| | Bundle of Authorities Relied On |
|---|---|
| 01 | Albany North Landowners v Auckland Council [2017] NZHC 138 |
| 02 | Campbell v Christchurch City Council [2002] NZRMA 332 (EnvC) |
| 03 | Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council [2015] NZEnvC 166 |
| 04 | Countdown Properties (Northlands) v Dunedin City Council [1994] ELRNZ 150 (HC) |
| 05 | General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 |
| 06 | Gertrude's Saddlery Limited v Queenstown Lakes District Council [2020] NZHC 3387 |
| 07 | Hastings v Auckland City Council A068/01 |
| 08 | Palmerston North City Council v Motor Machinists Ltd [2013] NZHC 1290 |
| 09 | Royal Forest and Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 (HC) |

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

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

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|---|---|
| BETWEEN | ALBANY NORTH LANDOWNERS<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>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

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**JUDGMENT OF WHATA J**

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*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**

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| BETWEEN | AUCKLAND MEMORIAL PARK LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2323**

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| BETWEEN | AUCKLAND UNIVERSITY OF TECHNOLOGY<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2333**

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| BETWEEN | FRANCO BELGIORNO-NETTIS<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2335**

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| BETWEEN | FRANCO BELGIORNO-NETTIS<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2351**

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| BETWEEN | BUNNINGS LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2326**

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| BETWEEN | CHARACTER COALITION INC LTD & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2327**

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| BETWEEN | CHARACTER COALITION INC LTD & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2322**

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| BETWEEN | STEPHEN HOLLANDER<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2321**

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| BETWEEN | HOWICK RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2320**

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| BETWEEN | JPR ENTERPRISES & ORS<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2324**

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| BETWEEN | NORTH EASTERN INVESTMENTS LIMITED & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2325**

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| BETWEEN | NORTH EASTERN INVESTMENTS LIMITED & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2349**

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| BETWEEN | THE STRAITS PROTECTION SOCIETY INCORPORATED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2350**

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| BETWEEN | STRAND HOLDINGS LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2344**

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| BETWEEN | SUMMERSET GROUP HOLDINGS LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2305**

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| BETWEEN | VALERIE CLOSE RESIDENTS GROUP<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2341**

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| BETWEEN | VILLAGE NEW ZEALAND LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2316**

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| BETWEEN | WALLACE GROUP LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2331**

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| BETWEEN | MAN O'WAR FARM LIMITED<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

**CIV-2016-404-2302**

| | |
|---|---|
| BETWEEN | SOUTH EPSOM PLANNING GROUP INCORPORATED & ANOR<br>Plaintiff |
| AND | AUCKLAND COUNCIL<br>Defendant |

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

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

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## 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

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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.

[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

[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

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[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

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

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[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

[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.<br><br>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.<br><br>Amend the extent of the Single House zone significantly to less than 10% of the Auckland area. |

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| | Recommendations<br><br>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". …<br><br>In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. …<br><br>If the Proposed Plan is not declined, then amend it as outlined below:<br><br>– Pertaining to the zoning allocation of the Unitary Plan:<br><br>– Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone.<br><br>– Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone<br><br>– 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.<br><br>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 |

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|---|---|---|
| | 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.<br><br>Blockhouse Bay Town Centre<br><br>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.<br><br>Blockhouse Bay North – New Windsor South<br><br>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.<br><br>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.<br><br>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. …<br><br>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. …<br><br>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<br><br>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.<br><br>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.<br><br>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.<br><br>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:<br><br>– Areas of Mixed Use and centres in Newton, Grafton<br><br>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<br><br>Suggested: More Mixed Use and THAB in places such as:<br><br>– Around the future Newton rail station, near St Benedicts St<br><br>– Much of Grafton West, around Seafield View Rd and Park Rd<br><br>– 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…

---

[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".<br><br>(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

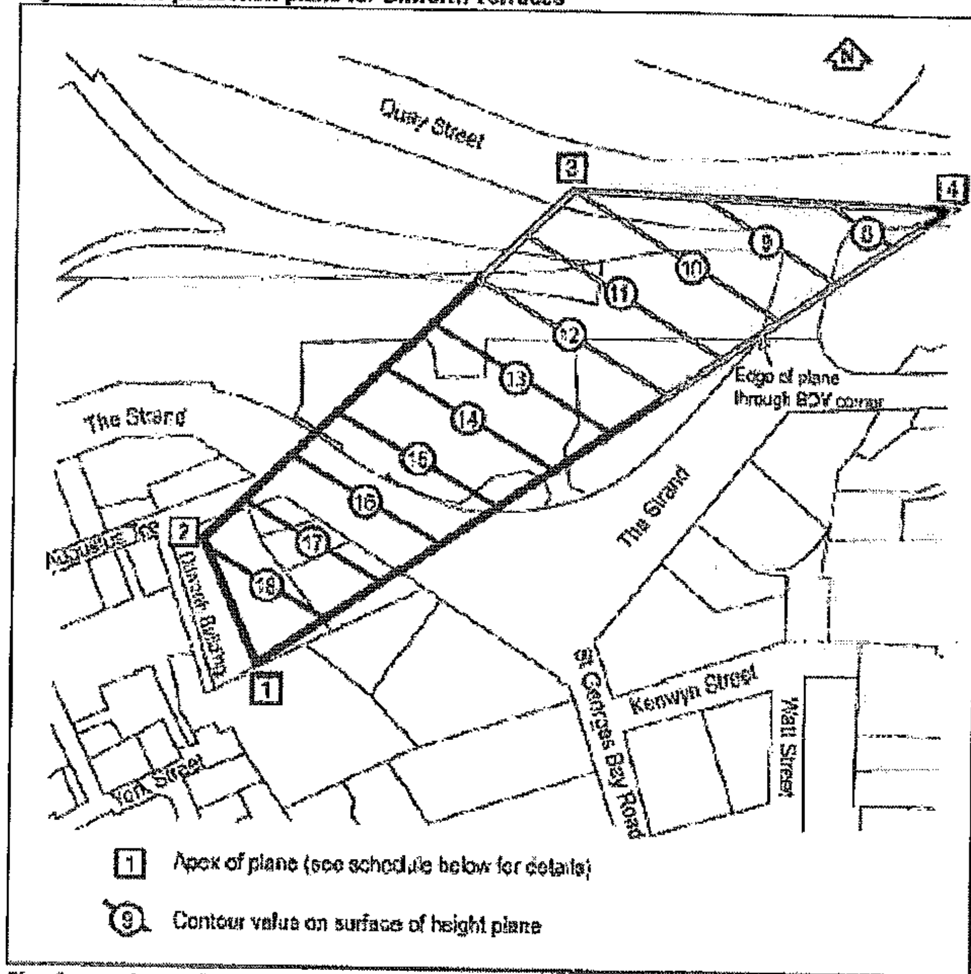
concerns the 65 affected Howick properties. For the reason just mentioned the general submissions identified by the IHP (and others) fairly raised the issues that HRRA are now seeking to re-litigate though specifically in relation to the 65 identified properties. I see no broader unfairness by upholding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

[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. |

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| 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 | |

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| 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 | | | |
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| **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 |

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| | | 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)."<br><br>"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:<br><br>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);<br><br>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;<br><br>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 |

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| | | | 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);<br><br>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<br><br>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;<br>…"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 |

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| | | 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. | |

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| | 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:<br>- 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:<br>- 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:<br>…<br>- A deliberate down-zoning apparent between the draft Unitary Plan released |

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| | | | 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.” |

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| | 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"<br>… |

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| | | | In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage.<br>…<br>If the Proposed Plan is not declined, then amend it as outlined below:<br>Pertaining to the zoning allocation of the Unitary Plan:<br>- Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone.<br>- Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone<br>- 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 |

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| | | 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** | | | |
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| **KEY FURTHER SUBMISSIONS TO THE IHP** | | | |
| Submitter | Number | Submissions Opposed | Key Quotes |
| Auckland 2040 | 412 | Oppose:<br>Generation Zero | Support:<br>“The submission by Generation Zero, if allowed, would have the effect of removing the distinction between the MHS and MHU zones.”<br>“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.”<br>“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:<br>New Zealand Institute of Architects and Urban Design Forum | “ “ |
| | | Oppose:<br>Property Council of New Zealand | “ “ |
| | | Oppose:<br>Housing New Zealand Corporation | “ “ |
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| | | Ockham Holdings Limited | |
| Character Coalition | 2209 | Oppose:<br>Property Council New Zealand | Support:<br>The submission by Property Council, if allowed, would have the effect of removing the distinction between the MHS and MHU zones."<br>"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."<br>"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:<br>New Zealand Institute of Architects | " " |
| | | Oppose:<br>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.<br>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:<br>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 |

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| Incorporated | | | MHS and MHU zones.”<br>“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.”<br>“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:<br>Ockham Holdings Limited | “ “ |
| | | Oppose:<br>Generation Zero | “ “ |
| | | Oppose:<br>Property Council New Zealand | “ “ |
| | | Oppose:<br>Housing New Zealand Corporation | “ “ |
| | | Support:<br>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.” |

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| | | | "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."<br><br>"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." |

**DOUBLE SIDED** ORIGINAL

Decision No. C 40 /2002

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

**AND**

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

**BETWEEN** **VALERIE MARION CAMPBELL**

(RMA 532/99)

Appellant

**AND** **CHRISTCHURCH CITY COUNCIL**

Respondent

**BEFORE THE ENVIRONMENT COURT**

-Environment Judge J R Jackson (sitting alone under section 279 of the Act)

**HEARING** at **CHRISTCHURCH** on 6 and 14 March 2002

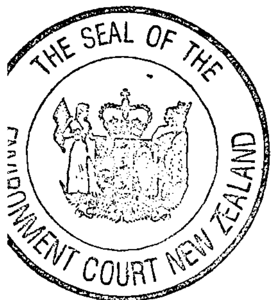
**APPEARANCES**

Mr H L Cuthbet-t for Mrs V M Campbell
Mr J G Hardie for the Christchurch City Council
Ms A Dewar and Ms A C Limmer for the C S Campbell Family Trust, Houseman Developments Ltd, and Chrystall Holdings Ltd – as section 271A parties

## DECISION AS TO JURISDICTION

### *Introduction*

[1] This is another decision as to the scope of Mrs Campbell's reference about the provisions of the proposed City Plan of the Christchurch City Council ("the Council") prepared under the Resource Management Act 1991 ("the Act" or "the RMA"). In a decision dated 21 February 2002[1] I held that her reference, which on its face seeks to rezone land from a Living Hills A ("LHA") or B ("LHB") zone to a Rural (Hills) zone, does not apply to land owned by a Mr and Mrs



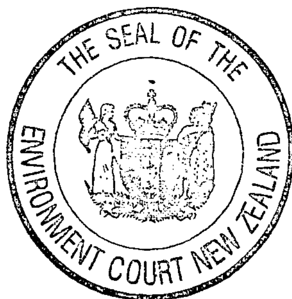

[1] Decision C23/2002.

Bryce and which is zoned in the proposed plan as "Living Hills" (which is different from the LHA and LHB zones).

[2] The question now raised by Ms Dewar for various other section 271A parties about the reference has raised rather more complex issues about the Court's jurisdiction. Those parties – Chrystall Holdings Ltd, Houseman Developments Ltd and the C S Campbell Family Trust (together called "the landowners") – own land on Monck's Spur and Mount Pleasant towards the eastern end of the Port Hills. Their land was zoned LHA or LHB by the Council in the proposed plan (as revised) and so they understood (according to counsel) Mrs Campbell's reference as seeking a change of zoning to a Rural Hills zone. That appears simple enough.

[3] Pursuant to a timetable order for the exchange of evidence, Mrs Campbell has given her evidence – including that of a landscape architect Ms D J Lucas – to the Council and the landowners. In that evidence apparently Mrs Campbell states that she now accepts that at least some of the land on Monck's Spur should not be rezoned as Rural H, but may remain LHA or LHB subject to further controls as to design, landscaping, and the provision of development plans. I add that I have not seen any such statement by Mrs Campbell and nor has there been any formal advice to the Court that she is limiting the scope of the relief she seeks. In fact at the hearing before me, her recently instructed counsel, Mr Cuthbert, expressly stated that Mrs Campbell was not resiling from the relief she claims in her reference.

[4] I should also record that I was handed, by consent, an "Addendum" to the evidence of Ms D J Lucas (a landscape architect to be called for Mrs Campbell) which shows that that witness is recommending design controls, apparently within a framework of LHA and/or LHB zonings in respect of the landowners' land.




[5] What the landowners object to is that while they had previously understood the issue between the parties was "Living Hills A (or B) zoning versus Rural Hills zoning", they now find from the briefs of evidence circulated

by Mrs Campbell, that it appears the real issue is as to modification of their land's zonings (but not for the LHA and LHB zones elsewhere on the Port Hills) by the addition of extra design or landscaping controls. They submit it is beyond the Court's jurisdiction to consider imposition of such controls.

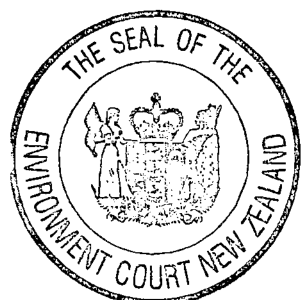
[6] There is some urgency about this because the Port Hills references have been set down for hearings in various weeks over the next three months commencing with the general cases of the parties on Monday 11 March 2002. A further complication is that after the first hearing on 6 March 2002 I considered there might be a more fundamental difficulty with Mrs Campbell's original submission to the Council – in particular whether any of the relief now sought was requested in the original submission. I raised that with the parties and then reconvened the hearing on 14 March, for further argument.

***Background***

[7] The Council notified its proposed plan in 1995 (this version of the City plan I will call "the notified plan"). After receiving submissions and conducting a hearing on them the Council notified an amended plan in 1999 ("the revised plan"). Mrs Campbell's reference to the Court of provisions in the revised plan was founded on her original submission to the Council concerning the notified plan.

[8] The undated and unsigned submission by Mrs Campbell to the Council reads (relevantly):

> *Submission to the Proposed City Plan*
> *Valerie Campbell*
> *Port Hills Road, Christchurch 2.*
>
> *Introduction:*
> ...
> *I wish to submit points on a number of aspects of the Plan:*



*Protection of the Port Hills, including comments on Hills Housing and its expansion.*

*Coastal environment*

*Maintenance of public access to the Port Hills, coastline and waterways.*

*The Green Wedge.*

*Protection of the Port Hills*

*While the recreation value of the Port Hills is immense, its value as an unbroken backdrop [of consfsntly (sic) changing natural beauty] to the city of Christchurch is immeasurable. It feeds the aesthetic needs of our citizens as well as the need for passive and more active recreation.*

***Volume 2: environmental results anticipated; second point***

*P2/14*

*Present statement is too vague, restricting [I] suggest:*

*"Maintenance of overall natural character AND significant features of the Port Hills. "*

. .

***Volume 2: Objectives; p 2/22;***

*I applaud the objectives expressed in this section ie. "buildings are controlled as to their appearance, siting, location and scale to ensure that any adverse effects are minimised"*

*In fact this is not carried through in the* ***Rules.*** *While there are limits to the area of building on a particular site, and to its size in residential zones there are NO* ***guidelines whatever as to its appearance, sty/e or colour.***

*I, and a great many others agree, that much of the housing being built at present is* ***unsympathetic to its setting and distracts from the unbuilt environment*** *in which it intrudes. Examples which spring to mind as being especially disfiguring to the Christchurch backdrop are Mt Pleasant [and] new divisions east of Cashmere. Similar buildings on the* ***proposed developments at Worsley's Road, above Halswell Quarry and the extension of Mt Pleasant*** *are to be deplored given this lack of "guidance" on the part of the City Council.*

*I request the following:-*

- *that these developments be withdrawn from the City Plan and be returned to RuH zone.*
- *that the City give serious consideration to developing some guidelines indication the general structure and colours regarded as appropriate to such visible ENVIRONMENTAL SITES.*
- *that above the 160 metre contour any building will be a notifiable act.*

*Volume 3: Statement of Rules. Chapter 5: Conservation Zone.*

*I support the general thrust of the Rules governing the Conservation Zones. . . .*

[My emphasis].

[9] There is a slightly disconcerting use of emphases in the submission, however at first sight the following points about the relief claimed in the submission seem to follow: Mrs Campbell is raising four issues with the Council and the first of these is the "protection" of the Port Hills. She then considers each issue in turn, commencing with the Port Hills. She is concerned about the effects of new housing development on the Port Hills in three places: Mount Pleasant, Worsley's Spur, and near Halswell Quarry. She wishes "new developments" in those areas to be rezoned as Rural Hills. All buildings above 160 metres are to be "notifiable" regardless of zone.

[IO] The Council then had to summarise Mrs Campbell's submission (amongst thousands of others) under clause 7 of the First Schedule to the RMA. By consent I was given the relevant pages of the Council's summary of submissions. There are hundreds of pages of summary in total, but in relation to Mrs Campbell's submission they state:

| | | | | | |
|---|---|---|---|---|---|
| **2-2.4** | **The protection and enhancement of key elements and processes comprising the City's natural environment.'** | | | | |
| | **- z - j - - -** | | **Decision ID** | **Request** | **Decision Sought** |
| | ... | | | | |
| | S2962 | V Campbell | D6810 | Amend | That the City develop guidelines for general structure and colours appropriate to visiable (sic) environmental sites.[3] |
| **3-4** | **Rural Zones** | | | | |
| | **Submission** ID | Submitter | Decision ID | Request | Decision **Sought**[4] |
| - | S2962 | V Campbell | D6812 | Amend | That above the 160m contour of any building be a notified application.[5] |
| | ... | | | | |
| **4-55** | **Planning Map 55** | | | | |
| | **Submission ID** | **Submitter** | **Decision ID** | **Request** | **Decision Sought**[6] |
| | **S2962** | V Campbell | D6809 | Amend | Rezone Living HA zone .and (Living 1 zone?) in Mt Pleasant area to Rural (Hills) zone.' |
| | ... | | | | |
| | **Planning Map 59"** | | | | |
| | **S2962** | **V Campbell** | **D6806** | Amend | Rezone Living HA zone above Halswell Quarry to Rural (Hills) zone.[9] |
| | I.. | | | | |

2 Summary p.31.
3 Summary p.177.
4 Summary p.324.
5 Summary p.325.
6 Summary p.796.
7 Summary p.799.
8 Summary p.803.
9 Summary p.805.

| | | | | | |
|---|---|---|---|---|---|
| | Planning Map 60"' | | | | |
| | **S2962** | V Campbell | D6808 | Amend | Rezone Living HB zone(?) in Worsleys Road to Rural (Hills) zone." |

The most relevant entry for current purposes relates to Planning Map 55. It will be seen that the Council staff "read" Mrs Campbell's mind. The summary of her submission is more explicit about the relief she is seeking than the submission itself -- it states that she is seeking to change the LHA zone in the Mount Pleasant area (and, by implication, shown on Planning Map 55A) to Rural Hills.

[I I] In its decision the Council declined to grant any of the relief sought by Mrs Campbell in respect of the Port Hills. In her reference the relief claimed by Mrs Campbell is (relevantly):

> *That the areas zoned Living Hills A and B, [in the area known generally as Mt Pleasant] on Planning Map 55, in the* ***Christchurch City Plan,*** *notified in May, 1999, which have not been already the subject of a Decision of the Environment Court, be returned to the RuH zone.*
>
> ...
>
> ***And*** *Any consequential changes, including cross-referencing or explanation, necessary to give effect to the relief sought, . . .*
>
> ***Or*** *Such other relief as may be considered appropriate by the Court and/or the parties in agreement.*

[12] With that background, I now turn to ascertain whether Mrs Campbell's submission and reference give the Environment Court jurisdiction to entertain the relief she now seeks. I adopt the approach set out in ***Feltex Carpets Ltd v Canterbury Regional Council'*:***

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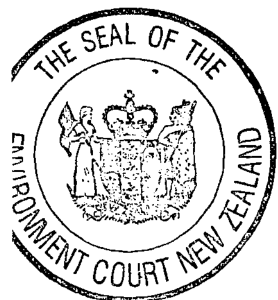


10 Summary p.808.
11 Summary p.808.
12 (2000) 6 ELRNZ 275 at para [9].

*the relevant factors to consider when examining the breach of a requirement of the RMA include:*

*(1) What is the purpose of the provision, looking at its text in isolation? (the more important it is to other people the less accepting of any breach the Court is likely to be)*

*(2) What is the place of the provision in the organisation and format of the RMA, and what is its relative importance in that scheme?*

*(3) What is the extent of the breach?*

*(4) What is the actual effect of the breach on other persons?*

*(5) Making an overall assessment in the light of the answers to (1)-(4): is the purpose in section 5 of the RMA and of the particular provision sufficiently met to excuse the breach?*

***Purpose of a submission***

[13] Clause *6* of the First Schedule to the RMA provides that any person may "in the prescribed form" make a submission on (inter alia) a proposed plan that has been publicly notified. The prescribed form is identified by Regulation 5 of the Resource Management (Forms) Regulations 1991 ("the Regulations"). This states:

> 5. *Submissions to Local Authorities*
> *Every submission under clause 6 of the Schedule 1 to the Act on a proposed policy statement or plan shall be in form 3 in the Schedule to these regulations or to like effect.*

The words "to like effect" express what modern principles of statutory interpretation imply - that compliance with a form need not usually be exact. The High Court in ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[13] stated:

[13] [1994] NZRMA 145 at 147.

*Persons making submissions in many instances are unlikely to fill in the forms exact/y as required by the First Schedule and the Regulations, even where the forms are provided to them by the Local Authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.*

[14] Form 3 of the Regulations requires a submitter, after identifying himself or herself and the relevant local authority and proposed plan, to supply the following information:

> I. *The specific provisions of the proposed policy statement or plan that my submission relates to are as follows:*
>
> *2. My submission is that:*
>
> *[State in summary the nature of your submission. Clearly indicate whether you support or oppose the specific provisions or wish to have amendments made, giving reasons]*
>
> *3. I seek the following decision from the local authority:*
> *[Give precise details]*
>
> *4. I do or do not wish to be heard in support of my submission.*
>
> *5. If others make a similar submission I would or would not be prepared to consider presenting a joint case with them at any hearing.*

[15] Form 3 also requires:

> (b) the signature of the person making the submission (or their agent);
> (c) a date;

(d) a title, and address for service of the submitter.

None of these requirements were met in this case. However, since the requirement for a signature and address for service are, partly, duplication of information required at the head of Form 3 (and Mrs Campbell did supply her name and address) I hold that those omissions do not invalidate her submission. Of greater concern is whether Mrs Campbell complied with the first three substantive requirements of Form 3 as quoted above, and this issue – as to the extent of the breach – will be examined below.

[16] The High Court has given some guidance on what is required of submitters. In ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** the Full Court stated[14]:

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

The High Court continued?

> *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.*

It concluded that?

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14 [1994] NZRMA 145 at 167.
15 [I 994] NZRMA 145 at 165.
16 [1994] NZRMA 145 at 164.

*... the local authority or Tribunal [now the Environment Court] must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.*

[17] In this context there are three points particularly worth noting about ***Countdown:***

(1) that some of the modifications to the proposed plan change were not specifically sought as "relief" in a submission, but were contained in "grounds". Thus there is High Court authority for the proposition that one cannot rule out relief based on reasons in a submission. ***Countdown*** was followed by the Environment Court in ***re an Application by Vivid Holdings Ltd***[17] where the reasons for a reference were held to give guidance as to the real relief sought;

(2) It is "unreal" and legalistic to hold that a Council can only accept or relief sought in any given submission. In other words the local authority may amend its proposed plan in a way that it is not sought by any submission – subject presumably to the constraints that the change must be fair and reasonable, and it must achieve the purpose of the RMA.

(3) The High Court also stated[18]:

*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.*

17 (1999) 5 ELRNZ 264 at 272 [1999] NZRMA 467 at 477.
18 [I 994] NZRMA 145 at 166.

At first sight the High Court seems to have rather diminished (but not eliminated) the importance of giving notice to landowners and other interested persons of changes sought by submissions. There is, after all, no formal requirement for service under the RMA in respect of proposed plans. However as will be seen shortly there are in fact other safeguards for such other parties in the scheme of the Act which affect what is "fair" in the plan preparation process.

[18] In the subsequent case Royal ***Forest & Bird Profecfion Society Inc v Southland District Council*** Pankhurst J. stated[19]:

> *... it is important that 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.*

Both of the High Court cases were concerned with what relief could be granted even if not expressly sought as such in a submission. There was no direct issue in those cases as to whether the relevant submissions were sufficiently clear in themselves. I hold that the same general test applies – does the submission as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue.

[19] I was referred to a number of Planning Tribunal and Environment Court decisions: ***Romily Properfies Lfd v Auckland City Council***[20]***; Biocycle (New Zealand) Ltd v Manawatu-Wanganui Regional Council***[21]***; Lovegrove v Waikato District Council***[22]***; Duchess of Rothesay v Transit New Zealand***[23]***; Atkinson v Wellington Regional Council***[24]***; Hardie v Waitakere City***

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19 [I 997] NZRMA 408 at 413.
20 Decision A95/96.
21 Decision W 148/96.
22 Decision Al 7/97.
23 Decision W33/98.
24 Decision W 13/99.

***Council***[25]***.*** All those cases turn on their own facts given the principle stated by the High Court in the ***Countdown*** and Forest ***and Bird*** cases so I can obtain no real guidance from them.

[20] The High Court's guidance in ***Counfdown*** is, with respect, very useful on the issue as to whether a Council may make changes not sought in any submission. It appears that changes to a plan (at least at objective and policy level) work in two dimensions. First an amendment can be anywhere on the line between the proposed plan and the submission[26]. Secondly, consequential changes can flow downwards from whatever point on the first line is chosen. This arises because a submission may be on any provision of a proposed plan[27]. Thus a submission may be only on an objective or policy. That raises the difficulty that, especially if:

(a) a submission seeks to negate or reverse an objective or policy stated in the proposed plan as notified; and

(b) the submission is successful (that is, it is accepted by the local authority)

- then there may be methods, and in particular, rules, which are completely incompatible with the new objective or policy in the proposed plan as revised. It would make the task of implementing and achieving objectives and policies impossible if methods could not be consequentially amended even if no changes to them were expressly requested in a submission. The alternative – not to allow changes to rules – would leave a district plan all in pieces, with all coherence gone.

[21] The danger in the proposition that a change to an objective or policy may lead to changes in methods – including rules which are binding on individual citizens – is that citizens may then subsequently protest with some justification that they had no idea that a rule which binds them could result from a submission on an objective.

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25 Decision A69/2000.
26 See paragraph [37] below for further discussion of this.
27 See paragraph 1 of the submission Form 3 set out earlier in this decision.

[22] In my view there are two answers to that. The simple, legalistic answer is that the operative date of a proposed plan as revised – with all consequential changes to rules included – needs to be notified[28] and copies made available at public libraries*' and in the local authority's office[30]. From that date every rule in a district plan has the force and effect[31] of a regulation under the Act.

[23] The second answer, attempting to answer questions as to the fairness of the procedure, relies on the various methods of attempting to advise citizens of the changes that might result from the submission process. I now turn to consider the procedure for the preparation (and change) of a district plan.

***The place of submissions in the organisafion and format of the RMA?***

[24] A submission is the first opportunity that ordinary citizens have to contribute to the preparation of a district plan[32]. The procedural requirements for preparation of a district plan are set out in the First Schedule to the Act. I will refer to those, to the extent necessary, shortly. First, however it is important to note the substantive requirements for a district plan, because they give some guidance as to what submissions may try to achieve.

[25] Every district in New Zealand must have a district plan[33] at all times. A territorial authority[34] must[35]:

> *... prepare and change its district plan in accordance with its functions under section 31, the provisions of Pat-t II [and] its duty under section 32 . . . .*

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28 Clause 20 of the First Schedule to the RMA.
29 Clause 20(5) of the First Schedule to the RMA.
30 Section 35 RMA.
31 Section 76(2) RMA.
32 Or regional plan or policy statement; for brevity in this decision we refer only to a "district plan" or "proposed plan".
33 Section 73(1) RMA.
34 Similar obligations apply to regional councils as local authorities: sections 61 &66 RMA.
35 Section 74 RMA.

[26] The contents of a district plan must state, amongst other things[36]:

> *(a) The significant resource management issues of the district; and*
>
> *(b) The objectives sought to be achieved by the plan; and*
>
> *(c) The policies in regard to the issues and objectives, and an explanation of those policies; and*
>
> *(d) The methods being or to be used to implement the policies, including any rules; and*
>
> *(e) The principal reasons for adopting the objectives, policies, and methods of implementation set out in the plan; and . . .*
>
> [My underlining].

[27] The unique nature of a district plan as "a living and coherent social document"[37] is identified in sections *74* and 75 of the Act: it must identify objectives and policies which are not directly binding on individual citizens at all: ***Auckland Regional Council v Norfh Shore City Council***[38]***.*** Further a district plan does not need to contain any rules. It usually does but rules are only one category of method that can be used.

[28] Objectives and policies can be general or specific. As Cooke P (as he then was) stated when giving the decision of the Court of Appeal in ***Auckland Regional Council v North Shore City Council***[39]***:***

> *It is obvious that in ordinary present day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday*

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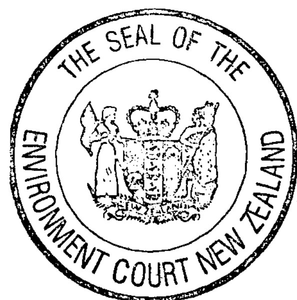
36 Section 75 RMA.

37 ***(1984) J Rattray & Son Ltd v Christchurch City Council*** 10 NZTPA 59 (CA) per Woodhouse P. (this phrase was applied to a plan under the Town and Country Planning Act 1977; but it has been held to apply with equal accuracy to plans under the RMA).

38 [1995] NZRMA 424 at 431 (CA).

39 [I 995] NZRMA 424 at 430 (CA).



New *Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific.*

[29] The hierarchical nature of a district plan is clear: the methods must implement[40] or achieve[41] the objectives and policies of the plan: ***Beach Road Preservation Society Inc v Whangarei District Court***[42].

[30] Clause 6 is part of the First Schedule to the Act. The First Schedule comprehensively sets out the procedure for the preparation of proposed plans and policy statements under the RMA. As such clause 6 is one step in the process started under Part V of the RMA and continuing with the process set out in Part I of the First Schedule to the Act from preparation under clause 2 to the date a district plan becomes operative under clause 20.

[31] A submission has an important continuing role in the preparation of a plan as shown by reference to the following (relevant) clauses of part I to the -First Schedule:

- Clause 7 — Public notice of a summary of all submissions must be given;
- Clause 8 — Further submissions may be made, supporting or opposing a primary submission made under clause 6;
- Clause 8B — A hearing into all the submissions must be held by the local authority (and a decision issued under clause IO);
- Clause 14 — Any person who made a submission may lodge a reference in the Environment Court *"if that person referred to that provision or matter in that person's submission ..."*.

40 Section 75(l)(d) RMA.
41 Section 76(l)(b) RMA.
42 [2001] NZRMA 176 at para [39].

- Clause 16A A local authority may initiate a variation to a proposed plan.

[32] The clause 7 summary is important and has been the subject of various decisions which hold that if the summary is inaccurate or unfair or misleading then an amended summary may need to be renotified e.g. Re ***Christchurch City Council (Montgomery Spur)***[43]; ***Re an Application by Christchurch International Airport Ltd and Another***[44]***; re an Application by Banks Peninsula District Council***[45]***.***

[33] For present purposes it is important to note that for a person who is interested to know whether there are any submissions seeking changes to the provisions of a proposed plan that concern them, the clause 7 summary is where they start. So if the summary prepared by the Council is fair, accurate and not misleading, then readers are not initially disadvantaged. Thus I consider ***Romily Properfies Limited v Auckland City Council*** may have overstated the position when the Court stated[46]:

> *People who may wish to oppose a submission or appeal, or to propose some modification to the relief sought, have* ***only*** *the original documents from which to learn what is the scope of the possible amendments that might be made to the proposed instrument . . .* [My emphasis].

As I have stated above, there is another, earlier, source for ascertaining the scope of a submission: the Council's summary of that submission.

[34] I respectfully prefer the approach of the Environment Court in ***Lovegrove and Others v Waikato District Council***[47]***.*** In that decision the Environment Court was concerned with three references on the respondent's proposed

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43 (1999) 5 ELRNZ 227.

44 Decision C77/99 confirmed by the High Court on appeal under the name ***Health/ink South Ltd v Christchurch City Council*** [2000] NZRMA 375.

45 Decision C27/2002.

46 Decision A95/96 at p.6.

47 Decision AI 7/97.

district plan. One of the references by a Mr Austin was based on a submission prepared by Mr Austin himself which stated[48]:

> *I support the plan to allow sub-division of the rural zoned area of Windmill Road.*
>
> ...
>
> *The size of farmlet blocks as above which comprises . . . nearly 1/3 in gully is not sufficient size to make it viably commercial. I seek subdivision be allowed due to strong demand for smaller blocks in this area.*

Mr Davis was fortunate that the Council staff included his submission in the summary relating to the Rural Residential zone[49].

[35] The Court stated[50]:

> *A planning authority, and this Court too, would wish to give a broad interpretation to a submission prepared without professional assistance if it is capable of being understood, provided that in doing so no one else is prejudiced. In this case there is no risk of prejudice of others.*
>
> *A submission has to inform the planning authority with particularity what amendment is sought to the proposed instrument. The words from Mr Austin's submission already quoted do not themselves convey that he* was *seeking that his property be rezoned Rural Residential. Even so, the Council officials evidently divined that this was what he was seeking, and apparently they were correct. Even though Mr Austin did not attend to clarify what he was seeking, the submission* was *considered by the committee on that basis and, in addition to stating that the submission could not be accepted because it was not specific enough, the committee also gave a decision rejecting the submission on the merits.*

48 Decision Al 7/97.
49 Decision Al 7/97 at p. 11.
50 Decision Al 7/97 at p. 13.

*In those circumstances we accept Mr Clark's contention that although it* was *wanting in particularity, the submission was sufficient that it could be and was understood. We also accept that Mr Austin acted in good faith.*

*For those reasons we do not dismiss Mr Austin's appeal for the reason that it seeks relief which was not specifically sought in the submission. However we take the oppottunity to state again that in general the wording of a submission sets the limits of the relief that can be granted, as it may be relied on by others who may wish to support or oppose the submission.*

[36] Mr Davis' situation in Lovegrove raises the issue as to what happens when a summary of a submission is fair and accurate, but the submission itself is less so. The Court appears to have held that other persons who were not parties to the appeal were not prejudiced because they had been put on notice adequately by the Council's summary.

