IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2014-406-14
[2014] NZHC 3350

IN THE MATTER	of an appeal under section 299 of the Resource Management Act 1991
BETWEEN	NEW ZEALAND AVIATION MUSEUM TRUST AND MARLBOROUGH AERO CLUB INCORPORATED Appellants
AND	MARLBOROUGH DISTRICT COUNCIL First Respondent
	COLONIAL VINEYARD LIMITED Second Respondent

Hearing: 11-12 August 2014

Counsel: Q A M Davies and D P Neild for Appellants
S F Quinn for First Respondent
P A Steven QC and M Hardy-Jones for Second Respondent

Judgment: 19 December 2014

JUDGMENT OF GODDARD J

This judgment was delivered by me on 19 December 2014
at 12.00 pm, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Gascoigne Wicks, Blenheim for Appellants
DLA Phillips Fox for First Respondent
Hardy-Jones Clark, Blenheim for Second Respondent

Introduction

[1] This appeal concerns the rezoning of rural land for residential development. The land is a 21.4 hectare viticulture block sited on the urban periphery of Blenheim and is in the vicinity of Omaka Aerodrome. The appellants are the New Zealand Aviation Museum Trust and Marlborough Aero Club Incorporated.[1]

[2] In April 2011, the second respondent, Colonial Vineyard Limited (Colonial), requested a private plan change (PC59) to the Wairau Awatere Resource Management Plan (WARMP) for rezoning of the site for residential development, and amendment to or addition of some policies in the district plan, together with consequential changes to methods of implementation. The only important policy aspect of the change proposed by PC59, was an amendment to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the Colonial Vineyard site, as well as land elsewhere to the south of the central business zone of Blenheim.

[3] Colonial's land as a site for proposed residential development, its setting and its relationship with the land potentially affected by PC59, was described by the Environment Court as follows:

> [2] … The site [of Colonial's vineyard] is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees.
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> [3] The land opposite the site on the eastern and northern boundaries has Residential zoning. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development.
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> [4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

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1 Together, the appellants.

> [5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicas and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.
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> [6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.
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> [7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

[4] PC59 was based on a report known as the Southern Marlborough Urban Growth Strategy 2010 (SMUGS 2010), which had been commissioned by the first respondent, Marlborough District Council (the Council). SMUGS 2010 identified an urgent need for residential rezoning in the district and had examined different sites that could be well suited for such development, including Colonial's land. SMUGS 2010, as notified, had recommended that Colonial's land be rezoned for residential use. The Council concedes that, but for the effects of noise on the potential residents and the restrictions that might be placed on the Omaka Aerodrome because of those noise effects, the land had appeared suitable for residential use at that time – the only real issue being whether the noise effects should prevent the rezoning. In this respect, while workshops conducted for the SMUGS 2010 report had identified noise as an issue, the available information was that Colonial's land was entirely located outside the 55dB contour and was therefore suitable for residential development.

[5] Following the Christchurch earthquakes in 2010 and 2011, the Council commissioned liquefaction reports for areas of land which had previously been earmarked for employment uses. Significant liquefaction issues were apparently identified and the Council says the needs of the region had then to be reassessed.

[6] SMUGS 2010 was revised on the basis of the liquefaction reports and public consultation and reissued as SMUGS 2013. It was adopted by the Council on 21 March 2013 and ultimately led to eight plan changes (namely, plan changes 64–71). As well as recognising the need to address the liquefaction risks, the SMUGS 2013 noted the importance of Omaka Aerodrome as a regional resource and recommended that Colonial's land be earmarked for employment activities rather than residential. This arose from a submission by Omaka interests and its airport noise consultants. The basis for the change of direction is at the heart of the issues between the parties. The Council says the SMUGS process represents considered, region-wide integrated management. Colonial's case is that nothing in the SMUGS 2013 revision "altered the clear suitability, and ranking of the Colonial land for residential rezoning".

[7] On 31 July 2012, the Council accordingly declined Colonial's application for PC59 in its entirety, as not achieving the goals of the WARMP. The decision was based on three aspects of planning integrity. These were first, the view that PC59 would lead to reverse sensitivity in terms of noise effects from the Omaka Aerodrome.[2] Second, that PC59 pre-empted the wider strategic planning assessment the Council is currently undertaking as part of a review of the WARMP. In this regard, the Council's position is that, given the proximity of the site to the Omaka Aerodrome, a comprehensive strategic planning exercise needs to be undertaken rather than simply considering PC59 in isolation. Third, the Council was of the view there was insufficient information regarding the intended layout and design of the proposed development, and the potential adverse effects of poor urban design and interface management on adjoining land uses.

The Environment Court decision

[8] The Council's decision to decline PC59 was appealed to the Environment Court, which on 14 March 2014 granted the appeal. In approaching its task, the Environment Court reminded itself that, under s 290 of the RMA, it stood in the shoes of the local authority and thus was required to undertake a s 32 evaluation.

