Before an Independent Hearings Panel
Appointed by Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions on the Proposed Waimakariri District Plan and Variation 1

and: Hearing Stream 10A: Future Development Areas

and: **Carter Group Property Limited**
(Submitter 237)

and: **Rolleston Industrial Developments Limited**
(Submitter 160 and Submitter 60 in Variation 1)

Legal submissions on behalf of Carter Group Limited and Rolleston Industrial Developments Limited regarding Hearing Stream 10A: Future Development Areas

Dated: 9 February 2024

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LEGAL SUBMISSIONS ON BEHALF OF CARTER GROUP LIMITED AND ROLLESTON INDUSTRIAL DEVELOPMENTS LIMITED REGARDING HEARING STREAM 10A: FUTURE DEVELOPMENT AREAS

INTRODUCTION

1 These legal submissions are filed on behalf of Carter Group Limited and Rolleston Industrial Developments Limited (*Submitters*) regarding the Hearing Stream 10A: Future Development Areas for the Proposed Waimakariri District Plan (*Proposed Plan*) and the Variation.

2 We note that these legal submissions are specific to the new development areas (rather than the existing development areas) and the certification process for these contained in the Proposed Plan. For clarity, these development areas are also referred to as 'future development areas', 'FDAs', or 'FUDAs' in other relevant planning documents and by other witnesses in this process.

THE CERTIFICATION PROCESS

3 The certification process in the Proposed Plan effectively enables Rural Lifestyle Zoned land to be developed as if it were already residentially zoned land, through an application for resource consent as a restricted discretionary activity.[1]

4 A process of this kind circumvents the usual process to rezone land from rural to urban zoning, and the Schedule 1 process under the RMA which prescribes how this is done.

THE INADEQUACIES OF THE PROVISIONS AS PROPOSED BY THE COUNCIL OFFICER

5 Putting aside the legality or appropriateness of the certification process for now, the evidence of **Mr Jeremy Phillips** details the various issues with the planning provisions as proposed, including:

5.1 The breadth and process-oriented nature of the objective and policies for the DEV chapter which offer very little guidance or direction to users of the Plan or decision makers, and therefore provide little to no direction for urban development proposals in development areas;[2]

5.2 The unresolved issues with respect to the structural, drafting, application, and clarity of the DEV chapter rules such that

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[1] Proposed Plan, DEV-R1.

[2] Evidence of **Mr Phillips** for this hearing stream dated 2 February 2024 at [12]-[13].

they are unlikely to work in practice as intended by the Officer;[3] and

5.3 The narrow yet equally non-specific considerations under the matters of discretion which provide little certainty and are open to interpretation.[4] They would result in a failure to take into account key considerations of allowing such land to be developed for residential purposes, such as the implications of development on strategic infrastructure (in particular the Christchurch International Airport), and the effects of high hazard risks both on-site and off-site as a result of development.

6 Further, while the specific development area Outline Development Plans (*ODP*) do account for some site-specific considerations, these are not mentioned in the DEV rules or included in the matters of discretion. This begs the question how those site-specific considerations could even be managed or controlled by the Proposed Plan.

THE FUTURE DEVELOPMENT AREAS WERE INTENDED TO GO THROUGH A SCHEDULE 1 PROCESS

7 The Council planning officer (*Officer*) in his section 42A report considers the certification process as one that is 'parallel' to a rezoning process, and that these are not contingent on each other.[5] It is unclear what the Officer means by 'parallel' and 'not contingent'. He goes on to say when discussing the certification process:

> "I reiterate that within this report I haven't considered and I am not pre-empting or promoting rezoning outcomes."[6]

8 Presumably, this comment is made on the basis of the Officer's opinion that both the certification process and a rezoning process will involve the same degree of assessment of matters such as airport noise and natural hazards and risks.[7]

9 The Officer has therefore not considered in any detail the adverse effects that may arise from enabling residential development in these areas through the certification process. Yet, it is difficult to

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3 Evidence of **Mr Phillips** for this hearing stream dated 2 February 2024 at [14]-[18].

4 Evidence of **Mr Phillips** for this hearing stream dated 2 February 2024 at [19]-[22].

5 Section 42A Report: Development Areas (DEV), prepared by Peter Wilson, dated 12 January 2023, at [81].

6 Section 42A Report: Development Areas (DEV), prepared by Peter Wilson, dated 12 January 2023, at [96].

7 Section 42A Report: Development Areas (DEV), prepared by Peter Wilson, dated 12 January 2023, at [307].

see how any resource consent for certification under the proposed rules package would ever be declined on the basis of the matters of discretion as drafted. They have been drafted in a way that effectively allows a developer to find a solution to each matter.

10 It is very apparent that the two processes are not the same and would not involve the same assessment matters, or level of detail, or scrutiny. A rezoning process (whether through this Proposed Plan review or as part of some other future plan change) would go through a full Schedule 1 process with everything that comes with that. What is being proposed by the certification process is a very confined consenting process with far more limited considerations than any proposal that would be considered under Schedule 1.

11 The scrutiny with which the Council will treat the rezoning requests sought by submitters on this District Plan (and being heard in Hearing Stream 12) will be significantly greater than the scrutiny the Council has undertaken in proposing the certification process for the development areas.

12 There has been no consideration, nor will there be under the proposed certification process, of whether urban development is, in principle, appropriate in that particular location, taking into account all of the adverse effects.

13 Nor has there been any assessment under the NPS-UD (noting this is a higher order document which came into force after the Map A was inserted into the Canterbury Regional Policy Statement (*CRPS*) and which must also be given effect to) of whether the development of these areas:

13.1 is integrated with infrastructure, and strategic over the medium and long term;[8] or

13.2 would contribute to a well-functioning urban environment.[9]

14 In this sense, the proposed certification process appears to proceed on an assumption that the Future Development Areas as identified in Map A of the CRPS have already been deemed appropriate for urban development, and therefore should not be required to go through a Schedule 1 process.

15 However, this is clearly not the case:

15.1 The CRPS explicitly provides a framework for the <u>rezoning</u> of the development areas:[10]

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8 National Policy Statement on Urban Development 2020, Objective 6.

9 National Policy Statement on Urban Development 2020, Policy 1.

10 Canterbury Regional Policy Statement, Principal reasons and explanation to Policy 6.3.12, page 90.

> "Policy 6.3.12 provides for the re-zoning of land within the Future Development Areas, through district planning processes, in response to projected shortfalls in feasible residential development capacity over the medium term. Addressing longer term needs will be further considered as part of a comprehensive review of the Canterbury Regional Policy Statement scheduled to commence in 2021. …
>
> More detailed planning to determine the specific staging of development within the Future Development Areas will be required before land is re-zoned through district planning processes."

