into play broader considerations of fairness, and in particular whether in the peculiar circumstances of the case, being the limited basis upon which TCL sought to upzone the northern portion of its site, together with the TCL expert's primary expert evidence and position adopted by the Council planning team, WGL was effectively misled into assuming that the northern portion of the site was never at risk of upzoning to MHU. While not as stark as the SHL case, the disenabling effect of the recommended change, combined with the TCL submission and primary evidence raises natural justice considerations.

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[174] In fairness to Mr Brabant and WGL several of the matters raised by the Council were not foreshadowed to Mr Brabant in advance of the presentation of the case for WGL.

[269] While, as counsel submits, this is not a 'scope' case, I am nevertheless satisfied that it was not fair and reasonable in the specific circumstances of this test case to treat the extension of the Mixed Use Zoning to the northern portion of the TCL site as appropriate without affording WCL an opportunity to submit on the consequences of that upzoning for its site.

The Albany North Landowners' Group site

[270] ANLG pleads that the Council erred in law by zoning the ANLG site Future Urban Zone (FUZ) where:

(a) this was not sought in any submission; and

(b) the requirement under s 144(8) of the Act, for the Panel to identify any recommendations that are beyond the scope of submissions, was not met.

[271] In comparison to other test cases where the spatial application of zones has informed the zoning applied to individual sites, the ANLG case relates to the zoning of a discrete block of land, where the zoning of adjacent land or a zoning pattern has not determined the zoning applied.

[272] ANLG's Notice of Appeal pleads:

(a) The Proposed Plan as notified proposed that ANLG site be zoned a mix of Large Lot Residential and Countryside Living.

(b) The submission by ANLG sought that the ANLG site be rezoned either:

  (i) A mix of Mixed Housing Suburban and Single House Zones;

  (ii) Or, if that zoning was not successful, FUZ.

(c) By legal submissions dated 29 April 2016, ANLG formally withdrew its alternative relief seeking FUZ. This was confirmed by letter dated 2 May 2016.

(d) No other submissions sought FUZ for the ANLG site or specifically addressed zoning of the ANLG site.

(e) The ANLG site is the only land in this location to be zoned FUZ. Accordingly, the zoning is not consequential to zoning of adjacent land or required in order to achieve a coherent zoning pattern.

(f) There is no general submission or further submission which would provide scope for the FUZ zoning of the ANLG site.

[273] The submission, which was later withdrawn, provided:

> The Group seeks the following changes to the PUP:
>
> …
>
> (c) Change the zoning of the land inside the new RUB to the Future Urban Zone.
>
> The reasons for the Group's requested changes are set out in parts 4.2 - 4.5 below. The reasons are supported by the following technical reports:
>
> - Infrastructure Assessment Report, dated May 2013, and addendum dated February 2014, prepared by Terra Consultants, attached, marked B;
> - Transport assessment report, dated 31 May 2013, prepared by Traffic Design Group, attached, marked C;
> - Landscape and Visual Assessment, dated May 2013, prepared by LA4 Landscape Architects, attached, marked D; and
> - Urban Design Assessment, dated May 2013, prepared by Urbanismplus, attached, marked E;
> - Stormwater assessment, dated February 2014, prepared by Stormwater Solutions, attached, marked F.

Argument

[274] Ms Baker-Galloway for ANLG submits, in short, that the imposition of a "FUZ" zoning was not reasonably and fairly raised by any submission, given that ANLG had withdrawn its submission seeking that relief. Nor, she submits, was it necessary to achieve vertical or horizontal integration. The central complaint therefore is that the IHP found scope to impose a FUZ zoning on the ANLG's land simply to give effect to the RPS when there was no jurisdiction to do so. I also understand that the recommended changes in the final form are more disenabling that the PAUP as notified.

[275] The Council responded that the withdrawal of the ANGL submission did not remove scope, because ANGL sought to extend the RUB to its site, which if granted, required the IHP to assess the most appropriate form of complementary zoning for the site. The selection of FUZ, in preference to declining the relief altogether or imposing immediate upzoning to Mixed Use, was an evaluative decision available to the IHP. The

Council also identified other submissions which, it says, provided scope for FUZ, including the following submission:

(a) Robert Harpur (957-3): "Cut back on the greenfields developments planning in the RUBs in the south, north west and north of Auckland";

(b) Harold Waite (939-7): "Cut back the areas zoned for Mixed Use Housing and terrace housing and have a staged release for development"; and

(c) Kevin Birch (6253-1): "Reconsider the FUZ and rural areas rezoned Residential and apply appropriate zonings which take into account infrastructural constraints."

Assessment

[276] I agree with the Council. ANGL, by seeking to extend the RUB to its location, must have known that the IHP would be required to ensure that the new zoning applicable to the land within the RUB was the most appropriate form of land use for the site. In this particular case, the IHP identified FUZ as the most appropriate zoning for that part of the site within the RUB. It is not for this Court to test the merits of that assessment. It is a fairly clear example of providing relief that is somewhere between that sought by the submitter and the notified plan.

[277] Significantly also, ANGL, by seeking FUZ, signalled to the world that this might be a potential outcome and so there can be no challenge based on orthodox scope grounds. Indeed in seeking FUZ as an alternative relief, ANGL must have, at least at the time of making the submission, understood the FUZ zoning to be a suitable option. This then aligns with the other submissions noted by the Council seeking a measure of control in relation to land incorporated within an extended RUB.

[278] I also understand that ANGL had the full opportunity to challenge the merits of the FUZ zoning at the hearing. If that is the case, then the substantive basis for the appeal is weak. If I were to reverse the IHP decision on scope grounds that would likely mean that the ANGL would need to persuade the Environment Court that it was "unduly

prejudiced" by the imposition of the FUZ. [175] That prospect must be small. While that cannot by itself provide a basis for disallowing an appeal based on lack of scope, given the clear natural justice purpose of the scope provisions, the error in this particular case, if any, lacks materiality.