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[2] The term "reverse sensitivity" is used to describe the impact of a new use on established uses nearby.

[9] Before turning to analyse the evidence, the Court enquired of itself what matters it needed to consider where a plan change was in issue. The Court then embarked upon a comprehensive summary of those requirements, in light of the major changes brought in by the Resource Management Amendment Act 2009 and the interpretative application of those in the jurisprudence.

[10] The Court then identified the relevant statutory provisions, the relevant plan provisions, and the relevant authorities. At the centre of the appeal are the Council's functions under s 31(1) of the RMA. These are:

- the establishment, implementation and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district and region;

- the strategic integration of infrastructure with land use through objectives, policies and methods; and

- the control of the emission of noise and the mitigation of the effects of noise.

[11] As the Council is a unitary authority it is responsible, under ss 30 and 31 of the RMA, for the preparation of planning documents in both its regional and district functions. The Marlborough Regional Policy Statement (RPS) provides an overview of the resource management issues in Marlborough and the policies and methods to achieve integrated management of the natural and physical resources of the whole region. Its purpose is to give strategic direction but it does not promulgate rules. The strategic direction it provides is then given effect to through the WARMP. Under s 75(3)(c) of the RMA, any district plan change must "give effect to" any regional policy statement. Central to the appellants' case is the Court's interpretation of policy 7.1.17.

[12] The second key document is the WARMP, which is a combined plan prepared by the Council to give effect to the RPS.[3] The WARMP integrates the regional coastal plan, the regional plan and the district plan. Its purpose is to promote sustainable management through expanding on the key environmental issues identified by the RPS and describe how the issues should be managed and the standards met. Under s 75(4)(b) any district plan change "must not be inconsistent with" a regional plan for "any matter specified" in s 30(1). The Court's interpretation of policy 12.7.2.1.3 of the WARMP was also cited as being of central relevance to the appellants' case.

[13] Having set out those documents in full, the Environment Court then stated the questions it needed to answer in determining whether the proposed plan change would achieve the purpose of the RMA by giving effect to it. These were posed as follows:[4]

> …
>
> (ii) What are the benefits and costs of PC59 and the alternatives?
>
> (iii) What are the risks of approving (or not) PC59?
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> (iv) Does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP?
>
> (v) Does PC59 achieve the purpose of the RMA?
>
> (vi) Should the result be different from the Council's decision?

[14] Having addressed each of these questions, the Court granted the appeal on the following basis:

> 7.2 Should the result be different from the council's decision?
>
> [181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.
>
> [182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence

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3 In accordance with s 80 of the Resource Management Act 1991, which provides that a local authority may prepare, implement and administer a document that meets the requirements of two or more of: (a) a regional policy statement; (b) a regional plan, including a regional coastal plan; and (c) a district plan.

4 *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [22].

reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

…

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Mr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield – especially in helicopter numbers – will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints on such growth of Omaka

> airfield use in any event – for example complaints from residents of the new subdivision east of the Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.
>
> 7.3 Outcome
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> [191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

The appeal to the High Court

[15] An appeal to the High Court from the Environment Court is governed by s 299 of the Resource Management Act 1991 (RMA) and is confined to questions of law. The onus of establishing any error or errors of law rests on the appellant.[5]

[16] An error of law will only justify interference with a decision of the Environment Court if it can be established that the Environment Court:[6]

(a) applied a wrong legal test;

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

(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.

[17] The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for reconsideration by the

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5 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

6 *Countdown Properties (Northland) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150, [1994] NZRMA 145.

High Court as a question of law.[7] The Court will not therefore engage in a re-examination of the merits of the case under the guise of a question of law.[8]

[18] The role of this Court when hearing appeals from the Environment Court pursuant to s 299 was aptly explained by Blanchard J in *Stark v Waitakere City Council*:[9]

> … the role of this Court is not to delve into questions of planning and resource management policy. That is for the expert Tribunal to determine based on its knowledge gained from its day to day experience and its consideration of district and regional plans and submissions made to it in respect of them. Judges of this Court, whether sitting alone or as a Full Court, have no such expertise, nor have they the necessary background to be able comfortably to deal with issues of policy in an individual case. Much uncertainty and no doubt some anomalies would be created if this Court were to embark upon an investigation of the appropriateness of policies which have been endorsed or laid down by the Tribunal. The role of this Court is to see that the statute, the district plan and the regional plan have been correctly interpreted, i.e. that their language has been properly understood and applied, to ensure that all relevant, and no irrelevant, matters have been considered, that the decision of the Tribunal is properly based upon the evidence before it and that the decision reached is "reasonable" in the sense that it was one that could be arrived at by rational process in accordance with a proper interpretation of the law and upon the evidence. The weight to be attached to policy questions is for the Tribunal to determine.