15.2 Our Space 2018-2048 (being the process which developed Map A which was subsequently included in the CRPS) states:[11]

> "Further more detailed assessment of these future growth areas will be required, and undertaken as part of district plan reviews, and can address any new requirements relating to managing risks of natural hazards and mitigating impacts on versatile soils."

15.3 The evidence for **Ms Joanne Mitten** on behalf of the ECan for Hearing Stream 1: Strategic Directions and Urban Form and Development sets this out correctly:[12]

> "However, simply because an area may be identified as an FDA under the CRPS provisions, this does not mean that it can automatically be developed. There are still other criteria that are required to be met (see Policy 6.3.12 of the CRPS), for example if the land is in a high hazard area."

15.4 **Mr Mark Buckley**, the Planning Officer for Hearing Stream 1: Strategic Directions and Urban Form and Development accepted this in his right of reply:

> "As discussed below, no assessment of the land suitability of the development areas in Map A has been undertaken."[13]

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[11] Our Space 2018-2048: Greater Christchurch Settlement Pattern Update, Section 5.7, page 37.

[12] Evidence of **Ms Joanne Mitten** on behalf of Canterbury Regional Council for Hearing Stream 1: General Matters, Definitions, Strategic Directions and Urban Form and Development dated 1 May 2023 at [73].

[13] Council reply on Urban Form and Development prepared by Mr Mark Buckley for the Waimakariri District Council dated 16 June 2023 at [25].

> "… I consider that the criteria used to identify the potential development areas within Map A did not include a detailed analysis of site-specific constraints that may constrain development within these areas and consequently may alter the ability of the identified FDA areas to provide the development capacity required."[14]

15.5 In fact, **Mr Buckley** seems to assume that there would be a rezoning process for the development areas:

> "… the degree to which an FDS… or Map A is best referenced in the UFD chapter is in my view best informed by the evaluative exercise of the suitability of rezoning outcomes in the FDA areas …"[15]

> "… I consider that it would be appropriate for this question to be answered following rezoning of the FUDA areas. …"[16]

> "… If it is found that FUDA areas have development constraints that mean that they are not suitable, then Map A will not give effect to the NPSUD."[17]

16 Based on the above, the foundation from which the Officer is proposing the certification process for development areas is unclear. There is a clear pathway for the rezoning and enabling of development areas in the CRPS which is well understood by both ECan, and other Council officers.

17 This is particularly so for development areas such as in Kaiapoi which has significant potential constraints to development including effects on strategic infrastructure and relating to natural hazards (as discussed further below) that need to be carefully considered. This is exactly the reason why these areas should go through a proper Schedule 1 process in order to consider these potential effects in terms of appropriateness of any proposed zoning.

18 As drafted, the certification process provisions will not allow any of the development area land to undergo the level of scrutiny that would be required through a Schedule 1 change in zoning process, particularly with reference to specific policies in the CRPS.

19 The Panel's decision on this hearing is de facto the rezoning of the land under the Proposed Plan Schedule 1 process. This is the only

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[14] Council reply on Urban Form and Development prepared by Mr Mark Buckley for the Waimakariri District Council dated 16 June 2023 at [28].

[15] Council reply on Urban Form and Development prepared by Mr Mark Buckley for the Waimakariri District Council dated 16 June 2023 at [30].

[16] Council reply on Urban Form and Development prepared by Mr Mark Buckley for the Waimakariri District Council dated 16 June 2023 at [31].

[17] Council reply on Urban Form and Development prepared by Mr Mark Buckley for the Waimakariri District Council dated 16 June 2023 at [32].

point in time, should the certification provisions be accepted, that the appropriateness of development on this land will be considered in a fulsome manner. There will be no other chance as the certification process provisions are drafted in a way that they provide for limited assessment of only some matters.

20 On this basis, the Council simply has not provided sufficient evidence to the Panel to justify the certification process in terms of the matters contained in 6.3.12 of the CRPS (discussed further below).

21 It is not appropriate for the Council to seek to enable development on this land through strained, contrived, and frankly unusual provisions which have the effect of circumventing the usual assessment and scrutiny of the merits of development on this land through a Schedule 1 process.

THE LEGALITY OF THE CERTIFICATION PROCESS

22 Putting aside the merits there are significant issues about the legality of the certification process. As currently proposed, it is contrary to the purpose and principles of the RMA.

23 The section 32 analysis for these provisions considers the scale and significance of effects on matters of national importance to be 'low' but fails to engage with:

23.1 Section 5(2)(c), the purpose of the RMA which seeks sustainable management, while avoiding, remedying, or mitigating any adverse effects on the environment.

23.2 Section 6(h), which requires all persons exercising functions and powers under the RMA to recognise and provide for, as a matter of national importance, the management of significant risks from natural hazards (such as those in high hazard flooding areas); and

23.3 Section 7(b) and (f), which requires all persons exercising functions and powers under the RMA to have particular regard to the efficient use and development of natural and physical resources.

24 The certification process provisions are contrary to those purpose and principles of the RMA listed above.

25 The level of detail in the section 32 report is woefully deficient and fails to contain an appropriate level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from the implementation of the certification process.[18] It fails to identify a number of key effects,

[18] Resource Management Act 1991, s 32(1)(c).

benefit and cost considerations, and other reasonably practicable alternatives for achieving the objectives.

26 The Environment Court has also found that similar provisions in other Proposed District Plans (introducing frameworks for consenting outline development plans) to be *ultra vires*.[19] The cases are complex and nuanced. We have attached copies and attempted to summarise them below:

27 In *Queenstown Airport*, the Court found that:

27.1 The status of an activity derives from the RMA and from subsidiary planning instruments, not from a resource consent.[20]

27.2 The status of an activity should not arise from the consent authority's exercise of a discretionary power through a prior grant of consent.[21] This would make a District Plan hard to interpret, as the status of a certain activity would not be conveyed in clear and unambiguous terms by simple reference to the District Plan.