Man O'War Farm

[279] Man O' War pleads that the Council erred in law by including an amended definition of "Land which may be subject to coastal hazards" in the AUP which was not sought in any submissions, without the requirements of s 144(8) of the Act being met (by the IHP). Paragraph 14 of Man O' War's amended Notice of Appeal pleads as follows:

> The grounds of this Part (C) of the appeal are as follows:
>
> (a) when notified, the Unitary Plan set rules for activities (including buildings and structures) on land which may be subject to natural hazards (Part 4.11 of the Unitary Plan as notified).
>
> (b) The appellant opposed these provisions with reference to the phrase "land which may be subject to natural hazards" as applied under Policy 1 of section CS.12 of the Unitary Plan as notified, and as then defined under the Unitary Plan.
>
> (c) The Hearings Panel recommended and Auckland Council adopted revised definitions of such areas including a new definition of "Land which may be subject to coastal hazards" as including any land which may be subject to erosion over at least a 100 year timeframe. No submissions to the Unitary Plan requested such a revised definition.
>
> (d) A reader of the Unitary Plan will not be able to determine including with reference to the Unitary Plan maps, whether land in coastal areas falls within that definition, and as such the definition and the provisions of the Unitary Plan triggered by the definition are void for uncertainty and ultra vires.

[280] By way of relief, Man O'War seeks that the revised definition be deleted, and/or a declaration whereby the substantive issue regarding the provisions of the Unitary Plan triggered by the revised definition could be addressed by the Environment Court.

[281] The notified definition of "Land which may be subject to natural hazards" was:

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[175] Local Government (Auckland Transitional Provisions) Act 2010, s 156(3)(c).

Any land:

- Within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18-degrees)
- On any slope with an angle greater than or equal to 1 in 2 (26-degrees)
- At an elevation less than 3m above MHWS if the activity is within 20m of MHWS
- Any natural hazard area identified in a council hazard register/database or GIS viewer.

[282] Policy 1 (Section C5.12 of the PAUP as notified) stated:

1. Classify land that may be subject to natural hazards as being:
    a. within a horizontal distance of 20m from the top of any cliff with a slope angle steeper than 1 in 3 (18 degrees)
    b. on any slope with an angle greater than or equal to 1 in 2 (26 degrees)
    c. at an elevation less than 3m above MHWS if the activity is within 20m of MHWS
    d. any natural hazard area identified in the councils' natural hazard register, database, GIS viewer or commissioned natural hazard study.

[283] A number of submissions made on the definition were submitted to the Court, however, it became clear during the hearing that the relevant submission for the purposes of scope was that of Bernd Gundermann, which sought the following relief:

> Recognise that development in coastal areas needs to be considered with a significantly larger time frame. Planning for coastal areas must exceed 100 years.

[284] The IHP's recommended definition, which was accepted by the Council was:

Any land which may be subject to erosion over at least a 100 year time frame:

(a) within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees); or

(b) at an elevation less than 7m above mean high water springs if the activity is within:

(i) Inner Harbours and Inner Hauraki Gulf: 40m of mean high water springs; or

(ii) Open west, outer and Mid Hauraki Gulf: 50m of mean high water springs.

Any land identified as being subject to one per cent annual exceedance probability (AEP) coastal storm inundation (CSI).

[285] The specific scope issue raised by this test case is whether the following aspect of the IHP's recommended amended definition of "land which may be subject to coastal hazards":

... any land which may be subject to erosion over at least a 100 year timeframe

was reasonably and fairly raised in the course of submissions.

Argument

[286] Mr Williams, for Man O War, submitted:

(a) Relevant submissions sought greater certainty and the IHP recommended the opposite by incorporating an indefinite aspect into the criteria for land use requiring resource consent - that is "land which may be subject to erosion over at least a 100 year timeframe";

(b) The IHP recommendation could not have been reasonably anticipated by an affected land owner and therefore was out of scope, especially given the degree of uncertainty arising from the indefinite aspect;

(c) While there were submissions that sought that the Unitary Plan show, identify or make "quantifiable" areas affected by coastal erosion, the recommended definition does none of these things;

(d) Prejudice arises to all of the coastal properties falling within the expanded areas now referenced in the expanded definition;

(e) Submitters could have reasonably anticipated that a longer term management approach might be applied to planning for coastal hazards, extending over 100 years, and accounting for climate change, but they

could not have anticipated being left uncertain as to whether they were caught by the coastal hazard provision requiring resource consent;

(f) The hearings process, including mediations and expert conferral about the definition of coastal hazards did not expand the scope of the submissions – citing *Waipa*; and

(g) The substantive issue raised by Part C of the Man O' War appeal is closely related – namely the indefinite aspect means the relevant provision is ultra-vires for lack of certainty.

[287] The Council responded:

(a) The changes at issue occurred as part of a broader restructure of the natural hazards provisions that was developed through two comprehensive rounds of mediations and hearings;

(b) The amended definition was within the scope of submissions addressed to the defined phrase "land which may be subject to natural hazards" as "coastal hazards" is a subset of the more general "natural hazards";[176]

(c) The amendment is consistent with Policy 24 of the New Zealand Coastal Policy Statement (NZCPS) which notes that "Hazards risks, over at least 100 years, are to be assessed…";[177]

(d) The specific amendment is a reasonably foreseeable consequence of the submissions, including the Gundermann submission noted at [283], particularly given the requirement to achieve consistency with the NZCPS; and

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[176] Referring to submissions, for example, by Tonkin and Taylor seeking the following relief: "re examine the
definition of "land that may be subject to natural hazards".

[177] Department of Conservation *New Zealand Coastal Policy Statement 2010* (3 December 2010).

(e) The amended definition is not indefinite – it has specific parameters including a horizontal distance of 20m landward of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees).

Assessment

[288] I do not agree with the basic premise underlying Man O' War's scope challenge. The Gundermann submission plainly brought into frame the prospect of changes to the coastal hazard provisions to enable assessment of coastal erosion "over at least a 100 year timeframe". When the broader submissions seeking definitional change are then also taken into account, a land owner of coastal property should have appreciated that one method to achieve the Gundermann relief could be via definitional change and the qualifying criteria for applications for resource consent. When that is overlaid with Policies 24 and 25 of the NZCPS, and the statutory requirement to give effect to it in regional and district level policy, there can be no serious complaint when the consenting criteria bring in 'an over 100 year' timeframe for assessment.

[289] It is unnecessary for me to resolve whether the hearings process cured any underlying lack of scope.[178] But what the hearing and mediation process (as described by the Council[179]) reveals is that the definitional issue was thoroughly ventilated. This supports the conclusion that the submissions put that issue squarely on the table. It also mitigates the prospect of substantive unfairness, insofar as it appears both sides of the argument were considered.

[290] As to the ultra vires issue, this test case procedure was not triggered to address that issue. I therefore do not propose to resolve it, save to encourage the parties to think about the workability of an indefinite threshold as a criterion for resource consent.