[19] Where there has been an error of law, relief will not be granted unless it can be established that the error materially affected the result of the Environment Court's decision.[10]

[20] All of the above principles were recently summarised in the decision in *Simons Hill Station*.[11]

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7 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

8 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna City Council* HC Auckland M456/88, 7 August 1989.

9 *Stark v Waitakere City Council* [1994] 3 NZLR 614 (HC) at 617.

10 *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81–82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

11 *Simons Hill Station Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2014] NZHC 1362.

The issues on appeal

[21] The notice of appeal listed seven grounds of appeal. These grounds were later distilled into eight issues:

(a) Did the Court incorrectly interpret policy 7.1.17 of the RPS as applying only to Woodbourne Airport?

(b) Did the Court incorrectly treat policy 12.7.2.1.3 of the WARMP as a district plan provision rather than a regional plan provision and fail to consider whether PC59 is not inconsistent with that provision?

(c) Did the Court incorrectly define the future environment?

(d) Issues relating to PC59 and the Council's function of integrated management:

(i) Did the Court err by adopting a quantitative approach rather than a qualitative approach in its assessment of whether PC59 was in accordance with the Council's function of integrated management?

(ii) Did the Court fail to properly assess the risk of acting or not acting if there is uncertain or insufficient information?

(iii) Did the Court fail to consider whether PC59 was in accordance with the Council's function of integrated management?

(iv) Did the Court err in finding that there was no specific evidence that Omaka was part of a finite physical resource?

(v) Did the Court misinterpret policy 11.2.2.1.3?

Colonial's case

[22] It is Colonial's case that no errors of law were made by the Environment Court, subject only to the concession that the interpretation of the relevant plan policies and their proper scope by the Court does constitute a question of law. Apart from this, Ms Steven QC for Colonial submitted there was no clear exposition by the appellant or the Council of an erroneous application of any of the statutory tests required to be applied in an inquiry of the sort conducted by the Environment Court. The appeal amounts to no more than a challenge to the weight afforded to various relevant considerations and is an invitation to the Court on appeal to engage in a re-examination of the merits of the case, an exercise it is precluded from undertaking.

Did the Court incorrectly interpret policy 7.1.17 of the RPS as applying only to Woodbourne Airport?

[23] The appellants and the Council contend that the Court incorrectly interpreted policy 7.1.17 of the RPS as applying only to Woodbourne Airport. The relevant parts of policy 7.1.17 are set out in full below:

> 7.1.14 OBJECTIVE – COMMUNITY INFRASTRUCTURE IN A SUSTAINABLE WAY
>
> *Infrastructure is made up of those components which enable a community to function. It includes land, air, and marine transport systems, water and power supply, telecommunications, waste disposal, and central and local government functions.*
>
> …
>
> 7.1.17 POLICY – AIR TRANSPORT
>
> Enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 METHODS
>
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the*

airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities to do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

[24] The Court dealt with policy 7.1.17 in the following way. Having noted that PC59 was required to give effect to the policy, the Court stated:[12]

> It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the district plan (as we will see shortly). On the other hand, the Omaka airfield does have heritage values – especially in connection with the Aviation Heritage Centre – which we consider later.

[25] Later in its decision, the Court summarised its conclusion that PC59 would give effect to the RPS:[13]

> … It would enhance the quality of life by supplying houses while not causing adverse effects on the environment, and it would approximately locate a type of activity (residential development) which would cluster with

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12 *Colonial Vineyard Ltd v Marlborough District Council*, above n 4, at [27].

13 At [150].

> housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.
>
> The air transport policy in the RPS – which focuses on Woodbourne – would not be affected.

[26] As is evident from the above passage, the Court took the position that Omaka Aerodrome was not a focus of the "air transport policy" as a matter of regional significance in the RPS.

[27] The appellants' case is that the Court incorrectly interpreted the description "air transport system" (which is not defined) as referring only to Woodbourne Airport. Mr Davies advanced four arguments in support of this proposition.

[28] First, Mr Davies submitted that the Environment Court's interpretation of policy 7.1.17 was inconsistent with its earlier factual finding at [5] of its judgment that "the helicopter operations and some of the aircraft maintenance are parts of the 'air transport' infrastructure".

[29] Second, the term "air transport system" must include all three airports in Marlborough; otherwise Woodbourne would have been singled out if the other two were to be excluded. Further, in other parts of the policy, Woodbourne is explicitly mentioned. For example, method 7.1.18(a) refers to "Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes". This is consistent with there being other air transport facilities that are still part of the "air transport system".

[30] Third, policy 7.1.17 should be interpreted in light of the objective to "provide for the safe and efficient operation of community infrastructure in a sustainable way". If the word "system" is interpreted narrowly as including only Woodbourne, a significant part of the community infrastructure network would be left out.