27.3 Therefore, proposed rules which require prior consent to be sought for an outline development plan, the approval of which then changes the activity status of subsequent activities within the subject land, is *ultra vires*.[22]

27.4 The rule in this case did not identify the outline development plan activities for which consent would be required. The Court did not accept the Council's arguments that this sort of consent would be a 'land-use' consent under s 87 of the RMA. The Court held that the term 'outline development plan' did not constitute an activity and that a rule which did not specify the activities which were expressly allowed subject to a grant of consent would be *ultra vires*.[23]

28 This case was affirmed in *Re Auckland Council*, where the Court found further that if a consent did not authorise the consent holder to use land in a manner which contravened a district rule, but

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19 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93; *Re Auckland Council* [2016] NZEnvC 56; *Re Auckland Council* [2016] NZEnvC 65.

20 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 at [183].

21 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 at [178].

22 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 at [195].

23 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 at [168].

instead purported to authorise a plan about the future use of the land, such a rule would be *ultra vires*.[24]

29 It does appear from this line of cases that there may be ways to draft a District Plan to give effect to the intent of the provisions the Council was seeking in those cases. However, this requires careful drafting so as to ensure provisions with are *intra vires* of the RMA.[25]

30 As currently drafted, the certification provisions of the Proposed Plan would be *ultra vires* for the same reasons as set out in the above cases:

30.1 The certification provisions effectively change the activity status of certain activities based on the existence of a resource consent (a certification consent under DEV-R1). A member of the public would have no way of ascertaining at any given point of time, the status of particular activities that could be undertaken on a site from only reading the District Plan.

30.2 DEV-R1 purports to give a consenting pathway for the activity of "Certification of land for residential and commercial development within a Development Area." This is not an 'activity' under the RMA for which a resource consent can be granted. This is not a 'land use consent' as asserted by the Officer.[26] The rule fails to identify any of the activities to which the resource consent would authorise. It is ambiguous and uncertain what activities could or would be authorised under this rule.

30.3 There are also fundamental issues with rules DEV-R2 to 4 insofar as reference to the need to obtain certification consent is made in the description of the 'activity' for those rules. They do not list the obtaining of the prior certification consent as a condition of the activity status.[27] Nor could they, as those rules provide for permitted activities, and permitted activities by definition[28] are activities that do not require a resource consent.

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[24] *Re Auckland Council* [2016] NZEnvC 65 at [15].

[25] *Re Auckland Council* [2016] NZEnvC 56; *Re Auckland Council* [2016] NZEnvC 65.

[26] Section 42A Report: Development Areas (DEV), prepared by Peter Wilson, dated 12 January 2023, at [84].

[27] *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93 at [177].

[28] Resource Management Act 1991, s 87A.

THE CERTIFICATION PROCESS RELATING TO THE KAIAPOI DEVELOPMENT AREA IS CONTRARY TO HIGHER ORDER DOCUMENTS

31 Setting aside the issues with the certification process in principle, the RMA requires that a District Plan must give effect to any regional policy statement.[29] The Panel must therefore ensure that its decisions give effect to the CRPS.

32 The certification provisions relating to the Kaiapoi development area in particular would not give effect to the CRPS because they would allow development contrary to:

32.1 Policy 6.3.12 which provides the method through which urban development is to be enabled in Future Development Areas;

32.2 Policy 11.3.1 which provides for the avoidance of development in high hazard areas; and

32.3 Policy 6.3.5(4) which seeks to avoid noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport.

33 We note that the evidence of **Ms Mitten** for this hearing stream considers that the Kaiapoi development area should not be included as part of the certification process, but should instead be rezoned through a plan change process.[30]

Policy 6.3.12 – Future Development Areas

34 Policy 6.3.12 provides that urban development should be enabled in Future Development Areas, only where a list of certain circumstances are met. Relevantly these include that:

34.1 The development would promote the efficient use of urban land and principles for future urban growth set out in Objectives 6.2.1.[31] Objective 6.2.1(8) provides that development is enabled through land use framework that protects people from unacceptable risk from natural hazards and the effects of sea-level rise.

34.2 The timing and sequencing of development is appropriately aligned with the provision and protection of infrastructure, in accordance with Policy 6.3.5.[32] Policy 6.3.5 provides for integration of land use development with infrastructure by:

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29 Resource Management Act 1991, s 75(3)(c).

30 Evidence of **Ms Joanne Mitten** on behalf of Canterbury Regional Council for Hearing Stream 10A: Development Areas, Airport Noise Contour and Bird Strike and Growth Policies dated 1 February 2024 at [48].

31 Canterbury Regional Policy Statement, Policy 6.3.12(2).

32 Canterbury Regional Policy Statement, Policy 6.3.12(3).

(a) only providing for new development that does not affect the efficient operation, use, development, appropriate upgrading and safety of existing strategic infrastructure, including by avoiding noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport;[33] and more generally by

(b) managing the effects of land use activities on infrastructure, including avoiding activities that have the potential to limit the efficient and effective, provision, operation, maintenance or upgrade of strategic infrastructure and freight hubs.[34]

34.3 The development would occur in accordance with an outline development plan and the requirements of Policy 6.3.3.[35] Policy 6.3.3 states that development in future development areas is to occur in accordance with the provisions set out in an outline development plan. Outline development plans and associated rules must, among other things, show how the adverse effects associated with natural hazards are to be avoided, remedied or mitigated as appropriate and in accordance with Chapter 11 (discussed further below).

34.4 The effects of natural hazards are avoided or appropriately mitigated in accordance with the objectives and policies set out in Chapter 11.[36] Relevantly, Policy 11.3.1 which is discussed further below.

35 For the reasons set out in these legal submissions, the Kaiapoi development area fails to meet all of these criteria. As such, the CRPS currently does not provide an avenue for the urban development of the Kaiapoi development area, despite identifying the area on Map A.

36 Within this context, it is noted that the CRPS is due for review with consultation underway and notification expected in December. At the present time, however, future development areas can only enable development when all of circumstances in the Policy 6.3.12 are met.

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[33] Canterbury Regional Policy Statement, Policy 6.3.5(4).

[34] Canterbury Regional Policy Statement, Policy 6.3.5(5).

[35] Canterbury Regional Policy Statement, Policy 6.3.12(4).

[36] Canterbury Regional Policy Statement, Policy 6.3.12(6).