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178 As noted by Mr Williams, Wylie J in *General Distributors v Waipa District Council*, above n 91, deprecated reliance of the hearings process to expand the scope of the Plan change as notified. The relevance of that dicta to the present case is contestable. That case concerned whether an explanatory note that was not subject to the Plan Change application could be changed. Wylie J found it could not and that evidence given about it could not expand the scope of the plan change.

179 I was not taken to a record of the process on this aspect.

Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

[291] The Council submits that issues of scope must be resolved by way of judicial review of the IHP decision on scope. It says that Council had no jurisdiction to accept or decline a determination that a recommendation was within scope. It could only decide whether the recommendation should be accepted or rejected.

[292] Strand Holdings Limited submits that it could only proceed by way of judicial review because it did not have an appeal right, not having submitted on the provisions subject to the IHP recommendation in dispute.

[293] Character Coalition, Auckland 2040, Albany North and Man O' War contend that a decision by the Council based on an erroneous assumption that a recommendation is in scope must be appealable on a point of law. This is important because the decision to accept the recommendation as in scope, when it was not, unlawfully deprived them of the ability to pursue a substantive right of appeal to the Environment Court.

Assessment

[294] The IHP is empowered to make recommendations that are within or beyond the scope of submissions[180] and is obliged to identify recommendations that are beyond scope.[181] The Council is empowered to make decisions on the recommendations. It may accept or reject the recommendations.[182] It does not need to hear evidence, and may only consider submissions and evidence tabled with the IHP.[183] If the Council rejects the recommendation, then it must provide an alternative solution that is within scope of the submissions. Section 148(3) makes clear however that the Council may accept recommendations that are beyond the scope of the submissions on the proposed plan. The Council is strictly circumscribed by s 148(4) to issue a decision accepting or rejecting the recommendation. A decision to accept a recommendation may include alteration with minor effect or to correct a minor error. The Council had 20 working days to make its decisions.

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180 Local Government (Auckland Transitional Provisions) Act 2010, s 144(5).
181 Section 144(8)(a).
182 Section 148.
183 Section 148(2).

[295] Section 158 confers a limited right of appeal to the High Court as noted at [85].

[296] Section 158(5) incorporates sections 299(2) and 300 - 307 of the RMA in terms of appeals. Notably, s 308 enacting a right of appeal to the Court of Appeal is not included. Section 159 then preserves the right of judicial review, but a person must not apply for judicial review of a decision made under s158 in respect of a decision unless the person lodges the judicial review and appeal together. Unless impracticable, the appeal and review must be heard together.

[297] Given the foregoing, it is tolerably clear that the Council decision making power is binary – it must either accept or reject the recommendations, and it must do so quickly. It does not expressly or by necessary implication contemplate a decision accepting a recommendation while at the same time rejecting an IHP finding about scope. This is reinforced by the appeal rights procedures. Section 156 confers a limited right of appeal on submitters in relation to any decision of the Council rejecting the IHP's recommendation or to any person in relation to any decision by the Council to accept a recommendation where "the Hearings Panel had identified the recommendation as being beyond the scope of submissions". Section 158 then confers a right of appeal to this Court on the Council's decisions to accept a recommendation on the provisions of the plans while s 159 preserves the right to seek judicial review, presumably in relation to the IHP's decisions on, among other things, scope, which triggers an orthodox administrative law issues of procedural fairness.

[298] But this does not mean that on appeal the High Court cannot examine whether the IHP decision on scope was unlawful. The purpose of any appeal on a point of law is to test the legality of the Council decision. While the issue of scope is essentially about procedural fairness, a recommendation assuming scope when there was none is contrary to the scheme and policy of public participation of Part 4 and the RMA. It is unlawful. Plainly, the Council cannot lawfully accept an unlawful recommendation. If that were not the case, the right of appeal to the High Court would be largely meaningless. For example, any failure by the IHP to ensure that the recommendation complied with the matters specified at s 145 would be beyond challenge.

[299] There will be persons, like SHL, who having not submitted on the relevant provision, only have recourse to a remedy through judicial review. The availability of judicial review is most obviously directed to this type of applicant who has not had any say on a relevant provision in the proposed plan. Conversely, the scheme of the RMA envisages that submitters cannot judicially review a decision while they enjoy rights of appeal. In any event, the availability of judicial review to correct error presents no bar to the High Court appellate procedure on the issue of scope.

What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

[300] This Court on appeal may, having found error of law, make any decision it thinks should have been made.[184] This is significant in the present case, because the full corrective power on appeal avoids, where appropriate, the need to refer the relevant aspect of the decision back to the Council or IHP, though this power is used sparingly.[185] In the present context that logically means that if this Court declares that a recommendation is out of scope or otherwise unlawful, it may make any decision the Council could have made, including to accept or reject an out of scope recommendation. Of course this Court may decide to refer the matter back for reconsideration by the Council. This may be most appropriate approach where the error as to scope bears on the substantive merits of a provision and policy considerations.

[301] The position is slightly different in relation to the power to grant relief under judicial review. The exercise of supervisory jurisdiction is corrective not substantive. Unless the correction results in a different decision, this Court will ordinarily refer the matter back to the person empowered by Parliament to make the decision.[186] In this case the special scheme of Part 4 must colour this orthodoxy. It has an inbuilt system for addressing out of scope recommendations, namely the right of appeal to the Environment Court. It is permissible and preferable in this context to correct an unlawful decision on scope only to the extent necessary to trigger this appeal right.

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184 High Court Rules 2016, rule 20.19.
185 *Taylor v Hahei Holidays Ltd* [2006] NZRMA 15 (CA).
186 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [97].

Outcome

[302] The answers to the preliminary questions are:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

Yes

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

No

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

No

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

Yes

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

Yes

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 case law relevant, when addressing scope under the Act?

See discussion at [101]-[136]

(e) Did the IHP correctly apply the legal framework in the test cases?

(i) Mt Albert – Yes

(ii) **Glendowie** – **Yes**

(iii) **Blockhouse Bay – Yes**

(iv) **Judges Bay – Yes**

(v) **Wallingford Street – Yes**

(vi) **Howick** – **Yes**

(vii) **Strand Holdings Limited – No**

(viii) **WGL – No**

(ix) **Albany – Yes**

(x) **Man O War – Yes**

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

Both

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

See discussion at [300]-[301]

Effect of Judgment/Relief

[303] The purpose of resolving the test cases was to provide affected appellants with guidance on the issue of scope. It will be for them to decide whether and to what extent they wish to pursue their appeals in light of my decision. It should be evident that I consider the appeals concerning residential upzoning and the Albany and Man O' War appeals should be dismissed on the question of scope, while the SHL and WGL appeals should be upheld on the same issue. My current view is that the SHL and WGL matters should now be referred to the Environment Court for resolution.