[37] Clause 14 of the First Schedule needs to be emphasised since the scope of a reference is bounded by the submission(s) at one end and the notified plan at the other. In Re ***Vivid Holdings Ltd*** the Environment Court stated[51]:

*... in order to start to establish jurisdiction a submitter must a raise a relevant 'resource management issue' in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:*

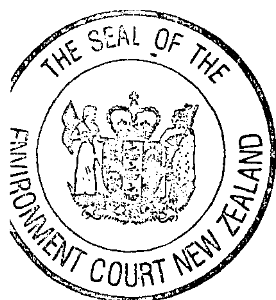
*(a) fairly and reasonably within the general scope of:*
*(i) an original submission; or*
*(ii) the proposed plan as notified; or*
*(iii) somewhere in between*
*provided that:*
*(b) the summary of the relevant submissions was fair and accurate and not misleading.*

51 (1999) 5 ELRNZ 264 at para 19.

[38] *I* now turn to two provisions which are important factors in considering whether a submission **fairly** raises certain relief. Under clause 16A of the First Schedule to the Act a local authority has the power to initiate a variation to a proposed plan at any time before the plan is approved. There are no restrictions on why a council may choose to do that. Obviously one reason might be that a council wished to promote provisions in a proposed plan which no party had requested. Another case is where a party has asked for some general relief in its submission and a local authority considers that other parties should be warned as to precisely what is proposed to be amended in the proposed plan. For present purposes the important aspect of the variation procedure is that it involves further notification of the proposed amendments to the notified plan, since the First Schedule procedure applies to the variation as if it were a plan change[52]. Thus it is in a local authority's power to ensure fairness by notification of any amendments to a proposed plan that have not already been notified.

[39] In ascertaining the place of clause 6 not just within the First Schedule but also in the scheme of the Act as a whole it is important to recognise that, if a reference is lodged in the Environment Court so that it is seized of an aspect of a proposed plan then this Court has additional powers to change a plan. Section 293 of the RMA states [relevantly]:

> ***293. Environment Court may order change to policy statements and plans***
>
> *(1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.*
>
> *(2) If on the hearing of any such appeal or inquiry, the Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider*




52 Clause 16A(2) of the First Schedule.

*the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.*

*(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Court shall –*

*(a) Indicate the general nature of the change or revocation proposed and specify the persons who may make submissions; and*

*(b) Indicate the manner in which those who wish to make submissions should do so; and*

*(c) Require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.*

...

In *Vivid* the Court stated[53]:

> *... the Court has the wide power in section 293 of the Act to change any provision of a plan when hearing a reference to the Court. Certainly this power is exercised cautiously and sparingly, but its existence suggests that if the Court is concerned that other interested persons should be heard then it can remedy that by directing notification under section 293(2). I consider that one of the reasons Parliament has given the Environment Court the powers in section 293, especially in section 293(2) is to cover the situation where the relief the referrer is seeking is not spelt out in adequate detail in the submission and/or the reference. Obviously it is good practice to spell out precisely the relief sought, but it is not essential to do so. If it is not and the Court considers a reasonable case for a particular change to a proposed plan is made out but that interested persons have not had adequate notice – because the relief was not stated, or not clearly – then the Court can exercise its powers under section 293(2).*

53 (1999) 5 ELRNZ 264 at para 28.

[40] The wider scheme of the Act also needs to be considered, including the purpose of sustainable management of natural and physical resources[54]. Indeed references (and their relative submissions) have been struck out as not relevant to the purpose of the Act: Winter ***and C/ark v Taranaki Regional Council***[55].

[41] Another relevant part of the RMA is Part III setting out duties and restrictions under the Act. Ms Dewar submitted that section 9 of the RMA entails that there are no restrictions on land use under the Act unless a plan provides them (cf ***Mar/borough Ridge Ltd v Mar/borough District Council***[56]). She then argued that if a submitter seeks to impose extra, or at least different, restrictions on landowners then both the land in question and the proposed restrictions should be clearly identified. I agree that providing fair notice to landowners of possible changes affecting their land is important. But what is fair must be assessed in the context of the RMA's format and scheme as already discussed.

[42] In summary, in relation to the first two steps of the analysis I need to carry out, I come to the conclusions that as to whether a submission **reasonably** raises any particular relief the following factors need to be considered:

(1) the submission must identify what issue is involved (***Vivid***[57]) and some change sought in the proposed plan;
(2) the local authority needs to be able to rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly and in a non-misleading way ***(Montgomery Spur***[58]);
(3) the submission should inform other persons what the submitter is seeking, but if it does not do so clearly, it is not automatically invalid.

54 Section 5 of the RMA.
55 [1998] 4 ELRNZ 506.
56 [1998] NZRMA 73 at 79.
57 (1999) 5 ELRNZ 264 at para 19.
58 (1999) 5 ELRNZ 227.

[43] As to the **fairness** of the relief sought, there are four safeguards for the rights of landowners and the interests of other parties by giving them notice of what is proposed:

(1) other parties' knowledge of what a submitter seeks comes first (usually) from the local authority's summary of submissions; and

(2) if it becomes clear to a local authority – at any time before it reaches a decision on submissions – that the summary of submissions is not accurate about a submission then it can apply to the Environment Court for an enforcement order directing renotification. That was the responsible course taken by the local authority in ***re an Application by Banks Peninsula District Council***[59];

***(3)*** if the local authority considers that a summary of a submission was accurate, and the submission should be accepted, but that consequential changes to rules or other methods are necessary, then it may promote (and notify) a variation under clause 16A of the First Schedule to the Act;

(4) if there is a reference that is based on a reasonable submission but it appears fairer to give further notification then the Environment Court has its section 293 powers to ensure by notification that persons not yet before the Court have an opportunity to be heard: ***Romily v Auckland City Council***[60]; ***re an Application by Vivid Holdings Ltd***[61].

[44] There is one gap in the RMA's scheme. It appears to be open to a local authority to make consequential changes to rules as a result of a general submission on an objective or policy which the local authority accepts in its decision. If a party failed to lodge a further submission"* and subsequently reads the proposed plan as revised (and finds it very different from the proposed

59 Decision C27/2002.
60 Decision A95/96.
61 [I 999] NZRMA 467.
62 Under clause 8 of the First Schedule to the RMA.

plan as notified) then they have no remedy under the RMA. Only a submitter[63] may refer an issue to the Environment Court. Any disaffected non-submitter needs to bring judicial review proceedings in the High Court. This lacuna suggests that it might be fairer and a realistic recognition of the scope of possible consequential changes to methods or plans to amend the First Schedule of the Act to allow a non-submitter to lodge a reference on amended methods (but not objectives or policies) changed by a local authority as the result of a submission on an objective or policy which did not expressly seek a change to the rules.

***The* extent *of the breach***

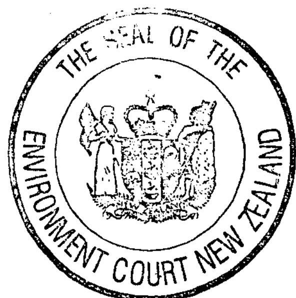
[45] For her landowner clients Ms Dewar submitted that the description in the submission of both the land affected and of the relief sought was so vague and uncertain that the submission was a nullity. Further, a submission on Volume 2 of the proposed City Plan could not reasonably be read as a submission seeking to change the zoning of land in the planning maps (in particular Map 55A). She also submitted that the submission when it referred to Mt Pleasant could not reasonably be read as referring to land on Monck's Spur.

[46] For Mrs Campbell, Mr Cuthbert submitted that if the submission is looked at as a whole, these aspects are apparent:

(1) The submission is about four issues, one of which is "Protection of the Port Hills, including comments on Hills Housing and its expansion";

(2) There is a separate heading "Protection of Port Hills" and all the relevant submissions are under that heading;

(3) The subheading "Volume 2: Objectives: p.2/22" is separate from the separate issue "Rules";




[63] Clause 14 of the First Schedule to the RMA (there are exceptions for requirements under clause 4 for public utilities).

(4) "Rules" are not given a subheading on a new line in the submission, but are emphasised as **"Rules";**

(5) The Living Hills zone(s) are identified as "the extension of Mount Pleasant"; and

(6) The relief applicable is "That these developments be withdrawn from the City Plan and be returned to the RuH zone"; and

(7) Further, that one of Mrs Campbell's main criticisms of the notified plan was that while it contained an objective to avoid or mitigate adverse effects of development on the Port Hills:

> ... *buildings are controlled* as *to their appearance, siting, location and scale ...*
>
> *In fact this is not carried through in the Rules. ...*

(8) The logic of the submission is that if such rules (Mrs Campbell calls them "guidelines") cannot be introduced as she requests, then the land in question should be returned to a RuH zoning.

[47] For the Council Mr Hardie advised that on this issue the Council abided the decision of the Court. However to assist the Court he pointed out that the obligations on a Council to summarise submissions[64] in a way that is fair, accurate and not misleading[65] is quite onerous. Consequently there must be, he submitted, minimum standards of accuracy on a submitter, so that there is some material to be accurately and fairly summarised.

[48] Map 55A as it was in the notified plan shows land in relevant zones:

- Living Hills ("LH") zone on either side of Mt Pleasant Road;
- Living Hills A ("LHA") on either side of Monck's Spur Road; and
- Living Hills A ("LHA") between Monck's Spur Road and Mt Pleasant Road:

64 Under clause 7 of the First Schedule to the RMA.

65 See *re* an ***Application by the Christchurch City Council (Montgomery Spur)***( 1999) 5 ELRNZ 227 at 235.

- The upper slopes of the Port Hills as Rural Hills ("RuH").

[49] While I appreciate the thoroughness of Mr Cuthbert's analysis I am left with the thought that it would have been simple for the submission to have requested as relief:

> *That all the land on Mount Pleasant and Monck's Spur shown as LH or LHA be rezoned as RuH.*

[50] In fact the submission is unclear as to which land or even which zones are to be rezoned to Rural H. Although the Council has inferred that Mrs Campbell's submission related to the LHA rather than LH zone and has summarised it accordingly I can see no reason for that. Similar considerations apply to the second and third limbs of Port Hills relief requested by Mrs Campbell. She requests guidelines for "general structure and colours" in "such -visible ENVIRONMENTAL SITES". Again if she had stated "in the LH or LHA zones" other persons may have been much more readily able to tell what land Mrs Campbell was referring to. As for the relief that above the 160 metre contour (which is shown on the planning maps in the notified plan) "any building will be a notifiable act", that too is silent as to what land it applies to. On its face it applies to all land on the Port Hills regardless of zone.

[51] Despite those difficulties I find that Mrs Campbell's submission does **reasonably** raise an issue about, and a request for rezoning of Living Hills and LHA zoned land in the general Mount Pleasant area (and elsewhere).

[52] If I was simply looking at the submission itself, I would find that applying the non-legalistic approach identified in ***Countdown*** and the ***Forest and Bird*** cases, that while the relief sought (read in the context of the submission as a whole) does reasonably raise the rezoning of the land zoned LHA and LH on Mt Pleasant and Moncks Spur it does not **fairly** do so. However, that is not the correct approach.

[53] I consider that I should look at the submission in the light of the Council's summary of submissions[66] and the place of a submission in the scheme of the Act. It is a tribute to the sympathetic and careful work of the relevant Council officer(s) that they have managed to spell some coherent relief out of Mrs Campbell's submission. For example the references to Mt Pleasant, Worsley's Spur and "above Halswell Quarry" have been translated into summaries in respect of the three relevant planning maps – 55A, 59A and 60A – for rezoning of LHA and LHB zones to the RuH zone. I have already noted there is a restriction in the ostensible scope – Mrs Campbell's submission could have been read so as to be a request that land in the LH zone as well as in the LHA zone was to be rezoned, but the Council has not read the submission in that way. Similarly, the request that all building above the 160 metre contour be notifiable has been read as applying to the Rural Hills zone only.

***What is the actual effect of the breach?***

[54] Ms Dewar submits that because the submission is so unclear, a number of landowners on Mount Pleasant and Monck's Spur whose land is zoned LHA or LHB in the revised plan may not be parties to this reference concerning their land. There are two answers to that:

(a) The Council's summary showed that (in the Council's view) Mrs Campbell sought that all land in the area zoned LHA[67] in the notified plan be rezoned as Rural Hills;

(b) If the Court hears the merits <u>and</u> decides Mrs Campbell has made a reasonable case for change, it can direct notification under section 293 of the Act.

[66] As summarised in the schedule in para [IO] above.

[67] They could have added the land zoned "LH" as well, but for some reason chose not to do so

***Overall Assessment of the Submission***

[55] In assessing whether Mrs Campbell's submission fairly and reasonably seeks to rezone land on Mt Pleasant Spur as Rural Hills I need to take into account the matters identified in paragraphs [42] and [43]. In the circumstances of this case these translate to the following considerations:

(1) that the submission should be read as a whole and in the light of the submission's place in the plan preparation process;
(2) the RMA's encouragement of laypersons being involved in the process;
(3) that my approach should be non-legalistic and realistically workable;
(4) that on the issue of fairness there are two safeguards – first affected landowners and other interested persons could rely on the Council's summary of submissions to advise them what the submission seeks; i.e. rezoning from LHA or LHB to RuH of the land on Map 55A; secondly if Mrs Campbell makes a reasonable case for change of the proposed plan then there is the section 293 procedure by directing further notification, thus allowing affected landowners and interested persons to join the proceedings;
(5) that the purpose of the Act may be met by enabling the submission, or rather the consequential reference to be heard because there are, potentially, matters of national importance involved. (In ***Flanaghan v Christchurch City Council***[68] the Environment Court found the Port Hills to be "an outstanding natural landscape and feature").

[56] While it is a close-run decision I hold that the submission does fairly and reasonably raise rezoning of the land identified on map 55A as LHA to RuH. It will be obvious that in coming to that conclusion I regard the Council's summary

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68 Decision C222/2001.

and the possibility of section 293 notification as being of decisive importance in this particular case.

The reference

[57] Mrs Campbell's woes do not end with a challenge to her submission. The primary challenge of Ms Dewar, at least initially, was as to the scope of Mrs Campbell's **reference.** Her argument was that while the submission (if it is valid) raises three points about the Port Hills provisions of the proposed plan viz:

(1) Rezoning some land from LHA and LHB to RuH;
(2) Specifying design controls in the rules;
(3) Notified applications for buildings above the 160m contour

- the reference only requests relief (1). The problem then is that the evidence now circulated for Mrs Campbell apparently accepts that the relevant land on Mt Pleasant and Monck's Spur should retain a LHA or LHB zoning. Instead of seeking an RuH zoning it suggests design and landscaping controls should be imposed.

[58] Ms Dewar submits that such controls, introduced as zone rules, are unacceptable for two reasons. First it would treat the LHA or LHB zoned land on Mt Pleasant Spur (and possibly on Worsleys and Kennedys Bush Spurs) as separate subzones with different rules from LHA and LHB zones elsewhere on the Port Hills. Secondly the Court would be reinstating relief expressly claimed in the submission but not in the reference. She submitted that would be quite wrong.

[59] I cannot accept Ms Dewar's first submission. It is always open to a party to argue on the merits, that different land should be zoned differently. The fact that such relief might create a "spot zone", or a plethora of small subzones is an issue to be considered at a substantive hearing.

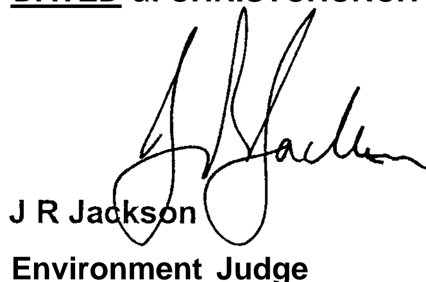
[60] The second issue is more complex. In general lesser (implicit) relief always comes with greater express changes sought by an appeal - see for example on a section 120 appeal: Upper ***Clutha*** Environmental Society ***Inc v Queenstown Lakes District Council***[69]***.*** Can that apply where a reference appears, on its face, to have dropped relief sought in the original submission? Somewhat reluctantly, and bearing in mind the flexible, non-legalistic approach encouraged by the High Court I come to the conclusion that Mrs Campbell may even now, seek design and landscaping controls as specified in the evidence she is to call.

***Summary***

[61] In the circumstances I hold that both Mrs Campbell's submission and reference are valid and that she may call evidence as to design and/or landscaping controls on the hearing of the reference.

[62] The proceedings are adjourned for a further prehearing conference to plan for a hearing.

**DATED** at **CHRISTCHURCH** this 28th day of March 2002.



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

issued: - 2 APR 2002

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69 Decision C34/2002

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2015] NZEnvC 166

**IN THE MATTER** of an appeal under Clause 14 of the First Schedule to the Resource Management Act 1991 (**the Act**)

**BETWEEN** THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS TRUST BOARD
(ENV-2014-AKL-000157)

Appellant

**AND** HAMILTON CITY COUNCIL

Respondent

Decision made on the papers

Court: Environment Judge M Harland

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**DECISION OF THE ENVIRONMENT COURT ON SCOPE**

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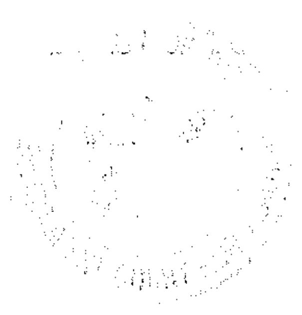
A. **The amendment sought to policy 19.2.3a and the inclusion of policy 19.2.3x are within the scope of the appellant's submissions and notice of appeal.**



## REASONS FOR DECISION

### Introduction

[1] This decision concerns whether or not an agreed amendment to Policy 19.2.3a and the inclusion of a new Policy 19.2.3x in the proposed Hamilton District Plan concerning the protection of heritage values of significant buildings (among other things) are within the scope of the appellant's appeal.

### Background

[2] The operative Hamilton District Plan ("**the ODP**") had a five classification ranking system for heritage buildings.

[3] The proposed Hamilton District Plan ("**the PDP**") as notified provided for a two-tiered ranking approach to categorising heritage buildings.

[4] Heritage buildings are listed in Schedule 8A of the PDP and are ranked either A or B.

[5] The PDP provided for the demolition of all heritage buildings and structures listed in Schedule 8A as a non-complying activity.

[6] The appellant's submission on the PDP sought to reinstate the previous ranking system approach in the ODP and to amend the activity status for demolition of "lesser ranked buildings" to either a discretionary activity or restricted discretionary activity. The submission also raised the specific issue of the ranking of the David O McKay Building as a Category B building, and considered a non-complying activity status for the demolition of this building inappropriate.

[7] The Council, in its decision, retained the two-tiered ranking approach but amended the activity status for demolition of Category B buildings from non-complying to discretionary. As such, the David O McKay Building retained its Category B ranking, but the activity status for its demolition became discretionary.

[8] Rankings for historic buildings and structures listed in Schedule 8A have been established as follows:

> Plan Ranking A: Historic places of highly significant heritage value include those assessed as being of outstanding or high value in relation to one or more criteria and are considered to be of outstanding or high heritage value locally, regionally or nationally.
>
> Plan ranking B: Historic places of significant heritage value include those assessed as being of high or moderate value in relation to one or more of the heritage criteria and are considered to be of value locally or regionally.

[9] The appellant's appeal sought to reinstate the five classification rankings for heritage buildings in the ODP.

**The jurisdictional issue**

[10] The appellant has raised an issue concerning the policy framework relevant to any proposed demolition of a B ranked building or structure. In summary, there is a disconnection between the relevant policy (Policy 19.2.3a) and the activity status which applies to demolition of B ranked buildings and structures.

[11] Objective 19.2.3 states:

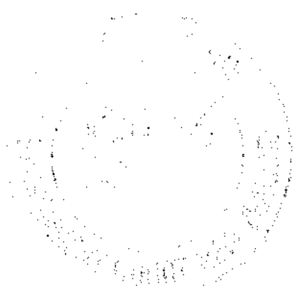
> 19.2.3 The heritage values of significant buildings, structures and their immediate surroundings are protected.

[12] Policy 19.2.3a then states as follows:

> Demolition or relocation of buildings or structures in Schedule 8A shall be avoided.

[13] Schedule 8A includes both A ranked and B ranked buildings and structures. It does not distinguish between the two. Accordingly, the policy position is that demolition is to be avoided, regardless of ranking. The appellant's position is that whilst Policy 19.2.3a may be appropriate for demolition of A ranked buildings as a non-complying activity, it is not appropriate for demolition of B ranked buildings as a discretionary activity. The Council shares this view and is amendable to the relief which the appellant proposes, which is to:

(a) Amend the existing policy to clarify that it applies to A ranked buildings; and



(b) Introduce a new policy which will apply to B ranked buildings.

[14] The proposed amendments are set out below:

(a) Amend existing Policy 19.2.3a as follows:

Policy 19.2.3a

Demolition or relocation of buildings or structures ranked A in Schedule 8A shall be avoided.

(b) Add a new Policy 19.2.3x as follows:

Policy 19.2.3x

Demolition or relocation of buildings or structures ranked B in Schedule 8A should be discouraged.

[15] The appellant considers the proposed amendments are within scope of the Notice of Appeal.

[16] The Council is not satisfied that the proposed amendment to Policy 19.2.3a and the inclusion of the proposed new policy, Policy 19.2.3x are within the scope of the appeal and it is therefore not prepared to sign a consent memorandum which endorses the proposed changes. Nevertheless, the Council is supportive of such amendments being made to the PDP on the basis that the proposed changes are necessary to ensure that the rule and policy framework are consistent with the purpose of the Act.

**Relevant law**

[17] The central question to be determined is whether the proposed amendments are within the scope of the PDP as publically notified or as sought to be amended by the appellant's submission and Notice of Appeal.

[18] The scope of an appeal is bounded by the submission at one end and the notified plan at the other. In ***Environmental Defence Society Incorporated v Otorohanga District Council***[1] Judge Kirkpatrick said:

> A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope.[2] Submissions must be on the proposed plan and cannot

[1] [2014] NZEnvC 070.

[2] ***Federated Farmers of New Zealand Inc v Mackenzie District*** Council [2013] NZENVC 257 [24]-[51].

> raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of council must be in respect of identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to and make its own decision on that.

[19] In ***Re Vivid Holdings Limited***[3] the Court determined that in order to start to establish jurisdiction, a submission must, first, raise a relevant resource management issue, and then any decision requested of the Court on appeal must be fairly and reasonably within the general scope of:

(a) An original submission; or

(b) The proposed plan as notified; or

(c) Somewhere in between.

[20] The test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan changes. This will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[4]

[21] Whether an amendment is fairly and reasonably raised in submissions is to be approached in a realistic workable fashion rather than from the perspective of legal nicety.[5]

[22] The fundamental principle is that the Court cannot permit a planning instrument to be amended without those potentially affected by it being given a real opportunity to comment on it, should they choose to do so.[6]

## The submissions

[23] The appellant made the following submission in relation to Policy 19.2.2b:

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[3] [1999] NZRMA 468.
[4] ***Countdown Properties (Northlands) Limited v Dunedin City Council*** [1994] NZRMA 145.
[5] ***Countdown Properties (Northlands) Limited v Dunedin City Council*** [1994] NZRMA 145.
[6] ***Royal Forest and Bird Protection Society v Southland District Council*** [1997] NZRMA 408.

23. Amend Policy 19.2.2b to read as follows:

The loss of heritage values associated with scheduled items shall be avoided to the fullest extent practicable.

[24] The appellant made the following submissions on the PDP in relation to Rule 19.3:

24. Rule 19.3 Activity Status Table

Rule 19.3 – Activity Table introduces a one size fits all classification for all demolition works irrespective of whether a heritage item has low or outstanding heritage value. The PDP advocates a black and white approach to demolition that fails to recognise that, in some circumstances, demolition is not only the best practicable option, but a better use of physical land resource. It also fails to recognise that, whilst the physical effects of demolition are no different between an A or a B ranked item, the resultant historic and cultural effects can be very different. The complexities of that situation need to be reflected in the activity classification and the heritage categories contained in the ODP are supported over those in the PDP in Appendix 8.

[25] The appellant sought the following relief:

(1) Amend relevant sub-sections of Rule 19.3 – Activity Status as appropriate, to reflect the broader ranking systems described in submission point 22 (below) and as set out in the Appendix 2.3-1 of the ODP.

(2) Amend Rule 19.3(i) so that demolition of lesser ranked buildings and structures are either a discretionary activity or restricted discretionary activity.

[26] In relation to the Assessment of Historic Buildings and Structures the appellant said:

32. Section 8-1.1 has categorised all built heritage into one of two classifications, being an A ranking or a B ranking. This is in contrast to 5 classification rankings under the operative District Plan, being A+, A, B, C and D. Under the operative plan, buildings such as the David O Mckay Building were deemed of recognised heritage value and therefore given a Category C building ranking. The demolition of a Category C building is a discretionary activity under the operative plan.

Under the proposed plan, the David O McKay Building has a B ranking, being an historic place of significant heritage value, and assessed as being of high or moderate value in relation to the heritage assessment criteria listed in section 8-1.2 of the plan. The demolition of a B ranked structure is a non-complying activity under the proposed District Plan.

In effect the David O Mckay Building has been elevated from something of recognised heritage value

[27] As relief the appellant sought the following:

> Amend Appendix 8-1.1 and Appendix 8 – 1.2 to enable a broader ranking system which more accurately reflects the breadth, diversity and significance of heritage buildings and structures.
> Apply the new ranking system to the heritage buildings within the Church College site and other sites as appropriate. Specifically the Trust Board wishes the new ranking system to be applied to the following buildings:
>
> H106 David O McKay Building
>
> H107 G.R Beisinger Building
>
> H108 Hamilton NZ Temple
>
> H109 Wendell B Mendenhall Library
>
> H133 First House/George Beisinger House
>
> H134 Kai Hall
>
> H135 Block Plant

**The appeal**

[28] In its Notice of Appeal the appellant sought:

> Rule 19.3 Activity Status Table – Heritage Ranking System; Volume 2 - Appendix 8 – Section 8.1 – Classification System for Built Heritage.
>
> 14. Under the Operative Plan, buildings such as the David O McKay Building were deemed of "recognised heritage value" and therefore given a Category 'C' ranking. However under the Proposed District Plan, the David O McKay Building now has a 'B' ranking, being an "historic place of significant heritage value", and assessed as being of high or moderate value in relation to the heritage assessment criteria listed in section 8-1.2 of the Plan. In effect, the David O McKay Building has been elevated from something of "recognised heritage value" to something of "significant heritage value".
>
> 15. The Trust Board considers that the reduction of heritage categories from the five categories in the Operative District Plan to the two categories in the Proposed District Plan inflates the heritage value of the David O McKay building without any additional heritage assessment work being undertaken. The heritage categories contained in the Operative District Plan are preferred and the Trust Board considers that the David O McKay building should be ranked under the ODP heritage category as a C ranked building.
>
> The Trust board seeks the following relief:
>
> ...
>
> (d) Replace the two heritage categories contained in section 8-1.1 of Appendix 8: Heritage in the Decisions version of the PDP with the five heritage categories contained in Appendix 2.3-1 of the Operative District Plan along with the related heritage assessment criteria in that Appendix.
>
> (e) Such further or other relief as is necessary in order to give effect to this appeal.

**The appellant's submissions**

[29] The appellant submitted that its submissions seek amendments to enable a broader ranking system which more accurately reflects the breadth, diversity and significance of heritage buildings and structures, as well as seeking to apply that ranking system to a number of specified buildings owned by the appellant. In essence, the submission is seeking to revert to the 5 classification rankings under the ODP so that the identified buildings can be considered for demolition on a discretionary basis.

[30] It submitted that it would also have been clear to the wider public that the appellant through its submission was challenging the classification system for heritage buildings overall and seeking a classification system and methodologies akin to those contained in the ODP. The submission is broad enough to put the public on notice that the policy basis for the new ranking system was under challenge by the appellant.

[31] The Notice of Appeal does not narrow the relief sought in the submission. It explicitly appeals the classification system for built heritage and states the appellant's preference for the approach to the heritage categories contained in the ODP.

[32] The relief pleaded at paragraph (d) refers to the 5 heritage categories contained in the ODP. Paragraph (e) of the relief, in seeking "such further or other relief as is necessary in order to give effect to the appeal" enables the possibility of additional or consequential changes needed in order to make sense of and give effect to the relief sought in the body of the appeal and submission.

[33] It submitted that a policy explanation and justification for the heritage classification and discretionary demolition rule falls into that category of relief able to be considered by the Court. The introduction of sensible policy provision explaining the rules is important in order to give the rules coherence and to assist the Council and applicants in understanding and implementing the district plan provisions. Given the discretionary status of Category B buildings, that explanation is in fact essential.

**The Council's submissions**

[34] The validity of the appellant's submission and/or Notice of Appeal is not disputed by the Council. However, the Council does not consider that the proposed relief was contemplated in either the appellant's submission and/or Notice of Appeal.

[35] In paragraph 24 of the appellant's submissions the appellant sought an amendment to Rule 19.3 so that demolition of lesser ranked buildings and structures is either a discretionary or restricted discretionary activity. As the Council's decision accepted this submission by amending the activity status for B ranked buildings from non-complying to discretionary, it is understood that the appellant did not wish to pursue this issue further in its Notice of Appeal.

[36] Neither the submission nor Notice of Appeal raised the matter of the policy framework which applies to "Buildings and Structures" (including Policy 19.2.3a), which is relevant to the activity status for the demolition or relocation of buildings in Schedule 8A. While the submission raised the matter of the general policy framework applying to "All Historic Heritage" by seeking amendments to Policy 19.2.2b, this relief was not carried through to its Notice of Appeal.

[37] It submitted that it is inappropriate to conflate relief sought in respect of the ranking system in schedule 8A with the policy framework which applies to the rules determining activity status for the demolition or relocation of heritage buildings.

[38] Any person reviewing the summary of submissions would have been put on notice that the submitter sought a return to the five-tier ranking system of heritage buildings and structures, a change to the activity status for demolition of buildings from non-complying to discretionary or restricted discretionary, and an amendment to Policy 19.2.2b only. The matter of the policy framework applying to demolition of heritage buildings was not raised.

[39] Furthermore the "general prayer for relief" which is stated at paragraph in (e) of the notice of appeal does not assist the appellant in providing scope for the proposed changes. Unless there is some relief sought in the appeal which raises the matter of the policy framework for the demolition or relocation of heritage

buildings, such a general statement cannot be interpreted to provide jurisdiction to make changes to those policies.

**Discussion**

[40] Neither the appellant's submissions nor the Notice of Appeal raised Policy 19.2.3a in the relief sought; however, the test is not about determining whether the policy is named in the submission or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions.[7]

[41] Although the submission did not specifically raise the amendment of Policy 19.2.3a, which states that demolition or relocation of buildings in Schedule 8A should be avoided, the grounds for the submission did raise the issue of demolition. The appellant essentially sought that 19.3 Rules - Activity Status Table be amended by making the demolition of heritage buildings ranked B, a restricted discretionary activity and not a non-complying activity.

[42] This submission point was accepted in part by the Council and demolition was made a discretionary activity in relation to B ranked buildings.

[43] When looking at the Notice of Appeal, the specific relief sought is narrower than the appellant's submissions in that the status of demolition as an activity is not referenced as part of the relief. The appellant did however set out the grounds for the appeal, and this included that the heritage categories contained in the ODP are preferred to those in the PDP.

[44] Both the ODP and the PDP set out the status of demolition activities in connection to the ranking systems. The PDP makes demolition of A ranked buildings a non-complying activity and B ranked buildings a discretionary activity.

[45] The amendment sought to Policy 19.2.3a and the inclusion of Policy 19.2.3x, which differentiate between the A and B rankings with the words "avoid" and "discouraged", recognises that there is a difference between the two categories which occurred as a result of the appellant's submissions.

[7] ***Royal Forest and Bird Protection Society v Southland District Council*** [1997] NZRMA 408.

[46] The Court is satisfied that the amendments sought are sufficiently inferential to the extent that other submitters would have been aware that the issue of ranking and the activity status of demolition relating to those rankings were in contention.

[47] It is fair and reasonable that as part of the relief sought in relation to the ranking system that the accompanying policies would be amended. The ranking system, the relative activity status of demolition and the policies in support are all interconnected. They do not operate in a vacuum. It is unlikely that an amendment would be made to one without parallel changes being made to the other.

[48] Nor is there any indication that the amendments sought would prejudice any party. The appellant sought that the ranking system reverts to that contained in the ODP. The parties have agreed that this is not to happen. The amendments made in the alternative to resolve this relief simply reflect the current position in the plan, which is that demolition in relation to A ranked buildings has a different activity status to those that are ranked B. It makes sense for the related policies to reflect this.

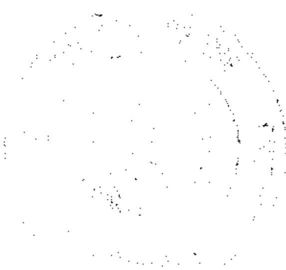
[49] Accordingly, the Court is satisfied that the amendments sought are within scope of the appellant's submissions and Notice of Appeal.

**Decision**

[50] The amendment sought to Policy 19.2.3a, and the inclusion of Policy 19.2.3x, are within the scope of the appellant's submissions and Notice of Appeal.

**SIGNED** at AUCKLAND this 22nd day of September 2015

M Harland
Environment Judge



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|---|---|
| **Appellant** | **COUNTDOWN PROPERTIES (NORTHLANDS) LTD AND COUNTDOWN FOODMARKETS NZ LTD; FOODSTUFFS (OTAGO SOUTHLAND) PROPERTIES LTD; TRANSIT NEW ZEALAND** |
| **Respondent** | **DUNEDIN CITY COUNCIL** |
| **Applicant** | **ML INVESTMENT CO LTD AND WOOLWORTHS (NZ) LTD** |
| High Court Nos | AP 214/93 AP 215/93, AP 216/93 |
| Tribunal | Barker J (presiding) Williamson J & Fraser J |
| Judgment Date | 7/3/1994 |
| Counsel/Appearances | RJ Somerville & RJM Sim; TC Gould; DG Bigio; ED Wylie; ARP More; NS Marquet |
| Quoted | Manukau City Council v Trustees of Mangere Law Cemetery (1991) 15 NZPTA 58, 60; Environmental Defence Society v Mangonui County Council (1988) 12 NZPTA 349, 353; Royal Forest & Bird Protection Society Inc v W A Habgood (1987) 12 NZPTA 76, 81-2; Northern Milk Vendors' Association Inc v Northern Milk Ltd [1988] 1 NZLR 530, 537; Wellington City Council v Cowie [1971] NZLR 1089; Kirkham v Attenborough [1897] 1 QB 201, 203; Calvin & Carr (1980) AC 574; AJ Burr Limited v Blenheim Borough [1982] NZLR 1; Love v Porirua City Council, [1984] 2 NZLR 308; Meade v Wellington City Council (1978) 6 NZPTA 400; Morrow v Tauranga City Council A6/80; Nelson Pine Forest Limited v Waimea County Council (1988) 13 NZPTA 69, 73; Noel Leeming Limited v North Shore City Council (No. 2) (1993) 2 NZRMA 243, 249; Haslam & Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council C71/93; Batchelor v Tauranga District Council (No. 2) [1992] 2 NZLR 84; Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671, 675; KB Furniture Ltd v Tauranga District Council [1993] 3 NZLR 197; Ashburton Borough v Clifford [1969] NZLR 921, 943; Auckland City Council v Auckland Heritage Trust (1993) 1 NZRMA 69; Bitumix Ltd v Mt Wellington Borough [1979] 2 NZLR 57; McLeod Holdings v Countdown Properties (1990) 14 NZPTA 362; Waimea Residents Association Inc v Chelsea Investments Ltd Davison CJ, Wellington M 616/81, 16/12/81.; Environmental Defence Society Inc v Tai |

| | |
|---|---|
| | Tokerau District Maori Council v Mangonui County Council [1989] 13 NZPTA 197; Wainuiomata District Council v Local Government Commission, Wellington, 20/9/9/1989 CP 546/89.; Port Otago Ltd v Dunedin City Council Dunedin AP 112/93. |
| Statutes | Resource Management Act 1991, 1991/69, s6, s7, s8, s19, s31, s32, s34, s39, s43, s52, s53, s64(4), s65(4), s73(2), s74, s76, s290, s293, s299, s311, s373(3), First Schedule cl 10, cl 14, cl 16; Town and Country Planning Act 1977, 199/121, s150(1), s150(2); High Court Rules, R718A |

**Keywords**

district plan change; zoning; point of law; declaration; procedural

***Significant in Planning and Procedure - s32***

*The Full Court of the High Court upheld the Planning Tribunal's decision, W53/93. The Court reaffirmed the principles enunciated in the Tribunal's decision on the role of a s32 analysis and the distinction between the timing of a s32 analysis on a privately initiated plan change versus one initiated by council or government.*

**SYNOPSIS**

This decision is 74 pages long. For this reason the full text has not been included here.