37 We note that the Greater Christchurch Partnership[37] has issued its recommended decisions on the Greater Christchurch Spatial Plan[38] which will ultimately feed into the review of the CRPS. Among other things, the Greater Christchurch Spatial Plan considers key natural and physical constraints to growth in Christchurch and specifically acknowledges such issues exist for Kaiapoi. It notes:

> "Layering all the areas to protect and avoid or mitigate on top of each other highlights the most constrained areas of Greater Christchurch for development (see Map 5). These areas include the eastern areas along the coastline, the Port Hills and Te Pātaka a Rākaihautū / Banks Peninsula, the areas to the north-west of Christchurch, and the areas surrounding Kaiapoi. These parts of the city region are affected by a variety of natural and man-made factors…"[39]

> "A number of areas in Greater Christchurch are vulnerable to flooding, particularly in the low-lying eastern areas of Christchurch and areas surrounding Kaiapoi; while coastal areas are vulnerable to sea level rise, coastal inundation and erosion, and tsunamis (see Map 7)."[40]

Policy 11.3.1 – Avoidance of inappropriate development in high hazard areas

38 The Kaiapoi development area is located in a high hazard area as defined in the CRPS.[41]

39 The ODP for this development area acknowledges the fact that it is predicted the land will be affected by flooding from localised rainfall, an Ashely River/Rakahuri breakout and sea water inundation. But does not go as far as to acknowledge it as a high hazard area as defined in the CRPS. To manage the potential effects of flooding, the ODP states:

> "Filing of land and/or the construction of a bund to mitigate the effects of these hazards is anticipated to be required for residential development to occur, which will likely affect development feasibility and consequently impact on housing affordability."

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37 Being a between partnership of all four Canterbury councils and other key stakeholders.

38 https://christchurch.infocouncil.biz/Open/2024/02/GCPC_20240216_AGN_9746_AT.PDF

39 Recommended Greater Christchurch Spatial Plan, at page 36.

40 Recommended Greater Christchurch Spatial Plan, at page 43.

41 Canterbury Regional Policy Statement, definition of 'high hazard area', page 170; as modelled in <https://waimakariri.maps.arcgis.com/apps/MapSeries/index.html?appid=16d97d92a45f4b3081ffa3930b534553>

40 However, the CRPS provides:

> Policy 11.3.1 Avoidance of inappropriate development in high hazard areas
>
> To avoid new subdivision, use and development (except as provided for in Policy 11.3.4) of land in high hazard areas, unless the subdivision, use or development:
>
> …
>
> 3. is not likely to require new or upgraded hazard mitigation works to mitigate or avoid the natural hazard; and
>
> 4. is not likely to exacerbate the effects of the natural hazard;

41 Policy 11.3.1 places a clear requirement of 'avoidance' of inappropriate development in high hazard areas. It is well established from *King Salmon*, that the term 'avoid' "has its ordinary meaning of "not allowing" or "preventing the occurrence of"."[42]

42 While there are exceptions to this requirement in Policy 11.3.1(6), these do not apply to Future Development Areas and therefore are not relevant.

43 The filling of land and/or construction of bunds as set out in the Kaiapoi development area ODP clearly constitute new hazard mitigation works with the intent of mitigating or avoiding the high flood natural hazard that exists over the land.

44 The development of this land as described in the ODP would therefore be contrary, and would not give effect, to the CRPS. To allow this development area against the backdrop of an avoidance policy to be included in the Proposed Plan subject to the certification process would be contrary to the RMA.

45 The Council Officers in neither the s 32 nor s 42A report engage in any way with CRPS policy framework. This is a key omission.

46 There is also no consideration or assessment of how these proposed mitigation works might affect (and potentially exacerbate) the effects of flooding on neighbouring land.[43] This is a significant risk when filing or bunding that while effects on the site might be mitigated, effects are simply shifted offsite.

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[42] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24].

[43] Although we understand from the Evidence of **Ms Joanne Mitten** on behalf of Canterbury Regional Council for this hearing stream dated 1 February 2024 at [28]-[29] that provision might now be made for offsite effects in the Natural hazards chapter of the Proposed Plan.

47 While we have focussed here on the CRPS, we understand from the evidence of **Ms Mitten** that the high flood hazard on this site is the result of a coastal hazard risk.[44] In this respect, it would also appear the proposed Kaiapoi development area would be contrary to the New Zealand Coastal Policy Statement (*NZCPS*), and specifically Policy 25 which provides that areas potentially affected by coastal hazards over at least the next 100 years, among other things:

47.1 avoid increasing the risk of social, environmental and economic harm from coastal hazards;

47.2 avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards; and

47.3 discourage hard protection structures (such as bunding and filling) and promote the use of alternatives to them, including natural defences.

Policy 6.3.5 – Integration of land use and infrastructure

48 We refer to the evidence and legal submissions prepared on behalf Christchurch International Airport Limited (*CIAL*) for this hearing with respect to Policy 6.3.5(4) which seeks to avoid noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport.

49 As set out in separate submissions for CIAL, the Officer is wrong in his interpretation of the exception in the CRPS for Kaiapoi. The wording of the CRPS is clear that any such exception does not apply to future development areas. The Hearings Panel recommendation for PC1 explicitly stated that "*there is no exemption for noise sensitive activities in FDAs and any development would therefore need to comply with Policy 6.3.5*".[45] It therefore makes sense that FDAs were deliberately not added to the list of land types that are granted an automatic exemption from the direction in Policy 6.3.5(4).

50 The land is therefore subject to an avoidance policy unless and until the CRPS is changed.

CONCLUSION

51 For all of the reasons above, the certification process proposed for development areas in the Proposed Plan (and particularly the Kaiapoi development area) is contrary to the CRPS and the RMA (and possibly the NZCPS).

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[44] Evidence of **Ms Joanne Mitten** on behalf of Canterbury Regional Council for this hearing stream dated 1 February 2024 at [45].

[45] *Report to the Minister for the Environment on Proposed Change 1 to Chapter 6 of the Canterbury Regional Policy Statement*, dated March 2021 at paragraph 152.

52 The Panel is asked to decline to include these provisions in the Proposed Plan. We note that many (if not all) of the development areas are subject to submissions seeking rezoning, to be heard under Hearing Stream 12 of this Proposed Plan process. That is the appropriate method for determining the appropriateness of development of this land.