[304] The parties are invited to file a joint memorandum in respect of relevant appeals for case management purposes within 10 working days. A further case management conference will be set down in relation to the scope appeals on the first available date thereafter.

Costs

[305] The parties have leave to seek costs. Submissions no longer than three pages in length are to be filed within 10 working days, unless the parties agree otherwise.

APPENDIX A		
SUBMISSIONS RELIED UPON BY THE IHP		
GENERAL SUBMISSIONS		
Submitter	Number	Summary of submission (as published by Auckland Council on its website)
Minister for the Environment and Ministry of Business, Innovation and Employment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations
	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).

	839-3	Amend the PAUP to encourage housing choice in the residential zones.
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban intensification around centres, frequent transport networks and facilities and other community infrastructure.
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.
	6099-2	Delete the 'construct' of density from all sections of the plan.
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.
	6099-5	Reduce the size of the Single House zone.
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.
	6099-10	Delete all density controls.
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3

	6212-3	Retain policies.
	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.
Generation Zero	5478-3	Retain the compact city model.
	5478-4	Retain the requirement for no more than 40 per cent of new dwellings to be located outside the 2010 MUL.
	5478-36	Amend rules to increase dwelling capacity within existing urban boundaries as per Regional Policy Statements.
	5478-57	Retain up-zoning in areas around New Lynn, Avondale, Glen Innes, Panmure and Papatoetoe.
	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific suggestion to rezone the properties.
	839 A + C series maps	
	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.
	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO MT ALBERT		
Housing New Zealand Corporation	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific request to rezone HNZC properties.
	839 A + C series maps	
Rose Dowsett	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.

Joseph Erceg	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
John Childs	4903-1	Rezone 16 Knight Avenue, Mt Albert from Single House to Terrace Housing and Apartment Buildings and other properties within Knight Avenue to Terrace Housing and Apartment Buildings
Anton Sengers	4895-1	Retain Mixed Housing Suburban zone for 45 Alberton Avenue, Mt Albert
	4895-45	Retain Mixed Housing Suburban zone on 47 Alberton Avenue, Mt Albert
Pantheon Enterprises Ltd	2516-1	Retain the Mixed Housing Suburban zone at 45 Alberton Avenue, Mount Albert.
	2516-49	Retain the Mixed Housing Suburban zone at 47 Alberton Avenue, Mt Albert.
Vincent Carl Heeringa	1430-1	Rezone 1 Mt Albert Rd, Mt Albert from Single House to Mixed Housing.
Hiltrud Gruger, Gregor Storz	968-1	Retain the current residential District Plan provisions in the area referred to as the Springleigh Estate, and bordered by the Western Railway, Oakley Creek, Unitec and Woodward Rd, Mt Albert
Auckland Council	5716-2802	Rezone 3 Raetihi Crescent, Mount Albert (Lot 33 DP 17374) and 5 Raetihi Crescent, Mount Albert (Lot 32 DP 17374) from Mixed Housing Suburban to Single House. Refer to submission, Volume 4, page 3/35 and Attachment 538, Volume 20.
	5716-2848	Rezone part of 33 Ennismore Road, Mount Albert (Pt Lot 11 DP 19853) from Single House to Mixed Housing Suburban. Refer to submission, Volume 4, page 5/35 and Attachment 580, Volume 20.
Gavin Logan	6083-3	Rezone 15 Harbutt Avenue, Mt Albert to Terrace Housing and Apartment Buildings.
NZ Institute of Architects	5280-118	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5280-123	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5280-124	Rezone land within Mount Royal Avenue, Mount Albert Road, La Veta Avenue , Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban with a review of the special character overlay.
	5280-117	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban
Urban Design Forum	5277-116	Rezone land on McLean Street, Richardson Road, Mount Albert Road, Woodward Road and New North Road, Mt Albert as shown in the submission [refer to page 3/104], from Single

		House, Mixed Housing Urban and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
	5277-115	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban.
	5277-117	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5277-121	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5277-124	Rezone land on Burns Avenue and Northcroft Street, Takapuna as shown in the submission [refer to page 7/104], from Single House and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GLENDOWIE		
Housing New Zealand Corporation	839 A + C series maps	
CIT Holdings	6240-1	Rezone 14-30 Waimarie Street, St Heliers, from Single House to Mixed Housing Suburban.
Rental Space Ltd	6969-5	Rezone 5 and 9 The Rise, St Heliers, from Single House to a zone that reflects the existing characteristics and recognises the potential for further development, such as Mixed Housing Suburban, and provides for a density of at least 5 residential units on the land with a building height of 8 to 10m.
	6969-1	Reject the Single House zone, and related provisions, at 5 and 9 The Rise, St Heliers.
Auckland Presbyterian Hospital Trustees Ltd	4429-4	Rezone St Andrews retirement village at 207 Riddell Road, Glendowie and all St Andrews landholdings in Glendowie from Special Purpose - Retirement Village to Mixed Housing Urban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO BLOCKHOUSE BAY		
Area A – Lynbrooke Avenue area		
Housing New Zealand	839 A + C series maps	
Area B – Barton and Wade Street area		
Geoff Bennett	2791-9	Rezone 42 Connaught St, Blockhouse Bay from Single House to Mixed Housing Suburban.