Foodstuffs, Countdown and Transit NZ all appealed to the High Court on the grounds that the Tribunal's decision was erroneous in law.

The appeals were heard by a Full Court of 3 Judges. The appeals by Foodstuffs and Countdown were dismissed. The appeal by Transit NZ was allowed by consent, by remitting the matter back to the Tribunal for further consideration and determination, and the possible exercise of its powers under s293 or Clause 15(2) of the First Schedule, in relation to proposed agreed alteration to certain rules relating to access to the site.

The High Court decision runs to 74 pages. It appears that some 23 grounds of appeal were raised. Not all of those grounds were pursued; and the Court grouped some of the grounds in delivering its judgment. The principal rulings given by the Court were:

(a) With a plan change initiated privately, adopting comes at the time when the Council decides, after hearing all the submissions, that it should adopt the change. In the case of a plan change requested by another authority or by the Minister, to which s32(3) applies, a Council receiving the request will have to adopt the change prior to advertising the change; and therefore must complete its s32 report by that stage.

(b) The definition of 'proposed plan' does not apply to privately requested plan changes. Accordingly there is no restriction as to the time when persons making submissions on a privately requested plan change may raise the question of non-compliance with s32. They do not have to do so in their submission.

(c) The Tribunal was not in error in its ruling as to the timing of the s32 'exercise' by the respondent Council, nor as to the adequacy of the s32 analysis.

(d) The Council or Tribunal must consider whether any amendment made to a plan change as publicly notified goes beyond what is reasonably and fairly raised in submissions made on the plan change. That will usually be a question of degree, to be judged by the terms of the proposed change and of the content of the submissions. (The Court described as 'unhelpful', the test articulated by the Tribunal in Haslam & Meadow Mushrooms v Selwyn District Council, C71/93.) But the Tribunal had not erred in the manner it dealt with amendments in this case.

(e) The Tribunal had not erred in declining to defer a decision on the proposed plan change pending the review of the Council's plan.

(f) The Council had not erred in using zoning as the technique of the plan change. It followed the decision in Batchelor v Tauranga District Council (No. 2) [1992] 2 NZLR 84, and agreed with the 'pragmatic' approach to transitional plans articulated in KB Furniture v Tauranga District Council [1993] 3 NZLR 197. The Court approved the Tribunal's ruling that s76(4)(e) does not preclude similar rules in other cases where they are needed.

(g) The Tribunal had correctly ruled that it had the powers conferred by s293, although in the end the Tribunal had not exercised those powers and had acted only pursuant to Clause 15(2) of the First Schedule. The Court differed from the Tribunal's conclusion as to s290. The Court held that the nature of the process before the Tribunal, although called a reference, is also in effect an appeal from the decision of the Council. (The terminology used in Clause 15 of the First Schedule links that Clause with s290.) But it said that even if the Tribunal had held that s290 applied, the steps the Tribunal would have taken in its deliberation and judgment would have been no different from those it in fact took.

(h) The Tribunal had not failed to apply the correct legal test when it confirmed the proposed plan change. That ruling involved an examination of the meaning of the word 'necessary' in s32; the Court held that in its context the word has a meaning similar to 'expedient' or 'desirable' rather than 'essential'. The Court went on to say that s32 is only part of the statutory framework; that s74 requires a council to prepare and change its district plan in accordance with its functions under s31, the provisions of Part II, its duty under s32 and any regulations. The Tribunal's conclusions on page 128 had to be read in the light of 2 earlier paragraphs on page 127. *"Reading the relevant part of*

*the Tribunal's decision as a whole, we consider that its approach was correct....."*

In the course of its decision, the Court set out its approach to appeals from decisions of the Planning Tribunal. It said that the Court will only interfere with those decisions if it considers that the Tribunal -

(i) applied the wrong test; or
(ii) came to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
(iii) took into account matters which it should not have taken into account; or
(iv) failed to take into account matters which it should have taken into account.

The Court also said:

(v) The Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.
(vi) Any error of law must materially affect the result of the decision, before the Court should grant relief.
(vii) In dealing with reformist legislation, the responsibility of the Courts, where problems have not been specifically provided for in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

## FULL TEXT OF AP214/93; AP215/93; AP216/93

**Introduction:**

These appeals from a decision of the Planning Tribunal ('the Tribunal') given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 ('the RMA') - a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town & Country Planning Act 1977 ('the TCPA') were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment. All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd,

(called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

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

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and
(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

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

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

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

Essentially, these appeals are concerned with a request by Woolworths to the Council, seeking a plan change to rezone a central city block from an existing

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

Both appellants operate supermarkets within the same general area in or near the Dunedin central business district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by s299 of the RMA but are similar in scope to those conferred by the TCPA.

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

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under s311 of the RMA -

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

(b) whether the Council could lawfully complete the evaluation and assessments required by s32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question

was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

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

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

**Chronology**

Woolworths' request, made pursuant to s73(2) of the RMA, was received by the Council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the Council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the Council, acting under delegated authority, resolved to "agree to the request" in terms of Clause 24(a) of the First Schedule of the Act ('the First Schedule'). This resolution was made within 20 working days of receiving the request as required by Clause 24. The Council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations and to request and commission all additional information as required by the RMA. There was consultation by the Council with Woolworths as envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

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

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained

in s32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by s32 (to be discussed in some detail later) was not prepared by the Council until after the hearing of submissions. Obviously therefore, no draft s32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the Committee to a draft s32 analysis prepared by Mr Hovell; a final version was prepared by him at the Committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the Committee at this stage of its deliberations. On 11 August 1992, the Committee acting under delegated powers, decided that the change be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the Council's decision, a legal opinion from the Council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

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

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

**Approach to Appeal**

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

(a) Applied a wrong legal test; or
(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
(c) Took into account matters which it should not have taken into account; or
(d) Failed to take into account matters which it should have taken into account.

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

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See Environmental Defence Society v Mangonui County Council (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision

before this Court should grant relief. Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd (1987), 12 NZTPA 76, 81-2.

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

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

Grounds 1, 2 and 3

1. The Tribunal misconstrued the provisions of s32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form;
2. The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by s32
3. The Tribunal misconstrued s32 and s39(1)(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's s32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.

These grounds are concerned with the Council's duty under s32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under s32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the s32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a s32 report available to persons making submissions on the plan change?

(c) Was the Council's actual s32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the s32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

Section 32 of the Act at material times read as follows -

> *"32 Duties to consider alternatives, assess benefits and costs, etc - (1) In achieving the purpose of this Act, before adopting any objective, policy, rule or other method in relation to any function described in subsection (2), any person described in that subsection shall -*

*(a) Have regard to -*

*(i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and*

*(ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and*

*(iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and*

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

*(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -*

*(i) is necessary in achieving the purpose of this Act; and*

*(ii) is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness* relative to other means.

*(2) Subsection (1)* applies to -

*(a) The Minister, in relation to -*

*(i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;*

*(ii) the recommendation of the making of any regulations under section 43.*

*(b) The Minister of Conservation, in relation to-*

*(i) the preparation and recommendation of New Zealand coastal policy statements under section 57'*

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

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

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

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

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

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. s73(2) provides -

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

Clause 2 of the First Schedule requires -

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

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

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

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission. It is doubtful whether the local authority can make a submission to itself under the RMA in its original form. The Court of Appeal in Wellington City Council v Cowie [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the Council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public

hearing; the procedure at the hearing is outlined in s39 of the RMA; notably, no cross-examination is allowed.

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

The Act does not define the phrase used in s32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (clause 21), "prepared" (clause 28), "publicly notified" (clause 5), "considered" (clauses 10 and 15), "amended" (clause 16), and "approved" (clauses 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

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

The Tribunal's findings on the local authority's s32 duties can be summarised thus.

(a) Read in the context of s32(2) the word "adopting" as used in s32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by s32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

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

(d) If Parliament had intended that in every case s32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there

would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in s32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

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

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that s32 requires the Council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under s32 after that point.

Interpreting the provisions of s32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. s32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

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

Under s32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The Appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

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

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

Lord Esher, MR in Kirkham v Attenborough, [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the Council which shows anything other than an initial acknowledgment that:

(a) the proposed change has more than a little planning merit; and
(b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process.

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

During argument, two obstacles to this view were signposted They concerned, first, s32(3) and, second, s19. It was submitted that s32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with s32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under Clause 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that s32(3) was capable of giving that indication but concluded that, if Parliament had intended the s32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether s32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held:

(a) there was no exclusion of privately requested changes in the words "change to a plan" in s32(3)(a);
(b) the use of the term "proposed plan" in the first phrase of s32(3) does not

preclude a challenge to the Council's performance of its s32 duties in a submission under clause 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with s32 by the Council. They do not have to do so in their submission.

This approach to s32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not 'adopted' for the purposes of s32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the s32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of s32(3) We hold that the "adopting" by the local authority under s32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of s32(3) A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time, preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous, vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous s32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a s32 report being prepared. A local authority might not be therefore in a

position to 'adopt' the plan change until it had the s32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a s32 report because the Act in s32(3) clearly envisages their having the right to comment on a s32 report, the answer lies in the interpretation we have given to s32(3) There is no restriction on the time in which a s32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the Council's decisions or submissions to the Tribunal can criticise the s32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which s32(3) applies; i.e. plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s32 report would have to be available at the time the plan change is advertised because of the limitation contained in s32(3) on the right to comment on the adequacy or otherwise of a s32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a s32 report should include as a precaution a statement that the s32 report was inadequate; this was suggested in argument by counsel for the Council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

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

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

In the case of a plan change requested by another authority or by the Minister to which s32(3) applies, a Council receiving the request will have to 'adopt' the change prior to advertising the change and therefore complete its s32 report by that stage. Again, the Council may not ultimately 'approve' the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a s32 report, one imagines that other local authorities or a Minister in requesting the change should be in a

position to supply the territorial authority with most of the information needed for its s32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under s38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient **prima facie** information justifying the request which would make the adopting process simple.

The time for 'adopting' the plan change therefore in terms of s32 is a 'moveable feast' depending on whether or not the plan change is initiated by a private individual.

Section 19 of the RMA is as follows -

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

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under s32 must take place before the time for making or lodging submissions or appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to s32

The Tribunal did not place any weight on the argument under s19. We have carefully considered the submissions and conclude that, while s19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as s32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to

be satisfied of the matters arising under s32(1)(a); (b) and (c). Certainly there are no words within s19 which purport to affect the duty under s32
Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. Section 9(1) of the RMA provides as follows-

> *"No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -*
> *(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or*
> *(b) An existing use allowed by s10 (certain existing uses protected). ..."*

As noted, 'proposed district plan' includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. Section 19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.
In the result, we believe that the Tribunal came to the correct decision about the timing of the s32 report; in the circumstances of this case, the report was properly 'adopted' at the time when the Council gave its decision on the submissions.
In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a s32 report available to them prior to the hearing of submissions. Reference was made to s39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing. We did not consider that there is any merit in this submission. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under s32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.
The adequacy of the report prepared by the First Respondent is challenged in Ground 2. It was claimed that the Council (a) had taken into account irrelevant considerations, namely, Sections 6, 7 and 8 of the RMA; (b) had failed to take into account the matters; and had (c) applied the wrong test.
These same criticisms were considered by the Tribunal which concluded that, while the Council's s32 analysis report did not scrupulously follow the language of s32(1), it was not substantially deficient in any respect. After

weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal incorrectly permitted an inadequate compliance by the Council with its s32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

> *"In our opinion failures to perform the s32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome, may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act."*

Earlier it stated -

> *"Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by s32 can be condoned compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required if any deficiency that may be discovered from a punctilious scrutiny of a s32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form."*

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the s32 exercise or the adequacy of the First Respondent's s32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and s32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

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

Ground 4.

That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in

making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision.

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

Mr Marquet for the Council helpfully provided a compilation which, in each case, demonstrated:

(a) the provision as advertised;

(b) the provision in the form settled by the Council after the hearing of submissions;

(c) the appellants' criticism of the alteration or addition;

(d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based;

(e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of Counsel's submissions which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups:

(a) Those sought in written submissions;

(b) Those that corresponded to grounds stated in submissions;

(c) Those that addressed cases presented at the hearing of submissions;

(d) Amendments to wording not altering meaning or fact;

(e) Other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

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

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

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned shall give its decision **regarding the submissions** and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall **allow or disallow each objection either wholly or in part...**" (Emphasis added)

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

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

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

Counsel relied on Meade v Wellington City Council (1978), 6 NZTPA 400 and Morrow v Tauranga City Council (A6/80 Planning Tribunal, 13 December 1979) which emphasised that a Council's role under a scheme change was to allow or disallow an objection.

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

> *"...that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."*

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

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

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

> *"...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement and ordinances in its plan. It follows that when an authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."*

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

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

did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

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

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

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

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent". We find that there was no submission which could have

justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate; because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then s373(3) of the RMA would apply; that subsection provides as follows -

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

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

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

Ground 5.

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

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

Ground 6.

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

Ground 7.

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

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin

City area arise when a Council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the Council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

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

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

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred
and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

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

Ground 8.

The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued s5(2), s9, s31(a), s31(b) and s76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

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

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural wellbeing (the words of s5 of the RMA). Much was made of the difference between the RMA and the TCPA. Section 5 was said to be either or both 'anthropocentric' and 'ecocentric'.

Consideration of s76 is required -

*"Section 76.*

*(1) A territorial authority may, for the purpose of*

*(a) Carrying out its functions under this Act; and*

*(b) Achieving the objectives and policies of the plan, - include in its district plan rules which prohibit, regulate, or allow activities.*

*(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.*

*(3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.*

*(4) A rule may -*

*(a) Apply throughout a district or a part of a district;*

*(b) Make different provision for -*

*(i) Different parts of the district; or*

*(ii) Different classes of effects arising from an activity:*

*(c) Apply all the time or for stated periods or seasons;*

*(d) Be specific or general in its application;*

*(e) Require a resource consent to be obtained for any activity not specifically*

*referred to in the plan."*

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

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

Similar submissions about s5 the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in Batchelor v Tauranga District Council (No 2) [1992] 2 NZLR 84; that was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

> *"Our conclusion on the competing submissions about the application of s5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."*

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

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

We find the Batchelor and K.B. Furniture cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of s5 of the RMA. In Batchelor's case, the Tribunal had taken a similar pragmatic view to that

taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

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

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

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

Ground 9.

"That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of s76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act."

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was **ultra vires** the rule-making power of s76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as Ashburton Borough v Clifford [1969] NZLR 921, 943. Counsel submitted that s9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by s74(4)(e); that normal principles of statutory interpretation should properly have applied

to the construction of s76
The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in s76(4) than deliberately excluded. The rule is clearly within the general scope of s76(1) and we do not consider that it was ultra vires respondent's powers".
The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the Legislature intended, by providing expressly for such rules in the circumstances referred to in s76(4)(e); to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.
Mr Marquet referred to a decision of the Tribunal in Auckland City Council v Auckland Heritage Trust (1993), 1 NZRMA 69 where Judge Sheppard held that a reference anywhere in a plan to a particular activity was sufficient to preclude the application of s373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.
In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the Auckland Heritage Trust decision.
Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that s373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.
We reject this ground of appeal.

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

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

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

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

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

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

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

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

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

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

questions of fact and degree which are capable of judgment and were upheld. We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

Ground 11.
That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to.
This ground was withdrawn at the hearing and is therefore dismissed.

Ground 12
That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 were so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision.
This ground relates to the evidence of a statistical retail consultant, Mr M.G. Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.
In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p.34) records the Tribunal's appreciation of such criticisms.
The Court is dealing with the decision of an specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24.
The Tribunal erred in law and acted unreasonably by failing to consider either

in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following - Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds.

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of evidence and one which no reasonable Tribunal could have reached.

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

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

Ground 13.

That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of s31.

Ground 14.

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

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

Grounds 15, 16, 17 and 18:

15. That the Tribunal erred in law by holding that s290 of the Act did not apply to the references in Plan Change No 6.
16. That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in s32(1).
17. That the Tribunal misconstrued the Act when it held that it has the powers conferred by s293, when considering a reference pursuant to clause 14.
18. That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it.

The first step in the appellant's argument to the Tribunal on this part of the hearing was that s290 of the RMA applied to the proceedings. That section reads-

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

The second step in the argument was that pursuant to s290(1) the Tribunal had a duty to carry out a s32(1) analysis in the same way as the Council had. The Tribunal held that s290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in s32(1) It went on to say -

> *"However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in s32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references."*

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that s290 did not apply and in determining that it was not itself required to discharge the s32 duties.

The Tribunal also held that s293 of the RMA, unlike s290, was applicable and that it had the powers conferred thereby. Section 293 (in part) is as follows -

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

Although s293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for s293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by s293 in respect of a proposed change as well as those conferred by clause 15(2) of the First Schedule. That clause is as follows -

> *"(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."*

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by s293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that s290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in s293 but instead on its jurisdiction under clause 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of s32. He submitted that even if the Tribunal had the duties under s32 of the Council

(but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to s290 and s293.

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers conferred by s293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to clause 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to s290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect an appeal, from the decision of the Council. In addition, the provisions in clause 15(2) that a reference of the sort involved here is an 'appeal' and a reference into a regional coastal plan pursuant to clause 15(3) is an 'inquiry' link, by the terminology used, clause 15 in the First Schedule with s290.

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. s150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as s290(1) and (2) of the RMA; in particular, s150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in Waimea Residents Association Incorporated v Chelsea Investments Limited (Davison CJ, Wellington, M616/81, 16 December 1981).

There was no provision in the TCPA corresponding to s32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

We accept Mr Gould's submission that even if the Tribunal had decided that s290 applied and it had the same duties as the Council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pages 121 to 125 of the decision.

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

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in Environmental Defence Society Inc and Tai Tokerau District Maori Council v Mangonui County Council [1989] 13 NZTPA 197 and of Greig J in

Wainuiomata District Council v Local Government Commission (Wellington, 20 September 1989, CP546/89).

The Tribunal considered that in s32(1) 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in s32(2) In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

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

We return now to the appellants' primary submission.

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

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

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. Section 32 is part only of the statutory framework; by s74 a territorial authority is to prepare and change its district plan in accordance with its functions under s31 the provisions of Part II, its duty under s32 and any regulations. This was fully apprehended by and dealt with appropriately by the Tribunal. It said at p.127 -

> *"We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and area and the maintenance and enhancement of the quality of the environment.*

We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achieve that purpose, and is in accordance with those functions under s31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function."

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

In our view, the Tribunal applied the correct test when considering the relevant part of s32 it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

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

<u>Ground 20</u>.
In considering Plan Change No 6 in terms of s5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district.

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

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

<u>Ground 23</u>.
The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process.
These grounds were not argued because of the settlement reached by Transit

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

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

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically stated the amendments sought and that that was final because it had not been appealed. Reference was made to s295 of the RMA viz -

> *"that a decision of the Planning Tribunal ... is final unless it is re-heard under s294 or appealed under s299*

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

All parties accepted that the Tribunal had power under clause 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under s293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in s293(3).

On the penultimate page of its decision the Tribunal stated -

> *"The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's*

*reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N.S. Read, in cross-examination by Transit's counsel.*

*The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address."*

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under s293 or clause 15(2) of the First Schedule.

In Port Otago Limited v Dunedin City Council (Dunedin, AP112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under s293 or Clause 15(2) of the First Schedule in relation to the rules forming part of the settlement.

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

Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under s299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are:

(a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable;

(b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal;

(c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court.

There is much to be said for having the same rules for similar kinds of appeals. Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might

have thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court. We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in s300-s307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

**Result**

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

# GENERAL DISTRIBUTORS LTD v WAIPA DISTRICT COUNCIL

High Court, Auckland (CIV-2008-404-4857)
Wylie J

21, 22 October:
19 December 2008

*District Plan — Land — Commercial development — Large format retail development in town centre — Planned development included a supermarket — Rezoning of land from residential and rural to general zoning — Respondent approved plan change, provided retail development 1.2 km from the town centre — Appeal to Environment Court — Appeal dismissed — Environment Court purported to amend plan in a way not sought in plan change as notified — Appeal to High Court — Submitted Environment Court lacked jurisdiction to amend plan in such a way, and that it had applied s 74(3) Resource Management Act 1991 in a way which subverted unchallenged plan objectives — Interpretation Act 1999 s 5(1); Resource Management Act 1991, ss 2, 7, 32, 74(1), 74(3), 94(2)(a), 94D, 104(3)(a), 104(8), 274, 293, 299, 301, Part 1, Schedule 1; Resource Management Amendment Act 1997; Resource Management (Forms, Fees, and Procedure) Regulations 2003.*

A privately initiated plan change proposed a large format retail development in the town centre of Te Awamutu. The proposed development, which included a supermarket tenanted by a subsidiary of Foodstuffs (Auckland) Ltd, would rezone an area of 6.08 ha from residential and rural to general zoning. The respondent, the Waipa District Council ("the council"), approved a plan change but provided for the retail development 1.2 km from the town centre. The appellant, General Distributors Ltd ("GDL"), was a subsidiary of Foodstuffs rival Progressive Enterprises Ltd ("Progressive"). Progressive owned or supplied three existing supermarkets in Te Awamutu.

GDL appealed to the Environment Court to overturn the plan change. The Court dismissed the appeal, and instead purported to amend the plan in a way not sought in the plan change as notified, nor as expressly sought by any submitter. Further the Environment Court held that any effects on the town centre would be minor, and that the change would not have consequential flow-on effects on the town centre, other than those of normal trade competition.

GDL subsequently appealed to the High Court on grounds that the

Environment Court lacked jurisdiction to change the plan in such a manner, and that it had applied s 74(3) Resource Management Act 1991 ("RMA") in a way which subverted unchallenged plan objectives.

**Held**, (1) the Environment Court lacked the jurisdiction to approve an amendment to an explanation contained in one objective of the consent documentation. In finding that the explanation was sufficiently connected to the plan change and submissions to warrant approval, the Court had erred. Nor was the reworded explanation an iterative extension of matters discussed at the council hearing. What was discussed at the council hearing was irrelevant when considering whether or not the Court had jurisdiction to approve an amendment to a plan change. Rather, it is the terms of the proposed change and the content of the submissions filed which delimit the Environment Court's jurisdiction. (para 64)

(2) Section 74(3) RMA does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed, it is obliged to do so under s 74(1) RMA. (para 93)

(3) Local authorities promulgating plans, or changing plans, must not have regard to trade competition, or to the effects which are normally associated with trade competition. The promotion of town centre consolidation, and the dispersal of commercial activity, however, are legitimate resource management issues because they can raise significant social and economic concerns. Provision can properly be made for them in district plans. In the present case the Environment Court was required to disregard trade competition and any effect on the town centre ordinarily associated with, or expected from, normal trade competition. That is what is required by the prohibition contained in s 74(3) RMA, as interpreted by the Supreme Court in *Discount Brands*. Here, the Environment Court had not erred in its approach to trade competition issues. (paras 94, 96, 100)

*Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17; [2005] 2 NZLR 597; (2005) 11 ELRNZ 346; [2005] NZRMA 337 referred to

(4) There was nothing in the Environment Court's analysis which had tainted its comments on the application of s 293 RMA. It was clear from the wording used by the Environment Court that it was simply indicating that, but for its finding on the issue of jurisdiction, it would have invoked s 293. (para 104)

**Comment,** councils, and the Environment Court on appeal, should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change

documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change. The High Court doubted that that conclusion should be too readily reached. Lawyers and planners will often seek to bolster their arguments by reference to particular provisions contained in a plan, and that it is difficult in advance to predict how significant or otherwise certain passages or words in a plan may prove to be. To reason that an amendment can be made because it is consistent with the broad tenor of a plan change, begs the question — why is it being belatedly sought by one side and why is it being resisted by the other? (para 63)

*Appeal dismissed.*

**Cases referred to**

*AFFCO NZ Ltd v Far North DC (No 2)* (1994) 1B ELRNZ 101; [1994] NZRMA 224
*Campbell v Christchurch CC* [2002] NZRMA 332
*Countdown Properties (Northlands) Ltd v Dunedin CC* (1994) 1B ELRNZ 150; [1994] NZRMA 145
*Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZSC 17; [2005] 2 NZLR 597; (2005) 11 ELRNZ 346; [2005] NZRMA 337
*Northcote Mainstreet Inc v North Shore CC* (2004) 10 ELRNZ 146
*Royal Forest & Bird Protection Soc Inc v Southland DC* [1997] NZRMA 408
*Shaw v Selwyn DC* [2001] 2 NZLR 277; [2001] NZRMA 399
*Smith v Takapuna CC* (1988) 13 NZTPA 156
*Vivid Holdings Ltd, Re an application by* (1999) 5 ELRNZ 264; [1999] NZRMA 467

**Appeal**

This was an unsuccessful appeal against an Environment Court decision which dismissed an appeal against the Waipa District Council's decision to approve a change to its District Plan.

*C N Whata* and *J D Gardner* for appellant
*P M Lang* for respondent
*D R Clay* and *V N Morrison* for first s 301 party
*L F Muldowney* for second s 301 party

**WYLIE J** (reserved): [1] This is an appeal from a decision of the Environment Court in relation to a proposed plan change — Plan Change 53 — to the Operative Waipa District Plan ("the District Plan"). It raises essentially two issues:

(a) whether the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified,

and which was not expressly sought by any submitter or further submitter; and

(b) whether the way in which the Environment Court approached the prohibition contained in s 74(3) of the Resource Management Act 1991 ("the Act") subverts unchallenged objectives and policies contained in the District Plan.

**Relevant factual background**

[2] Plan Change 53 is a privately initiated plan change. It was initiated by Bilimag Holdings Ltd ("Bilimag"). It seeks to rezone an area of 6.08 ha situated at 670 Cambridge Rd, Te Awamutu from residential and rural zoning to general zoning. It also seeks a number of changes to existing objectives, policies and rules contained in the District Plan.

[3] The overall purpose of the plan change is to provide for a large format retail development (including a supermarket) on the subject site, which is situated approximately 1.2 km from the Te Awamutu town centre.

[4] Bilimag requested the Waipa District Council ("the council") to undertake the change to its District Plan pursuant to cl 21(1) in the First Schedule to the Act. It lodged a draft plan change together with an evaluation made under s 32 of the Act.

[5] The council did not adopt the plan change under cl 25(2)(a). Rather it accepted the request and proceeded to notify it under cl 25(2)(b) of the Act.

[6] Bilimag did not lodge a submission. It was of course nevertheless entitled to appear at the hearing before the council — cl 29(3) of the First Schedule to the Act.

[7] Various submissions were lodged, including a submission by The National Trading Company of New Zealand Ltd ("NTC"). NTC is a wholly-owned subsidiary of Foodstuffs (Auckland) Ltd ("Foodstuffs"). Foodstuffs trades under various banners including Pak'n Save, New World and Four Square. It is the proposed tenant of the supermarket space which would be enabled by the plan change. NTC, in its submission supported the change, claiming that it is consistent with the purpose and principles of the Act, that it will benefit the economic and social wellbeing of the Te Awamutu community and that any adverse effects are mitigated through conditions and the proposed rules. No changes to the wording of the plan change were sought.

[8] A submission was also lodged by the appellant — General Distributors Ltd ("GDL"). GDL is a subsidiary of Progressive Enterprises Ltd ("Progressive"). Progressive also trades under various banners including Countdown, Woolworths and Fresh Choice. It owns and operates one of the two existing supermarkets in Te Awamutu, which trades under the Woolworths banner. The other supermarket trades under the Fresh Choice

banner. It is independently operated but is supplied by Progressive. GDL's submissions asserted that the plan change will not promote sustainable management, that it will not promote the centre based planning framework contained in the District Plan and it will undermine the District Plan's integrity and coherence.

[9] Thus the scene was set for yet another supermarket tussle without which planning and resource management law in this country would be so much the poorer.

[10] Round one was before the council through its Regulatory Committee ("the committee"). It held a hearing and issued its decision on 19 December 2006. The committee recorded in its decision that it heard a substantial amount of technical and expert evidence, particularly in relation to economic effects on the Te Awamutu town centre. Substantial submissions were presented by both NTC and GDL. In the event the committee was satisfied that the proposed plan change would promote the sustainable management of natural and physical resources, and that it was in accordance with the purpose of the Act. It concluded that its effects would be minor, and in particular that the recognition and protection of the town centre afforded by the plan would not be compromised by adoption of the plan change. The council through the committee resolved that the plan change should be approved, with some relatively minor modifications.

[11] Round two was before the Environment Court. Bilimag, NTC and GDL all appealed. There were two s 274 parties — Thornbury Properties Ltd and Transit New Zealand. Bilimag sought minor changes to some aspects of the plan change approved by the council. NTC also sought changes to the plan change. GDL, supported by Thornbury Properties Ltd, sought that the council's decision be overturned and that the proposed plan change be declined.

[12] In the event the appeals by Bilimag and NTC were settled by consent with the council, and on the first day of the hearing consent documentation was filed. An amended version of the plan change incorporating the amendments made by the council in its decision and further agreed changes was also filed. GDL did not consent and it submitted that the Environment Court had no jurisdiction to approve some of the changes the other parties had agreed.

[13] GDL's appeal proceeded to a hearing. It was heard over a period of some 20 days, spread over five separate periods, commencing in November 2007 and concluding in February 2008. The Environment Court issued its decision on 8 June 2008. Subject to one minor change, it approved the plan change in the form agreed by Bilimag, NTC and the council. It considered that any effects on the Te Awamutu town centre will be no more than minor. It dismissed GDL's appeal.

[14] GDL has appealed to this Court and round three has been heard by

me. GDL's appeal raises five points of law — four of which are interrelated. NTC and Bilimag appear having given notice under s 301 of the Act.

[15] I will outline the relevant details of the District Plan and the proposed plan change before turning to the points raised on appeal.

**The District Plan**

[16] The District Plan became operative on 1 December 1997. It uses zoning to identify areas within the district suitable for various groups of activities, and then sets performance standards and assessment criteria to control and manage the environmental effects of activities occurring within the zones.

[17] There are two substantial towns in the district — Cambridge and Te Awamutu. As the Environment Court noted at para 8 of the decision under appeal, for commercial activities within these towns there are only two zones — namely the town centres zone and the general zone.

[18] In Te Awamutu, the town centres zone comprises seven blocks of land in the centre of the town. It is largely surrounded by the general zone, although there are isolated pockets of general zoning which are not immediately contiguous to the town centre zone. There are then industrial, residential and rural zones beyond the general zone.

[19] The zone statement for the town centres zone records that the zone contains concentrations of the most visitor and employee intensive activities such as retailing, personal services and offices. The broad strategy is to concentrate visitor-intensive activities — particularly retailing — in the defined central area, and to discourage the spread of visitor-intensive activities in the surrounding general and residential zones. Performance standards for the zone recognise the need to maintain a high standard of amenity for the large numbers of people working in and visiting the town centre.

[20] Relevant objectives and policies contained in the operative plan include the following:

(a) *Objective C01*
To sustainably manage the resources embodied in the central areas of the main towns in the district so that they efficiently meet community needs.

(b) *Objective C03*
To ensure minimal adverse effects of commercial activities on other activities, on people, and on the wider environment.

(c) *Objective C04*

To manage the development and redevelopment of the town centres in a way which enhances environmental quality and meets community outcomes.

(d) *Policy C03*
To require the containment of visitor-intensive activities (particularly retailing) in defined "core" areas (the Town Centres Zone) of Te Awamutu and Cambridge.

(e) *Policy C04*
To allow a wide range of activities which benefit from central locations in the area around the retail "core" ("General Zone") in Te Awamutu and Cambridge and Kihikihi town centre.

(f) *Policy C06*
To encourage energy efficiency by allowing intensive development in town centre areas, and requiring concentration of visitor-intensive activities, particularly retailing.

**The plan change**

[21] As noted, the plan change seeks to rezone residential and rural zoned land in Cambridge Rd to general zone.

[22] The executive summary in the public notice of the plan change stated as follows:

The proposed changes to the objectives/policies for commercial activities relate to:

- Recognising that there maybe circumstances where commercial activities could establish outside of town centres or surrounding general zone areas.
- Providing for commercial activities outside of town centres where it (sic) can be demonstrated that any adverse effects on the environment of these activities will be no more than minor.
- Altering the prescriptive wording of some policies to provide a more flexible approach to commercial activities outside of town centres.
- Consequential amendments to policy explanations and the zone statements for the town centre and general zones.

[23] There are various references in the plan change document itself, and in the s 32 report accompanying it, to the effect that adopting the plan change will have a no more than minor effect on the environment in the Te Awamutu town centre.

[24] As notified, the plan change did not seek to amend objectives C01, C03 or C04. It did however seek to alter the explanation to objective C04. The proposed alterations were as follows:

The broad strategy for sustainable management of the town centres in the district is to consolidate visitor-intensive activities (particularly retailing) in defined 'core' areas (Town Centres Zone) ~~surrounded~~*supported* by mixed activity areas occurring for the wide range of activities ~~which benefit from a central location~~ (General Zone)

in any urban community.

*It is recognised that there may be circumstances (such as lack of availability of suitably sized land parcels) where it is not possible for proposed large scale commercial developments to be located in areas surrounding the defined 'core areas'. Council may consider the extension of the General Zone to locations that do not surround the Town Centres Zone.*

[25] The plan change as notified proposed a new objective C05 and accompanying explanation to read as follows:

To provide for commercial activities outside the Town Centre zone where there are social and economic benefits for the community and where it can be demonstrated that any adverse effects on the environment of the town centre concerned will be no more than minor.

**Explanation**

While visitor-intensive activity is generally to be concentrated in the Town Centre zone there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor-intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on the town centre concerned.