Dated: 2 February 2024

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Jo Appleyard / Lucy Forrester
Counsel for Rolleston Industrial Developments Limited and Carter Group Property Limited

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 93

IN THE MATTER of the Resource Management Act 1991 (the Act) and of appeals under Clause 14 of the First Schedule of the Act

BETWEEN

QUEENSTOWN AIRPORT CORPORATION LIMITED

(ENV-2009-CHC-210)

TROJAN HOLDINGS LIMITED

(ENV-2009-CHC-211)

MANAPOURI BEECH INVESTMENTS LIMITED

(ENV-2009-CHC-212)

FOODSTUFFS (SOUTH ISLAND) LIMITED

(ENV-2009-CHC-214)

QUEENSTOWN CENTRAL LIMITED

(ENV-2009-CHC-215)

THE STATION AT WAITIRI LTD

(ENV-2009-CHC-216)

AIR NEW ZEALAND LIMITED

(ENV-2009-CHC-221)

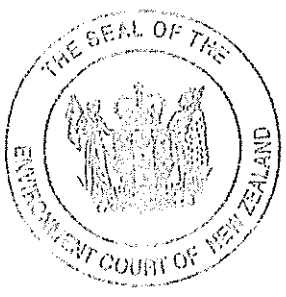
REMARKABLES PARK LIMITED AND SHOTOVER PARK LIMITED

(ENV-2009-CHC-222)

QUEENSTOWN LAKES COMMUNITY HOUSING TRUST

(ENV-2009-CHC-223)

Appellants



AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Hearing: at Queenstown on 24, 25, 26 and 27 February 2014

Court: Environment Judge J E Borthwick
Environment Commissioner R M Dunlop
Environment Commissioner D J Bunting

Appearances: J M Crawford for Foodstuffs (South Island) Ltd
I M Gordon for Queenstown Central Ltd
J D Young for Remarkables Park Ltd and Shotover Park Ltd
J E Macdonald for Queenstown Lakes District Council
R Bartlett as Amicus Curiae

Date of Decision: 28 April 2014

Date of Issue: 28 April 2014

THIRD INTERIM DECISION OF THE ENVIRONMENT COURT

A: The Environment Court finds residential activities (above ground) within AA-E2 was not fairly and reasonably raised in submissions/further submissions lodged by SPL and RPL on the plan change.

B: Shotover Park Limited's appeal to amend the activity status of convenience retail from non-complying to controlled, is dismissed.

C: Subject to the direction given at paragraph [70] in relation to policy 9.6(b) the AA-E2 objectives and policies are approved. These provisions are contained in Annexure A attached to and forming part of this decision.

D: The Structure Plan is approved. The Structure Plan is set out in Annexure B attached to and forming part of this decision.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

E: The Environment Court holds that it does not have jurisdiction under the Foodstuffs (South Island) Ltd appeal to amend the plan change by introducing a new type of activity in Table 1, clause 12.20.3.7 – namely large format retail activities in excess of 1000m^2 gross floor area, as a discretionary activity.

F: The Environment Court holds that it is *functus officio* on its decision limiting the size of retail units within AA-E2 to development between 500m^2 and 1000m^2 gross floor area.

G: The AA-A objective and policies in the form set out in the planners' second Joint Witness Statement are approved. These provisions are contained in Annexure A attached to and forming part of this decision.

H: The Environment Court finds the rules for permitted, controlled, limited discretionary and discretionary activities (rule 12.19.3.1 and rules 12.20.3.2-4) are *ultra vires* the Act. The decision on the objectives and policies pertaining to outline development plans is reserved, and leave is reserved for the parties to comment on the wording of the objectives and policies proposed by the planners in the second Joint Witness Statement.

I: Leave is reserved for any party to apply to the court to correct any minor editorial errors or omissions, including the use of consistent terminology.

REASONS

Introduction

[1] This decision addresses the balance of the objectives and policies including, to the extent that they were raised, certain rules and methods in plan change 19.

[2] The decision addresses the following topics which were the subject of a hearing conducted over 24-27 February 2014:

(a) residential activities (above ground) in Activity Area-E2 (AA-E2);

(b) convenience retail activities in Activity Area-E2;

(c) the objectives and policies for Activity Area-E2;

(d) the Structure Plan;

(e) the Environment Court's jurisdiction to approve of relief pursued by Foodstuffs (South Island) Ltd under its notice of appeal or under Shotover Park Ltd/Remarkables Park Ltd's notice of appeal;

(f) the determination of the objectives and policies pertaining to Activity Area-A; and

(g) the objectives and policies concerning outline development plans, and the vires of rules which would implement the same.

[3] The court's findings on each of these topics now follow.

TOPIC: Residential and Convenience Retail Activities

[4] Under its notice of appeal SPL sought to either refine existing objectives, policies and rules for AA-E1 and E2 or introduce a new sub-zone – AA-E3. This new sub-zone would enable business, large format retailing and residential activities on SPL land. Alternatively, SPL would include a separate suite of objectives, policies and rules for the same purpose. The appeal set out general and specific relief to give effect to the grounds for the appeal.

[5] In the Interim Decision[1] the court found residential, convenience retail and retail activities in the range of 500m^2-1000m^2 to be appropriate activities within AA-E2.[2] We come back to SPL's appeal later in this decision, but for now we record that the Interim Decision rejected a suite of objectives, policies and rules for the proposed AA-E3.

[6] The following section addresses residential and convenience retail activities in Activity Area E2 (**AA-E2**).

Residential activities within AA-E2

[7] Although not referred to by counsel the challenge to the Interim Decision is essentially by way of rehearing pursuant to s 294 of the Act.

[1] [2013] NZEnvC 14.
[2] Residential activity means residential activity east of the EAR.

[8] In the Interim Decision the court found residential activities (above ground) to be an appropriate activity within AA-E2. Any decision approving residential activities was subject to jurisdiction. Jurisdiction, if it existed, could only arise under SPL's appeal and the court expressed its uncertainty as to whether there was scope to approve the activity under this appeal.[3] Following argument on an entirely different basis, the court held in the second Procedural Decision that it had jurisdiction to consider the relief under SPL's appeal. Subsequently, at the court's prompting QLDC submits, and SPL agrees, the relief seeking enablement of residential activities under SPL's notice of appeal went beyond the scope of its submissions/further submissions on the plan change and as a consequence the court does not have jurisdiction to approve this activity east of the EAR.[4]

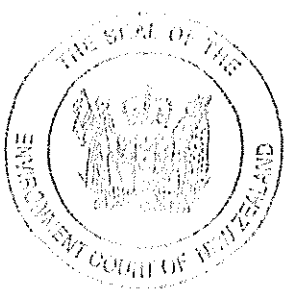
Outcome

[9] Having reviewed the submissions/further submissions the court finds residential activities (above ground) in AA-E2 was not fairly and reasonably raised in submissions/further submissions lodged by SPL and RPL on the plan change. It follows that the court does not have jurisdiction to approve residential activities east of the EAR in AA-E2 as supported by QLDC/QCL in the 2012 hearing.

Convenience retailing

[10] In the Interim Decision the court also found convenience retail to be an appropriate activity within AA-E2.[5] Convenience retail is defined in PC19(DV) as meaning "... a dairy, grocery store or newsagent and lunch bars, cafes [sic] and restaurants".