Housing New Zealand	839 A + C series maps	
Area C – Keats Place Bolton Street area		
Housing New Zealand	839-4193	Rezone 85B,77,75,73,85A,71,83,69,87D,81,87B,87C,79,87A, BOLTON STREET,24,39,37,43,41, MARLOWE ROAD, Blockhouse Bay from Single House to Mixed Housing Urban.
	839 A + C series maps	
Area D – Boundary Rd to Whitney Street area		
Housing New Zealand	839-722	Retain Single House at 9, JAMAICA PLACE, Blockhouse Bay.
	839-631	Retain Single House at 28, JAMAICA PLACE, Blockhouse Bay.
	839-1226	Retain Single House at 174,172, WHITNEY STREET, New Windsor-Blockhouse Bay.
	839-1225	Retain Single House at 69, MULGAN STREET, New Windsor.
	839 A + C series maps	
Carson Duan	6164-1	Rezone 45 Boundary Road, 87 and 89 Dundale Avenue, Blockhouse Bay from Single House to Mixed Housing.
Brian and Ruby Lowe	2468-1	Rezone 49 Boundary Road, Blockhouse Bay from Single House to a higher density zone to enable subdivision.
Ellen Ma	42-1	Rezone 87 and 89 Dundale Avenue Blockhouse Bay from Single House to Mixed Housing.
NZ Institute of Architects	5280-263	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Urban Design Forum	5277-261	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Mohammed Faruk	9409-1	Rezone 29 Dundee Place, Blockhouse Bay, so it can be subdivided into 2 sections or provide for the house or granny flat to be extended [inferred].
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO JUDGES BAY		
Housing New Zealand	839 A + C series maps	

Masfen Holdings Ltd	5968-16	Delete the Special Character Residential Isthmus A, B and C overlay from 21 and 23 Judges Bay road and 17 and 23 Bridgewater Road, Parnell.
Rolf and Peter Masfen	6411-1	Delete the overlay from sites 102 and 102A St Stephens Avenue and 12 Rota Place. Parnell.
Civic Trust Auckland	6444-101	Rezone Gladstone Road from Parnell to Taurarua Terrace from Terrace Housing and Apartment Buildings to Single House.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GREY LYNN		
Housing New Zealand	839 A + C series maps	
NZ Institute of Architects	5280-11	Acknowledge that the PAUP has had significant residential intensification removed from it when compared with the draft Plan. There is a need to relook at all the methods providing for and restricting residential intensification including the spatial location of residential and business zoning, overlays including the volcanic view shaft, height sensitive areas and heritage and character areas if the aspirations of the Unitary Plan are to be achieved [refer to page 9-10/39]. Review and amend the application of different zones based on the examples provided in the submission [refer to pages 1-104/104] and to address concerns raised in the submission.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO TAKANINI		
Takanini Central	4986-1	Rezone southern portion of 55 Takanini School Road, Takanini to mixed housing suburban
NO SPECIFIC SUBMISSIONS RELIED ON BY THE IHP FOR HOWICK. SEE GENERAL SUBMISSIONS ABOVE.		

APPENDIX B			
KEY GENERAL SUBMISSIONS TO THE IHP			
Submitter	Number	Summary of submission (as published by Auckland Council on its website)	Key Quotes
Minister for the Environment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan	"I seek that the zoning, overlays, development controls and other rules be adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high market demand – to meet Auckland's long-term (30 year) growth projections, as well as the development objects of the AUP itself."
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations	" I seek that the Proposed AUP's policies and methods be reconciled with its RPS-level objectives, improving the AUP's integrity, and that the approach for doing this focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations."
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).	"…the provisions of the residential zones are not sufficiently enabling of urban intensification (particularly urban regeneration) at a scale that is necessary to provide for 70% of the City's residential demand as the population grows. Failing to enable or provide for appropriately located and designed residential growth within the urban area will mean the Unitary Plan will not be consistent with, nor aid the implementation of, the strategic directions identified in the Auckland Plan."
	839-3	Amend the PAUP to encourage housing choice in the residential zones.	"…the provisions of the residential zones do not sufficiently encourage housing choices that are both necessary to support the social and economic demands of Auckland's community and are identified as appropriate in the Regional Policy Statement sections of the Proposed AUP."
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.	"…the Proposed AUP provisions unreasonably differentiate against multi-unit developments…the potential outcome of the higher 'consenting hurdles' of this approach will discourage urban regeneration projects (in favour of more ad-hoc infill type developments) and potentially result in both poorer urban design outcomes…and potentially in the failure to achieve the desired urban uplift sought."
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban	"With respect to residential zoning…there has been inconsistent application of the Regional Policy Statement direction for urban intensification opportunities around

		intensification around centres, frequent transport networks and facilities and other community infrastructure.	Centres, Frequent Transport Networks and facilities and other community infrastructure (e.g. education facilities).”
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)	“In particular, Housing New Zealand is concerned that the extent of areas zoned for greater residential intensification is not sufficient to achieve the desired urban uplift, nor to support other significant resources (e.g. the public transport network).” “To this end, Housing New Zealand is concerned that substantial rezoning is required to achieve the outcomes of the Auckland Plan and the Regional Policy Statement. In response, Housing New Zealand seeks the rezoning of a notable proportion of its land. Table 3 provides a summary of property specific rezoning submissions. These specific property submission points are made in addition to the submission matters that Housing New Zealand has made with zone, overlay and precinct provisions (Table 1). In this regard, it is important to note that the specific relief identified in terms of zoning requests is contingent on the provisions of the District Plan zones, overlays and precincts (to achieve the outcomes that Housing New Zealand is seeking). In summary, rezoning requests are made for the following broad reasons: a. There are a number of Housing New Zealand properties and sites that are within walking access of Frequent Transport networks and facilities, education and other social facilities and/or centres such that they warrant a zoning that would enable further urban intensification from that currently proposed (e.g. a shift from proposed zonings of Single House and Mixed Housing Suburban to Mixed Housing Urban, Terrace Housing and Apartments or in a few cases to Mixed Use); b. There are a few Housing New Zealand properties and sites where the zoning proposed in the Proposed AUP is inconsistent with the current development pattern on or surrounding the site and it is considered an alternate zone is more appropriate to these sites’ existing or proposed zoning; c. There are a number of Housing New Zealand properties that appear to have been ‘down-zoned’ (compared with either existing zoning or surrounding zoning) on the basis of infrastructure constraints (primarily flood hazard notations). It is submitted that these areas are better managed through the

			application of Overlays to address resource values/issues (such that if these issues can be addressed, the wider zoning pattern appears appropriate for the site); d. There are a few Housing New Zealand properties and sites that appear to have been 'down-zoned' (compared with either existing zoning or surrounding zoning) on the basis of Overlays (particularly built character/heritage). These values are also mapped and identified through Overlays and it is considered more appropriate to retain that method to manage these resource values. Managing resource values through both Zone and Overlay provisions essentially results in double-layered management of a single resource value, which is considered an overly onerous process which potentially undermines the philosophical approach to managing land use matters through a standardised suite of Zones while managing resource values through the applications of Overlays; and e. There are a few Housing New Zealand sites where Housing New Zealand considers that alternative zonings will better enable it to deliver positive social and community outcomes (meeting the social and economic wellbeing of the community."
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.	"At the overarching level the submitter seeks the following relief; …"that the Council declines the PAUP in respect of all residential zoning provisions and zoning maps. That the residential provisions be reformulated to achieve the outcomes set out below."
	6099-2	Delete the 'construct' of density from all sections of the plan.	"Remove the PAUP 'construct' of density from all sections of the plan."
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.	"Merge all MHU and THAB zoned land to create a new THAB zone."
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and	"Rezone as MHU all areas zoned MHS under the notified PAUP…Apply the new MHU zone to all residential sites with access off all main arterials and connecting

		apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.	roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road and so on"
	6099-5	Reduce the size of the Single House zone.	"Decrease the size of the Single House zone."
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.	"Enlarge the THAB zone to all residential sites located within 5 minutes' walk of all main arterials and connecting roads – such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc and reduce the extent of MHS and Single house zone accordingly."
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.	"Zone all land within 10 minutes' walk of train stations and transport nodes [which is not Business zoned] as THAB."
	6099-10	Delete all density controls.	"Remove all density related controls for the residential zones and Mixed Use zone except that for the Single House zone a minimum subdivision gross site area of 400m2 should apply to any new lots."
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3	
	6212-3	Retain policies.	

	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.	
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.	"We submit that more sites particularly along all arterial roads, within 700 metres walk away from railway stations, town centres and shopping centres should have a THAB zone classification."
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.	"We submit that there should be a return to a single Mixed Housing Zone encompassing approximately 50% of all residential sites in Auckland, and this should have the same planning controls of the Mixed Housing Urban Zones as set out in the PAUP notified on 30 September 2013."
Ministry of Business, Innovation and Employment	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.	"MBIE's concern with the Unitary Plan as proposed is that it does not follow through on its strategic objectives (which are generally supported) with appropriately-aligned policies and rules: - By not providing sufficient capacity through which appropriate zonings and density provisions to meet Auckland's forecast growth"
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.	"…By failing to free development from complicated policies and rules that will create high transaction costs, thereby limiting innovation and responsiveness of supply to demand."
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.	"The general relief sought is that: - Where necessary to achieve alignment with the objectives of the Auckland Plan and the Regional Policy Statement sections of the Proposed Unitary Plan are adjusted and amended such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections, and proactively enable efficient growth in areas of high market demand."
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.	"Unless supply is increased it is unlikely that a substantial change in house prices will be achieved, given increasing demand and restricted supply, unless the proposed Unitary Plan enables more residential development through both greenfield expansion, and just as importantly, by enabling greater residential densities in existing neighbourhoods."
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.	"…the misalignment between the regional level objectives and the district-level provisions are expressed through: … - A deliberate down-zoning apparent between the draft Unitary Plan released

			in March 2013, and the proposed version, creating a misalignment between areas of high demand and the areas where growth is provided for, which may create additional uncertainty for infrastructure providers, and additional cost to housing provision as developers challenge through out-of-zone consents, the development rules and zonings in order to achieve economically viable development."
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.	"There is little justification for why many zoning decisions across the city have been made – i.e. why ostensibly market-attractive areas near transport and employment etc have been zoned at low densities (or lower densities than indicated in the draft Auckland Unitary Plan in March 2013). Inefficient use of market attractive land while protecting micro-amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole, and detract from the overarching vision of Auckland as the world's most liveable city – attractive, economically efficient and socially equitable."
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.	"MBIE seeks amendment to the zoning and density rules pertaining across the region to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement sections of the proposed Unitary Plan, with the zoning, overlays and development controls and other rules adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high-market demand – to meet Auckland's long-term (30 year) growth projections."
Community of Refuge Trust (CORT)	4381-2	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage.	"CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model."
Tim Daniels	4600-1	Retain compact city model approach to intensification.	"I fully support the compact city model approach to intensification, in particular the concept of land within and adjacent to centres, frequent public transport routes and facilities being the primary focus for residential intensification."
	4600-2	Retain density approaches in zoning particularly the no density provision allowed for in the Terrace Houses and Apartment Buildings and Mixed Housing Urban zone.	"I also fully support the approaches to density in the zoning approaches especially the no density provision allowed for in THAB and within mixed housing urban as this will provide for additional growth in areas where public transport is highest and allows for sustainable development of the city."

	4600-3	Rezone areas around bus routes along strategic roads (e.g., Great North Road, New North Road and Dominion Road) to Terrace Housing and Apartment Buildings and Mixed Housing Urban.	"When you look at the zoning along the key bus routes along strategic roads such as Great North Road, New North Road and Dominion Road where high frequent buses are currently located and are going to be further enhanced by Auckland Transport investment strategy in coming years the zoning is not as high as it could be in parts. It is suggested that these areas and other similar roads should be re-considered in respect of there zoning and upzoned as appropriate to THAB and mixed housing urban zones."
Jacques Charroy	5116-1	Rezone (e.g. to Terrace Housing and Apartment Buildings) to increase the housing stock close to the city centre ie. in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn and Arch Hill.	"Transport and housing issues are intimately linked and could be best solved together by increasing the housing stock close to the city center, thereby reducing the need for transport, ie in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn, Arch Hill etc ... This is where densification of housing needs to happen first and be the most intense, regardless of what the few people living there at the moment want. The effect of this would be a more manageable transport system, giving the residents of these areas the choice of walking or biking to downtown Auckland as an alternative to taking the bus. This would help alleviate congestion much more readily than what the current plan would do."
Habitat for Humanity Greater Auckland Limited	3600-10	Delete the Single House zone.	"Habitat submits that the Single Housing Zone be abolished in an effort to ensure that the area within the RUB is able to be developed to its full potential."
Louis Mayo	4797-106	Rezone almost all of the Auckland Isthmus area as Mixed Housing, and delete all Single House zone within the Isthmus area.	"[A]lmost all of the Auckland Isthmus area should be included in the mixed housing urban zone. There is no reason for anywhere in the Isthmus to be in the single housing zone as it meets all the prerequisites for high-quality densification."
Ben Smith	4796-2	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL.	"The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected" …

			In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: Pertaining to the zoning allocation of the Unitary Plan: - Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. - Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone - Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone."
	4796-1	Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].	
Generation Zero	5478-2	Retain the compact city model.	
	5478-8	Amend Objective 2: Up to 70 per cent of total new dwellings by 2040 occurs is occurring within the metropolitan area 2010.	"Generation Zero supports the aim for 70% of urban growth over the next 30 years to be within the 2010 MUL….The wording need to confirm that, by 2040, 70 per cent of development is occurring within the 2010 MUL and that no more than 40 per cent of development has occurred outside the 2010 MUL."
	5478-57	Upzone across the urban area where this supports the Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport.	"These areas of upzoning alone are not enough to meet the 70% intensification target. Therefore we also give more general support to other areas of upzoning across the urban area where that upzoning supports the proposed Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport."
Cranleigh	7491-1	Rezone to provide for more density around areas where there is a high level of amenity, such as parks and coastlines, not just around town centres	"The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity areas has not been sufficiently leveraged. If we are to grow the

		and major transport corridors	attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity – areas such as parks and coastlines are an obvious example of this principle. The PAUP does not deliver on this.