[26] There were amendments to policy C03 and a new policy C04A was proposed. The new policy and explanation was to read as follows:

To provide for commercial/mixed use activities in areas of the District which do not form or surround existing town centres, to an extent that it can be demonstrated that such activities will not undermine the role and function of the town centres, as contained within the Town Centre Zone and the General Zone areas surrounding the town centres of Cambridge and Te Awamutu.

**Explanation**

While commercial activities are generally to be concentrated in the Town Centre Zone or the surrounding General Zone (policy C03, C012) there may be circumstances where other areas may be able to be developed for commercial/mixed use activities without impacting on the role or function of the town centre concerned. Council may consider the establishment of visitor-intensive activities in areas removed from the Town Centre Zone (or surrounding General Zone) where it is demonstrated that such activities will have no more than minor adverse effects on a town centre concerned.

[27] There were other amendments and alterations proposed, including to the general zone statement, the town centres zone statement, and the rules.

## The appeal

[28] The appeal is brought pursuant to s 299 of the Act. The right of appeal conferred by that section is limited to points of law.

[29] It is a trite observation that this Court should be slow to interfere with decisions of the Environment Court within its specialist area. To succeed GDL must identify a question of law arising out of the Environment Court's decision and then demonstrate that that question of law has been erroneously decided by the Environment Court — *Smith v Takapuna CC* (1988) 13 NZTPA 156.

[30] The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin CC* (1994) 1B ELRNZ 150; [1994] NZRMA 145 at pp 157-158, p 153. In that case the full Court — Barker, Williamson and Fraser JJ — noted as follows:

> this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal—
>
> (a) Applied a wrong legal test; or
>
> (b) Came to a conclusion without evidence or one to which on the evidence, it could not reasonably have come; or
>
> (c) Took into account matters which it should not have taken into account; or
>
> (d) Failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society Inc v Mangonui County Council* (1988) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[31] These observations have been cited and followed in numerous cases and I adopt them for the purposes of this appeal.

[32] I will address the jurisdictional issue first — namely whether or not the Environment Court had jurisdiction to amend the District Plan in a way which was not sought in the plan change as notified and which was not expressly sought by any submitter or cross-submitter — and then deal with the Environment Court's approach to the trade competition prohibition under s 74(3), and whether that approach subverted unchallenged objectives and policies in the District Plan.

## Jurisdiction of the Environment Court to amend District Plan

### *Explanation to objective C04 — the council's and the Environment Court's decisions*

[33] GDL focused on the explanation to objective C04.

[34] The council decision on the explanation adopted the wording proposed in the plan change as notified — see para 24 above — with one exception. In the second line of the second paragraph it deleted the word "possible" and replaced it with the word "feasible".

[35] The provenance of that change is unclear. It was not sought in any submission, but counsel were agreed that nothing turns on it.

[36] The notices of appeal filed in the Environment Court by NTC and Bilimag sought that the explanation to objective C04 should be further amended, by adding after the words "where it is not feasible" the words "or is inappropriate".

[37] The consent order submitted by Bilimag, NTC and the council went beyond the notices of appeal. It sought to delete the explanation to objective C04 in its totality, and to replace it with the following:

> The District Plan anticipates that visitor-intensive activities will generally be located in the Town Centres zone. It is also recognised that there may be circumstances when large scale visitor-intensive activities may be appropriately located in the General zone including poor site availability in the Town Centre zone or avoidance of adverse effects on Town Centre amenity. It is therefore appropriate to provide for visitor-intensive activities as permitted activities in the Town Centre zone and to complement that with provision for consideration of large scale visitor-intensive activities in the General zone.

[38] It was this version of the explanation to objective C04 which was ultimately approved by the Environment Court.

[39] The Environment Court considered whether it had jurisdiction to make the amendment. It referred to the decision of the full Court in *Countdown Properties*. It also referred to the decisions in *Re an Application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264; [1999] NZRMA 467, *Royal Forest & Bird Protection Soc Inc v Southland DC* [1997] NZRMA 408, and *Campbell v Christchurch CC* [2002] NZRMA 332, at para 20. The Environment Court stated at para 33 as follows:

> The issue therefore is whether the changes where jurisdiction is challenged seek to materially depart from the basic premise of the notified version of the Plan Change and its supporting documentation. Or to put it another way, whether the change sought falls '*fairly and reasonably*' or by '*reasonable implication*' within the general scope of a submission and/or the proposed plan as notified.

It then found at para 45 as follows:

> We find that the words '*or [is] inappropriate*' are within the Court's jurisdiction. We consider the reworded phrase contained in the consent documentation is sufficiently connected, all-be-it tenuously. The reworded phrase is an iterative extension of the matters discussed at the Council hearing and no one would be disadvantaged by the proposed amendment.

*GDL's appeal — jurisdiction to amend*

[40] The first question of law posed by GDL in the notice of appeal as question 3[a] is expressed as follows:

> Is the Environment Court empowered to grant relief to an Applicant for a plan change to amend the District Plan in circumstances where the relief sought:
> (a) was not included in the Notified Plan Change or associated reportage;
> (b) was not included in submissions on the Notified Plan Change (including the submission by the Applicant);
> (c) was not included in the Decisions version of the Plan Change; and
> (d) materially affects the interpretation and application of unchallenged objectives and policies of the District Plan.

[41] The question widely expressed, but it was common ground that it is confined to the explanation for objective C04 which the Environment Court ultimately approved. The question is also not well worded — because it assumes propositions which are open to debate — in particular that the amendment materially affects the interpretation and application of the District Plan.

[42] An additional question — question 3[g] — read as follows:

> Was the Environment Court required to determine that sufficient retailing opportunity existed in order to maintain objectives to focus attention entirely on areas surrounding the Town Centre?

[43] Although the connection between the two questions is not obvious — at least to me — no separate argument was mounted by GDL in regard to question 3[g]. Rather this question was subsumed within the argument presented on question 3[a].

*Submissions for GDL*

[44] GDL says that the specific explanation to objective C04 approved by the Environment Court was not included in the plan change as notified.

[45] Mr Gardner-Hopkins referred me to the various statutory provisions. He pointed out that the request for the plan change was made pursuant to cl 21 in the First Schedule to the Act. The council accepted it, and proceeded to notify it under cl 26. Pursuant to cl 29(1), Part 1 of the First Schedule applied. Any person was able to make a submission to the council on the proposed plan change — see cl 6. Any submission was to be in the prescribed form; Form 5 in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. *Inter alia* that form states that a submission should detail whether the submitter supports or opposes the specific provisions, or "wish[es] to have them amended". Notification was given by the council of the submissions — cl 7 — and there was then the opportunity for further submissions — cl 8. A hearing was held by the

council — cl 8(b). It was required to give its decision, including its reasons for accepting or rejecting the submissions — cl 10(1). There was then the appeal to the Environment Court — cl 14(1). That clause provides that a person who made a submission may appeal. Relevantly, cl 14(2) provides as follows:

> However a person may appeal under subclause 1 only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

[46] The submission made on behalf of GDL was that the explanation to objective C04 approved by the Environment Court had not been referred to in any submission.

[47] Mr Whata submitted that the amendment reflected a major shift in emphasis. He submitted that it:

(a) removes the policy thrust to consolidate retailing in core areas, unless it is not possible to locate that activity in those areas;
(b) recognises largely unfettered circumstances when large scale visitor activity may be appropriately located outside of the core areas;
(c) endorses provision for consideration of large scale visitor-intensive activity outside core areas.

[48] He submitted that the amendment had not been foreshadowed by the submission process or subsequently until the appeal stage, and then only in the consent order. He emphasised that the plan change had been overtly promoted:

(a) as having no impact on the broad strategy of consolidation of visitor-intensive activity (particularly retailing) within the town centres zone;
(b) as continuing to protect the town centre from the adverse effects; and
(c) as a no risk plan change.

As he put it, if the explanation is changed, the public "could quite rightly claim to have been played false", because members of the public would have had no opportunity to have input into it, and could not have anticipated it.

[49] He accepted that the amendment is a change to an explanation, but submitted that it is still significant, and that explanatory notes can be relevant to the interpretation of objectives and policies.

[50] He referred to the case law to the effect that amendments to a plan cannot go beyond the scope of what is fairly and reasonably raised in submissions on a plan change, and submitted that, in the absence of a submission seeking a change to the broad strategy of the District Plan, there was no jurisdiction for the Environment Court to rewrite the explanation to objective C04 and that the Court had erred in doing so.

*Submissions for the council, Bilimag and NTC*

[51] Mr Lang for the council submitted first that the amendment made by the Environment Court to the explanation to objective C04 did not amount to a change to the broad strategy contained in the District Plan. He argued that the amendment was consistent with the plan change proposal when read as a whole, and that it was a change that could reasonably have been anticipated to result from consideration of the plan change proposal by the council and by the Court. He referred specifically to the suite of proposed changes to the objectives and policies, including the addition of objective C05, and the addition of the further policy C04A. He submitted that these changes clearly signalled an intention to expand the range of opportunities for location of general zones to complement the town centres zone. He submitted that the proposed changes have a common purpose and theme, namely to provide greater flexibility in the strategy for managing visitor-intensive activity and development, and that, in that context, the changes to the explanation to objective C04 are consistent with the intent and theme of the proposed plan change, and could have been anticipated as a potential outcome of the plan change process.

[52] He also submitted that NTC had referred to the issue of location of large format retailing in its submission. He referred in particular to para 3.5 which reads as follows:

> Vehicle-orientated large format retailing is a legitimate form of retailing and land use is best suited locations beyond the town centre.

As Mr Lang put it, the submission involved NTC in that issue and gave fair indication to any reader that NTC might pursue the issue of the location of large format retailing in the plan change process, in a way that assisted large format retailing locating outside the town centre.

[53] Much the same arguments were made by Mr Muldowney on behalf of Bilimag, and Mr Clay on behalf of NTC.

*Analysis*

[54] 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. To this end the Act requires that public notice be given by a local authority before it promulgates or makes any changes to its plan. There is the submission/further submission process to be worked through. A degree of specificity is required in a submission — cl 6 in the First Schedule and Form 5 in the Regulations. Those who submit are entitled to attend the hearing when their submission is considered and they are entitled to a decision which should include the reasons for accepting or rejecting their submission. There is a right of appeal to the Environment Court but only if

the prospective appellant referred to the provision or the matter in the submission — cl 14(2) of the First Schedule.

[55] One of the underlying purposes of the notification/submission/ further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.

[56] There is of course a practical difficulty. As was noted in *Countdown Properties* at p 170, p 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic 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.

[57] The Act recognises this. Clause 14(2) requires only that the provision or matter has been referred to in the submission.

[58] In relation to amendments proposed to plan changes, the Court in *Countdown Properties* formulated the following test at pp 171-172, p 166:

> 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. . . . 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.

[59] In *Royal Forest & Bird Protection Soc Inc*, Pankhurst J at p 413 adopted the *Countdown Properties* test and went on to comment as follows:

> it is important that 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.

[60] This approach requires that the whole relief package detailed in submissions be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions — see *Shaw v Selwyn DC* [2001] 2 NZLR 277; [2001] NZRMA 399, at para 44.

[61] Here the change to the explanation to objective C04 was not specifically sought in any submission or further submission. NTC's submission supported the plan change, and highlighted the features of large format retailing which potentially make it inappropriate within the Town Centres zones. It did not however seek to change the explanation to objective C04. The submission as a whole did not contain anything which approximates the wording or the approach contained in the proposed explanation. Rather the submission endorsed the plan change as notified, recorded that it incorporated "appropriate provisions", and sought that it be

approved without amendment. In my view it cannot be said that the change to the explanation to objective C04 falls fairly and reasonably within the scope of NTC's submission.

[62] Nor in my view is the change to the explanation signalled in the proposed plan change as notified. I accept Mr Lang's argument that the change to the explanation is consistent with the overall tenor of the plan change, and in particular with new objective C05 and new policy C04A. That broad consistency however did not to my mind signal to the public that the explanation to objective C04 might be altered in the way ultimately approved by the Environment Court. Members of the public reading the public notice of the plan change, and the summary of submissions on it, were entitled to assume that no amendment was proposed or sought to the explanation to objective C04 beyond that signalled in the plan change as notified.

[63] In my view councils, and the Environment Court on appeal, should be cautious in making amendments to plan changes which have not been sought by any submitter, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change. I doubt that that conclusion should be too readily reached. Lawyers and planners will often seek to bolster their arguments by reference to particular provisions contained in a plan, and that it is difficult in advance to predict how significant or otherwise certain passages or words in a plan may prove to be. To reason that an amendment can be made because it is consistent with the broad tenor of a plan change, begs the question — why is it being belatedly sought by one side and why is it being resisted by the other?

[64] It is ultimately a question of degree, and perhaps even of impression, but in my view the Environment Court erred when it found that the explanation contained in the consent documentation was sufficiently connected to the plan change and the submissions to warrant its approval. There is nothing in either the change or the submissions to establish that connection. Moreover, I cannot see that the reworded explanation is an "iterative extension" of matters discussed at the council hearing as suggested by the Environment Court. Even if it were, I do not consider that this permitted the amendments approved by the Environment Court. Notwithstanding an obiter passage in *Countdown Properties* at pp 172-173, p 167 which might suggest to the contrary, in my view what was discussed at the council hearing is irrelevant when considering whether or not there is jurisdiction to approve an amendment to a plan change. Rather it is the terms of the proposed change and the content of submissions filed which delimit the Environment Court's jurisdiction. What occurred at the council or the Environment Court hearing and whether or not anyone would be

disadvantaged by the amendment are matters more appropriately addressed by the Environment Court when it is considering whether or not s 293 of the Act should be invoked.

[65] In my view the Environment Court did not have jurisdiction as a matter of law to approve the amendment to the explanation to objective C04.

[66] The council, Bilimag and NTC, argued that even if the Environment Court did not have jurisdiction to amend the explanation, that any error it made in this regard was immaterial, because the Court clearly signalled that it was prepared to invoke its powers under s 293 to direct the council to make the amendment. Mr Whata submitted that the Environment Court's indication at para 53 that it would not have hesitated to invoke s 293 was bound up with its approach to what he called the "trade competition filter". This leads directly to the other second key issue raised by the appeal. I deal with this and then return to the s 293 point below at paras 102-106.

## Section 74(3) — trade competition — unchallenged objectives/policies

*Section 74(3) — Environment Court's decision*

[67] Having determined that it had jurisdiction to approve the amendment to the explanation to objective C04, the Environment Court then went on to consider whether or not it should approve the plan change. It considered the relevant statutory framework, and noted the submissions made by GDL. It then summarised what it saw as the single crucial issue before it as follows:

> Whether the plan change is the most appropriate way to enable large format retailing having regard to the objectives and policies that seek to accord primacy to the town centre.

[68] It discussed the relevance of retailing effects and referred specifically to s 74(3). It noted that it was common ground that flow-on effects, or more precisely the consequential social and economic effects, caused by a change in trading patterns was a matter it must have regard to. It discussed what amount to consequential social and economic effects by reference to the judgment of Randerson J in *Northcote Mainstreet Inc v North Shore CC* (2004) 10 ELRNZ 146. In considering the appropriate balance to be adopted when considering these flow-on effects, it referred to the Supreme Court decision in the same case, which is reported as *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] 2 NZLR 597; (2005) 11 ELRNZ 346. In that case the Court found that effects must be "significant" before they can properly be regarded as being beyond the effects ordinarily associated with trade competition: at para 120.

[69] The Environment Court took the term "significant" to mean consequential upon or beyond effects ordinarily associated with trade competition on trade competitors.

[70] It then considered the evidence before it and concluded inter alia that the proposed new retailing centre which would be enabled by the plan change would not have consequential flow-on effects on the town centre either in the medium or long term other than what could be expected by normal trade competition — see para 142(iv). It concluded that the plan change was the most appropriate way to enable large format retailing having regard to the unchallenged objectives and policies in the plan that seek to accord primacy to the town centre.

*GDL's appeal — s 74(3)*

[71] GDL's notice of appeal posed the following questions:

- Was the Environment Court required by law (including s 74(3) of the Act) to disregard any effect on the Town Centre ordinarily associated with trade competition or expected by normal trade competition, irrespective of the unchallenged objectives and policies of the District Plan to protect the town centre?
- What is the meaning of trade competition under s 74(3) of the Act?

And/or

- Was the Environment Court required by law to have regard to all effects on the Town Centre, including those effects ordinarily associated with trade competition, where assessment of those effects is relevant to the attainment of the unchallenged objectives and policies of the District Plan referred to in paragraph 2(b)(i)-(iii) above?

And in particular:

- Was the Environment Court required to assess the Plan Change against *any* adverse impact it might have on the Town Centre, and the unchallenged objectives and policies identified in the District Plan to protect the Town Centre.

[72] In addition, the notice of appeal queried whether the Environment Court adopted an incorrect threshold of effects, and a wrong definition of the words "no more than minor" contained in the plan, and alleged that its decision was irrational — questions 3[f] and [h].

[73] Mr Muldowney submitted that the errors are linked, and that they are capable of being distilled down to one core proposition — namely the alleged subversion of the unchallenged objectives and policies of the District Plan via collateral operation of the trade competition ban. Mr Whata expressly accepted that this analysis was correct. I therefore deal with all of these alleged errors together.

*Submissions for GDL*

[74] GDL submitted that the most important matter for the Environment

Court to determine was whether the proposed new centre would have a more than minor effect on the town centre. It noted the Environment Court's conclusions that the distributional effects of the proposed new centre would have no effect on the town centre "other than what could be expected by normal trade competition" — para 141 — and that the new centre would not have consequential flow-on effects on the town centre in either the medium or long term "other than what could ordinarily be expected by normal trade competition" — para 142(iv). Mr Whata referred to the passage from the decision of Blanchard J set out below at para 89, and then went on to submit that context is everything. He argued that in the present case, there were unchallenged objectives and policies in the District Plan which seek to accord primacy to the town centre, and which embrace a broad strategy of consolidation of visitor-intensive activities in the town centre. He submitted the Environment Court should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre, and against these unchallenged objectives and policies. He relied on a passage in the judgment of Elias CJ in *Discount Brands* at para 17. He submitted that in the circumstances, it was erroneous and contrary to the explicit objectives of the District Plan to disregard effects that materially reduce the visitor-intensive activity in the core areas, and affect the primacy of the town centre as the focal point for visitor-intensive activities.

[75] Further, he submitted that there is nothing in s 74(3) that requires the Court to disregard effects that are relevant to the attainment of legitimate resource management purposes as manifested in unchallenged objectives and policies. He submitted that the words "trade competition" used in s 74(3) mean the operation of the market, comprising producers, retailers, and consumers of goods, and that the prohibition on having regard to trade competition does not prevent consideration of adverse effects on the environmental quality of town centres, if the District Plan identifies that value as being important to the community. It was his submission that the section does not require effects "ordinarily associated with" or "expected by normal" trade competition to be disregarded; rather it requires that "trade competition" be disregarded. It was asserted that trade competition ought not to be given a meaning that is inconsistent with the attainment of sustainable management, and that in the present context, due regard should have been given to the direct impacts on visitor-intensive activity in the town centre, irrespective of the fact that those impacts are ordinarily associated with trade competition. He submitted that the Environment Court had failed to assess those direct impacts, because it relied on what he called the "trade competition filter" derived from the passage in the judgment of Blanchard J.

*Submissions for the council, Bilimag and NTC*

[76] Counsel for the council, Bilimag and NTC variously argued that GDL's appeal attempted to subvert clear and express prohibition in s 74(3) against having regard to trade competition.

[77] It was submitted that the starting point is the wording in the section itself, and that the Court, applying s 5(1) of the Interpretation Act 1999, should take a purposive approach to the interpretation and application of the subsection. It was said that GDL's appeal attempts to subvert the prohibition by blurring the accepted definition of trade competition, and suggesting that if the proposed objectives and plan call for an assessment of any effects, then the s 74(3) prohibition should give way to the proposed objective. It was submitted that the subsection is intended to exclude trade competition (including its effects) from consideration. It was said that the counterpart section, s 104(3)(a), has been consistently interpreted in this manner, and that to exclude the effects of trade competition from consideration would be inconsistent with the scheme of the Act. It was argued that the Courts have recognised that limiting trade competition to effects solely on trade competitors is unworkable, given the interrelationship between trade competitors and their market. It was argued that trade competition effects include both direct effects on trade competitors, and the broader social and economic effects on those they serve, and that the line is drawn at the point where those broader social and economic effects become significant. Effects which do not reach the "significant" threshold have been described by the Court as effects ordinarily associated with trade competition and trade competitors, or effects normally associated with trade competition on trade competitors. It was submitted that there was no inconsistency between the judgments of Elias CJ and Blanchard J, and that both were consistent with the proposition that trade competition effects must be disregarded, and whether in the context of a notification decision (as in *Discount Brands*) or in relation to a decision whether or not to adopt a plan change. It was submitted that the Environment Court had correctly applied Blanchard J's significance test, that it had undertaken a detailed analysis of the evidence, and properly concluded that no such effects arose.

*Analysis*

[78] Section 74(3) provides as follows:

> (3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition. It was introduced to the Act in 1997 by the Resource Management (Amendment) Act 1997.

[79] There is a similar provision in s 104(3)(a) which provides that a consent authority must not have regard to trade competition when considering an application for a resource consent.

[80] The original prohibition was contained in what was s 104(8). It was limited to resource consent applications and it was in rather narrower terms. It read as follows:

> When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.

[81] This provision was amended. It is now s 104(3)(a) and it is no longer necessary that the effects of trade competition be on trade competitors before they become an irrelevant consideration. The amendment widened the scope of the subsection to trade competition per se regardless of who is affected. This was acknowledged by the then Planning Tribunal in *AFFCO NZ Ltd v Far North DC (No 2)* (1994) 1B ELRNZ 101; [1994] NZRMA 224, at pp 118-119, p 237.

[82] Parliament has not seen fit to define the words "trade competition", and in my view wisely so. The words are ordinary English words, and they should carry their ordinary and common sense meaning. They refer succinctly to the rivalrous behaviour which can occur between those involved in commerce.

[83] Mr Whata sought to argue that s 74(3) requires simply that "trade competition" be disregarded — and not its effects. I agree with Mr Muldowney that this is sophistry. The Act is effects based, and s 74(3) is in my view intended to ensure that trade competition, and its effects, are not to be had regard to in preparing or changing a district plan.

[84] The base proposition has long been that planning law should not be used as means of licensing or regulating competition — see *Northcote Mainstreet Inc* at para 52 and the cases there cited. These comments were referred to by Blanchard J with apparent approval — see *Discount Brands* at para 89.

[85] Read literally, the prohibition in s 74(3) could cut across other provisions contained in the Act, and in particular the purpose and principles of the Act set out in Part 2.

[86] The purpose of the Act is of course to promote the sustainable management of natural and physical resources, and the words "sustainable management" *inter alia* refer to the use and development of resources in a way which enables people and communities to provide for their social and economic wellbeing. Further s 7 requires all persons exercising all functions and powers under it to have particular regard to the efficient use and development of natural and physical resources, and to the maintenance and enhancement of amenity values. These broad provisions are backed up by the wide definitions given to the words "environment", and "amenity values" in s 2 of the Act.

[87] The Courts have striven to give effect to the statutory prohibition, and to the wider purposes and principles of the Act, by making it clear that it is only trade competition and those effects ordinarily associated with trade competition, which are required to be ignored under s 104(3)(a), and which cannot be had regard to when preparing or changing a district plan under s 74(3). Effects may however go beyond trade competition and become an effect on people and communities, on their social, economic and cultural wellbeing, on amenity values and on the environment. In such situations the effects can properly be regarded as being more than the effects ordinarily associated with trade competition.

[88] This proposition was discussed by the Supreme Court in *Discount Brands* and in particular by Elias CJ and Blanchard J. At para 89, Blanchard J noted as follows:

> In his judgment in the High Court Randerson J observed that there was a statutory policy that the Act was not to be used as a means of licensing or regulating competition. Section 104(8) precluded a consent authority from having regard to the effects of trade competition on trade competitors when considering an application for a resource consent. But broader economic and social impacts might flow if a proposal were to result in the decline of an existing shopping centre to the extent that it would no longer be viable as a centre, with consequent adverse effects on the community as a whole or at least a substantial section of it:
>
> > 'Such effects might include the loss of investment in roading and other infrastructure as well as the loss of amenity which could result from the closure or serious decline in the attractiveness or viability of the centre as a whole. Loss of employment opportunities on a significant scale might also qualify as adverse effects for these purposes. So too the possibility that important community services associated with shopping centres might cease to be appropriately located to serve persons attracted to the shopping centre.'

His Honour went on to confirm Randerson J's description of the threshold at which social and economic effects which may flow on from trade competition can become relevant, namely when they go beyond those effects normally associated with trade competition, and become significant. Blanchard J stated at paras 119-120 as follows:

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres — on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by

trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

[120] The Court of Appeal considered that only 'major' effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were 'ruinous' the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be 'significant' before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[89] GDL sought to rely on a passage at para 17 in the judgment of Elias CJ in *Discount Brands*. It was suggested that there was an inconsistency between the judgments of Elias CJ and Blanchard J. The passage relied on reads as follows:

> In context, therefore, the application in the present case had to be assessed against any adverse impact it might have on the amenity values of existing shopping centres, and the policies identified in the district plan to confine business activities generally to centres within North Shore City identified by the district plan. It required the 'thorough evaluation' provided for by policy 4, designed in particular to consider the impact upon the amenity values of the existing centres. And in policy 5 it looked to the 'advocacy' of community-based groupings in the identification and promotion of 'the essential qualities of individual centres'.

[90] Particular emphasis was placed on the use of the words "any adverse impact". GDL submitted that the Environment Court in the present case should have assessed the effects of the plan change against *any* adverse impact it might have on the town centre.

[91] In my view, the passage in the judgment of Elias CJ in *Discount Brands* at para 17 is not concerned with identifying the appropriate test for distinguishing between effects that are to be considered under the Act, and effects which may not be considered due to either s 74(3) or s 104(3)(a). The paragraph was concerned with the analysis that was appropriate in *Discount Brands*, given the District Plan provisions there in issue. That is

clear from the discussion of the District Plan rules which precedes the paragraph, and by the use of the words "in context" at the beginning of the paragraph. It is apparent from other parts of her judgment that Elias CJ shared the view expressed by Blanchard J that while the effect of trade competition was irrelevant, other "wide ranging matters were required to be taken into account" — see, eg para 8. I do not consider that there is an inconsistency as asserted by GDL.

[92] The views expressed by Blanchard J were agreed with and adopted by the other Judges in the Court — see Keith J at para 57, Tipping J at paras 142 and 150, and Richardson J at paras 178 and 179. They formed part of the ratio of the case, and they are binding on the Environment Court and this Court.

[93] It follows that s 74(3) does not preclude a territorial authority preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in terms of s 74(1).

[94] Mr Whata sought to elevate GDL's arguments by submitting that strict application of the *Discount Brands* test would mean that district plans could not provide for town centre consolidation, or prevent dispersal of commercial activity, unless there was a serious decline. I do not consider that this argument has any merit. Local authorities promulgating plans, or changing plans, must not have regard to trade competition, or to the effects which are normally associated with trade competition. The promotion of town centre consolidation, and the dispersal of commercial activity however are legitimate resource management issues, because they can raise significant social and economic concerns. Provision can properly be made for them in district plans.

[95] There is no set definition of those effects which are normally associated with trade competition, or those which are significant. The examples cited by Randerson J in *Northcote Mainstreet Inc* at para 54, and by Blanchard J in *Discount Brands* at para 119, provide a useful benchmark against which to evaluate alleged significant social and economic effects on a case by case basis.

[96] In my view the Environment Court in the present case was required to disregard trade competition and any effect on the town centre ordinarily associated with or expected from normal trade competition. That is what is required by the prohibition contained in s 74(3), as interpreted by the Supreme Court in *Discount Brands*.

[97] There are various objectives and policies contained in the District Plan which seek to protect the existing town centre, and which recognise its importance to the people and community it serves. Those objectives and policies are not inconsistent with the prohibition contained s 74(3) for the

reasons I have explained above.

[98] GDL did rely on new objective C05, which seeks to provide for commercial activities outside the town centre zone where there are social and economic benefits, and where it can be demonstrated that any adverse effects on the environment of the town centre concerned *will be no more than minor*. GDL claimed that this objective sets the threshold, and that there is nothing in s 74(3) of the Act that requires the Court to disregard effects that are relevant to the attainment of a legitimate resource management purpose.

[99] To my mind, GDL's argument is flawed. The statutory prohibition is the primary driver, and the wording contained in proposed objective C05 cannot undermine the statutory prohibition. The reference to adverse effects in objective C05 can only be a reference to relevant effects — ie those that are beyond the effects of trade competition. There is nothing in the Act which allows a district plan to modify the effect of s 74(3) in the way in which GDL contends. If Parliament had intended that district plans should be determinative, it could have introduced s 74(3) with the words, "subject to the rules in any district plan". This approach has been taken in other provisions of the Act — see for example s 94D, which permits notification requirements to be modified by district plan rules.

[100] In my view the Environment Court did not err in its approach to trade competition issues. It did not proceed on an erroneous definition of threshold effects, and its decision cannot be said to be irrational. Rather it made a full assessment on the evidence before it, and it correctly applied s 74(3).

**Materiality**

[101] I have found the Environment Court erred when it concluded that it had jurisdiction to approve the amendment to the explanation to objective C04.

[102] That however is not the end of that matter. The Environment Court went on to observe as follows:

> [52] With regard to the possibility of applying section 293 of the Act is concerned, we agree that section 293 should be used cautiously and sparingly:
> (a) It deprives potential parties or interested persons of their right to be heard by the local authority;
> (b) The Court has to discourage careless submissions and references;
> (c) The Court has to be careful not to step into the arena — the risk of appearing partisan is the great disadvantage of inquisitorial methods.
>
> [53] However, if we are wrong with respect to our findings on the issue of jurisdiction we would have no hesitation in invoking section 293 of the Act. All of the matters contested reasonably arise out of the wording of the Plan Change

as modified in the decisions version and are part of the natural progression of the planning process. There is unlikely to be any non-party affected and no one would be disadvantaged.

[103] The council, Bilimag and NTC argued that the Environment Court had in fact exercised its discretion under s 293.

[104] I do not consider that that is the case. It is clear from the wording used by the Environment Court that it was simply indicating that, but for its finding on the issue of jurisdiction, it would have invoked s 293.

[105] Contrary to the submissions advanced for GDL, in my view the Environment Court has approached the issue of trade competition, and the prohibition contained in s 74(3) correctly, and there is nothing in its analysis which tainted its comments on the application of s 293. The Environment Court's preparedness to invoke s 293 provides an answer to the jurisdictional issue. The point becomes immaterial and I therefore decline to remit the matter to the Environment Court.

**Conclusion**

[106] Accordingly, the appeal is dismissed. The council, Bilimag and NTC are entitled to costs. I direct that any application for costs is to be filed within 10 working days of the date of this judgment. Any response by GDL is to be filed within a further 10 working days. Any final submissions in reply by the council, Bilimag and NTC are to be filed within a further 5 working day period. I will then deal with costs on the papers filed, unless I require the assistance of counsel.

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

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

**CIV-2019-425-000130**
**[2020] NZHC 3387**

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| BETWEEN | GERTRUDE'S SADDLERY LIMITED<br>Appellant |
| AND | QUEENSTOWN LAKES DISTRICT COUNCIL<br>Respondent |
| AND | ARTHURS POINT OUTSTANDING NATURAL LANDSCAPE SOCIETY INCORPORATED<br>First Interested Party |
| AND | LARCHMONT DEVELOPMENTS LIMITED<br>Second Interested Party |

| | |
|---|---|
| Hearing: | 27 and 28 October 2020 |
| Appearances: | M E Casey QC, M A Baker-Galloway, R M Giles for Appellant and Second Interested Party<br>K L Hockly for Respondent<br>P A Steven QC and E L Keeble for First Interested Party |
| Judgment: | 17 December 2020 |

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## JUDGMENT OF DUNNINGHAM J

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*This judgment was delivered by me on 17 December 2020 at 4.00 pm, pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*
*Date: 17 December 2020*

## Introduction

[1] In June 2018, the Upper Clutha Environmental Society Incorporated (Upper Clutha) lodged an appeal against the Queenstown Lakes District Council's Proposed District Plan (PDP). The Arthurs Point Outstanding Natural Landscape Society Incorporated (the Society) subsequently joined the Upper Clutha appeal as a party pursuant to s 274 Resource Management Act 1991 (RMA). The question on this appeal is whether the issues of concern to the Society fall within the scope of the Upper Clutha appeal and allow the Society to pursue them in the Environment Court.

[2] In a procedural decision which issued on 6 November 2019, the Environment Court ruled that the Society could use its s 274 notice on the Upper Clutha appeal to pursue its concerns about changes made to the PDP following the hearing of submissions, affecting two properties at Arthur's Point.[1] The changes were to exclude the properties from the area identified as Outstanding Natural Landscape (ONL), and to rezone them from Rural to Lower Density Residential (LDR).

[3] The owners of the two affected properties, Gertrude's Saddlery Ltd (Gertrude's Saddlery) and Larchmont Developments Ltd (Larchmont), along with the Queenstown Lakes District Council (the Council), all say the Judge erred in law in coming to that conclusion and have appealed it on that basis.

[4] Gertrude's Saddlery goes one step further. Mr Casey QC says the issue is now moot as the relevant part of the Upper Clutha appeal has been heard and determined against Upper Clutha. The Society cannot now pursue the issues it wishes to advance in reliance on its status as a s 274 party to that appeal.

[5] Ms Steven QC, for the Society, argues that the Judge did not err in law in the ways alleged and, looked at in a realistic and workable way, the Society's s 274 notice is within the scope of the Upper Clutha appeal. Furthermore, the issues of concern to the Society were "carved out" in the Environment Court's case management process for the PDP appeals, to be heard at a subsequent point in time, so even though all other

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1 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 176.

issues raised in the Upper Clutha appeal have been determined, the part of the appeal involving the Society is not moot and can still proceed.

## Background

[6] The procedural issues outlined above arise in the context of the Council reviewing its Operative District Plan (the ODP) through a staged series of plan changes. The Council notified Stage 1 of the PDP in August 2015. The changes notified included an Urban Development Chapter which introduced Urban Growth Boundaries (UGB) around urban areas and a Landscape Chapter that set out how development affecting the district's valued landscapes would be managed, including mapping lines that identify ONLs and Outstanding Natural Features (ONFs).

[7] The current appeal relates to the decisions made in respect of a triangle of land called Arthurs Point which sits within the Wakatipu Basin. Two of the three sides of the triangle are bordered by the Shotover River which is, itself, identified as an ONF in this area. Arthurs Point has an existing settlement on it. The properties owned by Gertrude's Saddlery and Larchmont sit on Atley Road, along the south edge of the existing settlement, but north of the Shotover River. Adopting the terminology of the Environment Court, I will refer to these properties collectively as the Shotover Loop.