[11] The main limitation on this activity is its maximum size - it is not to exceed $200m^2$.[6] PC19(DV) classified convenience retail within AA-E2 a non-complying activity. On appeal and by way of specific relief, SPL sought to amend this classification to a controlled activity and to broaden its definition by introducing grocery stores less than $150m^2$.[7]



[3] Interim Decision at [461]-[470], and see SPL notice of appeal dated 18 November 2009 [7.5(g) and (h)].
[4] SPL memorandum dated 5 November 2013, QLDC memorandum dated 22 October 2013.
[5] At [508].
[6] Table 1, clause 12.20.3.7.
[7] Notice of appeal, at 8.2.5(v) and 8.2.13(iii).

[12] At the resumed hearing in February 2014 Ms Hutton, a planner engaged by QLDC, advised that in the absence of residential and visitor accommodation in AA-E2, she no longer considered appropriate all of the activities defined as convenience retail, in particular dairy, groceries and newsagents.[8] If a less restrictive activity status were approved, she was concerned convenience retail would proliferate along the EAR.[9] That said, there remains a need for the food and beverage components of convenience retail and so she proposed a new activity called "Prepared Food and Beverage Activity" for inclusion as a discretionary activity in Table 1, together with a supporting policy and definition. The proposed definition, which does not refer to the 200m^2 restriction on floor space, talks about smaller scale retail operations meeting day-to-day convenience needs, particularly those of prepared food and beverage.

[13] Mr Mead, also a planner for the QLDC, mused that food and beverage outlets may be up to 500m^2 or 1000m^2 gross floor area.[10]

[14] SPL's planning witness, Mr Brown, was of the view that unconstrained convenience retail would overwhelm the activity area and should be discouraged (through a non-complying or discretionary activity status) or minimised.[11] He strongly opposed food and beverage activities exceeding 200m^2.[12] Finally, Mr Edmonds for QCL, was concerned that retail chains would impose predetermined site layouts upon this activity area undermining the strategic outcomes in the plan change.[13]

Discussion and findings

[15] We understand the QLDC to say that elements of convenience retail may no longer be appropriate within AA-E2. Those elements that are appropriate are set out in a new activity called "Prepared Food and Beverage". Ms Macdonald submitted prepared food and beverage is a sub-set of convenience retail whereas Ms Hutton says "Prepared Food and Beverage" is a sub-set of "Other Retail".[14] This difference in approach was not explained.

[8] Hutton EiC dated 14 February 2014 at [19].
[9] Hutton EiC dated 14 February 2014 at [15]-[16].
[10] Transcript at 385, 420-421, 423-424.
[11] Brown EiC dated 14 February 2014 at [35].
[12] Brown EiC dated 11 March 2014.
[13] Edmonds EiC 18 February 2014 at [6.5]-[6.9].
[14] QLDC submissions dated 20 February 2014 at [45]-[46], Ms Hutton EiC dated 14 February 2014 at [17].

[16] While we understand Ms Hutton's reasons for not supporting elements of convenience retailing within AA-E2, without direction from the QLDC as to our jurisdiction to approve the introduction of a new policy, definition and amended rule we decline to approve the amendments recommended by its planners. In the absence of residential activities we dismiss SPL's appeal insofar as it seeks to amend the status of "convenience retail". The status of convenience retail is confirmed as a non-complying activity.

[17] If elements of convenience retail, in particular prepared food and beverage, are appropriate it remains open for the QLDC to make provision for this activity when it undertakes the review of the District Plan.

Outcome

[18] SPL's appeal insofar as it seeks to amend the status of convenience retail is dismissed.

Topic: AA-E2 Objective and Policies

[19] The court received no less than three joint witness statements (**JWS**) addressing the higher order provisions for AA-E2; namely the first JWS dated 25 November 2013, the second JWS dated 23 January 2013 and a revised JWS received during the course of the resumed hearing and dated 25 February 2014. Finally, at the court's direction Messrs Mead[15] and Edmonds[16] filed updated sets of AA-E2 provisions recording changes they had proposed during the course of the hearing.

[20] As Mr Gordon correctly states, it is counsels' responsibility to ensure that the provisions placed before the court for approval are within jurisdiction. We record that the parties undertook to instruct their planning witnesses on those activities within jurisdiction, for the purpose of framing policies for AA-E2.[17] The activities were eventually finalised in the revised JWS tabled during the hearing where health,

[15] Filed 25 February 2014.
[16] Filed 11 March 2014.
[17] Joint memorandum dated 23 December 2013at [5], and Minute dated 18 December 2013 at [13]-[14].

recreational, residential and visitor accommodation activities were deleted from policy 9.1.[18]

[21] As it is relevant to the framing of some objectives/policies for the Activity Area we record that in response to directions from the court[19] the Council, SPL/RPL, QCL and Foodstuffs (South Island) Ltd advised they consider the following activities to be within jurisdiction in AA-E2:[20]

Retail (including mid-sized retail and smaller scale convenience)	Commercial
Offices	Light Industry
Community	Education

[22] We were materially assisted during the hearing by the witnesses and in particular Mr Mead, a consultant planner retained by the council, explaining differences between wordings for the objectives/policies in the second planners' JWS, the evidence and the revised JWS. As not all of the provisions were contested and this is a convenient juncture to confirm the following policies in the revised planners' JWS which were not in dispute between the parties or questioned by the court:

9.4	9.7
9.8	9.9
9.10	9.11

AA-E2 Objectives

[23] The revised Planners' JWS proposed two AA-E2 objectives as follows:

> **Objective 9 - Activity Area E2** (Commercial Corridor)
>
> A. A predominantly commercially-orientated corridor for activities that benefit from exposure to passing traffic and which provides a transition between the adjoining residential and industrial areas, while complementing the role of Activity Area C1/FFSZ(A).
>
> B. A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.

[18] Tabled by Mr Mead 25 February 2014 (Transcript 378).
[19] Court Minute 18 December 2013 [22].
[20] Joint memorandum of the parties, 23 December 2013 [4].

[24] Mr Mead gave the planners' reasons for the changes from their second JWS and answered related questions in cross-examination and questions from the court. Through this process, and listening subsequently to the examination of other witnesses, Mr Mead progressively refined his preferred expression of the objectives (and related policies which we come to below). Mr Mead's finally preferred wording for objective 9 was as follows:[21]

> **Objective 9 - Activity Area E2** (Mixed Business Corridor)
>
> A. A business-orientated corridor for a range of activities that benefit from exposure to passing traffic, provides a transition between the adjoining residential and industrial areas while maintaining the role of Activity Area C1/FFSZ(A) as a town centre.
>
> B. A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.