APPENDIX C			
KEY FURTHER SUBMISSIONS TO THE IHP			
Submitter	Number	Submissions Opposed	Key Quotes
Auckland 2040	412	Oppose: Generation Zero	Support: "The submission by Generation Zero, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Auckland 2040 is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects and Urban Design Forum	" "
		Oppose: Property Council of New Zealand	" "
		Oppose: Housing New Zealand Corporation	" "
		Oppose:	" "

		Ockham Holdings Limited	
Character Coalition	2209	Oppose: Property Council New Zealand	Support: The submission by Property Council, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. The Character Coalition is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects	" "
		Oppose: Housing New Zealand Corporation	"In order to accommodate Auckland's residential growth, intensification within our existing suburbs will be required, but Council must ensure a development mix is sensitive to the existing character of Auckland's residential areas. Council must balance the need for intensification with the desirability, including economic, of retaining the residential character of the majority of the suburbs."
Howick Ratepayers and Residents Association	216	Oppose: New Zealand Institute of Architects and Urban Design Forum	"The submission by Institute of Architects and Urban Design Forum, if allowed, would have the effect of removing the distinction between the

Incorporated			MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Howick Ratepayers and Residents Association Inc is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: Ockham Holdings Limited	" "
		Oppose: Generation Zero	" "
		Oppose: Property Council New Zealand	" "
		Oppose: Housing New Zealand Corporation	" "
		Support: Howick Ratepayers and Residents Association Incorporated	"It is a grave oversight of the Unitary Plan that Old Howick has not been gazetted as an Historic Heritage Suburb Area. We believe that Historic Howick must be recognised as a special "Village" and that the suburban nature of this Village based around second oldest Selwyn church in NZ and the traditional Pub, market place and village square and memorials to early Maori and Pioneers must be preserved at all costs."

			"We reject the progressive whittling away of protection for old Howick as seen in the maps below – from Heritage status to Single House with an overlay, to parts downgraded yet further to the Mixed Housing Suburban zoning." "We fear the haphazard approach to development which will be fostered any undifferentiated zoning as it stands whereby incongruous newly developed large edifices could be built in areas of predominantly pre 1944 homes leading to an ugly intrusion in a character landscape and devaluing the esthetic (sic) appearance of whole neighbourhoods."

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2012-454-764
[2013] NZHC 1290

UNDER	the Resource Management Act 1991
BETWEEN	PALMERSTON NORTH CITY COUNCIL Appellant
AND	MOTOR MACHINISTS LIMITED Respondent

Hearing: 13 & 20 March 2013

Counsel: J W Maassen for Appellant
B Ax in person for Respondent

Judgment: 31 May 2013

JUDGMENT OF THE HON JUSTICE KÓS

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[1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.

(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.

(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

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[1] Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

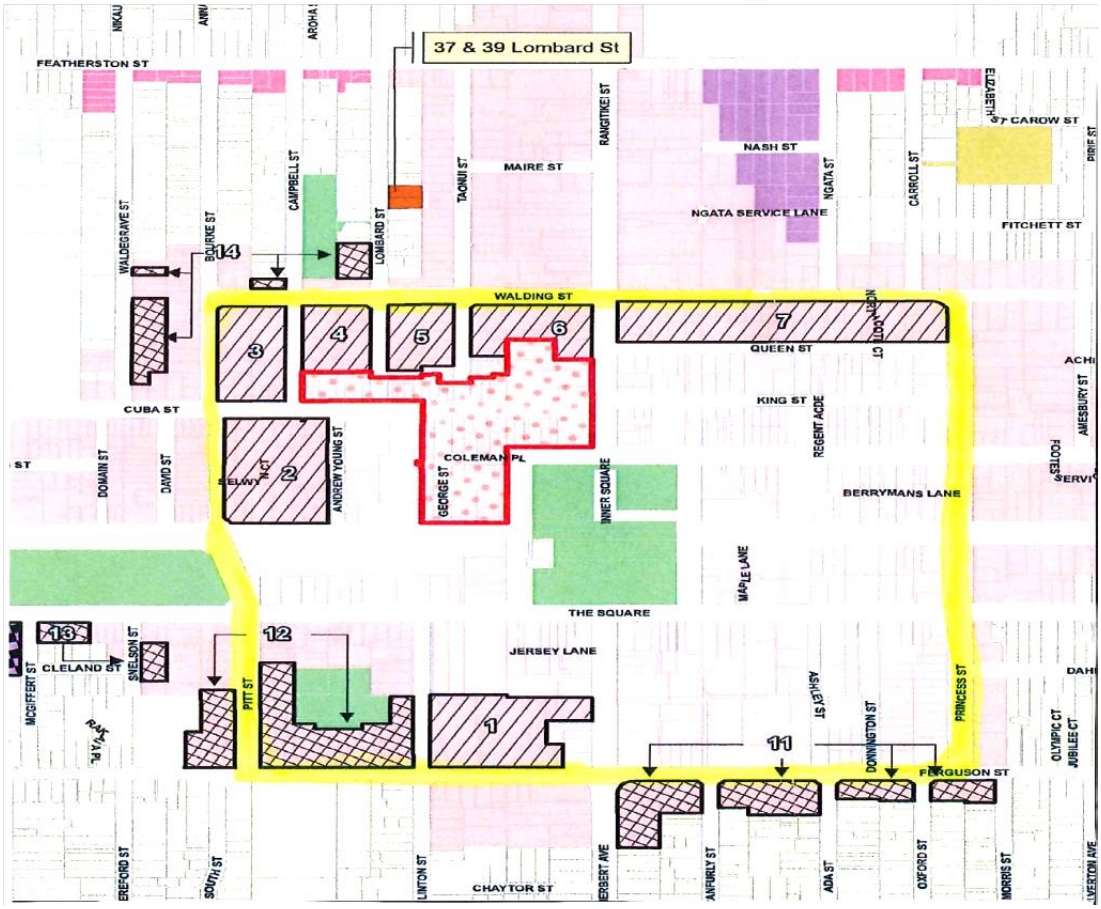
[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 hectares of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did