[8] Under the ODP, the entire area that Arthurs Point sits within is described as an ONL (Wakatipu Basin). The majority of the boundary to that ONL is indicated by a dotted line. The legend to the relevant map contained in Appendix 8A of the ODP says that a dotted line means:

> [t]hese lines have not been through the Environment Court process to determine their exact location and … [are] … subject to analysis of specific physical circumstances of each site and the landscape descriptions provided in the … District Plan.

A part of the boundary to the ONL (Wakatipu Basin) is shown as a solid line, which is described in the legend as a "boundary between two different landscape categories or between a landscape category and an urban area … [which is] … fixed".

[9] Under the ODP, the Shotover Loop was zoned Rural General, and both properties sat within the ONL (Wakatipu Basin), as did the existing settlement at Arthurs Point.

[10] The ODP's distinction between fixed and provisional ONL boundary lines was not carried through into the PDP as notified (the PDP(N)). The lines were all shown as fixed. Planning map 39 of the PDP(N) showed the urban-zoned part of Arthurs Point delineated by an UGB, but still within the ONL. The UGB captured both the existing Arthurs Point residential area and an extension to that area proposed to be zoned LDR, but excluded all surrounding rural zoned land.

[11] Gertrude's Saddlery and Larchmont both lodged submissions on the PDP(N). Gertrude's Saddlery sought:

(a) that a defined part of its property still zoned rural should be zoned LDR;

(b) that the UGB around the Arthurs Point settlement be extended to include the part of the property which it sought to have zoned LDR.

(c) that the ONL classification over that part of the property be removed (albeit expressing this as occurring by "default");

[12] Larchmont sought:

(a) that its property be zoned LDR instead of rural;

(b) that the UGB around the Arthurs Point settlement be extended to include the Larchmont property;

(c) that planning map 39 of the PDP(N) be amended to reflect the rezoning and the change to the UGB.

Larchmont did not identify that its property was in an ONL or seek removal of that classification but in its submission it opposed having a "rural landscape classification" that did not reflect the use proposed for the site.

[13] After hearing submissions, the Council made the following decisions in relation to Arthurs Point:

(a) it inserted a new boundary line to the ONL to exclude both the existing Arthurs Point settlement and the proposed extension to it, from the ONL purporting to use its powers under sch 1 cl 16.2 of the RMA;

(b) the new ONL boundary also excluded the Shotover Loop from the ONL classification as had been done for the existing settlement;

(c) the Shotover Loop was zoned as LDR, rather than rural; and

(d) the Arthurs Point UGB was extended to include the Shotover Loop.

[14] No party expressly appealed those decisions to the Environment Court.

[15] Upper Clutha lodged an appeal. The text of the appeal is discussed more fully below, but it included a challenge to the "landscape lines" shown in the planning maps in the decisions version of the PDP (the PDP(D)).

[16] The Society (which did not exist when the initial submissions were made on the PDP(N) and so did not submit on it) lodged a s 274 RMA notice to join the Upper Clutha appeal. It did so on the grounds that it was a party with "an interest in the proceedings that is greater than the interest that the general public has".[2] In particular, it noted that "the Society is made up of members who own residential properties in close proximity to the [Shotover Loop] in Arthurs Point which it is proposed to rezone". There is no dispute that it has such an interest.

[17] In the course of pre-hearing conferences in the Environment Court, the Council advised the Society that the Upper Clutha appeal did not seek site-specific relief in relation to the Arthurs Point ONL and there was, therefore, no scope for the Society to rely on the appeal to seek either a change to the Arthurs Point ONL boundary line, nor that the Shotover Loop be rezoned back to rural. The competing views of the Council

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[2] Resource Management Act 1991, s 274(1)(d).

(supported by Gertrude's Saddlery and Larchmont) and of the Society on the issue of scope were subsequently heard by the Environment Court pursuant to s 279(1)(a) and (e) of the RMA. It is not necessary to traverse the procedural history of that matter, except to say that it culminated in the Environment Court's decision which is the subject of this appeal.

**Legal principles on appeal**

[18] Section 299 of the RMA allows an appeal to the High Court against a decision of the Environment Court on a question of law only. An error of law will have occurred where the Environment Court has:[3]

(a) applied the wrong legal test;

(b) reached a conclusion that on the evidence it could not reasonably have come to;

(c) failed to take into consideration relevant matters; and

(d) taken into account irrelevant matters.

[19] That said, the High Court will always acknowledge the deference to be shown to the Environment Court as an expert Court. As was said in *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*:[4]

> [n]o question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (footnotes omitted)

[20] In addition, the error of law must be material to the decision of the Environment Court for this Court to find in favour of the appeal.[5]

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3 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
4 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].
5 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 3, at 153.

## The issues

[21] The parties agree that two key issues arise out of the Environment Court's decision. The first is whether the Judge erred in law when he determined that the issues raised in the Society's s 274 notice came within the scope of the Upper Clutha appeal. The second is whether the Environment Court erred in law when it found that the rezoning of the Shotover Loop back to rural and removal of the UGB around it, was consequential relief that followed if the ONL lines were revised to include those properties.

## The law governing the role of a s 274 party

[22] The Society's rights to pursue an appeal are constrained by the fact it is participating as a s 274 party. Section 274 of the RMA permits various parties (including parties who were not involved in the first instance hearing) to be parties to proceedings before the Environment Court, including an appeal, but only to support or oppose the proceeding.[6] As a s 274 party, they can "appear and call evidence …" but only if "it is on matters within the scope of the appeal".

[23] The leading decision on a s 274 party's capacity to seek relief in proceedings it has joined, is the High Court's decision in *Transit New Zealand v Pearson*.[7] That case involved an appeal of certain conditions to be included in a designation. However, the s 274 party who joined the appeal sought to argue for cancellation of the designation. William Young J held that the scope of an appeal is the range between what was in the decision being appealed and the relief sought in the appeal.[8] The s 274 party could not therefore go beyond the scope of the appeal and argue for the cancellation of the designation.

[24] In *Calveley v Kaipara District Council*, Judge Hassan observed that despite subsequent amendments to s 274:[9]

> … *Pearson* remains authoritative on the essential point. That is that the scope of the appeal defines the limits of what a s 274 party to an appeal can pursue

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6 Resource Management Act 1991, s 274(3).
7 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
8 At [48]-[50].
9 *Calveley v Kaipara District Council* [2015] NZEnvC 69 at [12].

> by way of relief. The available limits to relief are between what was in the decision being appealed and the relief sought in the appeal.
>
> (footnotes omitted)

[25] He went on to say, citing *Meridian Energy Ltd v Wellington Regional Council*:[10]

> … that an incoming s 274 party is not free to define and argue for its own desired outcome but is confined to supporting or opposing only what is raised by the scope of the appeal documents. If the s 274 party wishes to seek an outcome other than one within that range the correct pathway is to lodge its own appeal.

[26] In the present case, the Society cannot lodge its own appeal. It was not a submitter on the PDP(N). Its ability to participate in the appeal process stands or falls on whether the amendments it is seeking come within the scope of the Upper Clutha appeal.

[27] There are logical reasons for these constraints. The RMA process for preparing, changing and reviewing plans, as set out in sch 1 to the RMA, is designed to:

(a) progressively refine the disputed issues as the proposed plan goes through the submission and appeal process; and

(b) promote the principles of procedural fairness and natural justice by ensuring potentially affected parties know what changes to the proposed plan are sought so they can choose to participate in decisions being made on that issue.

[28] It is for these reasons that an appellant in such proceedings cannot pursue an outcome on appeal that falls outside the scope of their original submission.[11] It is also why s 274 parties are constrained to supporting or opposing the appeal (and giving reasons for that support or opposition), and confining their evidence to matters that are within the scope of the appeal. The intention is that the addition of the s 274 party

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10 At [13], citing *Meridian Energy Ltd v Wellington Regional Council* [2012] NZEnvC 148 at [6]-[7].

11 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 (EnvC).

will not result in changes to the plan that could not have been anticipated from the appeal itself. If a submitter on a plan reviews the appeals which are lodged and is satisfied that none of them seek relief which concerns the submitter, the submitter need not concern themselves with the s 274 notices as those parties cannot seek relief beyond the scope of the appeal.

[29] With those principles in mind, I summarise both the Upper Clutha submission on the PDP(N) and its notice of appeal, as the scope of those documents and the relief sought in them are central to the issues which are addressed in the decision and raised in this appeal.

**The Upper Clutha submission on the PDP(N)**

[30] The starting point when determining the scope of Upper Clutha's appeal is to consider its original submission on the PDP(N), as the appeal can not raise issues which are outside the scope of that submission, and "the jurisdiction of the Environment Court is then limited by the scope of the relief sought on the appeal".[12]

[31] In respect of the PDP(N)'s proposal to include "definitive Landscape Lines" in the planning maps, the Society's submission read as follows:

> The Society agrees that the existing landscape provisions in the Operative District Plan are functioning well. It is accepted that some uncertainty [is] created by the case by case approach to landscape categorization in the Operative District Plan but in our submission there is no other practical approach available. The imposition of dubious and contentious Landscape Lines as proposed in the Proposed District Plan is not a credible course of action.

[32] The submission promoted the ongoing "case-by-case" approach whereby the Environment Court identified Landscape Lines in contentious part of the districts through the court process. The Society felt it was "inefficient" to determine the lines in the plan change process itself as "these may become the subject of numerous appeals by landowners thus delaying the District Plan coming into force".

[33] The relief sought by Upper Clutha was as follows:

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[12] *Hauraki Maori Trust Board v Waikato Regional Council* CIV-2003-485-999 HC Auckland, 4 March 2004, at [76].

> [Upper Clutha] seeks that the Landscape Lines determined in the Proposed District Plan process are excluded from the Plan altogether because they are not credible.
>
> Failing this [Upper Clutha] seek that the Landscape Lines are included on District Plan maps as dotted lines and that the Landscape Lines are described as guidelines that are purely indicative.

[34] As the Environment Court Judge observed, Upper Clutha's submission was "broad and wide-ranging" but it did not refer specifically to the Arthurs Point area at all. Rather, it challenged all new or amended ONL lines in the PDP(N).[13]

[35] However, Ms Steven QC points out that the Upper Clutha submission covered more than simply the "Landscape Lines" issue. It addressed numerous interrelated provisions in its 62 pages, including:

(a) wanting residential subdivision and development to be non-complying rather than discretionary within ONLs or ONFs; and

(b) expressing concern that the rural zone objectives, policies and assessment matters did not sufficiently protect against development in inappropriate locations that could degrade landscape values.

Importantly, it sought that "all of the provisions in the Operative District Plan that apply or in any way relate to Outstanding Natural Landscape (Wakatipu Basin) … are retained in the District Plan in the exact same form as in the Operative District Plan".

[36] As Ms Steven submits, the Upper Clutha submission opposes the PDP(N) provisions in relation to ONL/ONF land insofar as they depart from those in the ODP. The submission is therefore broad enough to oppose new ONL boundary lines being incorporated for the purpose of excluding land from an existing ONL, as was done in the PDP(D) for the settlement at Arthurs Point and the Shotover Loop.

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13 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*, above n 1, at [17].

**The Upper Clutha appeal**

[37] Having discussed the broad issues raised in the Upper Clutha submission, it is now necessary to turn to the Upper Clutha appeal, which is more focused than its original submission.

[38] Under the heading "Specific Provisions [Upper Clutha] is appealing", the following text appears:

> [Upper Clutha] is appealing the parts of the PDP Stage 1 that contain objectives, policies, assessment matters, rules and maps and any other provisions that relate in any way to subdivision and/or development in the Rural Zone.
>
> [Upper Clutha] is also appealing the parts of the PDP Stage 1 decision where it makes decisions and/or recommendations on the PDP Stage 2 where this in any way relates to Rural Zone subdivision and/or development.

[39] The appeal document goes on to set out the reasons for the appeal. These include:

> 2. …
>
> - The PDP does not adequately recognise and provide for matters in Section 6 of the Resource Management Act and in particular s.6 (a) and (b). The PDP does not adequately protect for future generations the Outstanding Natural Landscape (ONL) and Outstanding Natural Feature (ONF) landscapes of the district from inappropriate subdivision and/or development.
>
> …
>
> 3. The decision errs in failing to recognise that Operative District Plan (ODP) provisions rolled-over into PDP Stage 1 in the manner shown in Appendices A-D (or very similar) better achieve the purpose of the Act than the provisions in the PDP Stage 1 decision. …
>
> 4. The decision errs in failing to give sufficient weight to the Council decisions, public submissions, appeals and Environment Court decisions that wrote the rural objectives, policies, assessment matters, rules and other rural provisions in the ODP. The decision errs in failing to fully recognise that these essentially addressed the same rural issues under the same Act as those addressed in the PDP Stage 1 decision.
>
> …

10. The decision errs in deciding that the Landscape Lines delineating ONL, ONF's and Rural Character Landscape in the maps and the PDP Stage 1 decision are credible. The decision errs in failing to recognise that the process behind identifying these Landscape Lines is flawed. The decision errs in deciding that there is "an adequate evidential foundation for identifying ONL and ONF lines". The decision errs in deciding that, as delineated, these Landscape Lines will be efficient and effective in categorising landscapes and in implementing the objectives, policies, assessment matters and rules attached to such categorisation.

[40] The relief sought by Upper Clutha included:

…

3. That amendments to the PDP Stage 1's text and maps consistent with the issues listed below are incorporated in the PDP where they are additional to those detailed in Appendices A-D and paragraphs 1 and 2 above.

…

5. That the PDP reflects in its provisions that there is sufficient land zoned in the Queenstown Lakes District for residential purposes to satisfy population growth until at least 2048 without the need to grant consent for any additional residential capacity in the Rural Zone.

…

7. That the Landscape Lines shown on the ODP maps are rolled-over in their exact current form. That the Landscape Lines additional to those contained on the ODP maps, shown on the PDP Stage 1 maps, are included in the PDP as dotted lines (with the exception of the two locations at Dublin Bay/Mount Brown, Waterfall Hills/Waterfall Creek described below) with the following attendant text shown on all maps where these dotted lines appear:

> *Boundary between two different landscape categories. The solid lines represent landscape categories determined by the Court and are not subject to change. The dotted lines have been determined under a broad-brush analysis as part of the District Plan process but have not yet been through a detailed analysis of specific physical circumstances of each site in the Environment Court to determine their exact location and so are not definitive. The dotted lines are purely indicative until their exact location has been determined through the Environment Court process.*

8. That in the two areas where the Society will give landscape evidence in the Court (Dublin Bay/Mount Brown, Waterfall Hill/Waterfall Creek), the Court holds where the Landscape Lines should be situated, and that these lines then appear as solid lines in the PDP.

[41] The notice of appeal made no express reference to Arthurs Point or the decisions made in respect of the Shotover Loop. After filing the appeal, and through the case management process, Upper Clutha subsequently gave further particulars of the relief sought. As the Environment Court Judge noted, those particulars "appear to eschew any claim to relief in respect of the Arthurs Point area".[14]

[42] The Judge considered those further particulars of relief were irrelevant to the Society's reliance on the original appeal because they "post-date the Society's joining the appeal".[15]

**The Environment Court Judge's decision**

[43] After setting out the arguments of the respective parties, the Judge said he considered those opposing the Society were "selective in their reading of [Upper Clutha's] submission and notice of appeal".[16]

[44] He responded to the argument that there was no submission by Upper Clutha about an ONL boundary line being drawn around the Arthurs Point settlement to exclude it, by saying that was because it was not in the PDP(N). Rather, it was incorporated as a consequence of the Commissioners' decision on Arthurs Point. However, he held that the Upper Clutha submission did direct itself to that by "disagreeing with any future new ONL [boundary line] before knowing where the boundary was to be drawn".[17] The Judge concluded that this brought the submission squarely within sch 1 cl 14(1)(b) of RMA.

[45] In addition, he pointed out that the notice of appeal sought that any new lines be drawn as "dotted lines" (and therefore provisional) until resolved by the Environment Court. He concluded that what Upper Clutha appeared to be seeking was that "the new line is regarded as provisional and that a definitive line would be determined by the Environment Court" when an issue about development arises (and presumably an appeal is lodged).[18] He went on to say that:

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14 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*, above n 1, at [20].
15 At [20].
16 At [38].
17 At [42].
18 At [44].

> [45] If the relevant landowners [Gertrude's Saddlery] and Larchmont have already, by their submissions, sought resolution of the issue, it is fair and reasonable that [Upper Clutha] (and consequently the Society in its shoes) should be allowed to put forward a substantive case as to the appropriate definitive location of the ONL(B).

[46] He rejected the submission that such a wide reading of Upper Clutha's submission and appeal would "open the floodgates" by making the status of every landscape boundary in the PDP subject to potential litigation, saying that is precisely what Upper Clutha sought in its original submission.

[47] For these reasons, he held that the notice of appeal by Upper Clutha raised the issue of the proper location of the ONL boundary in the vicinity of Arthurs Point generally, and the Society could use its s 274 notice to seek a different ONL boundary in order to include the Shotover Loop within it.

[48] Having found that there was scope in the Upper Clutha appeal for the Society to argue that the ONL line excluding the Shotover Loop should be removed, the Judge turned to whether the Society could then seek, as consequential relief, the rezoning of the Shotover Loop back to rural.

[49] The Judge rejected the submission that the Upper Clutha appeal did not seek any consequential relief. He considered the statement that Upper Clutha was appealing the parts of the decision that "relate in any way to subdivision and/or development in the Rural Zone" was broad enough to enable the Court to consider whether the Shotover Loop should be excluded from the UGB, and its LDR zoning changed back to rural.[19] While he acknowledged that the appeal did not identify this under the heading "relief sought", he considered that made no difference, as the notice of appeal must be read as a whole.

[50] In his view, the reference in the notice of appeal to the rural zone must be to the rural zone as shown in the PDP(N), which included the Shotover Loop. In any event, even if he was wrong, he considered the Environment Court would have jurisdiction to reverse the zoning, saying:[20]

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[19] At [48].
[20] At [52].

> [I]t would appear to be an automatic consequence of any finding ... that the Shotover Loop is part of the ONL that the UGB should move and the Rural zoning be removed, even though there is no appeal directly seeking to overturn the Council's decision in respect of the [Gertrude's Saddlery] and Larchmont submissions.

[51] For these reasons, he was satisfied that the Upper Clutha appeal:

(a) raised the issue of the proper location of the ONL in the vicinity of Arthurs Point; and

(b) sought "both directly and consequentially" the reversal of the rezoning of rural land as residential by the Commissioners issuing the PDP(D);

and so the Society could use its s 274 notices to seek a different ONL boundary and classification for the Shotover Loop.

**Is the Society's s 274 notice within the scope of the Upper Clutha appeal?**

*Gertrude's Saddlery submissions*

[52] Gertrude's Saddlery submits that the Judge erred in law in determining that the Upper Clutha appeal addressed the new ONL boundary line drawn around the Arthurs Point settlement and the Shotover Loop to exclude them. It argues that the only available interpretation of the Upper Clutha appeal is that the Landscape Lines in the PDP(D) are not credible and so:

(a) existing ONL boundaries as shown on Appendix 8A of the ODP should be "rolled over" in their exact current form (i.e. solid or dotted) onto the PDP planning maps; and

(b) new (additional) ONL boundaries should be shown on the PDP planning maps as dotted lines, accompanied by the explanatory text proposed to the effect the lines are provisional only.

[53] Importantly, Gertrude's Saddlery says the appeal does not seek that any new ONL boundaries be deleted, but simply that they are shown as provisional. While

Upper Clutha's submission showed that it was concerned with the "credibility" of the ONL boundary lines inserted through the PDP process, by the time of its appeal, the relief it sought had narrowed to seeking new boundary lines be shown as provisional only. Gertrude's Saddlery says if the intent of the Upper Clutha appeal was that all ONL boundaries revert to the ODP position and all new ONL boundaries determined through the PDP process be deleted, then the appeal would have made this plain. However, there was no general challenge in the appeal to the location of the new ONL boundaries, just to their status as confirmed rather than provisional.

[54] The only specific challenge to the location of ONL boundaries was in relation to two discrete locations near Wanaka township identified at para 7 of the relief sought, being Dublin Bay/Mount Brown and Waterfall Hill/Waterfall Creek (the Wanaka sites). In respect of those ONL boundaries, Upper Clutha sought to present evidence and have their correct location determined through the appeal process rather than be made provisional as was requested for the others. The fact it did not do so for any other ONL boundary reinforces the fact it was not seeking their alteration or removal.

[55] Accordingly, the Judge erred by relying on the Upper Clutha submission to support his conclusion there was scope in the appeal to remove the ONL boundary line inserted around the Shotover Loop when that was not sought in the appeal itself.

[56] In addition to incorrectly applying the legal test for scope, Mr Casey submitted that the Environment Court wrongly conflated the determination of the scope of the Upper Clutha appeal with a consideration of the merits of the appropriate location of an ONL boundary at Arthurs Point, and the Court's view on the appropriate sequence in which decisions on the location of an ONL should be made.

[57] The Judge stated:

> [21] There are a number of contextual matters that need to be borne in mind when assessing the jurisdiction of the court in relation to the landscape setting of Arthurs Point.

The Judge then went on to discuss the structure of the PDP, with overarching strategic chapters sitting above district wide and zone specific chapters, noting there was a difficulty in determining any subsequent step in the PDP process until the strategic

issues have first been resolved, particularly in respect of identifying the boundaries of ONLs. Mr Casey submits that those considerations were not relevant to the question before the Environment Court, but they appear to have influenced the Judge's decision on scope.

[58] Similarly, the Judge appeared to have had regard to considerations of "fairness" to the parties when that, too, was not relevant to the question of scope. The legal test for scope is whether a matter was "fairly and reasonably" raised in the submission on which the appeal is based, not whether it is "fair and reasonable" to allow a potentially interested party to seek their desired relief.

*The Council's submissions*

[59] The Council endorsed Gertrude Saddlery's submissions on error of law. Ms Hockley pointed out that the significance of this issue to the Council is that it should not be required, through the appeal process, to respond to matters that have not been explicitly raised in a notice of appeal. The Council is concerned to have the appeal process conducted as efficiently and expediently as possible, and for the scope of an appeal to be determined in accordance with established authority and not coloured by the additional matters which were raised in the judgment.

[60] Of particular importance to the Council was the concern that the Judge focused on the original Upper Clutha submission rather than the notice of appeal to determine the issue of scope. Ms Hockley points out that at [46], the Environment Court defends its view on scope by having reference to the broad terms of the Upper Clutha submission, saying, "a submission on a plan change can be wide or narrow provided it is still "on" the plan change …".[21] She points out that whether the Upper Clutha submission was on the plan change was not at issue; what was at issue was whether the Upper Clutha appeal raised the location of the ONL boundary relative to the Shotover Loop. She submits that the Environment Court erred because its finding relied on the breadth of the Upper Clutha submission which sought that all Landscape Lines determined in the PDP process were excluded, when that was not the relief

21 At [46].

pursued in the Upper Clutha appeal. As a consequence, the finding at [46] was made in reliance on the wrong document.

[61] Similarly, the Environment Court's reliance on "contextual matters"[22] and fairness,[23] introduced irrelevant considerations to the question of scope. For all these reasons, the Council agrees the Judge erred in law.

*Submissions for the Society*

[62] Ms Steven argues that there was no error by the Environment Court in interpreting and applying the test for scope. The Society submits that:

(a) It is incorrect to say that Upper Clutha's submission and appeal were only ever about lines on the planning maps, and that approach fails to recognise the relationship of all provisions challenged by Upper Clutha and the extent to which they are interrelated.

(b) Upper Clutha had clearly challenged both the adequacy of the identification of areas of land which had ONL values and the adequacy of the PDP provisions to protect ONL values and, to the extent that the PDP(N) and PDP(D) departed from the ODP provisions, its appeal encompassed that.

(c) A reinstatement of the rural zoning over the Shotover Loop was fairly and reasonably raised in the Upper Clutha appeal and, in any event, is a consequential alteration that arises from both the Upper Clutha original submission and its appeal.

[63] Ms Steven emphasises the broad scope of the Environment Court's powers on appeal, which, under s 290(2) RMA, may confirm, amend, or cancel a decision to which an appeal relates. She goes on to discuss how the question of scope should be approached, relying on decisions as to the scope of submissions made on proposed plans. In *Countdown Properties (Northlands) v Dunedin City Council* the High Court

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22 At [21].
23 See, at [45].

emphasised that the test for whether an amendment to a plan was within scope and therefore permissible, turned on whether it was one which was fairly “raised by and within the ambit of submissions”.[24] In approaching that issue, one should not be “bound by formality” but should approach it “in a realistic workable fashion rather than from the perspective of legal nicety”.[25] This approach is intended to enable public participation in the RMA process.

[64] Ms Steven then refers to sch 1 cl 14 of the RMA, which is the relevant starting point in determining the scope of an appeal. It states that a person may appeal a provision or matter in a plan but only if they “referred to the provision or the matter in the person’s submission”.[26] Relying on the decision in *Option 5 Inc v Marlborough District Council*, she says the words “referred to the matter or provision” used in cl 14 must also be given a liberal interpretation; a narrow technical interpretation is to be avoided.[27]

[65] In *Option 5 Inc*, a submitter, Mr Bezar, made a submission seeking to protect residential land adjoining the central business district (CBD) from pressure for out of zone commercial development. However, another submitter, Mr and Mrs McKendry, succeeded in having some of this residentially-zoned land adjoining the CBD rezoned for commercial activity. Mr Bezar lodged an appeal against the Council decision, and an incorporated society sought to join Mr Bezar’s appeal under s 274 of the RMA.

[66] A challenge was raised by the developer as to whether, as a s 274 party to Mr Bezar’s appeal, the incorporated society could oppose the changes, when Mr Bezar had not filed a submission expressly opposing the McKendry’s original submission. However, the High Court concluded that Mr Bezar’s original submission clearly referred to the relevant provision or matter that the incorporated society wished to address as a s 274 party to his appeal, so as to found a valid appeal which the s 274 party could support. Ms Steven argues that the Society is in the same position in the present case.

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24 *Countdown Properties (Northlands) v Dunedin City Council*, above n 3, at 166.

25 *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 10.

26 Resource Management Act 1991, sch 1, cl 14(2).

27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

[67] In response to the allegation that the Environment Court applied the wrong legal test in determining that the Upper Clutha appeal raises the issues of the location of the ONL at Arthurs Point, she responds by saying the original Upper Clutha submission was cast in very broad terms (district-wide) and addressed numerous interrelated PDP(N) provisions. Of particular relevance, the submissions supported the recognition of ONL land and the level of protection afforded to it in the ODP through the rural zone provisions. Upper Clutha wanted those provisions carried through into the PDP and implicitly opposed any reduction in that level of recognition and/or protection. The submission was therefore broad enough to raise this issue.

[68] Ms Steven then submits that the notice of appeal is not as narrow as alleged by the Council. If read as a whole, it also unequivocally opposes the PDP(D) provisions in relation to ONL/ONF land, insofar as they depart from those in the ODP. In the PDP(D), the Commissioners included a line around the Arthurs Point settlement and the Shotover Loop, excluding it from the ONL landscape unit within which it had otherwise been depicted. The Society seeks removal of these new lines, and that removal reinstates the recognition and protection of the ONL values in relation to the Shotover Loop, which was an outcome explicitly supported by Upper Clutha in its submission and, by implication, in its appeal.

[69] She rejects the submission that the Environment Court erred by conflating merits-based issues with the determination of scope, and points out that the Environment Court expressly disavowed consideration of the merits of the appeal, saying:[28]

> ... Nothing in this decision is any comment on the substantive issue of where an ONL(B) … line should be drawn in the vicinity of Arthurs Point.

[70] In respect of the submission that the Environment Court took into account irrelevant considerations, including the context of the plan change process, and the sequence in which the Court considered decisions on the location and zoning of ONL land should be made, Ms Steven submitted these were relevant considerations, including to the question of the consequential amendments that could flow from the removal of the ONL boundary around the Shotover Loop. It was unrealistic, and

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[28] *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*, above n 1, at [55].

wrong in law, to expect that the Environment Court could consider the scope of permissible changes to a plan without understanding the content and architecture of the plan sought to be amended.

[71] In terms of the allegation that the Court took into account the irrelevant consideration of fairness to the parties, she argues this is not an irrelevant consideration. The principles developed in case law on the determination of scope are founded on considerations of fairness.

[72] In response to the suggestion that the Court ignored relevant matters, being the further particulars provided by Upper Clutha which disavowed any interest in the Shotover Loop, Ms Steven says that the further memoranda filed by the parties did not purport to amend the appeal and therefore were irrelevant to the issue of scope. The fact that Upper Clutha only sought to bring evidence in relation to the ONL boundary at the Wanaka sites was a decision based on resources and nothing else. In Ms Steven's submission it would be unfair and irregular if the Council could request further particulars from an appellant in order to subsequently limit the scope of the s 274 notice which has been validly filed in relation to an appeal. As a s 274 party has the ability to continue on with its s 274 notice, even if the appeal it relates to is withdrawn, similar logic should apply to the s 274 party to continue with its notice even if the scope of the appeal is narrowed (albeit the Society does not accept that it was).

[73] In respect of the submission that the Environment Court took into account irrelevant matters, including:

(a) its finding in a prior decision that "the relief sought by [Gertrude's Saddlery] and Larchmont ... in respect of the "ONL" status of the Shotover Loop was both indirect and misleading";[29] and

(b) its reservations about the Commissioners' use of powers under cl 16(2) of the RMA, to insert an ONL around Arthurs Point,

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[29] At [8].

she submits neither observation was taken into account in deciding on scope, and so there was no error.

## Analysis

[74] I accept the Society's submission that the question of whether an amendment to a plan is reasonably and fairly raised in the course of submissions, should be approached in a realistic, workable fashion.[30] I accept, too, that Upper Clutha's original submission was sufficiently wide-ranging to cover the subject matter of concern to the Society. Upper Clutha submitted on the issue of "rural subdivision and/or development within outstanding Natural Landscape and Outstanding Natural Features". It wanted this activity to be non-complying. The submission had the overall theme that the ODP was stronger in terms of protecting landscape values than the PDP and it sought retention of what was in the ODP, including in terms of the lines that defined ONLs. There can be little doubt, read in a realistic and workable fashion, that there was scope within the Upper Clutha submission to object to the removal of an area from an ONL that appeared in the ODP.

[75] The critical issue, however, is whether the Upper Clutha appeal retains that scope. While, superficially, the issues of interest to the Society are captured by the breadth of Upper Clutha's original submission, it is clear the relief sought on appeal is more focused. That is appropriate, as the original submission must anticipate what issues might arise that the submitter is interested in, whereas by the time the appeal is lodged, the submitter has a decision to respond to, and can be expected to identify the specific parts of it the submitter takes issue with and the relief that is sought.

[76] The key relief sought in the Upper Clutha appeal was that:

(a) the objectives, policies, assessment matters, rules and maps and any other provisions that relate in any way to subdivision and/or development in the rural zone should adequately protect, for future generations, the ONL and ONF landscapes of the district from inappropriate subdivision and/or development; and

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30 *Royal Forest and Bird Protection Society v Southland District Council,* above n [23], at 10.

(b) all landscape lines from the ODP are rolled over "in their exact current form", but additional landscape lines are shown as dotted lines and therefore are indicative only.

[77] Nowhere in the notice of appeal does Upper Clutha expressly challenge the new ONL line which excluded the Shotover Loop from the ONL nor the rezoning that occurred during the Council decision making process. The only way the Judge can suggest it does is by reading the references to the rural zone in the document as the rural zone as identified in the PDP(N), not the PDP(D), and tying this in with the relief sought in the submissions, not the appeal, that the PDP(N) ONL boundaries should revert to those in the ODP.

[78] Looking at the detailed description of the relief Upper Clutha sought in its appeal, which is reflected in its marked up copies of parts of the PDP(D) attached to that document, there is no suggestion that Upper Clutha sought anything more in relation to the Shotover Loop properties than that the line excluding it from an ONL be shown as provisional only.

[79] To read the appeal as encompassing the relief sought by the Society is to rewrite the appeal. If an objection is to be raised to issues as major as the zoning of identified land and the position of a UGB, that should be obvious from the relief sought in the appeal, not, as the Judge did, deduced from the original submissions combined with generic statements in the introduction to the appeal.

[80] That conclusion is enough to determine the appeal. Essentially, I have found that the Judge wrongly relied on the breadth of the Upper Clutha submission to conclude that the relief sought by the Society was within scope of the Upper Clutha appeal, without having proper regard to the limited range of relief expressly sought in the appeal document. Alternatively, he came to a decision that no reasonable decision-maker could come to having regard to the legal test for scope, and applying it to the Upper Clutha appeal.

[81] However, if there were to be any doubt about that, I consider the further memoranda filed by Upper Clutha during the case management process put the issue

beyond doubt. In a memorandum dated 12 August 2018, Upper Clutha specified that it was "not challenging the location of any landscape lines in the Wakatipu (simply whether they are dotted or solid)", and suggested a changed wording in the appeal relief point 7 to make that clear. It concluded that "[i]t can be seen from the revised wording above, that [Upper Clutha] accepts that the dotted landscape lines can be used in all Council hearings until verified or changed by the Court". In a further memorandum filed on 31 August 2018, this stance was reiterated.

[82] The Judge ignored the content of these memoranda when determining whether the Society's s 274 notice fell within the scope of the appeal. I consider he was wrong in law to do so. The Society expressly stated that it was accepting the lines in the PDP(D) version so long as they were shown as dotted lines. While the Judge considered that the timing of this clarification meant it was irrelevant, I do not agree. Even if the relief sought by the Society was within the scope of the Upper Clutha appeal as lodged, (which I have found is not the case), where the appellant expressly limits the scope of its appeal, that must affect the position of the s 274 party.

[83] Under s 274, a person who becomes a party to proceedings before the Environment Court cannot prevent an appellant from withdrawing all or part of its appeal, except in very limited circumstances.[31] If the relevant part of the appeal is withdrawn (however that is indicated), that can affect the ability of the s 274 party to pursue those issues.

[84] As is explained in *Prestons Road Ltd v Canterbury Regional Council*, where an appellant gives notice of withdrawal of part or all or their appeal, but a s 274 wants to keep the appeal alive so their notice has something to work on:[32]

(a) the s 274 party may "oppose the withdrawal" provided (as is the case here) the original appellant was also submitter on the same proposed plan;

(b) the Court has a discretion to allow the withdrawal or part withdrawal;

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[31] *Parkbrook Holdings Ltd v Auckland City Council* [1999] NZRMA 10 (HC).
[32] *Prestons Road Ltd v Canterbury Regional Council* [2011] NZEnvC 167 at [18].

(c) if it refuses the withdrawal, then the s 274 party may call evidence on the (now) pro forma notice of appeal provided that the evidence is:

(i) within the scope of the appeal; and

(ii) on matters arising out of the s 274 party's submission to the local authority or on any matter on which the s 274 party could have appealed.

[85] In the present case, if the memoranda to the Court are treated as "withdrawing" part of the Upper Clutha appeal (by making it clear Upper Clutha was not opposing the location of any ONL boundary in the PDP(D) just its status), then the Society could have challenged that. However, if it was unsuccessful it would have had no right to call evidence on the existence of the ONL boundary line excluding the Shotover Loop from the ONL, because it was not a submitter on that issue originally, and that was relevant to the Judge's decision on whether it could pursue those issues.