[25] Mr Mead explained his preferred version with particular reference to the following considerations:

- the final clause of objective 9A reinforces the primacy of the C1/FFSZ(A) town centre in a positive fashion while recognising AA-E2 is to perform a complementary retail role to the centre. Ultimately, however, he preferred the use of "maintaining" to avoid any inference of a synergistic complementary relationship between Activity Areas C1 and E2. Mr Mead also considered that the term "corridor" better explains how E2 is to function as a "movement corridor" as opposed to a town centre node;[22]
- the reference in the Objective heading to a mixed use zone in earlier iterations was inappropriate with residential activities, in particular, removed from policy 9.1 for jurisdiction reasons. Mr Mead accepted, however, that AA-E2 in the form he supported still allowed for a mix of uses and that residential and other potentially suitable activities might be enabled by a future Plan change.[23] We note he finally settled on the term "Mixed", which we find appropriate in the heading;

[21] Mead, final revisions filed 11 March 2014.
[22] Transcript 379, 416 and 419-420.
[23] Transcript 380.

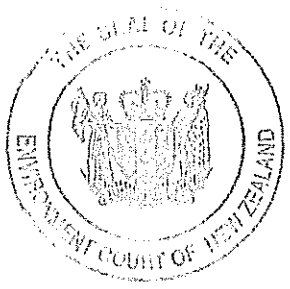
- the term "business" is preferable to "commercial" in both the Objective heading and sub-paragraph "A" because the latter is defined in the Plan in a way that may foreclose activities the council envisages populating the zone. Mr Mead intended that "business" be given its normal meaning as a "wide ranging term". Mr Mead also noted correctly that in the Decisions Version Commercial activities are non-complying.[24]

[26] Mr G Dewe and Mr J Edmonds, planning consultants retained by Foodstuffs and QCL respectively, supported Mr Mead's deletion of "complementary" and insertion of "maintaining" in objective 9A to better describe the relationship between E2 and C1/FFSZ(A).[25]

[27] When asked by the court whether "business" or "commercial" better fits the outcome sought by objective A, Mr Edmonds indicated he was mindful of the court's reservations about the use of the undefined term "business"[26] but anticipated difficulties if "commercial" were adopted because the activities enabled by its Plan definition go (well) beyond those enabled by policy 9.1.[27] We understood Mr Edmonds to finally prefer "business" notwithstanding its lack of definition, if used consistently to mean the activities covered by policy 9.1. Having consulted the operative Plan, we are less comfortable with his opinion that "the E2 area would be most closely aligned to the current Business zone" and on this basis have a synergy with the term.[28] Having reviewed the hearing transcript and considered the revised objectives/policies of Messrs Mead and Edmonds, Mr J Brown supported the use of "business" with the qualification that it may be helpful to define the term as part of the lower order hearing.[29]

[28] Mr Edmonds supported use of the term "mixed use" in the Objective 9 heading in the revised planners' JWS and presumably also in policy 9.3 on the basis that it lacks a single, correct definition and although amended policy 9.1 enables a reduced number of activities, they still comprise a reasonable mix.[30] For similar reasons we expect he would not demur from Mr Mead's finally preferred terms "mixed Business corridor"

[24] Transcript 381.
[25] Transcript 460 and 471.
[26] Expressed in the Interim Decision.
[27] Transcript 495.
[28] Transcript 498.
[29] Brown, planning consultant for SPL/RPL, brief of evidence 11 March 2014 [9].
[30] Transcript 499.



and "mixed Business environment" in the subject provisions. Mr J Brown also supported the continued use of "mixed use".[31]

Discussion and Finding

[29] By the end of the hearing there were few if any wording differences between the parties and their witnesses on the objectives. *"Business"* if given its common meaning as Mr Mead envisaged, addresses the court's concerns expressed in the Interim Decision.[32] We are satisfied that the objectives in their above form are the most appropriate way to achieve the purpose of the Act,[33] and are consistent with both the court's Interim Decision and other confirmed parts of PC19. The AA-E2 objectives are accordingly confirmed in the form finally proposed by Mr Mead, with the qualification that mixed-use is used.

AA-E2 Policies

[30] A number of policies required determination as a result of either unresolved differences between the parties or questions by the court arising out of the witnesses' joint statements and/or evidence. We have found it most efficient to commence by setting out the wording of the disputed policies supported finally by Mr Mead.[34] Only where necessary do we refer to earlier iterations, which in some instances were numerous.

Policy 9.1

[31] Policy 9.1 enables a mix of urban activities within AA-E2 as follows:

> **Policy 9.1**
>
> To provide for a mix of offices, light industry, community, educational activities, mid-sized retail and smaller sized prepared food and beverage outlets.

[32] Amended to exclude activities lacking jurisdiction, the policy proved relatively uncontentious except for "smaller sized prepared food and beverage outlets" which the planners supported substituting for "smaller scale convenience retail" contained in the

[31] Brown, brief of evidence 11 March 2014 [10].
[32] [2013] NZEnvC 14 [519].
[33] Section 32(3)(a) pre-2009 RMA.
[34] Attached to Ms Macdonald's email for QLDC to the court 11 March 2014.

planners' second JWS.[35] For reasons given above, we have declined to approve the amendments in respect of "smaller sized prepared food and beverage outlets".

Discussion and findings

[33] Policy 9.1 is approved without inclusion of "smaller sized prepared food and beverage outlets".

Policy 9.2

[34] Policy 9.2 follows:

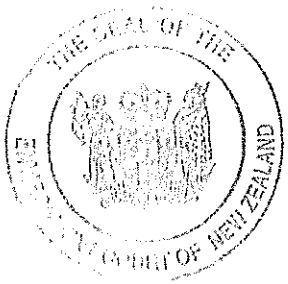
> **Policy 9.2**
> To exclude:
> (a) Activities that are incompatible with a high quality business environment due to the presence of harmful air discharges, excessive noise, use of hazardous substances or other noxious effects; or
>
> (b) Activities that would undermine Activity Area C1 as being the primary location for smaller scale retail.
>
> (c) Large footprint structures that are incompatible with the intended urban form outcome for the Activity Area.