[31] Fourth, Omaka Aerodrome includes a range of resources for community activities and businesses that must bring it within the ordinary meaning of "community infrastructure" and "air transport system".

[32] Mr Davies submitted that by misinterpreting policy 7.1.17, the Environment Court failed to "give effect" to the RPS, as it was required to do.[14] The allowance for additional housing close to Omaka Aerodrome could result in the airfield being unable to avoid adverse effects on existing residential areas nearby and this would result in unsafe and inefficient operation of air transport systems, contrary to the RPS.

[33] Colonial does not dispute that the Court was required to "give effect to" the RPS, including policy 7.1.17. The central issue is whether the Environment Court correctly interpreted that provision as providing protection for Woodbourne airport only.

[34] Policy 7.1.17 does not identify the 'air transport system" with reference to any particular named airport facility. For that reason, evidence was put before the Court for the purpose of establishing as a matter of fact that Omaka Aerodrome is a regionally significant infrastructure and implicitly part of the air transport system. The Court rejected that argument, stating that, at best, the significance of the Omaka Aerodrome is recognised at the policy level in the WARMP.

[35] I am satisfied that the Environment Court correctly interpreted and applied policy 7.1.17. It is important to read the provision as a whole. The starting point is that infrastructure is made of those components which enable a community to function, including land, air and marine transport systems. The focus turns to Woodbourne Airport, which is described as the main air transport facility for both military and civilian purposes, and a number of methods for enabling the safe and efficient operation of the air transport system are outlined. Each of these methods provides specific guidance for achieving that objective, with reference only to Woodbourne Airport.

[36] The meaning to be taken from this content is that, at a regional policy level at least, the drafters considered the purpose of enabling the safe and efficient operation of the air transport system would be met by providing for Woodbourne

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[14] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [132] at [77] and [91].

Airport. Ultimately, the appellants are trying to artificially read Omaka Aerodrome into the plainly expressed meaning of policy 7.1.17. As Mr Steven submitted, if policy 7.1.17 was meant to apply to another facility as part of the "air transport system", the statement of methods by which that policy is to be implemented would be deficient, because it only directs regulatory provision for Woodbourne airport.

[37] For completeness, I find that when the Court's comment at [5] is placed in context, it is clear that it does not constitute a definitive finding that Omaka Aerodrome is part of the "air transport system". The Court was merely contrasting the grass runways and adjacent workshops in the hangars (which are of heritage value), with the helicopter operations and some of the aircraft maintenance which form part of the air transport infrastructure of the airfield.

Did the Court incorrectly treat policy 12.7.2.1.3 of the WARMP as a district plan provision rather than a regional plan provision and fail to consider whether PC59 is not inconsistent with that provision?

[38] The appellants and the Council contend that the Court incorrectly treated policy 12.7.2.1.3 as a district plan provision, rather than as a regional plan provision; and that as a consequence, the Court failed to ensure PC59 is "not inconsistent" with that provision as it was required to do under s 75(4)(b).

[39] Chapter 12 of the WARMP is concerned with Rural Environments. The relevant parts of Chapter 12 are set out in full below. Under the subheading "Airport Zone", 12.7.1 identifies as the relevant issue:

> **12.7.1 Issue**
>
> Recognition of the need for and importance of national, regional, and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

[40] Of the following objectives and policies set out under 12.7.2, the appellants place emphasis on policy 1.3:

> **12.7.2 Objectives and Policies**
>
> **Objective 1**
>
> The effective, efficient and safe operation of the District's airport facilities.

Policy 1.1

To provide protection of air corridors for aircraft using Marlborough, Omaka, and Picton Airports through height and use restrictions.

Policy 1.2

To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.

Policy 1.3

To protect airport operations from the effects of noise sensitive activities.

[41] The Court did not consider whether PC59 was "not inconsistent with" the provisions in Chapter 12. Instead, it inquired of itself whether PC59 is the most appropriate method for achieving the objectives of the WARMP. Having considered the other policies relevant to PC59, the Court addressed Chapter 12 in the following way:

> [161] The Rural Environment section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation – flights of old aircraft – can continue and grow (within reason).
>
> [162] While the objectives and policies of the WARMP give some protection to Omaka there is a balance to be achieved with the activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

[42] The appellants submitted that the Court was required to identify which provisions of the WARMP are "regional plans" and ensure that the plan change is not inconsistent with those policies. It was argued that the Court should not have balanced the number of objectives and policies met by PC59 with those that did not. Rather, the Court was required to assess whether PC59 was not inconsistent with policy 12.7.2.1.3. The submission was that introducing noise sensitive residents into close proximity with Omaka Aerodrome is inconsistent with that policy.