[2] In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by Schedule 1, clause 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council.*[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council.*[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and

(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619m^2 to the 7.63 hectares proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in schedule 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did clause 7 of Schedule 1 require the local authority to notify persons who might be affected by submissions. Instead just a

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that Schedule 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater.*

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under Schedule 1, clause 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in

that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with Schedule 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Secondly, there is the consultation required by Schedule 1, clause 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Thirdly, there is notification of the plan change. Here the council must comply with Schedule 1, clause 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either –
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

[37] Fourthly, there is the right of submission. That is found in Schedule 1, clause 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

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7 Section 32(6).
8 Schedule 1, clause 3(2).
9 Schedule 1, clause 5(3)(b).

Making of submissions

(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

(2) The local authority in its own area may make a submission.

(3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).

(4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that –

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include* –
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority

[10] Section 43AAC(1)(a).

notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixthly, there is a limited right (in clause 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

> **Certain persons may make further submissions**
>
> (1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
>
> (a) any person representing a relevant aspect of the public interest; and
>
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
>
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a

further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within clause 8(1)(a). For a person to fall within the qualifying class in clause 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what clause 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms clause 8. It is worth setting out the relevant part of that report in full:

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.
>
> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources

[11] See at [25] above.

> would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by clause 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of clause 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10 day timeframe provided for in clause 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a clause 5(1A) equivalent in clause 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, Part 2, clause 22, states:

> **Form of request**
>
> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or

plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].

(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?

(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council.*[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater.* *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council.*[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater.* That gloss was disregarded in *Option 5.* I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

13 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].

17 At [59].

(b) an approach in which "on" is treated as meaning "in connection with"; and

(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Secondly, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real

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[18] At [65].

opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) To further lower the minimum sub-division lot size; and

(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26] to [44]. Much of what is said there remains relevant today. It noted amongst other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

[61] The Court noted that the statutory scheme suggested that: [23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under clause 5

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22 At [38].
23 At [41].
24 At [42].

notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42

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25 At [44].
26 At [51].
27 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council.*[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another High Court decision in

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[28] At [34].

[29] *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

Countdown Properties Ltd v Dunedin City Council.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within Schedule 1, clause 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).

wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might

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[34] Nolan (ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

[35] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under Schedule 1, Part 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the Schedule 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in clause 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about

by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to Schedule 1, clause 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of clause 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed

in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
>
> ...
>
> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit

> for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10 day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater*.

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under Schedule 1, clause 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council.*[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.
38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
39 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under Schedule 1, Part 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Stephen Kós J

Solicitors:
Cooper Rapley, Palmerston North for Appellant

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 191

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

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

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

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

REASONS

Introduction

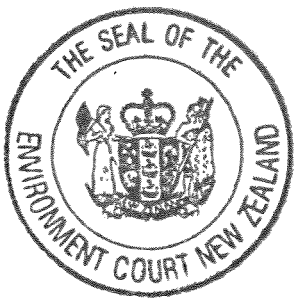
[1] This decision deals with the preliminary issue as to whether two appeals are within the scope of a plan change.

Background

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

Rangiuru Business Park

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

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

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

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

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

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

Ambit of PC72

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

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

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

(a) Divide the CSA into two distinct parts;

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

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

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

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

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

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

(a) amending the staging regime;

(b) amending the road infrastructure provisions;

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

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

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

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

The content of the submissions

[14] In its submission, Bluehaven submitted:

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

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

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

15 Agreed bundle of documents, Tab 14.

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

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

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

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

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

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

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

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

The Council's decisions on submissions

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

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

[16] Agreed bundle of documents, Tab 15.

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

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

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

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

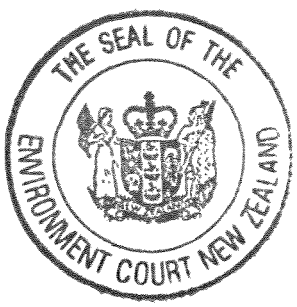
Submissions for a cap on the gross floor area for offices and retail are considered to be outside the scope of what is a very limited plan change. This plan change is not an opportunity to re-visit such matters, as these would have to be addressed by way of a further plan change,

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

The scope for a submission

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[32] As Allan J observed:[32]

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

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

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

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

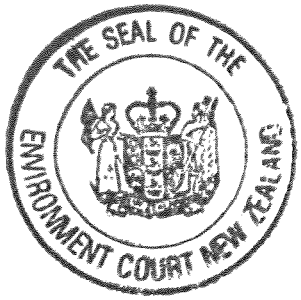
31 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC)
32 Above at fn 28 at [43].
33 Above at fn 19 at [81].
34 Above at fn 20.
35 Above at fn 19 at [81].
36 Above at fn 19 at [79].
37 Since the coming into force of the Resource Management Amendment Act 2013 on 4 September 2013, a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

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

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

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

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



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

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

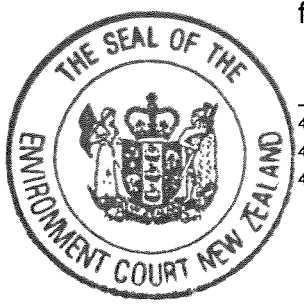
[39] Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether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

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

The arguments presented

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Are the submissions "on" the plan change?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

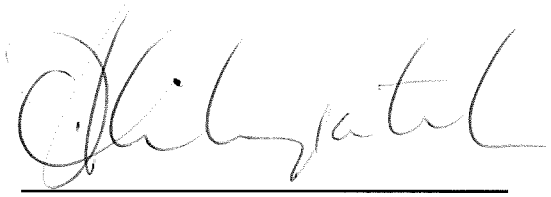
[61] In terms of the second limb of the *Clearwater* test (whether the submission would permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected), it seems clear that there is little risk where, as here, the submitters seek relief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

Conclusion

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

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

For the Court:



DA Kirkpatrick
Environment Judge