[86] However, in my view, the memoranda should most appropriately be seen as confirming the scope of the appeal, rather than amending it, and should not have been ignored in the Environment Court's decision. If the relief sought by the Society was not expressly sought in the Upper Clutha appeal and Upper Clutha confirmed that it was not seeking that relief, it is not for the Court to imply that relief in to the appeal, because it thinks it desirable to do so.

[87] Given my conclusions above, strictly speaking, I do not need to consider whether the Court had regard to irrelevant matters as claimed, or whether the decision was one that no reasonable decision-maker could have come to. However, I make the following brief comments.

[88] I consider the Judge did have regard to an irrelevant matter in reaching his decision that the Society's s 274 notice was within the scope of the appeal. He clearly relied, at least to some extent, on his view that because Gertrude's Sadlery and Larchmont had sought resolution of the issue of where the ONL lines should be Arthurs Point in the submission process, it was "fair and reasonable" that the Society

be allowed to present a case and challenge that decision. However, that consideration cannot influence whether the issues in a s 274 notice can be pursued if there is not otherwise scope to do so in the appeal it relates to. It was irrelevant to that decision. To the extent that it was taken into account, the Court erred in law.

[89] I am not satisfied, however, that any of the other matters raised by counsel as irrelevant considerations were in fact taken into account in the decision and those aspects of the appeal are not sustained.

**Was rezoning the Shotover Loop to Rural available as consequential relief?**

*Submissions of Gertrude's Saddlery*

[90] Even if there is scope within the Upper Clutha appeal for the Society to argue against the exclusion of the Shotover Loop from the ONL, both Gertrude's Sadlery and the Council argue the Court was wrong to interpret the Upper Clutha appeal as encompassing removal of the UGB around the Shotover Loop and reversion to rural zoning as consequential relief. Gertrude's Sadlery submits that this is not relief which meets the test of being "foreseen as a direct or otherwise logical consequence" of the Upper Clutha submission.[33] Rather, it could only have followed from taking into account irrelevant matters, including the policy direction in the PDP regarding the relationship between ONL, UGB and zoning, and legal authorities on the planning hierarchy for identifying appropriate ONL, UGB and zoning.

*Submissions of the Council*

[91] The Council supports Gertrude's Saddlery, saying that consequential relief must derive from other relief sought by an appeal. If that relief is not available because it is not within scope, there is no potential for that consequential relief to be granted. As was said in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*:[34]

> … "alternative" or "consequential" relief must relate to the grounds of appeal and cannot be relied on to extend the nature and extent of relief sought beyond the scope of an appeal.

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[33] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [108].
[34] *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZEnvC 14 at [95].

[92] The Council also says the finding that the Upper Clutha appeal both "directly and consequentially" sought the rezoning of the Shotover Loop, is irrational. An appeal can either seek relief directly, or it can seek it consequentially, but it cannot have both characteristics. Here, the Upper Clutha appeal did not raise rezoning and chose not to challenge any zoning decisions or decisions on the UGB. It therefore did not seek rezoning directly.

[93] It also can not be said to have sought it consequentially. When the notice of appeal refers broadly, to "subdivision and development in the Rural Zone", it is implicit that the references to the rural zone was to the zone as identified in the PDP(D) because it sought no changes to the zoning decisions in the PDP(D). Instead, the Upper Clutha appeal was seeking a stricter planning regime for that rural zone and for ONF/ONL land, rather than a zoning change. Accordingly, no aspect of the appeal can be interpreted as being directly applicable to the zoning of the Shotover Loop. As a result, there is no prospect of satisfying the "reasonably foreseeable logical consequence" test for the relief that the Environment Court held would be consequential.

[94] Furthermore, the Council concurs with Gertrude's Sadlery that the Court erred by finding that if an ONL boundary is changed "it would appear to be an automatic consequence" that the zoning and UGB of the area would also need to be changed.[35] These issues are not inextricably linked as the Court suggests. The Council notes that there are a number of different zones located within the ONLs shown in the PDP(D), and it cannot be assumed that only a rural zoning is appropriate.

*Submissions for the Society*

[95] In response to the alleged errors in relation to what "consequential relief" was available to the Society, Ms Steven argues that the Court correctly took a broad approach to the reading of the appeal and did not confine itself to the amendments expressly sought under the heading "relief sought". She submits this is the correct way to approach the interpretation issue, relying on the approach taken in *Countdown Properties (Northlands) Ltd* referred to in [63] above. Given the notice of appeal

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[35] *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*, above n 1, at [52].

stated that Upper Clutha was appealing the parts of the decision "that relate in any way to subdivision and/or development in a Rural Zone", the Court correctly concluded that this amounted to a request for consequential amendments that prevented subdivision in what had been a rural zone.

[96] In any event, Ms Steven submits that it will be for the Environment Court hearing the substantive appeal to decide whether the change to the zoning (and location of the UGB) is a consequential alteration that is justified on the facts and is within the sch 1 cl 10(2) RMA powers, or whether such amendment should be pursued under the extended s 293 jurisdiction, if it finds that the ONL classification should be reinstated.

*Analysis*

[97] The Judge identified that unless there was power to reverse the zoning of the Shotover Loop as determined in the PDP(D), then the Council be faced with the situation where the ONL was amended by the Environment Court to include the Shotover Loop, but "anomalously" the land would continue to have an LDR zoning, which was the real issue of concern to the Society. To conclude there was scope to make such a change, the Judge relied on the statement in the Upper Clutha appeal that it was appealing the PDP(D) insofar as it relates "in any way to subdivision and/or development in the Rural Zone". However, I accept that the only logical way to interpret the notice of appeal is that it related to the rural zone as identified in the PDP(D) as it did not take issue with the zoning decisions in the PDP(D).

[98] In addition, the Judge concluded it would be an "automatic consequence of any finding … that the Shotover Loop is part of the ONL that the UGB should move and the Rural zoning be [reinstated][36] even though there is no appeal directly seeking to overturn the Council's decision in respect of the [Shotover Loop]".[37]

[99] I do not agree. In *Albany North Landowners v Auckland Council*, the High Court determined that the test for scope to make consequential amendments is that the amendments are "necessary and desirable" and "foreseen as a direct or

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[36] The Judge used the word "removed" but this is clearly an error.
[37] At [52].

otherwise logical consequence of a submission".[38] I consider the same test must apply if the reference to a submission is a reference to an appeal. "Consequential amendments" generally include uncontested matters, such as amending planning maps to reflect the substantive change that is sought. It is an amendment which flows naturally and inevitably from the change that is sought. Again, this reflects the natural justice considerations that underpin the principle of scope.[39] Changes should not be made to the plan through the appeal process that could not have been anticipated from reading the notice of appeal.

[100] In this case, I agree with the appellant that neither the Upper Clutha submission, nor the appeal, fairly and reasonably raised the issue of non-rural land being within an ONL, or the issue of a mismatch between an ONL boundary and a UGB. Ironically, the ODP, which the Upper Clutha submission and appeal expressly endorsed, showed the existing residentially-zoned Arthurs Point settlement within the ONL. It therefore can not be assumed that land within an ONL inevitably requires a rural zoning.

[101] In conclusion, no aspect of the Upper Clutha appeal can be interpreted as being directly applicable to the zoning of the Shotover Loop and there was therefore no prospect of satisfying the "reasonably foreseeable logical consequence" test for a challenge to the zoning of this area under the PDP(D), or its inclusion within the UGB. The decision thus erred in law in concluding that such relief met this test.

**Is the appeal now moot?**

[102] Had I not found that the Judge erred in law when coming to his decision that the relief sought by the Society's s 274 notice was within the scope of the Upper Clutha appeal, Mr Casey argued an alternate ground which was that the Society could no longer pursue the s 274 notice as the Upper Clutha appeal had been heard and determined.

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38 *Albany North Landowners v Auckland Council,* above n 30, at [108].
39 At [107].

[103] The Environment Court heard the Upper Clutha appeal, along with other appeals in an extended hearing commencing on 8 April 2019. In a decision which issued on 20 September 2019, the Court declined the relief sought by Upper Clutha saying:[40]

> The request for the Landscape Lines shown on the ODP maps to be rolled-over in their exact current form (with associated text) is **declined**.

It deferred however, the determination of other topics, including in respect of the Wanaka sites, for a subsequent hearing. Given the Society's participation was dependent on this aspect of the Upper Clutha appeal, Mr Casey argued the Society had lost its opportunity to run its case as part of the Upper Clutha appeal.

[104] The Society had not appreciated, prior to hearing, that that point would be raised, and Ms Steven filed subsequent submissions to address that argument. She explained that the Society was not present at the hearing of the Upper Clutha appeal, which was heard in mid-2019, because the issues it wished to pursue in relation to the ONL line around the Shotover Loop were, during the case management process, "carved out" of the hearing on the first tranche of sub topics commencing on 8 April 2019.

[105] Furthermore, the Society's ability to participate in that hearing was complicated by the need to resolve the jurisdictional issues which were raised in relation to the Society's s 274 notice.

[106] In any event, Ms Steven says the topic addressed in *Hawthenden Ltd v Queenstown Lakes District Council* that related to Upper Clutha's desire to have the landscape lines retained in their exact current form, was a topic in which the Society had no particular interest.

[107] Having considered the Society's submissions, I accept that it reasonably understood that the issues of concern it had with the Shotover Loop, and its exclusion from the ONL, were deferred for a subsequent tranche of hearings, just as Upper Clutha's issues in relation to the Wanaka sites were. While it would be most

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40 *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 at A(i).

unusual (and in my view undesirable) for a s 274 party to have its submissions and evidence heard separately from the appeal it had joined, that appears to have been agreed in this case, and it could not, on its own, prevent the Society from being heard on appeal.

[108] However, what that does emphasise is the lack of connection between the topics raised in the Upper Clutha appeal and those which were proposed to be pursued by the Society. This supports my earlier finding that the Judge erred in law when finding there was scope for the Society to pursue its concerns under the Upper Clutha appeal. The reality is that the Society wished to pursue a point which was distinct from that pursued by Upper Clutha, and the fact it could be heard independently of the Upper Clutha appeal simply reinforces that.

**Result**

[109] I am satisfied that the Court erred in law when reaching its decision that the Society could use its s 274 notice of the Upper Clutha appeal to seek a different ONL and classification on the Shotover Loop, and those errors were material to the decision.

[110] The errors were:

(a) it relied on the breadth of the Upper Clutha submission, rather than the notice of appeal to find scope to seek removal of a new ONL boundary line;

(b) it relied on the irrelevant consideration of perceived fairness to the parties to reach this decision; and

(c) it incorrectly applied the test for whether the consequential relief sought by the Society was available should the new ONL around the Shotover Loop be deleted.

[111] Accordingly, the appeal is allowed.

**Relief**

[112] While Gertrude's Saddlery sought that the Court substitute its own decision for that of the Environment Court, that is an unusual step. The usual course is to send the matter back to the Environment Court for reconsideration.[41] However, the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court.[42]

[113] In the present case, what is at issue is a straightforward question of interpretation in the context of a procedural decision. It inevitably flows from my findings on the scope of the notice of appeal that the only decision which could flow is a reversal of the Environment Court's decision. This distinguishes this appeal from appeals on substantive issues, such as a decision to grant resource consent, or a decision on the content of a proposed plan, where a wider assessment is required of the evidence, in light of the error of law identified on appeal.

[114] Accordingly, the decision of the Environment Court dated 6 November 2019 is set aside and I make the following rulings:

(a) The notice of appeal by the Upper Clutha Environmental Society Incorporated does not raise the issue of the proper location of the Outstanding Natural Landscape boundary in the vicinity of Arthurs Point generally;

(b) The Upper Clutha Environmental Society Incorporated appeal does not seek, either directly or consequentially, that the rezoning by decisions of the hearing committee of the land zoned rural in the Proposed District Plan (Notified) be reversed and the zoning returned to rural; and, accordingly

(c) The Arthurs Point Outstanding Natural Landscape Society Incorporated may not use its s 274 notice on the Upper Clutha Environmental Society Incorporated's appeal to seek a different

41 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
42 *Landrovers Owners Club (Otago) Inc v Dunedin City Council* (1998) 4 ELRNZ 252 (HC).

outstanding natural landscape boundary and classification on the properties at 111 and 163 Atley Road.

**Costs**

[115] Costs are reserved but I see no reason why they should not follow the event on the agreed 2B basis. If counsel are unable to agree, submissions should be filed as follows:

(a) memoranda by the Council, Gertrude's Saddlery and Larchmont (preferably a joint memorandum) on or before 20 working days[43] from the date of this judgment;

(b) memorandum by the Society on or before a further 10 working days; and

(c) any memorandum in reply on or before a further five working days.

Solicitors:
Anderson Lloyd, Queenstown
Parker | Cowan, Queenstown

Copy To: Queenstown Lakes District Council
P A Steven QC, Christchurch

43 Working days excludes the Court holiday period pursuant to r 3.2(1)(b) High Court Rules.

**DOUBLE SIDED**

Decision No. A068/2001

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

**AND**

**IN THE MATTER** of two references under clause 14 of the First Schedule to the Act

**BETWEEN** **ANDREW VINCENT HASTINGS**

(RMA769/95)

**MANUKAU HARBOUR PROTECTION SOCIETY INCORPORATED**

(RMA 806/95)

Referrers

**AND** **THE AUCKLAND CITY COUNCIL**

Respondent

**BEFORE THE ENVIRONMENT COURT**

Environment Judge D F G Sheppard (presiding)
Environment Commissioner J Kearney
Environment Commissioner I G McIntyre

**HEARING** at **AUCKLAND** on 28, 29, 30 and 31 May 2001

**APPEARANCES**

L J Newhook and K Littlejohn for A V Hastings

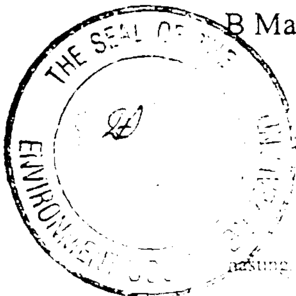
A Johnson for the Manukau Harbour Protection Society Incorporated

D A Kirkpatrick and E Child for the Auckland City Council

G Houghton for the Minister of Conservation

J Burns for the Auckland Regional Council

B Matheson for Tranz Rail Limited



## DECISION

### Introduction

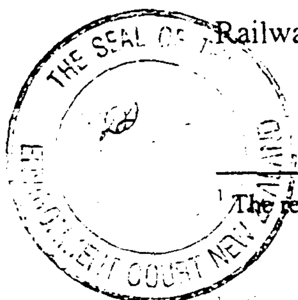
[1] Mr A V Hastings and the Manukau Harbour Protection Society Incorporated have referred to the Environment Court provisions of the proposed Auckland City District Plan (Isthmus Section) about the zoning of land at Anns Creek, Westfield.

[2] The Auckland City Council had also lodged a reference raising a number of issues relating to Tranz Rail designations.[1] All those issues save one were resolved by a consent order made by the Court on 5 November 1998. The one remaining issue concerned a designation of part of the land at Anns Creek for a future rail link. By the time the references were called for hearing, the City Council and Tranz Rail had reached agreement about how that reference is to be dealt with, depending on the outcome of Mr Hastings's reference. So that reference is not a subject of this decision, but can be disposed of following determination of the references by Mr Hastings and the Manukau Harbour Protection Society.

*The subject land*

[3] The subject land has an irregular shape, contains 6.6087 hectares, and is located at 791-793 Great South Road, Westfield. It lies adjacent to the Manukau Harbour, and a watercourse known as Anns Creek (or St Anns Creek) flows through the land to the harbour.

[4] The land lies within the junction of two railway lines. The western boundary is the North Auckland Railway Line, which runs north towards Newmarket. The south-eastern boundary is the North Island Main Trunk Line, which runs north-east towards Orakei. There is a short north-eastern boundary fronting Great South Road, opposite the intersection with Sylvia Park Road. The northern boundary is irregular, and generally follows the edge of an old basalt lava flow. That boundary adjoins industrial land occupied by Trailer Rentals. A curved strip across the middle of the land is subject to an easement for a future railway link between the North Auckland Railway and the North Island Main Trunk Railway.



[1] The reference is identified as RMA936/95.

[5] In addition to the creek and the railway lines, the land is affected by other infrastructure. The northern part of the land is crossed above ground by a high-tension electricity transmission line, and underground by a natural gas pipeline. Near the north-eastern boundary, two above-ground pipelines pass across the site, generally parallel with Great South Road. One conveys water, and the other sewage. There is also a telecommunications conductor generally parallel with them.

[6] For many years the land was railway land owned by the Crown. Apparently this land was considered surplus to railway requirements, and in July 1990 Mr Hastings entered into an agreement with the Crown for sale and purchase of the land. In due course the agreement was given effect, and on 27 May 1999 Mr A V Hastings and Mrs I G Hastings were registered as proprietors of the land.

[7] The Minister of Conservation informed the Court that marginal strips created over the land on its disposition by the Crown have yet to be defined.[2] It is our understanding that, unless a reduction or exemption is consented to by a Minister of the Crown,[3] on sale of Crown land, strips of the land 20 metres wide along the landward margin of any foreshore and the bed of any stream that has an average width of 3 metres or more are deemed to be reserved to the Crown.[4]

[8] At least the lower part of Anns Creek as it flows through the subject land is tidal, so that creates foreshore. Further, at least parts of Anns Creek within the land have an average width of 3 metres or more. On the face of it, 20-metre wide marginal strips are deemed to have been reserved from the sale to Mr and Mrs Hastings.

[9] There was no evidence before us of Ministerial consent to a reduction or exemption, and no evidence of a survey definition of the marginal strips retained on the disposal of the land to Mr and Mrs Hastings. In the absence of evidence on those matters, it is appropriate for the purpose of these proceedings for the Court to assume that by operation of law strips of the land 20 metres wide have been retained by the Crown on each side of Anns Creek.

[2] As to marginal strips generally, see Part IVA of the Conservation Act 1987, as inserted by s 15 Conservation Amendment Act 1990.
[3] See s 24A (power to reduce) and s 24B (power to exempt) Conservation Act 1987 (as so inserted).
[4] See s 24 Conservation Act 1987 as substituted by s 15 Conservation Amendment Act 1990.

*Provisions of the transitional district plan*

[10] Probably because of uncertainty over whether the land was within territorial authority districts or was part of the harbour, only parts of the land were zoned by the district schemes under the Town and Country Planning Act 1977 of the former One Tree Hill Borough Council and the former Mount Wellington Borough Council. More specifically, under the operative (transitional) district plan the north-western part of the land is zoned Industrial 2, and designated "North Island Main Trunk Line and Penrose Station"; and a small triangular piece at the southern end (between the two railway lines as they diverge) is zoned Industrial 3 and designated "North Island Main Trunk Railway". About 60% of the land, in the middle, which was not considered to be within the district of either of those former Borough Councils, is not zoned at all.

*Provisions of the proposed district plan as notified*

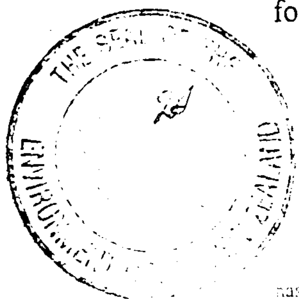
[11] The land is in the part of the Auckland City district to which the Isthmus Section of the proposed district plan applies. That section was publicly notified in 1993.

[12] The proposed district plan as notified contained a number of provisions affecting the subject land. We outline them first, then mention the provisions affecting adjacent land.

Provisions affecting the subject land

[13] First, the zonings. By the proposed district plan, two pieces of the land were to be zoned Special Purpose 3 (Transport Corridor). Those pieces were the curved strip crossing the middle of the land between the two railway lines, and a wedge-shaped piece adjoining it to the north-west. The rest of the land was to be zoned Open Space 1 (Conservation).

[14] Secondly, the whole land was the subject of a designation for Railway Purposes: North Island Main Trunk Railway. Tranz Rail is the responsible authority for that designation.



[15] Thirdly, a 5-metre wide strip along the Great South Road frontage was the subject of a building-line restriction for road widening. The City Council is the responsible authority in that respect.

[16] Fourthly, the land was also the subject of a requirement for a designation for Railway Purposes: North Auckland Railway. Tranz Rail is the requiring authority in that respect.

[17] Fifthly, most of the land was identified as being in the Coastal Management Area, to which restrictions on building and structures (other than network utility services) apply.

[18] Sixthly, the land was identified as being a geological feature.

[19] Seventhly, the land was subject to an Airport Approach Control for Auckland International Airport. (We were informed that in practice that control would not affect development on the land.)

Provisions affecting adjacent land

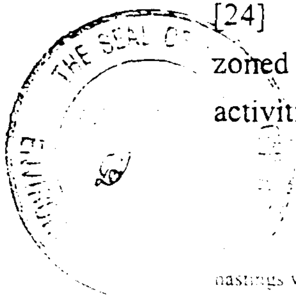
[20] The railway land to the west and south of the subject land was zoned Special Purpose 3 (Transport Corridor).

[21] Beyond the North Auckland Railway to the north-west of the subject land, there is land accessible from Hugo Johnston Drive zoned Business 6. (An electricity generating plant is now located in that area.)

[22] The land to the north of the subject land, occupied by Trailer Rentals, was mainly zoned Business 6, but an Open Space 1 zoning applied to a part adjoining the subject land which is also the subject of a registered conservation covenant.

[23] Land to the south of the subject land, beyond the North Island Main Trunk Railway, was mostly zoned Business 5, save for a drainage reserve vested in the City Council, which was zoned Open Space 2.

[24] Land on the eastern side of Great South Road opposite the subject land was zoned Business 4 and Business 5. That land is used for a range of business activities.



***Submissions on the proposed district plan***

Submissions by Mr Hastings

[25] Mr Hastings lodged four submissions on the proposed plan relevant to these proceedings.

[26] By Submission 6719 he submitted that the land should be zoned Business Activity 6 outside of the areas required for railway links and proposed railway reclamation work, and Special Purpose 3 for the piece at the southern end of the land where the two railway lines diverge. In that submission, Mr Hastings did not challenge the Special Purpose 3 zoning for the curved strip for the proposed link between the North Auckland Railway and the North Island Main Trunk Railway; nor did he challenge that zoning for the wedge-shaped adjoining piece in the north-western corner.

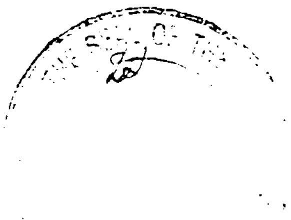
[27] By Submission 6717 Mr Hastings submitted that in the Open Space zone, earthworks, foreshore protection works and walls, carparking areas and building for recreation purposes should be either controlled or discretionary activities in that zone.

[28] By Submission 6716 Mr Hastings submitted that the rules for the Business Activity 6 zone should be amended to provide for commercial or public carparking, and earthworks, as controlled activities.

[29] By Submission 6718 Mr Hastings submitted that Sylvia Park Road and Great South Road should be a four-way intersection, with a road link terminating in the centre of Business Activity 6 zone to the north of the subject land; and that "allowance" should be made for two proposed rail links.

Submission by the Manukau Harbour Protection Society

[30] The Manukau Harbour Protection Society lodged a submission on the proposed plan seeking Open Space 1 zoning or Conservation zoning for the "Anns Creek wetlands".



Inferred submission by the Auckland Regional Council

[31] The Auckland Regional Council announced its participation in these proceedings as being under section 271A of the Act. That section provides for participation by any person who made a submission. Therefore we infer that the Auckland Regional Council had made a submission on the proposed plan relevant to these proceedings. If it had not done so, it would have sought to be heard under section 174 instead. However a copy of the Regional Council's submission was not produced in evidence, nor was evidence given of the contents of a relevant submission by it.

*Decisions on submissions*

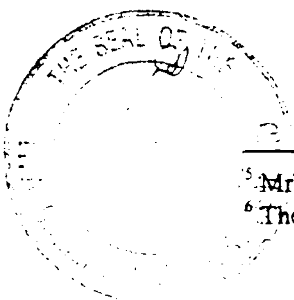
[32] The City Council's decisions on the submissions did not accept Mr Hastings's submissions on the zoning of the subject land, save for retaining the Special Purpose 3 zoning of the curved strip the route of the proposed link between the railway lines. The wedge-shaped piece in the north-western corner (the zoning of which had not been challenged) also retained Special Purpose 3 zoning. The Open Space 1 zoning was retained for the rest of the land.

[33] The identification of the geological feature was omitted at that time, and the extent of the land in the coastal management area was reduced.

*References on the proposed district plan*

[34] By his reference to the Environment Court,[5] Mr Hastings sought "a zone change to B6 on all of this land" (and other relief relating to stormwater and sediment that was not pursued at the hearing).

[35] By its reference[6] the Manukau Harbour Protection Society sought "retention of the proposed Open Space 1 zone over the entire area of Ann's Creek wetland". The original reference also sought alteration of policies, but that was omitted from an amended reference.



[5] Mr Hastings's reference is identified as RMA769/95.
[6] The Society's reference is identified as RMA806/95.

*Subsequent requirements affecting the land*

[36] The land is affected by two further requirements for designations. They are identified as Plan Modification No 110 and Plan Modification No 128, and were both publicly notified on 23 September 1996

[37] Plan Modification No 110 is a requirement for designation of the land for Proposed Nature Reserve. The City Council is the requiring authority.

[38] The City Council received nine submissions on that requirement (including a submission in opposition by Mr Hastings, and a submission in support by the Manukau Harbour Protection Society). The hearing of those submissions was postponed pending decision on the determination of the district boundary (mentioned below) and decision of these references.

[39] Plan Modification No 128 is a requirement for designation of an irregular shaped piece of the land (having an area of 136 square metres) adjoining part of the strip on the north-eastern boundary that is subject to the building-line restriction for road widening. The requirement is that the piece of land be designated "building line for road widening purposes". The City Council is also the requiring authority in respect of that requirement.

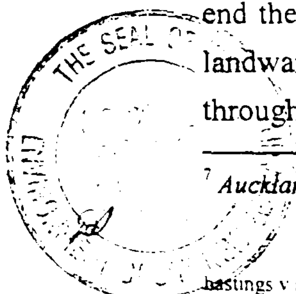
[40] The City Council received two submissions on that requirement (one from Mr Hastings in opposition). The hearing of those submissions has also been postponed pending decision of these references.

*Determination of district boundary*

[41] There had been an issue about whether the land was within the district of the Auckland City Council, or came under the responsibility (for resource management purposes) of the Auckland Regional Council. That depended on the location of the boundary of the coastal marine area in relation to the land.

[42] After protracted efforts to seek resolution of that issue by agreement, in the end the issue had to be decided by the Environment Court, which declared that the landward extent of the coastal marine area is at the harbour end of the box culvert through which Anns Creek flows under the North Auckland Railway.[7] The effect of

[7] *Auckland Regional Council v Hastings* Environment Court Decision A130/2000.



that was that the land the subject of these references is within the district of Auckland City, so that the Isthmus section of the proposed district plan applies to it. Consequently the Auckland Regional Plan: Coastal does not apply to the subject land.

[43] In the meanwhile, the City Council had (with the Court's consent) made operative the rest of that section of its proposed district plan, but excluding the subject land, because of these two references and the unresolved reference by the Auckland City Council against rejection by Tranz Rail of a condition recommended by the City Council in respect of a designation affecting part of the land.

## Defining the issues

[44] On Mr Hastings's behalf, it was submitted that the issues in these proceedings are whether the land (except the curved strip that is the route of the railway link) should be zoned Business 6 instead of Open Space 1 (on Mr Hastings's reference); and whether the curved strip should be zoned Open Space 1 instead of Special Purpose 3 (on the Manukau Harbour Protection Society's reference). However we are not able to accept that the issues can be defined in that way.

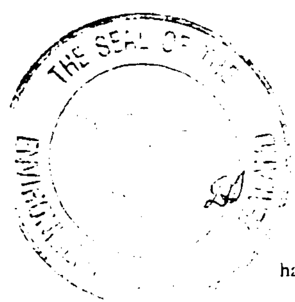
### *The coastal management area control*

[45] Counsel for Mr Hastings announced that if the Court determines that Business 6 zoning is appropriate, then Mr Hastings seeks an order under section 292 (1) (a) or (b) that the coastal management area notation in respect of the land be removed on the ground that it would be inconsistent with other applications of that notation in the plan, and would frustrate the provisions of Business 6 zoning and the objectives and policies that it gives effect to.

[46] Counsel for the City Council announced that the City Council opposed removal of the coastal management area identification of most of the subject land.

[47] Section 292(1) provides–

> *(1) The Environment Court may, in any proceedings before it, direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of–*
> *(a) Remedying any mistake, defect, or uncertainty; or*
> *(b) Giving full effect to the plan.*



[48] That provision cannot be invoked to authorise the Court to consider the appropriateness of provisions of a district plan about which there is no mistake, defect or uncertainty, and which have not been challenged by a reference and the submission on which the reference was based.[8]

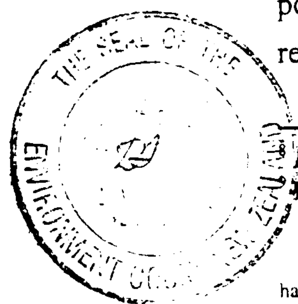
[49] It was contended on behalf of Mr Hastings that if his land is re-zoned Business 6, full effect could not be given to the zoning while the coastal management area controls continue to apply to it. However we are not persuaded of that.

[50] Certainly buildings and structures (other than network utility services) would need resource consent, and the criteria for deciding that consent include minimising disturbance of existing landform and vegetation, maintenance of natural character, and protection of water quality in the adjacent coastal marine area.[9] However that control is designed to enable the land to be used and developed in a way that respects its location in the coastal environment. It regulates, but does not prohibit, use of the land for the purposes of the Business 6 zone.

[51] The content of the four submissions on the proposed district plan lodged by Mr Hastings shows that he had identified detailed provisions of the district plan applying to the subject land on which he wished to make submissions. However he did not lodge a submission challenging the coastal management area control; nor did his reference to the Court refer to it.

[52] For the Court to consider removing the application of that control from that land in proceedings challenging the Open Space 1 zoning of the land would be to render pointless the provisions of the First Schedule and the regulations requiring statement in a submission of the relief sought, public notification of a summary of the submissions, and statement of the relief sought in a reference. It would involve the Court considering the appropriateness of provisions of a district plan which have not been challenged by a reference and the submission on which the reference was based.

[53] For those reasons we hold that it would not be an appropriate exercise of the power conferred by section 292 for the Court to consider in these proceedings removing the application of the coastal management area control. We decline to do



8 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).
9 Proposed district plan, Section 5B.7.

so. We proceed to our consideration of the zoning issues raised by these references on the basis that whatever the final zoning, the coastal management area control will apply to the subject land.

*The attitudes of the parties on zoning*

[54] We now describe the positions that were taken by the parties to the proceedings on the zoning issues raised by the references.

The rail link route

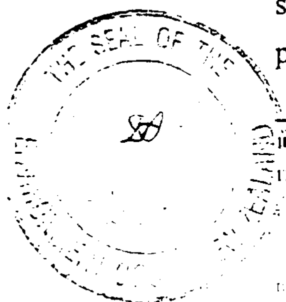
[55] First we address the zoning of the curved strip along the route of the proposed link between the North Auckland Railway and the North Island Main Trunk Railway, and the adjoining wedge-shaped piece in the north-western corner of the land.

[56] The Manukau Harbour Protection Society's reference challenged the zoning of this piece of the land as Special Purpose 3, and sought that it be zoned Open Space 1. That was the relief the Society sought at the Court hearing.

[57] At the hearing Mr Hastings opposed that, and sought Business 6 zoning. The relief sought in his reference was Business 6 zoning over the whole of the land. However that had not been the position he took in his original submission No 6719, in which he had sought Business 6 "outside the areas required for railway links and proposed railway reclamation work" (and Special Purpose 3 zoning for the piece at the southern end of the land where the two railway lines diverge). The text of the statement in the submission of the relief sought was–

> *I seek the following decision from the Council Zone the land BA6 and SPA3 see enclosed plan 34923 (amended).*

[58] Any decision requested of the Court on a reference has to have been fairly and reasonably within the general scope of the referrer's original submission, or somewhere in between that and the relevant content of the proposed plan.[10] The assessment of whether an amendment was reasonably and fairly raised in a submission has to be approached in a realistic workable fashion, rather than from the perspective of legal nicety.[11]



[10] *Re application by Vivid Holdings* [1999] NZRMA 467.
[11] *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408 (HC).

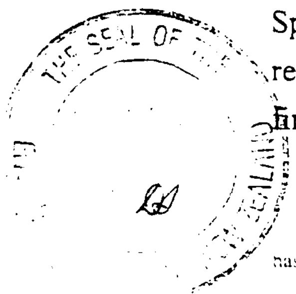
[59] Mr Hastings's submissions on the proposed district plan were not the work of an amateur or layman, of which the true intent might be somewhat obscure, and the tolerance called for by this precept liberally given. His submissions were apparently prepared by a named consultant planner and surveyor.

[60] Even so however, reading the text of Mr Hastings's submission No 6719 in a realistic workable fashion, it is not capable of being understood as challenging the Special Purpose 3 zoning for this piece of the land (the curved railway link route), or as seeking any change in it at all. Furthermore, the plan attached to the submission is entirely consistent with the text. On that plan, the parts of the site for which the zoning was challenged had been outlined in bold, and abbreviations for the zonings sought were clearly marked. The curved strip of the land along the route of the railway link lies between the pieces marked in bold, and is marked "Proposed SPA 3". The wedge-shaped piece is beyond the bold outlining, and there is nothing to indicate that any change of its zoning was sought.

[61] From those contents of the submission, we infer that Mr Hastings accepted the proposed zoning Special Purpose (Activity) 3 for the curved link strip and the wedge-shaped piece in the northwestern corner, and sought no change in respect of either of them. For those reasons we find that to the extent that Mr Hastings sought Business 6 zoning for those pieces of the land, that was beyond the scope of his original submission.

[62] We have also to consider whether Business 6 zoning would be somewhere in between the Special Purpose 3 zoning shown in the proposed plan and the Open Space 1 zoning sought by the Manukau Harbour Protection Society. Business 6 zoning is intended to provide for heavy, noxious or otherwise unpleasant industrial activity. A wide range of industrial activities is provided for. The Special Purpose 3 (Transport Corridor) zone is applied to existing railway rights of way (and certain strategic roads) for maintaining transport corridors, and provides for continuation of railway and roading uses, alternative transportation modes, and utility services. The Open Space 1 (Conservation) zoning is the most restrictive zoning in the Isthmus plan. There are no permitted activities in that zone except for informal recreation.

[63] Having compared those zones, we find that the range of difference between Special Purpose 3 zoning and Open Space 1 zoning is between considerably restrictive to highly controlled. By contrast, the Business 6 zoning is liberal, and we find that it is well outside the bounds of the range between the other two.



[64] Therefore we hold that in these proceedings it was not open to Mr Hastings to ask the Court to zone those pieces of the land Business 6.