[43] The submission in reply on behalf of Colonial was that the policies and rules contained in Chapter 12 are capable of being construed as district plan provisions (rather than regional plan provisions). Because the Court was inclined to treat the provisions of the WARMP, which address Omaka Aerodrome as district plan provisions, it did not then consider whether PC59 was inconsistent with Chapter 12 provisions. Instead the Court assessed whether or not, on balance, the plan change implemented the objectives and policies of the WARMP. Colonial's argument was that a conclusion that policies are implemented by a proposal under s 32 is barely different to a conclusion that the proposal is not inconsistent with those policies under s 75(4)(b).

[44] There are three issues to be determined. The first, whether the policies and rules contained in Chapter 12 are district plan provisions or regional plan provisions, can be dealt with briefly. Under s 75(4)(b) of the RMA, a district plan must not be inconsistent with a regional plan for any matter specified in s 30(1) of the RMA. One of the matters specified in s 30 is "the strategic integration of infrastructure with land use through objectives, policies and methods". Section 2 of the RMA defines infrastructure for the purposes of s 30 as including "an airport as defined in s 2 of the Airport Authorities Act 1996". Section 2 of that Act defines an airport as:

> ... any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.

[45] Chapter 12 is concerned with the integration of infrastructure with land use. Applying these provisions, it is self-evident that policy 12.7.2.1.3 is a regional plan provision.

[46] The second issue is whether the Environment Court's conclusion, that the objectives of the WARMP are implemented by PC59, is "barely different" to a conclusion that PC59 is not inconsistent with policy 12.7.2.1.3? I do not find that to be so. As the Environment Court outlined, different legal standards apply to the matters that must be considered.

[47] Section 75(4)(b) requires the plan change to be "not inconsistent with" an operative regional plan for any matter specified in section 30(1). However, the plan change must also satisfy the section 32 analysis. This requires the Court to examine the plan change, having regard to its efficiency and effectiveness, in order to determine whether it is the most appropriate method for achieving the objectives of the district plan. This examination must take into account the benefits and costs of the proposed policies and methods, and the risk of acting or not acting, if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

[48] I am satisfied that whether a plan change is inconsistent with the district plan is a distinct enquiry, that sits alongside the issue of whether, on balance, the plan change implements more objectives and policies than not.

[49] However, neither of these findings assists the appellants or the Council. Objective 12.7.2 of the WARMP and its implementing policies required the Court to undertake an assessment of fact as to whether any proposed land use protects or fails to protect airport operations. That is exactly what the Court did and on balance I am satisfied that the factual assessment undertaken by the Court supports a finding that PC59 is not inconsistent with either Chapter 12 or the specific policy 12.7.2.1.3 contained therein.

[50] It is necessary, however, to outline this factual assessment in some detail. The Court enquired whether the site would be affected by future levels of aircraft noise that might lead to constraints being placed on airport operations. The likely growth of the Omaka Aerodrome was the crucial issue because existing operations would not be affected. In assessing the likely growth of the Omaka Aerodrome, the Court made a number of findings. First, it preferred the method of assessing aircraft noise advanced by Colonial's expert, Mr Park. It found the data produced by Mr Park to be an appropriate base from which to project forward to the year 2038.[15]

[51] Second, the Court preferred the growth rates used by Mr Park to calculate the contours that would restrict the Aerodrome's growth. Mr Park applied growth rates

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[15] *Colonial Vineyard Ltd v Marlborough District* Council, above n 4, at [122].

of 2.7 per cent and 6.6 per cent for fixed wing aircraft and helicopters respectively. The Council expert applied a growth rate of 10 per cent for helicopters to his projection. The Court accepted Mr Park's view that 6.6 per cent would be adequate, and noted that, although lower than the figure used by the Council's expert, this rate is still 50 per cent higher than the average growth rate per annum from 1993 to 2013. The Court also noted that the planning consultant for the Council, Mr Foster, considered the growth rate for fixed wing aircraft to be not unreasonable and the growth rate for helicopters to be realistic.[16]

[52] Having evaluated the evidence before the Court, the Environment Court found the buffer between the site and the airport sufficient to address any potential reverse sensitivity effects; and, further, the use of no complaints covenants able to further mitigate any such potential effects. In other words, the site would not be exposed to unacceptable noise from aircraft activity and the Aerodrome would not be affected by Colonial's development proposal.

[53] Third, the Court remarked that, as a set, the contours are sufficient to indicate what may occur in future;[17] and regarded the contour provided by Dr Trevathon as "the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.[18]

[54] The Court also accepted the view of Mr Day, that the contour would reach the residential development at Taylor Pass before it reaches the site, and noted that one of the principal threats to the sustainable use of Omaka Aerodrome arises from its proximity to Woodbourne airfield. In accordance with those findings, the Court expressed some scepticism that Omaka Aerodrome would in fact grow in accordance with Dr Trevathon's projection.

[55] The Court then made two critical findings. First, that the distance between the site and Omaka Aerodrome is sufficient to address any potential reverse sensitivity effects; and second, that the use of no complaints covenants will further mitigate any such potential effects.