[65] The City Council opposed the Manukau Harbour Protection Society's case for Open Space 1 zoning, and maintained its position that the appropriate zoning for this piece of the land is Special Purpose 3.

[66] The Minister of Conservation took part in the proceedings under section 274 of the Act. The Minister supported Open Space 1 zoning for the whole site, without making any distinction of the curved strip from the rest.

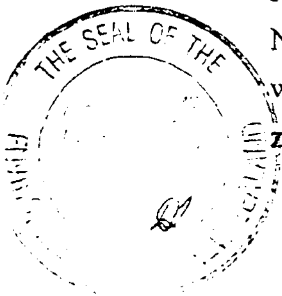
[67] The Auckland Regional Council's case did not distinguish the curved railway link strip from the rest of the subject land. However its counsel announced that the Regional Council supported the City Council's case, and its witness said the same. So we infer that the Regional Council supported Special Purpose 3 zoning for the curved strip.

[68] Tranz Rail's case implied that decision of the zoning of the curved railway link strip should follow decision of the zoning of the rest of the subject land. Its counsel submitted that if the Court determines that Business 6 zoning is appropriate for the rest, then either a Business 6 or a Special Purpose 3 zone would be appropriate for the rail link, rather than Open Space 1 which (as counsel observed) would effectively be an isolated strip running through a Business 6 zone.

[69] Conversely, if the Court determines that an Open Space 1 zoning is appropriate for Mr Hastings's land, then Tranz Rail supported the City Council's case for Special Purpose 3 zoning.

The rest of the subject land

[70] At the hearing Mr Hastings contended for Business 6 zoning for the rest of the subject land. That was consistent with the relief sought in his reference. However in his original submission No 6719, Mr Hastings had sought Special Purpose 3 zoning for the piece at the southern end of the land, lying between the North Auckland and the North Island Main Trunk railway lines. In the light of that we have to consider whether he was entitled to ask the Court to direct Business 6 zoning for that part of the land.



[71] We have already quoted from the original submission the statement in it of the provisions the submitter wished to have amended. The text of the statement of the relief sought in the original submission was–

> *I seek the following decision from the Council Zone the land BA6 and SPA3 see enclosed plan 34923 (amended).*

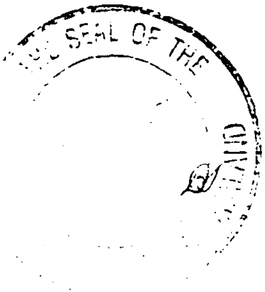
[72] The plan attached to the submission is a copy of Railways Plan 34923, showing the subject land, and with markings in bold. The plan shows that southern piece of the land separately outlined in bold, and the abbreviation "Proposed SPA 3"within that bold outline. We infer that Mr Hastings was seeking that this piece of the land be rezoned Special Purpose (Activity) 3.

[73] We have referred to the process by which this question has to be decided. We find that the marked version of Plan 34923 referred to in, and attached to, Submission 6719, forms part of the submission. Reading the text of No 6719 and the markings on the plan together in a realistic workable fashion, the submission is not capable of being understood as seeking Business 6 zoning for the southern piece of the land outlined in bold as described, and notated in bold "Proposed SPA3". Only one realistic workable understanding is possible: that as submitter Mr Hastings was seeking that the part of the land so identified be zoned Special Purpose 3.

[74] For those reasons we find that to the extent that Mr Hastings later sought Business 6 zoning for this piece of the land, that was beyond the scope of his original submission. Further, it cannot be claimed that Business 6 zoning is somewhere in between the Open Space 1 zoning shown for that piece in the proposed plan and the Special Purpose 3 zoning sought by Mr Hastings's original submission. We remain of the opinion that Business 6 zoning lies beyond the bounds of the range of difference between those two zones.

[75] Therefore we hold that in these proceedings it was not open to Mr Hastings to request the Court to direct that this southern piece of the land be rezoned Business 6.

[76] The City Council's case was that all the rest of the land (other than the curved railway link strip) should be zoned Open Space 1. In that it was supported by the Minister of Conservation, and the Auckland Regional Council. Tranz Rail did not take a position on that question.



[77] The Manukau Harbour Protection Society supported Mr Hastings's position in respect of the parts of the land that had been zoned Industrial when (in 1990) he had agreed to purchase it; and supported the City Council's case for Open Space 1 zoning on the rest. However, Business 6 zoning of the parts formerly zoned Industrial was not relief that had been sought in the Society's original submission, nor in its reference. The Society's support for Business 6 zoning for those parts therefore depends on Mr Hastings's own submission and reference. Therefore it cannot extend to the southern piece for which Mr Hastings had sought Special Purpose 3 in his original submission, even though that piece (more or less) had been zoned Industrial 3 in 1990.

***Summary of issues***

[78] In summary, the subject land has to be considered in three parts.

[79] The first part is the curved strip of the land on the route of the proposed railway link, and the adjoining wedge-shaped piece in the northwestern corner. In those respects, the issue is whether they should be zoned Special Purpose 3 (as in the proposed plan as notified) or Open Space 1 (as sought by the Manukau Harbour Protection Society).

[80] The second part is the southern piece of the land, lying between the North Auckland and North Island Main Trunk railway lines as they diverge, for which Mr Hastings had sought Special Purpose 3 zoning in his original submission. That piece is zoned Open Space 1 in the proposed plan. Mr Hastings (supported by the Manukau Harbour Protection Society) sought Business 6 zoning, but neither he nor the Society was entitled to do so. There was no reference seeking Special Purpose 3 zoning for that part, and no party presented a case for that zoning of it. We hold that there is no issue for determination by the Court in respect of that part of the land. The Open Space 1 zoning in the proposed district plan remains.

[81] The third part is the rest of the subject land. Mr Hastings sought (and was entitled to seek) Business 6 zoning for that remainder. That relief was supported by the Manukau Harbour Protection Society to the extent that the land was zoned Industrial when Mr Hastings agreed to purchase it, namely a piece in the north-western part of the land, formerly in the district of the One Tree Hill Borough. That relief was opposed by all the other parties, who support the Open Space 1 zoning in the proposed district plan.

[82] It is convenient to consider the zoning of that land, before considering the zoning of the curved rail link strip and adjoining wedge-shaped piece.

**Basis for deciding zoning**

General

[83] Counsel for Mr Hastings and for the City Council both relied on the *Nugent* tests for deciding the appropriateness of district plan rules[12]–

> *In summary, a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual and potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.*

[84] Counsel for the City Council also cited this formulation for deciding a zoning issue[13]–

> *...whether the Council's proposed zoning of the appellants' lands:*
> *(1) accords with Part II of the Act; achieves integrated management of the effects of the use, development or protection of the land; and implements the objectives and policies of the proposed plan;*
> *(2) meets the section 32 tests – subject to an argument about the application of section 32(3) of the Act; and*
> *(3) satisfies the ultimate issue as to whether "on balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it.*

[85] On point (2) in that formulation, in this case no party raised an argument about the application of section 32(3) of the Act, and we do not need to consider the applicability of that subsection.

Zoning precluding reasonable use

[86] As already mentioned, the Open Space 1 zoning is considerably restrictive on the use and development that might be made of land so zoned. Counsel for Mr Hastings submitted that such zoning should not be applied to private land over the owner's objection, citing section 85 of the Act, and decisions under the Town and Country Planning Act 1977 and the Resource Management Act.

[12] *Nugent Consultants v Auckland City Council* [1996] NZRMA 481, 484.
[13] *Williamson v Hurunui District Council* Environment Court Decision C50/2000, paragraph [16].

[87] Counsel for the City Council refuted the notion that the law prohibits such zoning of private land.

[88] We have considered the several decisions cited by counsel. In resolving the difference for the purpose of this case, it is not necessary for us to deal with decisions under the former Town and Country Planning Act 1977. We should consider the applicability of the reasoning in the most relevant Court of Appeal decision under the earlier regime, and reach our own opinion on the basis of the Resource Management Act and decisions given under it.

[89] The most relevant Court of Appeal decision is the Whangamarino Wetland case *Auckland Acclimatisation Society v Sutton Holdings.*[14] The case concerned a proposal to drain part of the wetland for summer grazing. An application had been made for a water right under the Water and Soil Conservation Act 1967 to dam and divert a stream for the purpose. That was opposed by conservation interests concerned that the wetland habitats would be harmed.

[90] The following passage from the judgment of the Court (delivered by Justice Cooke, as he then was) states the part of the Court's reasoning that is relevant for the present purpose–[15]

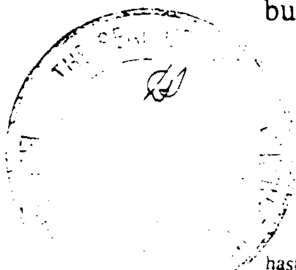
> *In his approach to the case Barker J was much influenced by the concept that it would require very clear words to justify freezing land in private ownership without rights of compensation for the owners. He invoked the principle that a statute should not be held to take away private rights without compensation. Counsel for the appellants strongly disputed the relevance of that principle.*
> *While the High Court Judge was of course quite right about the existence of the principle, its scope in planning law is limited and we have to say that it cannot be imported into the present field. From 1 April 1968 the 1967 Water Act, s 21, vested certain rights regarding water in the Crown – including the sole right to dam any river or stream, to divert or take natural water, to use natural water. There are various exceptions and provisos, including some protection for lawful existing uses, but none is material here. The farmers have the ordinary rights of landowners to use their land in its natural state, but the effect of the 1967 Act is that they have no right to divert the natural water that is on the land. Ownership of the land does not of itself carry the right to alter the natural conditions in that way. The scheme of the Act means that to refuse the water rights applied for would not be to deprive the landowners of anything. Rather, it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of refusal.*

[91] Next we quote section 85 of the Resource Management Act[16]–

[14] [1985] 2 NZLR 94.
[15] Page 98, line 50, to page 99, line 14.
[16] As amended by s 43 of the Resource Management Amendment Act 1993.

*85. **Compensation not payable in respect of controls on land**– (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*
*(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds -*
*(a) In a submission made under Part I of the First Schedule in respect of a proposed plan or change to a plan; or*
*(b) In an application to change a plan made under clause 21 of the First Schedule.*
*(3) Where, having regard to Part III (including the effect of section 9(1)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of the First Schedule, may–*
*(a) In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and*
*(b) In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.*
*(4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of the First Schedule.*
*(5) In subsections (2) and (3), a "provision of a plan or proposed plan" does not include a designation or a heritage order or a requirement for a designation or heritage order.*
*(6) In subsections (2) and (3), the term "reasonable use", in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.*
*(7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of the First Schedule on a reference under clause 14.*

[92] From the Whangamarino case we take it that legislation regulating use of natural resources may modify the general principle that a landowner's right to use land in its natural state should not be taken away without compensation. From section 85 we take it that in enacting the Resource Management Act 1991, Parliament deliberately ruled out rights to compensation for planning controls, and provided two other remedies instead. First, a person having an interest in land affected by a plan provision that would render the interest in land incapable of reasonable use (without significant effects on the environment) can challenge the provision in a submission on the plan when it is proposed. Secondly, such a person is able to apply for a change to the plan, if it renders the interest in land incapable of reasonable use (without significant effects on the environment), and places an unfair burden on any person having such an interest.



[93] In *Cornwall Park Trust Board v Auckland City Council*[17] the landowner referred to the Environment Court the zoning of land Open Space 2, seeking that it be rezoned Open Space 3. The Court rejected as too simplistic a proposition that in the absence of adverse effects off-site, it is not for the Council to tell a private landowner how to manage the use of his or her land. The Court applied the *Nugent* tests, and found that the Open Space 2 zoning more closely reflected the actual use and character of the land, and achieved the objectives and policies of the proposed plan, than did the zoning contended for by the appellant.

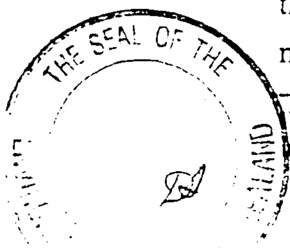
[94] In *Capital Coast Health v Wellington City Council*[18] the Environment Court considered a reference about Open Space B zoning of private land which was capable of residential development. The Court endorsed Inner Residential zoning instead. The Court expressed the opinion that if a Council wishes to protect land for open space, that purpose should be achieved by designation or acquisition, and observed–

> *However this general principle is always subject to the provisions in Part II of the Act. Where particular land has such significance in terms of any of the factors listed in s.6 and s.7 of the Resource Management Act 1991 that its use or development ought to be substantially limited or precluded, then land use controls which may have that effect may be appropriate regardless of the ownership of that land (but subject to s.32 and s.85).*

[95] Those two decisions are examples where the Court has considered challenges to restrictive Open Space zonings on the merits of the particular case, by applying the same tests as it would to other zoning challenges.

[96] We hold that even where the owner of an interest in land considers that proposed zoning would render that interest in land incapable of reasonable use, the remedies intended by Parliament are those described in section 85; and that on a challenge to such zoning the tests derived from the Act are to be applied to the merits of the case. We do not accept that it is necessarily unreasonable for a territorial authority to persist with such a zoning of private land in the face of the owner's objection, particularly where the territorial authority asserts that other use of the land would have significant effects on the environment.

[97] Counsel for the City Council submitted that a demonstrated commitment by the Council to designate and/or acquire the land or to compensate the owner may make reasonable an otherwise unreasonable zoning, where this furthers the purpose




[17] Environment Court Decision A58/97.
[18] Environment Court Decisions W101/98 and W4/2000.

and principles of the Act. It may do, in some circumstances. However when zoning is challenged by a reference to the Court, the main task is to apply the tests that are to be inferred from the Act (including where appropriate the test that can be inferred from section 85) and determine the appropriate zoning.

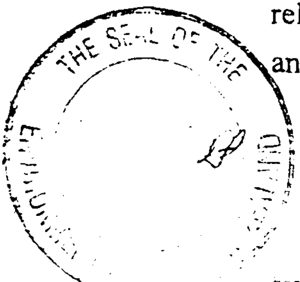
[98] Section 85 contemplates an owner of an interest in land challenging a plan provision on the ground that it renders an interest in land incapable of reasonable use. On a reference derived from such a submission, the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

[99] In this case, the private property rights of the owners have been recognised by the City Council to the extent of its requirement for designation of the land for a proposed nature reserve. That gives the owners the opportunity afforded by section 185 to have the City Council acquire the land. The City Council has passed resolutions confirming its intention to acquire the land, but its purchase negotiations with Mr and Mrs Hastings have not been successful. Counsel for Mr Hastings summarised the City Council's position as being "We will buy if the price is right". That may be, but a public authority is accountable for not paying more than the value of the land, as best that can be ascertained.

[100] Yet it remains the case that the City Council has not acquired the land, and (subject to the deemed reservation of marginal strips) it remains in the private ownership of Mr and Mrs Hastings.

*Relevance of other plan provisions*

[101] Next we consider whether, in deciding the appropriate zoning of the land, the other provisions of the proposed plan affecting the land are relevant. We have already given our reasons for holding that the coastal management area control is relevant. We now consider, separately, the relevance of the existing designations, and the pending requirements for designations.



Are designations relevant?

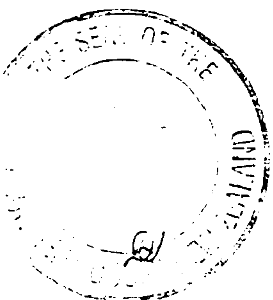
[102] Under the regimes of the Town and Country Planning Acts, land that was designated in district schemes had also to have what was called "underlying" zoning, that would have effect if and when the designation was removed.[19] Therefore in deciding the appropriate zoning for designated land in those regimes, the existence of the designation had to be ignored.[20] An advantage of ignoring the designation was that the underlying zoning of private land provided a basis for assessment of compensation on acquisition of the land for the designated purpose.

[103] However the Resource Management Act 1991 contains no corresponding direction. In the proposed plan, the City Council has followed a practice of applying zonings to designated land that are consistent with the designated purpose, where that zoning indicates the actual or likely use of the land. That practice forsakes the former advantage in assessing compensation, but that is not the concern of this Court. But the practice also eliminates the reason, valid in the former regimes, for ignoring the existence of a designation over the land in deciding the appropriate zoning.

[104] In our opinion, in deciding the zoning of designated land in a district plan in which zoning is not intended to regulate the use and development of the land if and when the designation is removed, it would be appropriate to have regard to the existence of the designation as another provision of the district plan.

Are requirements relevant?

[105] Requirements are different. Although they have interim effect,[21] they are really proposals for designations, that may or may not survive the statutory process of submissions and appeals.[22] While those processes are incomplete, it would not be appropriate to presume any particular outcome; and a zoning decision should not be influenced by supposing that the requirements will be confirmed, nor by supposing that they will be cancelled.[23]



[19] See the Town and Country Planning Act 1953, s 33A; the Town and Country Planning Act 1977, s 121.
[20] See for example, *Minister of Railways v Auckland City Council* (1969) 3 NZTCPA 214; *Henderson Borough v Corbans Wines* [1975] 1 NZLR 699; 5 NZTPA 278 (SC).
[21] S 178.
[22] Ss 169-174.
[23] *Hall v Rodney District Council* [1995] NZRMA 537.

*Is the previous Industrial zoning relevant?*

[106] The referrer's cases placed some reliance on the Industrial zoning of parts of the land under the previous district schemes at the time Mr Hastings agreed to buy it. However we do not consider that the previous zoning under the former regime is relevant. We adopt this passage from the Court's decision in the *Cornwall Park Trust Board* case–[24]

> *The test is whether the zoning is appropriate for the purpose of, and in terms of the current legislation, not whether an alteration to the zoning given the land by an instrument made under former legislation is justified.*

## Zoning of northern part (except rail link)

Relevant constraints

[107] In general, the appropriate zoning of land is determined by reference to its physical attributes, but without regard to its ownership. In the case of this piece of land, while ignoring ownership, it would be artificial to ignore constraints on the way in which it might be used or developed that are imposed by law through easements, designations, and other instruments.

[108] First, whatever the zoning, the use and development of this piece of the land is constrained by the easements to which it is subject for the existing lines for electricity transmission, natural gas, sewage, water supply, and telecommunications. In addition the piece of the land under consideration is divided by the curved strip that is subject to the easement for the proposed railway link between the two lines.

[109] Secondly, whatever the zoning, most of this piece of the land is subject to the Coastal Management Area control already described.

[110] Thirdly, the use or development of much of the land would be constrained by being deemed to have been reserved to the Crown as marginal strips under the Conservation Act. Marginal strips are held for conservation, public access and recreational purposes.[25]

[24] Environment Court Decision A58/97, page 8.
[25] Conservation Act s 24C (as inserted by s 15 Conservation Amendment Act 1990).

[111] Fourthly, all this piece of the land is subject to the existing designation for Railway Purposes: North Island Main Trunk Railway.

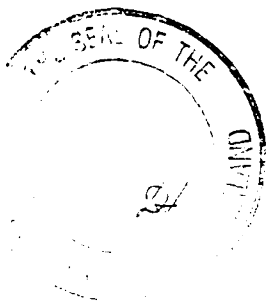
[112] Fifthly, the only frontage the land has to a road is affected by a building line restriction for road widening.

[113] Another possible constraint is the stormwater drainage function of Anns Creek itself. The stream drains a catchment having an area of 870 hectares. A catchment management plan prepared for the City Council recommended construction of stormwater cleansing and sediment ponds on the subject land. Although there is some doubt about whether the treatment ponds will be constructed there (and we are not aware that any requirement or resource consent application has been made for the purpose), the size of the catchment and the geographic position of the land at its lowest point makes almost unavoidable the continued function of the creek for drainage.

Physical features

[114] The land is open and is low-lying in comparison to surrounding land. Two streams discharge into the land on its eastern boundary, the northern being Anns Creek, the southern an un-named stormwater discharge. Anns Creek has been canalised for the first 150 metres of its passage through the land, and has a lateral channel connecting it with the southern discharge. The water then passes in a channel parallel with and adjacent to the southern boundary to join the main channel about 160 metres into the site and discharge through a culvert under the North Auckland Railway.

[115] The land lies at a convergence of two basaltic lava flows. A lower shelf of basalt lava flow from the Mt Richmond volcanic centres to the south extends over the eastern half of the land close to current sea levels. A more recent lava flow from the Mt Wellington volcanoes extends on to the northern part of the land, forming an irregular face extending on to the property. Geologically recent marine deposits have partially covered the lower basalt flow and form a soft unconsolidated layer on the western half of the site.




[116] A culvert under Great South Road and the North Island Main Trunk Railway, and railway embankments across the western end of the land, affect the levels of sediments and the extent of tidal flows. Due to the size of the present culvert under

the North Auckland Railway, there is insufficient capacity to drain under that railway embankment during periods of high flow, and much of the present site is on occasion inundated by ponding of floodwaters.

[117] In summary, the northern third of the property is raised land formed by new spoil deposits and old lava, and the substrate of the southern two-thirds of the land is primarily mud-silt.

Botanical and ecological features

[118] There is a mosaic of five vegetation communities on the site: weedfield, saltmarsh, mangrove estuary, freshwater wetlands and remnant shrubland.

[119] Weeds predominate on the railway and Great South Road embankments and the lava outcrops. On the mudflats, weeds are replacing native species.

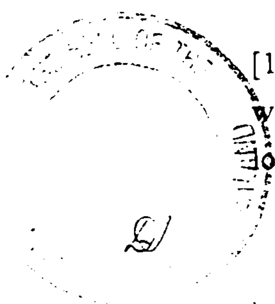
[120] There is about 0.6 hectares of saltmarsh community, mostly in the eastern portion on the mudflat edges. There are four vegetation types: Bolboschoenus (a brackish water community), Batchelors button (adjacent to the Bolboschoenus zone), glasswort (adjacent to the edge of the mangrove forest) and Wiwi/Oioi (between the largest lava tongue and raised land).

[121] About 1.6 hectares is covered in mangrove forest. There is one main raupo wetland, of around 1200 square metres, in a northern area between the raised weedland and the main mangrove forest.

[122] The remnant shrubland is small areas on the lava tongues and escarpment edges in the west and north-west of the land, where scattered native shrubs persist in amongst weeds on undisturbed ground. They include akeake (*Dodonea viscosa*), *Coprosma crassifolia, Plagianthus divaricatus,* and the scramblers *Muehlenbeckia complexa* and *Calystegia soldanella*.

[123] The akeake *Dodonea viscosa* appears to be known now only from the Anns Creek embayment, it is absent from the shoreline back to Onehunga

[124] The presence of *Coprosma crassifolia* is of some botanical interest, as the wider area along the stretch of shoreline from Onehunga to Anns Creek is the type locality of this species, being the place where the first collection was made (by



William Colenso in the 1840s). Such a collection is an important scientific reference point, so the persistence of the plants at the type locality of the species is valuable should the species or its genus be re-examined using modern techniques such as DNA analysis.

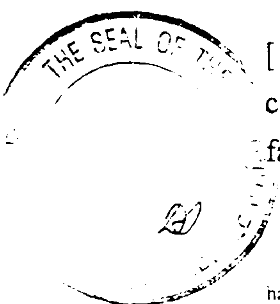
[125] This species of coprosma exists in a number of other locations in the Auckland region, including a large population on Hamlins Hill nearby, and at Bethells, but on the Auckland isthmus it occurs only in this corner of the Manukau Harbour. Although the type locality of the *Coprosma crassifolia* extends along the rocky coastline, the bulk of the genetic diversity of the remaining population at this locality is within the subject land.

[126] A botanical consultant called for the City Council, Dr R O Gardner, gave the opinion that the heritage value of the persistence of the plant at its original locality is also important. He deposed that, apart from *Coprosma crasssifolium*, only two other native higher plants were described from collections made on the Auckland isthmus, namely *Astelia grandis* (Ponsonby Road) and *Potamogeton cheesemanii* (St John's Lake). Only the latter of those two persists, and in a vastly altered habitat. The witness urged that it should be a matter of civic pride, as well as one of botanical significance, that the coprosma be preserved on its native ground at Anns Creek.

[127] Two native geranium species to be found on the southern lava tongue at Anns Creek (*Geranium retrorsum* and *Geranium solanderi*) have been classified as regionally threatened and declining, and are the largest currently known populations of each. There are approximately 100 individual plants of *Geranium solanderi* and 10 of *Geranium retrorsum.*

[128] Seed could be taken from the akeake, coprosma and geraniums on the land and sown in Hugo Johnson Reserve, and at other locations along the Onehunga shoreline to enhance the population of them in this locality. However the ability to take seed does not alter the botanical value of the subject land.

[129] The vegetation of the non-terrestrial part of the embayment consists of mangrove, saltmarsh and freshwater swamp.




[130] Approximately the southwestern half of the embayment has until recently carried a dense growth of mangroves (*Avicennia marina)* 2 to 3 metres tall and of fair age and good health. Approximately the northeastern half of the wetland area,

across to Great South Road, is covered by a saltmarsh turf dominated by the native glasswort (*Sarcocornia quinquefolia*) and batchelor's button (*Cotula coronopifolia*). Parts of the saltmarsh at a slightly higher level carry a weedy growth of tall fescue and sea orache (*Atriplex hastata*). There are also colonies of cordgrass (*Spartina* sp.).

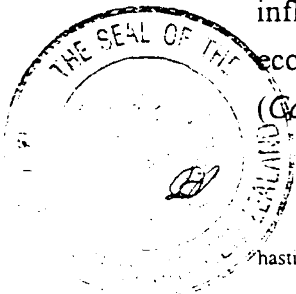
[131] There is freshwater swamp more or less centrally on the northern side of the embayment, and in the south-eastern corner against the North Island Main Trunk Railway and Great South Road. The most conspicuous native plant species of these two areas are raupo (*Typha orientalis*) and *Bolboschoenus fluviatilis*.

Ecotone sequence

[132] We have stated our findings about the plants of botanical interest on the subject land. The pattern of the various plant communities in the transition from foreshore to terrestrial habitat makes up an ecotone sequence that has greater value than the sum of the parts. On the subject land there is a sequence of freshwater communities merging into saltmarsh and then mangrove with remnant adjacent coastal lava shrubland.

[133] Very little is now left of the vegetation that originally grew over the wide areas of basaltic volcanic deposits of the Tamaki Ecological District. The vegetation at Anns Creek is one of the few remaining fragments of basalt flow vegetation. It is a mosaic of vegetation types, with significant ecotones (transitions) of rare basalt lava flow vegetation into freshwater and saltmarsh areas and into the mangroves. These ecotones do not occur anywhere else within the Tamaki Ecological District. The Anns Creek lava flows are significantly raised above the tidal influence and have strong freshwater influence. All other lava-flow remnant vegetation areas adjacent to estuaries are much lower and more exposed to the coastal influences. The vegetation composition at each known site reflects this difference.

[134] The saltmarsh supports a wide range of species, with concentrations of batchelor's buttons (*Cotula cornopifolia*), jointed wire rush, and glasswort present on the intertidal sediment. The lava flows still support elements of a natural indigenous shrubland on lavaflow ecosystem. These elements reflect the low saline influence at this site. Here are found a number of species that grow in terrestrial ecosystems including *Coprosma crassifolia*, akeake (*Dodonea viscosa*), karamu (*Coprosma robusta*), and mahoe (*Melicytus ramiflorus*).



[135] None of the vegetation types or communities present is rare, threatened or botanically or ecologically critical to the region or district. All the species that are found at Anns Creek can be found in similar associations in the Waitakere, Awhitu, and Manukau Ecological Districts. Other places have saltmarshes and wetlands typically containing raupo, ribbonwood, Wiwi/Oioi, glasswort, batchelor's button and mangrove; and some are very large areas.

[136] The future value of the communities is questionable, due to degradation from pervious works on the land, invasion of weeds and colonisation by mangroves. Even so, the land provides a characteristic example of the ecology of the local area, the wetlands contribute to the ecological viability of surrounding areas and biological communities, and it is a genetically valuable part of the type locality of *Coprosma crassifolia*.

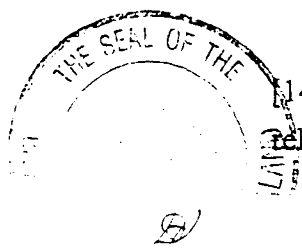
[137] The only other area that has both the equivalent terrestrial vegetation as well as the saltmarsh and mangrove is approximately 500 metres west on the esplanade reserve at the mouth of the next creek westward.

[138] A consultant ecologist called for Mr Hastings, Dr V F Keesing, deposed that construction of the rail link would require earthworks, access by machines for construction, create bared areas on which weed species would establish, and possibly restrict tidal influence, resulting in loss of saline communities, so that the land would lose most of the current ecological and botanical values that it has.

[139] However Dr Keesing's evidence in that respect depended on his assumption about the method of construction of the railway link. Tranz Rail has reached agreement with the City Council that if the land is zoned Open Space 1, the railway would cross Anns Creek on an elevated viaduct. In cross-examination, Dr Keesing agreed that the effects could be minimised.

[140] No doubt some disturbance would be caused, by whichever method the railway link is constructed; but the extent of environmental damage described by Dr Keesing is not inevitable.

Locations of features within parts of subject land




[141] There was no evidence directly locating the various botanical features in relation to the route of the proposed railway link or to the parts of the site to which

the remaining zoning issues relate. The absence of authoritative definition of the extents of the marginal strips also makes it difficult for us to make the findings necessary to decide those issues. We have to make our findings by inferences from the marked railways plan attached to Mr Hastings's submission 6719, the verbal descriptions by the witnesses, and the marked aerial photographs produced in evidence, interpreted with the aid of our own observations on visiting the site in the company of botanists appointed by Mr Hastings and the City Council.

[142] On those foundations, we find that it is more probable than not, that most of the *Coprosma crassifolium* (except for two small patches in the second, southern piece of the land) is in northern section of the third piece of the land, north of the curved railway link easement; and that some of the *Dodonea viscosa* is in that northern section of the third piece, the rest being in the piece that is subject to the easement for the railway link.

[143] From the same sources, we find that it is more probable than not that the main geranium populations are in the second, southern part of the land, in respect of which the Open Space zoning is not in issue in these proceedings, and also, more probably than not, are in a part of the land within 20 metres of Anns Creek deemed to have been reserved from sale as marginal strip.

[144] So in considering the zoning of the third, northern, piece of the land we take into account the presence on it of the *Coprosma crassifolium* and the *Dodonea viscosa* in the section to the north of the railway link designation. The southern section of the northern piece of the land contains mangroves and batchelor's button. As the geraniums are in the second piece of the land in respect of which the zoning is not in issue, we do not take them into account.

Part II

[145] The sustainable management purpose of the Act is elaborated in section 5(2)–

*5.* ***Purpose–*** *(1)The purpose of this Act is to promote the sustainable management of natural and physical resources.*
*(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–*
*(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
*(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

*(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[146] Plainly, zoning the northern piece of the land Business 6 would respond better to the element of enabling people (Mr and Mrs Hastings) to provide for their economic well-being than would zoning it Open Space 1.

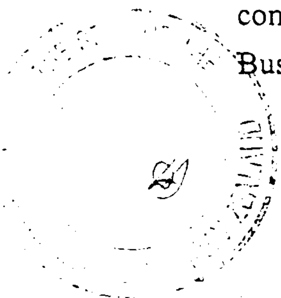
[147] There are several constraints that would apply to use and development of that part of the land in accordance with that zoning. We have in mind the existing physical infrastructure, the high mound of spoil on the northern boundary on which the transmission tower is located, the coastal management area control, earthworks control, the 20-metre wide marginal strips along Anns Creek, the designation for the North Island Main Trunk Railway, the general earthworks controls in the regional and district plans, and the road-widening building-line restriction would all limit the development and use that could be made of that part of the land.

[148] Enabling the owners to provide for their economic well-being is an element of sustainable management that may conflict with other elements of sustainable management. The marginal strips, the coastal management area control and the earthworks control would limit development or use of that part of the land in a way that would conflict with the goals described in paragraphs (a) to (c) of section 5(2).

[149] Those goals are elaborated in section 6 of the Act–

> ***6. Matters of national importance–*** *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, ... and their margins, and the protection of them from inappropriate subdivision, use, and development:*
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
> ...

[150] The coastal management area control, the earthworks control and the marginal strips would serve to recognise and provide for those matters in constraining development and use of the northern part of the land in accordance with Business 6 zoning.



Consistency with superior instruments

[151] Section 75(2) explains the relationship of contents of a district plan with certain superior planning instruments under the Act–[26]

> *75. Contents of district plans–*
> *...*
> *(2) A district plan must not –*
> *(a) Be inconsistent with any ... New Zealand coastal policy statement; or*
> *...*
> *(c) Be inconsistent with–*
> *(i) The regional policy statement; or*
> *(ii) Any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV*

NZ Coastal Policy Statement

[152] The New Zealand Coastal Policy Statement 1994[27] extends beyond the coastal marine area to the whole of the coastal environment, and is relevant to the zoning of the subject land.

[153] Policy 1.1.2 states that –

> *It is a national priority for the preservation of the natural character of the coastal environment to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in that environment by:*
> *(a) avoiding any actual or potential adverse effects of activities on the following areas or habitats:*
> > *(i) areas and habitats important to the continued survival of any indigenous species; and*
> > *(ii) areas containing nationally vulnerable species or nationally outstanding examples of indigenous community types;*
>
> *(b) avoiding or remedying any actual or potential adverse effects of activities on the following areas:*
> > *(i) outstanding or rare indigenous community types within an ecological region or ecological district;*
> > *(ii) habitat important to regionally endangered or nationally rare species and ecological corridors connecting such areas; and*
> > *(iii) areas important to migratory species, and to vulnerable stages of common indigenous species, in particular wetlands and estuaries.*
>
> *(c) protecting ecosystems which are unique to the coastal environment and vulnerable to modification including estuaries, coastal wetlands, mangroves and dunes and their margins; and*
> *(d) recognising that any other areas of predominantly indigenous vegetation ... should be disturbed only to the extent reasonably necessary to carry out approved activities.*

26 As amended by s 16, Resource Management Amendment Act 1997.
27 NZ Gazette 5 May 1994 page 1563.

[154] Policy 1.1.3 is–

> *It is a natural priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:*
> *(a) landscapes, seascapes and landforms, including:*
> *(i) significant representative examples of each landform which provide the variety in each region;*
> *(ii) visually or scientifically significant geological features;*
> *(iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas.*
>
> ...
>
> *(c) significant places or areas of historic or cultural significance.*

[155] The effect for the present proceedings is that high value has to be accorded to protecting any areas of significant indigenous vegetation on the land, particularly habitats important for the survival of indigenous species, or to regionally endangered species, and vulnerable coastal ecosystems; to the collective characteristics which give the coastal environment its natural character; and to significant places of historic significance.

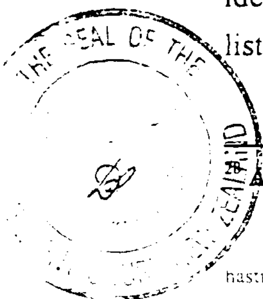
Regional Policy Statement

[156] The purpose of a regional policy statement is described in section 59–

> ***59. Purpose of regional policy statements–*** *The purpose of a regional policy statement is to achieve the purpose of the Act 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.*

[157] So the Auckland Regional Policy Statement may be taken to provide appropriate policies and methods to achieve sustainable management (as defined) of the natural and physical resources of the Auckland region. The contents of the district plan are not to be inconsistent with the Statement.

[158] The regional policy statement contains policies for evaluation of natural heritage resources. There was a difference between the parties on whether the Regional Planning Statement identifies the wetland areas of the subject land as significant natural areas. The difference arose because the relevant map in the Statement does not identify them as such. However Appendix B to the Statement identifies areas of regional or greater significance for natural heritage values. The list includes this item–[28]



28 Appendix B, item 217.

*Wetlands (mangroves, saltmarshes, and eelgrass) ... Areas of particular importance include:- ... Ann's Creek ...*

[159] So despite the regrettable ambiguity between the text and the map provided to illustrate the text, we find that the wetland (mangrove and saltmarsh) areas of the subject land are identified in the Auckland Regional Policy Statement as significant natural areas.

[160] Relevant policies call for use and development of those resources to be controlled so that the values of significance are preserved or protected from significant adverse effects, or where that is not practically achievable, remedied or mitigated.[29]

Proposed Regional Plan: Coastal

[161] The proposed Auckland Regional Plan: Coastal was prepared before it was determined that the land was not within the coastal marine area. It classifies the subject land as in Coastal Protection Area 1, but now that it has been determined that the land is not within the coastal marine area, the proposed plan will be amended so that this classification no longer applies to the land.

Isthmus Plan

[162] The Isthmus plan contains provision for protection and identification of threatened vegetation populations that warrant conservation.[30] Section 5A.5, under heading Habitats, refers to preparing an inventory of significant ecological areas on the isthmus with a view to their protection or enhancement. Annexure 2 to the plan[31] describes Significant Natural Environment Features, and identifies Anns Creek as an ecological area.

[163] Ms K J Dorofaeff, the senior planner called for the City Council, acknowledged that there may be parts of the land that, on their own, are not of significant value. However she gave the opinion that the land has to be taken as a whole, and that there would be little point in having pockets of business zoning that could not be used for that purpose. The witness deposed that there would be merit in having the less valuable parts of the land serving more of a buffer function for the

[29] Policy 6.4.1.
[30] Section 1.2.
[31] A non-statutory annexure intended to assist users of the plan.

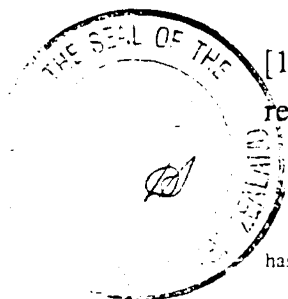
highly valuable areas, and that they may be able to be enhanced to be more compatible with the other parts that have more value.

[164] Ms Dorofaeff also referred to Part 4A of the Isthmus district plan which provides rules governing earthworks, by which resource consent would be required for earthworks over a certain limit. The witness deposed that on a grant of consent for earthworks, the Council could impose conditions to protect indigenous vegetation. However Ms Dorofaeff deposed that the vegetation on the land is not protected by the general tree protection controls, and expressed concern that it could be removed before an application for earthworks consent is made. That was the basis for her opinion that the earthworks controls would not be as effective to protect the natural values of the land as Open Space 1 zoning would be. The objective of the Open Space 1 zone is to provide for the conservation and protection of areas of particular scenic, heritage, natural or habitat value.

[165] Although consents would be required for earthworks and for building within the coastal management area even if the land is zoned Business 6, the focus of those controls is more on seeing if proposed development could be modified partly to protect values. The witness gave the opinion that the Council would not have the same degree of control of adverse effects and protection of natural values as it would if the land is zoned under Open Space 1.

Exercise of judgment

[166] The purpose of our consideration of the provisions of the Act and the planning instruments is the need to decide between the Open Space 1 zoning for better protection of the natural values of the land, and Business 6 zoning to enable the owners to have some opportunity to use and develop at least parts of the land for their economic wellbeing. That opportunity would be subject to the constraints of the existing infrastructure and designation on the land, and the coastal management area and earthworks controls. Those controls would not themselves afford quite as full protection of the natural values as Open Space 1 zoning would. However Open Space 1 zoning would preclude any use or development of the land that would enable the owners to provide for their own economic well-being from their investment in it.



[167] We find that, in terms of section 85 of the Act, Open Space 1 zoning would render the land incapable of reasonable use and would place an unfair burden on the

owners. The City Council maintained that its willingness to buy the land from Mr and Mrs Hastings adequately addressed that concern. However that willingness was qualified. It did not necessarily extend to purchasing if the land is zoned Business 6. The City Council has not been able to purchase the land yet, and our decision has to be made on the basis that it remains privately owned.

[168] In this case, the conflict between enabling economic use of the land and precluding all economic use to protect the undoubted natural values of the land is not quite as stark as that. Leaving aside the prospect of protection by the proposed designation for nature reserve, and eventual public acquisition, even Business 6 zoning would not allow unrestrained development of the remainder of the northern piece after excluding the marginal strips, the railway link easement, the other infrastructure elements, and the building line restriction. Although they would not be as fully effective to protect the features of natural value as Open Space 1 zoning, the coastal management area control and the earthworks control have the potential to provide considerable protection. In the unlikely event of activity to remove valuable indigenous vegetation in advance of a resource consent application (the risk mentioned by Ms Dorofaeff) a combination of sections 17 and 320 would provide a backstop.[32] By contrast, there is no corresponding moderation in Open Space 1 zoning to allow for any development to enable economic use, even development that does not have any significant adverse effect on the environment.

[169] Sustainable management of natural and physical resources is a single concept. Where conflict arises between elements of the concept, it is often possible to moderate them so that the essence of each element is preserved. However in the end a decision has to be made about what provision best meets the purpose of the Act.

[170] In this case there is a conflict between two important elements of sustainable management of the subject land, the important natural values and enabling the owners to provide for their economic well-being from it. The result of our consideration of the conflict is our judgment that Business 6 zoning of the northern part of the land would more fully serve the purpose of the Act than would Open Space 1 zoning.

THE SEAL OF

[32] See for example, *Auckland Regional Council v Hastings* Environment Court Decision A89/99.

[171] In conformity with that judgment, we find that Business 6 zoning, rather than Open Space 1 zoning, accords better with Part II of the Act, would assist the City Council to carry out its function of control of actual or potential effects of the development of the land, and is the more appropriate means of the Council exercising its function of achieving the purpose of the Act.

[172] If the City Council realises its wish to purchase the land, then Open Space 1 zoning could be reconsidered.

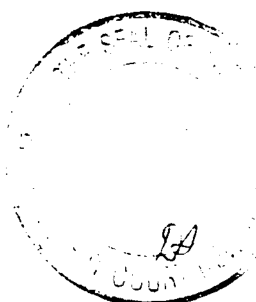
**Zoning of rail link route**

[173] We have now to consider the zoning of the curved strip of the land, the subject of the easement for the proposed railway link between the North Auckland Railway and the North Island Main Trunk Railway.

[174] The City Council maintained that the strip should be zoned Special Purpose 3 (Transportation Corridor), and the Manukau Harbour Protection Society sought Open Space 1 zoning. The Minister of Conservation supported the Society, and (to the extent that it took an attitude on the question) the Regional Council supported the City Council. As we have concluded that the rest of the northern part of the land should be zoned Business 6, Tranz Rail's stance supports that of the Councils. Mr Hastings had sought Business 6 zoning for this piece of the land, but as there was no foundation for that in his submission on the proposed plan, we hold that he is not entitled to seek that relief in these proceedings.

[175] Although they were the protagonists for change, neither the Minister nor the Society called evidence. The only evidence bearing on the issue that, from our analysis of the submissions, is properly before the Court in respect of this land was that of Ms Dorofaeff.

[176] Ms Dorofaeff gave the opinions that the Special Purpose 3 zoning is a means of achieving the statutory purpose in respect of this piece of the land, particularly enabling people and communities to provide for their social, economic and cultural well-being and for their health and safety, by use of it for a strategic transport connection. The witness also deposed that the zoning conforms with sustaining the potential of physical resources (the North Auckland Railway and the North Island Main Trunk Railway) to meet the reasonably foreseeable needs of future generations.



[177] Ms Dorofaeff also explained that a railway bridge on the land for a railway link would be a permitted activity, but earthworks exceeding 25 cubic metres in volume or 250 cubic metres in area would need resource consent, the criteria for which include adverse ecological effects on natural habitats, watercourses, wetlands, estuaries and coastal waters. The witness deposed that a railway embankment would require resource consent under the coastal management area control. She gave the opinion that in those ways the Special Purpose 3 zoning would assist the Council to carry out its function of control of actual or potential effects of the development of the land.

[178] Ms Dorofaeff's evidence in those respects was not challenged by cross-examination of contradictory evidence, and we accept them.

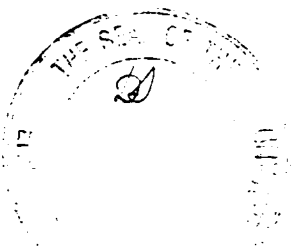
[179] The case of the Manukau Harbour Protection Society for Open Space 1 zoning instead of Special Purpose 3 zoning was that the latter would encourage further filling of Anns Creek, which would further diminish the potential environmental value of the land. The Society urged that Open Space 1 zoning would not preclude a railway link, but would have the effect that it would be provided on an elevated structure rather than on an embankment. However it accepted that this issue is secondary to the zoning of the rest of the land, and that if the rest is to be zoned Business 6, "then there is little value in arguing over the zoning underlying a rail connection."

[180] It appears that the Minister of Conservation took a similarly pragmatic view of this issue, as her counsel did not make specific submissions in respect of the zoning of the curved railway link strip.

[181] It is our opinion that in the light of our decision that the rest of the northern part of the land should be rezoned Business 6, the appropriate zoning for the curved railway link strip is Special Purpose 3.

**Determinations**

[182] For those reasons, the Court makes the following determinations.



[183] Reference RMA 769/95 is allowed to the extent that the Auckland City Council is directed to zone Business 6 the pieces of the subject land outlined in bold on the plan incorporated in Mr Hastings's Submission 7619 and marked "Proposed BA 6"; and in all other respects is disallowed.

[184] Except to the extent that the relief granted in the preceding paragraph meets relief sought by it, Reference RMA806/95 is disallowed.

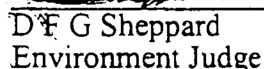
[185] We recognise that the complexities of the site and of the proceedings will have made the case more costly for the principal parties than district plan references generally. Even so, our provisional view is that each party should bear his or its own costs. However in case any party wishes to contend for an order for costs, the question of costs is reserved.

**Disclaimer**

[186] Nothing in this decision should be taken as expressing or implying any opinion about the merits of the City Council's requirement for a proposed Nature Reserve designation of the land.

**DATED** at **AUCKLAND** this 6th day of August 2001.

For the Court:



D F G Sheppard
Environment Judge

**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<br>Appellant |
| AND | MOTOR MACHINISTS LIMITED<br>Respondent |

Hearing: 13 & 20 March 2013

Counsel: J W Maassen for Appellant
B Ax in person for Respondent

Judgment: 31 May 2013

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## 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.

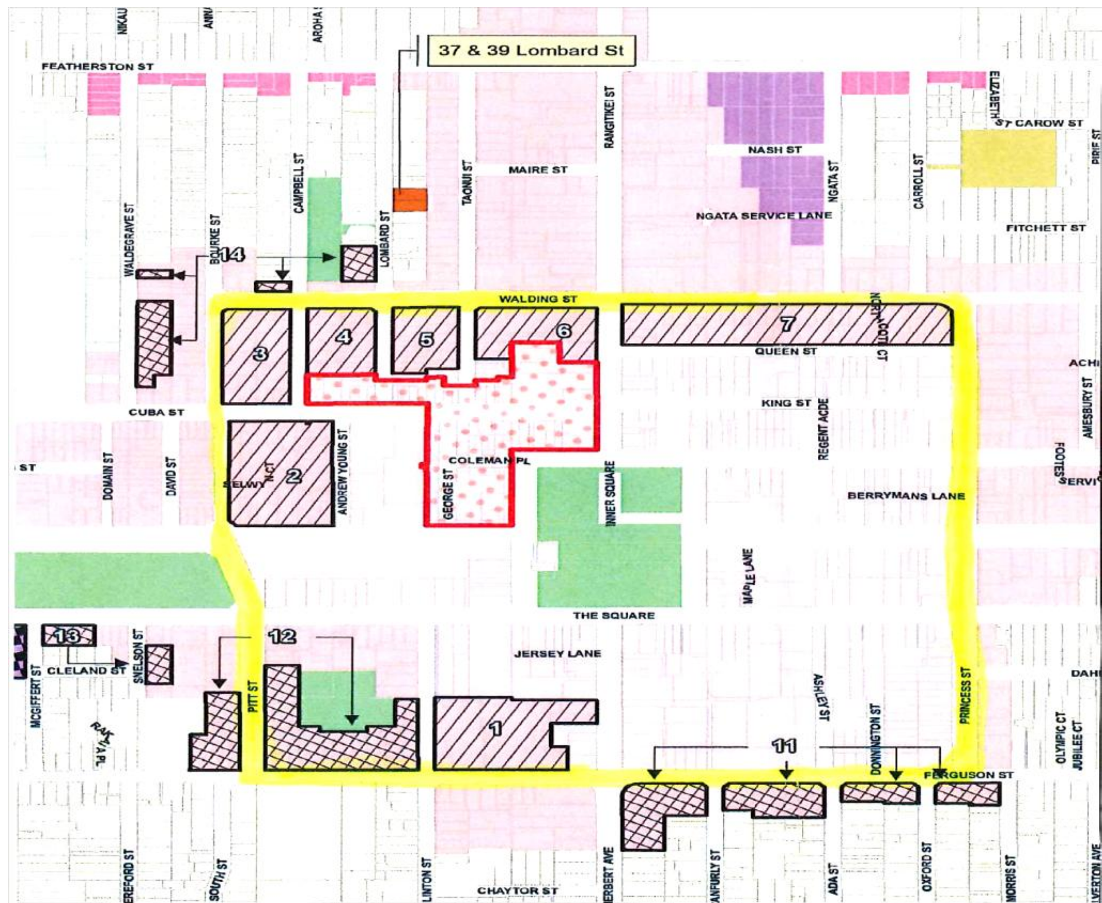
[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district 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

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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

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[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

[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

[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

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 198/96 (INV)

UNDER THE — Resource Management Act 1991

IN THE MATTER — of an Appeal pursuant to Section 299 Resource Management Act 1991

BETWEEN — THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC.

Appellant

A N D — SOUTHLAND DISTRICT COUNCIL

Respondent

**Hearing:** 12 June 1997

**Counsel:** P J Milne for Appellant
B J Slowly for Respondent
B I J Cowper for Rayonier NZ Limited

**Judgment:** 15 JUL 1997

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## JUDGMENT OF PANCKHURST J

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**Introduction:**

In a decision delivered on 1 July 1996 the then Planning Tribunal ("the Tribunal") held that a rule included in the Southland District Council's District Plan, by way of amendment to the proposed Plan, was ultra vires the Southland District Council ("the Council"). Such decision reflected an application of the principle recognised in ***Countdown Properties (Northlands)***

***Limited v Dunedin City Council*** (1994) NZRMA 145, and other cases, that an amendment to a Plan should not go beyond what was reasonably and fairly raised in submissions lodged in relation to that Plan This requirement flows from a value which underscores the Resource Management Act 1991 : that there should be public participation in the resource management process.

Unusually in the present case the Council itself made a concession before the Tribunal that it considered it had acted ultra vires. That view was shared by a number of parties who had lodged references to the Tribunal pursuant to clause 14 of the First Schedule to the Resource Management Act 1991 ("the Act"). However, the Royal Forest and Bird Protection Society Incorporated ("RF & B") contended that the amendment was validly made, in that it was fairly raised in a submission RF & B lodged in relation to the Plan.

In this Court three parties were represented. RF & B as the appellant again contended that the relevant amendment was properly made, while the Council supported the Tribunal's ultra vires ruling. Rayonier New Zealand Limited ("Rayonier") likewise supported the Tribunal's decision. Rayonier owns approximately 100,000 hectares of forest throughout New Zealand. An area approaching 30,000 hectares is in Southland and therefore directly affected by the provisions of this District Plan. Although Rayonier's forests are all exotic, a significant understorey of native vegetation develops within maturing forests. Accordingly Rayonier's concern in the present instance was with any provision controlling the clearance of native vegetation, as such provisions may impact upon the company's ability to harvest its crop.

**Background:**

The Southland proposed District Plan was publicly notified by the Council on 1 August 1994. *Clause 5 of the First Schedule to the Act prescribes* the steps to be followed to ensure all potentially interested parties have notice of the proposed plan and the opportunity to make submissions concerning its content. Those steps were followed.

The Plan was divided into sections, and then into subsections. Section 4 was entitled "**Resource Areas**", and section 4.6 "**Coastal Resource Area**". This section of the plan applied essentially to the coastal margin of the Southland District, which runs from Fiordland in the west, to the Catlands in the east. Within section 4.6 was a proposed Rule COA.4 as follows:

> *"Rule COA.4 Native flora and fauna*
> *Any activity that has the effect of destroying, modifying, removing or in any way adversely affecting any :*
> - *native vegetation, or*
> - *habitat of any native fauna*
>
> *shall require a Discretionary Resource Consent."*

The Rule then prescribed criteria to be applied by the Council in relation to applications for consent.

Section 3 of the Plan was entitled "**General Objectives Policies Methods and Rules**". This section was further divided into thirteen subsections of diverse content, ranging from "**Manawhenua Issues**" to "**Public Works and Network Utilities**" Section 3.4 was entitled "**Heritage**" and was devoted to three heritage types namely : natural, built, and cultural. Importantly

for present purposes section 3.4 is of district-wide application. By proposed Rule HER.5 it was provided.

> *"Any activity or work that would or is likely to have an effect on, or destroy, remove or damage any of those natural heritage sites or items in Schedule 6.13 and 6.12, shall require a Discretionary Resource Consent."*

The Rule then set out matters which the Council must consider in determining applications for Resource Consents. Schedule 6.13 described some "**123 Significant Geological Sites of Land Forms**", while Schedule 6.12 described various "**Significant Tree and Bush Stands**".

Both the proposed Rules COA.4 and HER.5 excited submissions and cross submissions from a range of interested parties. RF & B made submissions in relation to both Rules. In relation to the **Heritage** section generally it described the Plan as *"deficient and inadequate overall"*. Of Rule HER.5, RF & B argued·

> *"this rule is currently far too limited in its scope as it is dependent on the schedules, which only scratch the surface of significant areas."*

For present purposes it is not necessary to consider the submission in greater detail, other than to note the concern that there were in RF & B's view no controls on indigenous vegetation clearance, save for the quite circumscribed controls contained in proposed Rules HER.5 and COA.4. In argument counsel for RF & B summarised what RF & B sought in these terms:

> *"In essence the relief sought by RF & B was a new heritage rule or an amendment to existing Rule HER.5, to provide for clearance of all indigenous vegetation to be a discretionary activity and to require the Council in assessing application for*

> *Resource Consents to identify and protect areas of significant indigenous vegetation and significant habitats of indigenous fauna."*

In relation to Rule COA.4 RF & B made a very short submission in which it noted its support for the Rule which it considered would *"allow the Council to implement the purpose and principles of the Act in the coastal area".*

By contrast Rayonier lodged a submission in which it sought the deletion of proposed Rule HER.5. Alternatively it contended the operation of the Rule should be restricted or other methods of control recognised. Following the submission lodged by RF & B, that the clearance of all indigenous vegetation should be a discretionary activity, Rayonier lodged a cross submission in opposition. It contended that RF & B's approach would effectively elevate all native vegetation to the status of significant vegetation and would unjustifiably catch understorey in forest plantations. Rayonier did not make submissions in relation to proposed Rule COA.4 since the coastal strip which comprised the Coastal Resource Area was outside the company's area of operation. I have focused upon the submissions of RF & B and Rayonier to the exclusion of those from other parties. Of course there were submissions on Rules HER.5 and COA.4 from a range of people. In my view a focus upon RF & B and Rayonier's positions is sufficient for present purposes. Their markedly different positions sufficiently expose the issues which arise in the present vires context.

Before the Planning Tribunal Mr D G Halligan, Resource Manager for the Southland District Council, gave evidence by way of a prepared statement which was not challenged by any of the parties then represented. As the Tribunal noted his evidence was largely a recital of relevant portions of : the District Plan as publicly notified, the submissions and cross submissions, the resultant decisions of the Council, and the District Plan as amended consequent upon those decisions.

Mr Halligan's evidence also included a description of a revised Rule COA.4 which was drafted by Council staff and tabled before the District Plan Committee. The revised version of the rule provided as had the first draft that any activity which had the effect of destroying, modifying, removing or adversely affecting native vegetation or the habitat of native fauna should be a discretionary activity. However qualifications were added, namely such activity on land subject to the South Island Landless Natives Act 1906 would be a controlled activity. Further, if an approved sustainable yield management plan existed, then activity which would otherwise have a discretionary status would become a controlled activity and activity which would otherwise have a controlled status would become a permitted activity.

Contrary to the expectation of the Council's planning staff the Committee in a decision concerning proposed Rule COA.4 and after review of submissions on that Rule, resolved to amend the Heritage section of the Plan by introducing a new Rule HER.3

The new Rule read:

> ***"Rule HER.3 - Indigenous Flora and Fauna***
> *(i) Any activity which has the effect of destroying, modifying, removing or in any way adversely affecting any:*
> *(a) significant indigenous vegetation or*
> *(b) significant habitats of indigenous fauna*
> *shall, except to the extent set out in this Rule, be considered to be a discretionary activity."*

Defined exceptions in paragraphs (ii) and (iii) provided for the taking of timber from an area to which the Forests Amendment Act 1993 did not apply, and for the carrying out of proper agricultural practices on agricultural land, to be controlled activities. Further certain activities in accordance with a sustainable forest management plan and certain silvicultural, horticultural, and agricultural practices were defined as permitted activities. At the same time the Committee resolved to amend Rule COA.4 by restricting its application to *"significant"* indigenous vegetation or fauna, and by incorporation of a reference back to the new Rule HER.3.

In the most general of terms therefore the final result was to introduce into the District Plan an area-wide provision whereby works which would adversely affect significant indigenous vegetation or fauna became a discretionary activity. The thrust of Rule COA.4 was largely unchanged, subject to some refinement. The decision of the Council to introduce area wide control of significant indigenous vegetation and fauna by a new Rule in the Heritage section, but to do so in reliance upon submissions relevant to the

Coastal Resource Area section, fuelled the ultra vires argument before the Planning Tribunal.

**RF and B's Contentions:**

In the present appeal pursuant to s299 of the Act, RF & B alleges that the Tribunal erred in law in three respects:

(a) in finding that Rule HER 3 was not reasonably and fairly raised in RF & B's submission on the proposed Plan,

(b) in taking into account irrelevant considerations, namely the reasoning by which the Council justified the inclusion of Rule HER 3 and the circumstance that the general Heritage submission of RF & B seeking greater control of activities affecting indigenous vegetation or fauna was in the Tribunal's view *"disallowed by the Council"*, and

(c) in failing to take into account its own finding that RF & B's Heritage submission was publicly notified in a way that would have made it perfectly clear it was seeking in the Heritage section of the Plan a new Rule to control the clearance, logging or other use of land that would adversely affect indigenous vegetation, by making such activities discretionary.

It was argued by counsel for RF & B that such errors of law, either singly or in combination, required this Court to intervene and set aside the ultra vires ruling. I regard the three points raised as so interrelated, that the convenient course is to consider them together.

**Was HER.3 Fairly Raised?:**

The First Schedule to the Act lays down a clear process by which there must be public notification of both the proposed Plan and of a summary of the submissions received thereon. Thereafter the parties have the opportunity to make further submissions and ordinarily the Council must hold a hearing in relation to the rival submissions. This staged process is designed to ensure that before a Plan is amended the opportunity of informed public participation in the establishment of the Plan has been extended.

All counsel accepted the test laid down in ***Countdown Properties (Northlands) Limited v Dunedin City Council*** as appropriate in the present context. In that case a full Court, after review of earlier High Court decisions including in particular ***Nelson Pine Forest Limited v Waimea County Council*** (1988) 13 NZTPA 69, concluded that in deciding whether a plan amendment was properly made:

> *"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 of the plan change. .... It will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions."*

The Court then made some general observations concerning the extent to which the Act encouraged public participation in the resource management process. In this context it noted that persons making submissions were unlikely to fill in the forms exactly as required by the First Schedule, but opined that the

process should not be one *"bound by formality"*. I agree with, and adopt, the approach embraced in the ***Countdown Properties*** judgment.

The process of public notification, submissions, and hearing before the Council is quite involved. Issues commonly emerge as a result of the participation of diverse interests and the thinking in relation to such issues frequently evolves in the light of competing arguments. Thereafter the Council must determine whether changes to the Plan are appropriate in response to the public's contribution. Against this background it is important that 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

In the present case submissions made in relation to s3.4, the **Heritage** section, clearly raised the theme of greater control upon activities likely to adversely affect indigenous vegetation. The Tribunal accepted as much at p 6 of its decision when it held:

> *"This part of RF & B's submissions was publicy notified in a way that would have made it perfectly clear that it was seeking, in this section of the Plan, a new rule to control the clearance, logging or other use of land that would directly and adversely affect indigenous vegetation, by making this a discretionary activity."*

Rayonier, for example, readily appreciated the significance of RF & B's submission and moved to counter it. Had the Council, in the context of a decision concerning the **Heritage** section, and in response to submissions

thereon, decided to introduce Rule HER.3, a vires argument could hardly even have been raised.

The problem is one borne of the particular approach the Council adopted. In its **Decisions on Submissions** issued on 1 August 1995 the Council in Decision 3.4.2.201 first summarised the extensive submissions made in relation to Rule HER.5. It then continued:

> "**Decision:** *There was a general misconception in the submissions received that this section related to the removal of indigenous vegetation on private property.*
>
> *If detailed consideration is given to Schedule 6.12 it can be seen that the items of significant tree and bush stands identified are either situated on public property (ie. reserves), or in the alternative where they exist on private property, are a schedule of those lands already protected under QEII covenants in one form or another.*
>
> *It was not the intention of Council under Rule HER.5 to impose restrictions as it relates to indigenous plantations on indigenous vegetation on private property. This matter is more strictly addressed under Method HER.8."*

The decision of the Council relevant to Rule COA.4 was Decision 4.6.2.191. Again the approach of summarising the thrust of the submissions from various parties was adopted.

There then followed a lengthy decision of more than four pages. The decision included:

> *"The Committee has carefully read and listened to all of the submissions that have been made in respect of this Rule. As a result of that consideration the Committee has decided that the Rule should have the following amendments and that it*

> *should apply to the whole of the District and as a consequence be included in the* ***Heritage*** *section:"*

There then followed a description of what was to become Rule HER.3 and a description of the exceptions to it. The Council then continued:

> *"With those general amendments the Council believes that the Rule can be sensibly applied throughout the whole District through its inclusion as Rule HER.3."*

A little later the full text of Rule HER.3, and of the consequential amendments to Rule COA.4, were set out. These provisions are sufficiently quoted, or summarised, earlier in this judgment.

Against that background the Tribunal concluded Rule HER.3 was ultra vires for three reasons First, it found that the Rule was *"clearly founded on, and only on, the submissions and cross submissions made on Rule COA.4".* Moreover the Tribunal considered that *"none of the submissions or cross submissions on that Rule sought the resultant Rule HER.3".* Second, the Tribunal found that *"although there are similarities between Rule HER.3 and (what) was sought by RF & B, there are important differences".* In this regard the Tribunal noticed the specific exceptions in respect of forest management plans and the link between Rule HER.3 and Method HER.9 whereby determinations about whether indigenous vegetation was *"significant"* were to be made. Accordingly Rule HER.3 was described as *"a different rule"* from what was sought by RF & B. Third, the Tribunal found that the **Heritage** submission made and relied upon by RF & B to support Rule HER.3 was

disallowed by the Council. Decision 3.4.2.201, read as a whole, led the Tribunal to this conclusion.

It then noted however that the introduction of Rule HER.3 seemed at first sight to conflict with a rejection of RF & B's submission. However, the Tribunal referred again to the *"material differences"* between what RF & B sought and Rule HER.3. Finally, it added in a passage which seems to me to capture a principal concern of the Tribunal members that:

> *"It is plain from the Council's reasoning that in introducing Rule HER.3 it did not think it was controlling all activities relating to indigenous vegetation throughout the district which would have been the effect of the rule sought by RF & B. Nevertheless of course, the Council did introduce a District Rule containing a measure of control in respect of indigenous vegetation and the habitats of indigenous fauna, based on submissions that did not seek this relief."*

Then followed the ultra vires ruling.

Mr Slowley, in submissions on behalf of the Council, argued that the above findings, in particular the conclusion that Rule HER.3 was founded only on submissions made on Rule COA.4, were findings of fact which this Court should not disturb. The observations of Chilwell J in ***Environmental Defence Society v Mangonui County Council*** (1987) 12 NZTPA 349 at 353 are apposite:

> *"An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific*

> *findings of fact; but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."*

I accept these observations have some application in the present context. The Tribunal undoubtedly possesses expertise in relation to the evaluation of the process for public participation prescribed in the First Schedule. It must see and consider many examples of that process in the course of its work. On the other hand, the present are not findings of fact in the conventional sense. The Tribunal did not hear contested evidence and therefore enjoy an opportunity not possessed by this Court. The subject findings are rather conclusions drawn in the main from the Council's **Decisions on Submissions** issued on 1 August 1995. I accept it is appropriate to afford those findings special recognition as emanating from an expert Tribunal, but I do not accept counsel's submissions that the findings are decisive of the present problem.

Mr Milne for RF & B squarely confronted each of the reasons advanced by the Tribunal for its ruling As to the point that Rule HER.3 was founded only on submissions made in relation to Rule COA.4, he argued that the Tribunal's focus upon the reasons given by the Council was wrong in law; as the sole issue was whether the new Rule went beyond what was reasonably and fairly raised in RF & B's **Heritage** submission. Put another way, the ultimate issue was whether the public had received a fair crack of the whip; had enjoyed the opportunity to be heard in answer to RF & B's **Heritage** submission before Rule HER.3 was included in the Plan. Likewise, counsel disputed the finding that there were important differences between Rule HER.3

and what RF & B sought in its **Heritage** submission. He accepted there were differences, but argued such were as to matters of emphasis. The new Rule was fairly to be seen as a watered down version of what RF & B sought in the first place, counsel contended. Moreover, he submitted the proper test was not whether Rule HER.3 was *"materially different"* from, but whether its substance was *"reasonably within"* the scope of, the submission made by RF & B.

As to the finding that the Council rejected RF & B's **Heritage** submission, counsel argued that rejection was far from clear upon a reading of the Council's decision as a whole. In particular, the decision did not expressly state whether it accepted or rejected the submission, although Clause 10 of the First Schedule required that to be done.

**Conclusion:**

With some hesitation I am driven to the conclusion that the appeal must be allowed. The fundamental issue must be whether Rule HER.3 was *"reasonably and fairly raised"* in submissions relevant to the Southland Plan. There can only be one answer to that inquiry, namely that the substance of the rule was properly raised. Not only does a reading of the RF & B submission demonstrate this to be so, but the Tribunal found as much in the passage quoted earlier from page 6 of its decision.

As to the three matters relied upon by the Tribunal in support of its ultra vires ruling I do not see them, either singly or in combination, as supportive of the essential ruling. Unquestionably the Council's process of

reasoning was curious, in that it made the decision to include Rule HER.3 in the **Heritage** section, in the context of its consideration of the **"Coastal Resource Area"** section. But such a curious process of reasoning does not detract from the fact that the content of Rule HER.3 was squarely raised in RF & B's **Heritage** submission. In real terms no-one could be heard to argue that during the public consultative process they were denied the opportunity to oppose a change sought by RF & B. Put another way, the subsequent faulty reasoning of the Council does not impinge upon the effective process of consultation which preceded it.

Further the Tribunal's view that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission, is not helpful. I accept counsel's argument that the new rule was nothing more than a watered down version of what RF & B sought. Moreover the required approach was to ask whether Rule HER 3 was within the scope of RF & B's submission, rather than whether there were material differences. Likewise, I am not at all confident that a sensible reading of the Council's decision leads to the conclusion that it rejected RF & B's **Heritage** submission. In the absence of an express acceptance or rejection of this submission I am of the view that the proper conclusion to be drawn is that the Council accepted the thrust of RF & B's **Heritage** submission, by including Rule HER.3 in the **Heritage** section; albeit that the process of reasoning adopted was curious. Lastly, I reject the concern averted to by the Tribunal that the Council did not appreciate in introducing Rule HER.3 that *"it was controlling all activities relating to*

*indigenous vegetation throughout the District ...".* Such conclusion is not tenable when one has regard to the terms of Decision 4.6.2.191 where, albeit in the **"Coastal Resource Area"** section, the Council expressed its belief that an amendment could *"be sensibly applied throughout the whole District through its inclusion as Rule HER.3".*

To summarise, in my view the essential inquiry was whether the amendment effected through Rule HER.3 was reasonably and fairly raised in submissions Once it is decided that it was, the answer to a vires argument was plain. Instead the Tribunal focused upon the three reasons it advanced in support of its ultra vires conclusion. Aside from the fact that such reasons were dubious anyway, it was in my view wrong in law to elevate those issues above the test recognised in ***Countdown Properties***.

The formal determination of the Court is that the Tribunal erred in law in determining that Rule HER.3 was ultra vires the Council. Accordingly such ruling is set aside. Counsel for Rayonier submitted that should the appeal be allowed, the case should be remitted to the Environment Court for consideration on its merits. I agree In that regard it is appropriate to make two observations. First, the present vires decision may not preclude parties before the Environment Court from challenging the merits of Rule HER.3 by reference to the terms of the Council decision which produced it. Second, Rayonier in support of the Tribunal's vires ruling, argued that because the Council introduced rule HER.3 in the context of its decision in the **"Coastal Resource Area"** section, Rayonier could not challenge the merits of the new rule before

the Environment Court. This because it had not made submissions or sought to be heard in relation to the **"Coastal Resource Area"** of the Plan. I doubt that this can be so. The decision of this Court that Rule HER.3 is not ultra vires, because it was reasonably and fairly raised in RF & B's **Heritage** submission, must carry the consequence that Rayonier has standing to challenge the new Rule. It made a cross submission in direct response to RF & B's **Heritage** submission. Just as the curious process of reasoning whereby the Council introduced Rule HER.3 does not make the Rule ultra vires, nor can that same process of reasoning deny Rayonier standing which it would otherwise undoubtedly possess.

The question of costs is reserved. If RF & B seeks an award it should promptly file a memorandum. The Council and Rayonier, following filing and service of such memorandum, shall have fourteen days in which to respond.

Solicitors:
Simpson Grierson, Wellington, for Appellant
Pritchard Slowley & Co, Invercargill, for Respondent
Bell Gully, Auckland, for Rayonier NZ Limited