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16 At [124]–[128].
17 At [141].
18 At [138].

[56] I accept Colonial's submissions that the Court's finding that Omaka Aerodrome and Colonial's development can co-exist side by side, without preventing the use or enjoyment of each other, supports a finding that PC59 is not inconsistent with policy 12.7.2.1.3. This conclusion was based on the Court's assessment of expert evidence as to the likely growth of Omaka Aerodrome and it is not for this Court to engage in a re-examination of the merits of that assessment under the guise of a question of law.

Did the Court incorrectly define the future environment?

[57] In considering the actual and potential effects on the environment of allowing an activity, it is often necessary to consider the future state of the environment, in which these effects will occur.[19] The assessment of the future environment includes consideration of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan;[20] as well as commercial activity competing for use of the subject and surrounding land; and associated regulatory initiatives by way of proposed change.[21] Such considerations must be "reasonably foreseeable".

[58] The appellants and the Council challenge three aspects of the Court's definition of the future environment: the treatment of plan changes 64–71; the consideration of future regulation; and the Court's assessment of likely noise effects on the site.

[59] In defining the future environment, the Environment Court placed little weight on plan changes 64–71:[22]

> Plan changes 64–71would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

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19 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [42]–[57].

20 At [84].

21 *Queenstown Central Ltd v Queenstown Lakes District Council* [20913] NZHC 815 at [35].

22 *Colonial Vineyard Ltd v Marlborough District* Council, above n 4, at [100].

[60] The Court considered that the plan changes "are at such an early stage in their development" that they should be given minimal weight.[23]

[61] The Court then took into account anticipated regulation of fixed wing and helicopter operations at Omaka Aerodrome as a result of complaints from occupiers of the Taylor Pass subdivision; and also restrictions imposed by the Civil Aviation Authority in order to safeguard operations at Woodbourne. Such regulation included the adoption of helicopter abatement paths, which would deflect air traffic away from the site. The Court determined it unlikely that future growth in activities at Omaka Aerodrome will be restricted as a result of the effects of PC59.

[62] Although not identical, the submissions of the appellants and the Council can be considered together. The first submission was that the Council ought to have had regard to plan changes 64–71. These changes are the end result of a comprehensive process undertaken by the Council, which included a high degree of public consultation. Further, to the extent that the plan changes are speculative, so too is the future need for residential land, which the Court took into account.

[63] The second submission was that the Court's consideration of the future regulation of fixed wing and helicopter operations at Omaka Aerodrome was speculative and not supported by any evidence. It was further submitted that it was inconsistent for the Court to consider it more likely that regulation would be imposed on Omaka Aerodrome as a result of complaints from occupiers of the Taylor Pass homes, without considering the potential for regulations that would direct traffic away from the Taylor Pass subdivision and towards the site.

[64] The third submission was that the Court's assessment of the risk of noise effects on the site and the risk of reverse sensitivity effects took into account matters that were too speculative, and was based on limited or no evidence and therefore should not have formed part of the future environment assessment.

[65] Colonial's submission in reply was that the plan change initiatives are relevant to the s 32 analysis and consideration of whether, having regard to its

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[23] At [163].

efficiency and effectiveness, PC59 is the best appropriate way for achieving the objectives. As the Court noted, consideration of the risks of approving PC59 or not necessarily involves "the probabilistic assessments of an event and its consequences". As part of this assessment, the Court decided to place little weight on plan changes 64–71.

[66] In respect of the assessment of the contour modelling process, Colonial submitted that the Court had assessed the future noise environment around Aerodrome because the WARMP contemplated the calculation of contours prepared in accordance with NZS 6805 and that it was for the Environment Court to evaluate the contour evidence and decide what weight should be given to it.

[67] I accept there is an element of artificiality in the Court's treatment of plan changes 64–71. The reality is that these changes are likely to be implemented at least to some extent in the future. However, the weight to be placed on those changes is a matter for the Environment Court, which carefully considered the plan changes and determined those alternatives were too uncertain to be the subject of reasonable predictions. Given the changes were at an early stage of development at the time of the hearing, I am satisfied that this was a reasonable conclusion for the Court to reach.

[68] I reach the same conclusion in respect of the Court's assessment of the likely future regulatory environment. The Court was entitled to rely on the view of Mr Day that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reached the site. Similarly, the Court's view that the growth of Omaka Aerodrome was likely to be inhibited by the expansion of Woodbourne airport was based on Mr Barber's 2005 report. In addition, the Court was entitled to consider the proposal of no complaints covenants from residents of the site.

[69] Finally, there is little merit in the assertion that the Court took into account matters that were too speculative. First, as the Environment Court noted, there is almost always some practical uncertainty about possible future environments. Second, all of the parties agreed that it would be appropriate to look at the noise environment depicted by contours modelled on operations of the airfield at Omaka

Aerodrome in 2038. The Court heard expert evidence from all of the parties and, as outlined above, preferred the evidence produced on behalf of Colonial. Implicit in this conclusion is that the Court considered it had sufficient evidence to assess whether there would be reverse sensitivity effects that would weigh against approval of PC59. Overall, I am satisfied that the appellant's challenge to the Court's assessment of the risk of noise effects on the site is in reality an attempt to re-examine the merits and for that reason it must fail.

Issues relating to PC59 and the Council's function of integrated management

[70] The way in which issues relating to PC59 and the Council's function of integrated management were addressed in submissions and during the hearing did not mirror their formulation in the notice of appeal. The issues can be distilled into five separate headings.

Did the Court err by adopting a quantitative approach rather than a qualitative approach in its assessment of whether PC59 was in accordance with the Council's function of integrated management?

[71] The Council contended that the Court took a quantitative approach to the assessment of whether PC59 was in accordance with the Council's function of integrated management. This argument is presumably based on the Court's conclusion as set out below:[24]

> … we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

[72] There is little merit in this contention. The Court did not simply add up the number of objectives met by PC59 and compare that figure with the number of objectives not met. Each relevant objective and policy was identified and assessed in a qualitative fashion. The Court's conclusion that PC59 meets more of the "important" objectives and policies reflects that qualitative assessment. This ground of appeal must also fail.

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[24] At [162].

Did the Court fail to properly assess the risk of acting or not acting if there is uncertain or insufficient information?

[73] Section 32(2)(c) of the RMA provides that an assessment of the efficiency and effectiveness of a proposed plan change must involve an assessment of "the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions".

[74] The Council submitted that the Court's s 32 analysis ultimately came down to weighing the need for residential supply now against restricting Omaka Aerodrome's growth in the future. It argued there was too much uncertainty and insufficient information about future noise boundaries for Omaka Aerodrome and the likelihood of future regulation for the Court to properly assess whether "integrated management" could be achieved. Arguably, the Court should have declined PC59 until the completion of the Council's review of the WARMP. The appellants made a similar submission, arguing that the Council's process was intended to identify a noise contour boundary and to plan a coherent and integrated extension of the Blenheim residential zones and that PC59 cuts across both of those aims.

[75] This argument cannot succeed in the context of an appeal to the High Court on a question of law pursuant to s 299. The Environment Court carefully noted that it was required to take into account the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of PC59:[25]

> The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk".

[76] Having identified the risks of acting and not acting, the Court considered the following matters under separate headings:

(a) the supply of and demand for employment land

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[25] At [68].

(b) the reasonably foreseeable residential supply and demand in and around Blenheim

(c) the current intensity of use and the likely growth of the Omaka Aerodrome and Woodbourne airport

(d) the effects of airport noise on the quantity of residential properties demand and supplied in the vicinity of the airports.

(e) there was sufficient information to indicate to the Court what may occur in the future. The risk of acting or not acting was also considered.

[77] The Council does not impugn the Court's assessment of these matters under this head of appeal. Rather, it asserts that without the completion of its review of the WARMP, there was significant uncertainty regarding the risks of noise effects on the site and any potential restrictions on the activities of Omaka Aerodrome that would be appropriate as a consequence of rezoning the PC59 site as residential. However, the Court did carefully assess the evidence before it relating to those matters and considered that evidence to be adequate for the purpose of the s 32 analysis. This Court on appeal is not well placed to critique an assessment of this expert nature.

[78] I am satisfied that the decision of the Court relating to the efficiency and effectiveness of PC59 was properly based upon the evidence before the Court and that the decision to proceed despite the risk of acting on insufficient or incomplete information was reasonable.

Did the Court fail to properly consider whether PC59 was in accordance with the Council's function of integrated management?

[79] There is no dispute that the Council (and the Court) is required to implement policies to achieve the integrated management of the effects of the use, development or protection of land and associated physical resources; or that Omaka Aerodrome, as an airport, must be strategically integrated with land use. Under this head of

appeal it was argued that the Court had not properly considered whether PC59 was in accordance with the Council's function of integrated management.

[80] Colonial's submission in response was that the Court paid appropriate regard to the Council's function of integrated management. The Court had not dismissed relevant WARMP objectives and policies in favour of Part 2 matters[26]. Rather, it had made a balanced judgment of PC59 in lights of the WARMP objectives and policies.

[81] In support, Colonial referred to the decision of Chisholm J in *Kennedys Bush Developments Ltd v Christchurch City Council*, in which the applicant, Kennedys Bush, sought to have its small farm in Port Hills rezoned as residential.[27] The application was rejected. On appeal, it was argued that the Environment Court had wrongly interpreted s 31 of the RMA in respect of the integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district. Chisholm J held that the Court had properly assessed whether the rezoning of the land in question would constitute "integrated management" within the meaning of the Act"; or, in other words, "whether there would be harmony", and upheld the decision that the rezoning would create an arbitrary boundary between urban and rural that would not constitute integrated management.

[82] The difficulty with the Council's submission in the present appeal is that the Environment Court did consider whether PC59 achieved integrated management:[28]

> There was repeated reference in the evidence of the Council's witness to PC59 not presenting integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives and to do so in a generally integrated way.

[83] The Court's conclusion was reached on the basis of a careful consideration of those WARMP objectives and policies identified as relevant, and in particular, its

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[26] An approach rejected by the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 14.

[27] *Kennedys Bush Developments Ltd v Christchurch City Council* HC Christchurch CIV-2004-485-1189, 2 September 2004.

[28] *Colonial Vineyard Ltd v Marlborough District* Council, above n 4, at [182].

conclusion that the development envisaged by PC59 could co-exist alongside Omaka Aerodrome in future was reached on that basis. The appellants and the Council have sought to challenge the merits of this conclusion. However, this Court's role is limited to identifying an error of law or a failure to consider a relevant consideration or a wrong consideration of an irrelevant consideration, none of which are demonstrated here. This ground of appeal must also fail.

Did the Court err in finding there was no specific evidence that Omaka Aerodrome was part of a finite physical resource?

[84] The Council's submission under this head was that the Environment Court erred by finding there was no specific evidence as to whether Omaka Aerodrome was part of a finite physical resource. In response to an argument that s 7(g) could be relevant, the Court held:[29]

> … there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

[85] Section 7(g) of the RMA provides:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –
>
> …
>
> (g) Any finite characteristics of natural and physical resources.

[86] In support of its submission, the Council referred to and relied on the following responses of Colonial's planning witness, Mr Quickfall, during cross-examination:

> Q And, would you agree that the airport is a physical resource?
>
> A Yes.
>
> Q Would you also agree that the physical resource is, for practical purposes, finite in the sense that the prospects of constructing another significant airport in Marlborough are slim?

[29] At [170].

> A In, in that context it is finite, recognising that there is a, um, being a sub-regional airport at Woodbourne, which also operates as an air force base and there is a smaller sub-regional airport at Picton so it is finite in that context, recognising there are others.

[87] There is little merit in this submission. First, no affidavit evidence was put before the Court on that specific issue. It was addressed only briefly, during the cross-examination outlined above. Second, the treatment of Omaka Aerodrome as a finite resource is based on the assumption that no further airports will be constructed. This is slightly misconceived, given the evidence before the Court regarding the future expansion of Woodbourne. Third, the Environment Court found that Omaka Aerodrome was unlikely to be unreasonably affected by PC59 in future therefore the need to protect Omaka Aerodrome as a "finite resource" was met. Accordingly, even if the Environment Court erred in not considering evidence that Omaka Aerodrome is a finite resource (such as it was), the Council has failed to establish that this error of law materially affected the result of the Environment Court's decision.

Did the Court misinterpret policy 11.2.2.1.3?

[88] This point of appeal relates to an allegation that the Court misinterpreted policy 11.2.2.1.3. As noted at the beginning of this decision, PC59 proposes that 11.2.2.1.3 be amended as follows:

> Maintain high density residential use close to open spaces and within the inner residential sector of Blenheim located within easy walking distance to the west and south of the Central Business Zone.

[89] The underlined words are the addition. The Court described the effect of the proposed change as being:[30]

> … to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[90] The Court later described the change as "minor".[31]

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30 At [11].
31 At [32].

[91] The appellants submitted that this is a policy of general application and there is no basis for the Court's comment that it is limited to areas south of the central business district and highlighted that the use of the word "maintain".

[92] They argued that the Court's finding that this policy was a minor change failed to have regard to the wider implications of changing the policy on the Council's integrated management function and further that the Court's merits assessment was coloured by the fact that it saw the policy as justifying new high density residential activity close to areas of open space when, as amended, it merely provides for the maintenance of existing high density residential zoning.

[93] The difficulty with this submission is that, as Colonial submitted, the amendment was sought in order to provide policy support for the development enabled by the rezoning. Without this amendment, the policy only made provision for high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and south of the central business district. The appellants have not established how the Court's decision to approve the amendment was affected by an error of law, and it is difficult to ascertain how it could have affected the Court's decision in any case, given that the amendment was not used as the basis for the Court's view that there is an urgent demand for housing in Blenheim.

[94] The attempt to impugn the Court's assessment of the policy as minor is not elaborated on by the appellants. I am satisfied that it is a further attack on the Court's merits assessment of the proposal as a whole and has no merit in the context of this appeal.

Result

[95] The appeal is dismissed.

Costs

[96] The appellants asked that costs be reserved. I am minded to award costs to Colonial on a 2B basis plus disbursement. If the parties are unable to reach

agreement in light of that indication, they are given leave to file submissions on the issue of costs.

Goddard J