[35] Mr Mead's evidence was that this policy is fundamentally concerned with the urban form along the EAR. This policy, together with 9.3, discourages certain activities and other undesirable influences on urban form at this location.[36]

[36] Policy 9.2 in the revised planners' JWS contained two significant additions that are not in the planners' second JWS, namely sub-paragraphs (b) and (c).

[37] Addressing first policy 9.2(a), this policy was amended to align with the "business corridor" terminology in objective 9A, and proved uncontentious. The wording of policy 9.2(a) would better align with the objective heading if "mixed" were inserted before "business environment" and this would also provide enhanced guidance

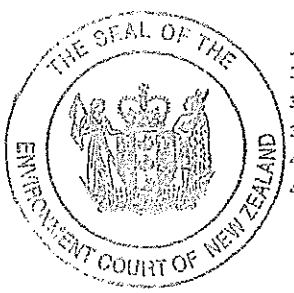
[35] Hutton, Fifth Statement 14 February 2014 [17]; Mead, Fourth Supplementary Statement 14 February 2014 [88] and revised planners' JWS 25 February 2014; Edmonds, Third Supplementary Statement 18 February 2014 [6.9] and Transcript 471; and Brown, Statement of Evidence 11 March 2014 [4]ff limited to 200m^2 GFA.
[36] Mead Transcript at 390-393.



for the formulation of related lower order provisions. Mr Edmonds supported the latter amendment.

[38] Mr Mead indicated that policy 9.2(b) reflects the intention of limiting retail activities to $500m^2$-$1000m^2$ units in lower order provisions except for the prepared food and beverage element which he supported. And that policy 9.2(c) addresses large buildings and their congruence with the urban design outcomes sought by the objective. Mr Mead explained that the caucusing planners were concerned with the potential adverse effects of large footprint buildings irrespective of whether they were used for retail or other activities. He indicated there was no issue with a multi level building with a $1000m^2$ footprint having, say, $3000m^2$ of floor space as opposed to the same area being achieved horizontally by a single storey building that would take up "quite a chunk" of the EAR frontage; depart from the mixed use outcome sought; and militate against a finer grain built form. Mr Mead considered that a "large footprint structures" definition was not required[37] but anticipated that the activity status and site and zone standards that attach to retail activities exceeding $1000m^2$, and buildings exceeding 1000 m^2 irrespective of activities conducted within them, would be different.[38] He emphasised that policy 9.2(c) is concerned with large footprint buildings per se whereas policy 9.3 deals with the extent of retail along the corridor (not to predominate) and the size of individual retail units. After careful reflection, Mr Mead confirmed his opinion that "urban form" was preferable to "built form" in policy 9.3(c) as it encompasses the latter, and as we note, is consistent with the language of objective 9B.[39] He also agreed that the word "or" should be deleted at the end of policy 9.2(a) being a "hangover" from an earlier iteration.[40]

[39] Mr Edmonds agreed with Mr Mead that "... incompatible with the intended urban form outcome for the Activity Area" was more appropriate than the planners' previously preferred wording " ... incompatible with the intended outcome for the Activity Area".[41]



[37] Transcript 397.
[38] Transcript 390-391 and 395.
[39] Transcript 399.
[40] Transcript 393ff.
[41] Transcript 472.

[40] We find no record of Mr Dewe or Mr Brown disagreeing with the revised planners' JWS wording of policy 9.2 including sub-paragraph (c).

Discussion and findings

[41] Policy 9.2 is approved in the form set out above subject to "mixed" being inserted before "business environment" in sub-paragraph (a) and "or" deleted at the end of the same provision.

Policy 9.3

[42] Policy 9.3 follows:

> **Policy 9.3**
> To ensure that a mixed business environment establishes along the EAR where retail uses do not predominate by:
>
> (a) Controlling the size of individual retail units.
>
> (b) Requiring development that fronts the EAR to provide two or more levels of development with above ground floor areas that are suitable for activities other than retail, or otherwise provide for a mix of uses along the road frontage of the site.
>
> (c) Limiting smaller sized retail operations to prepared food and beverage outlets and ensuring that cumulatively prepared food and beverage outlets do not have a strong visual presence along the corridor.
>
> (d) Enabling flexible occupation of floor space by:
>
> (i) having a standardised car parking rate for non-retail activities;
>
> (ii) floor to ceiling heights that enable a range of activities to occur within buildings.

[43] Acknowledging the threefold function of the EAR within the structure plan area Mr Mead advised policy 9.3 is to ensure that a mix of activities establishes along the EAR. This policy is supported by policy 9.6 which is concerned with the built form along the EAR.[42]

[44] To summarise, policy 9.3(b) is concerned to achieve a mix of uses by different means from the retail cap that he supported previously.[43] The genesis of policy 9.3(d)(i)

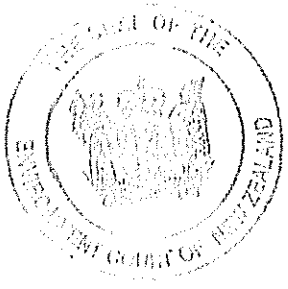
[42] Transcript at 411, 446-447.
[43] Transcript 401.

is the planners' revised JWS policy 9.3(c) but with its effect limited to non-retail activities for the reasons given by Mr Mead in his written brief.[44] The genesis of policy 9.3(d)(ii) is less clear but it appears to have arisen out of questions by the court of Mr Mead about the adaptive reuse of buildings for different purposes over their lifetime; that is providing for flexible occupation.[45]

[45] Mr Edmonds acknowledged that development may potentially be hindered by policy 9.3(b) if it were to require two or more levels. Nevertheless he considered the "references to two level buildings adjoining the EAR [to be] quite important matters that need to be addressed through policies".[46] He found support for this view in the Interim Decision and also in objective 9B's high quality urban form and finally the policy for a mix of activities. He considered the provisions noted preferable to pursuing a mixed use environment through "the only other option" of managing the ground floor use of land and effectively prescribing a retail cap, which he considered analogous to a licensing regime.[47] Mr Edmonds acknowledged that building scale could be achieved by setting façade and/or stud height minima but did not consider that either of these methods by themselves would necessarily achieve the mixed use outcome sought by the policies. In his opinion there was a relatively low risk of a policy for two or more levels causing an inefficient use of resources because of the length of the AA-E2 area, its other dimensions, and the land needs requirements described (we assume in 2012) by various experts.[48]

[46] Consistent with these views, Mr Edmonds preferred Mr Mead's wording of policy 9.3(b) to Mr J Brown's alternative of "Encouraging multiple level development" because it was "a bit more extensive and gave ... a clearer steer to the outcome" that multiple-level development should be occurring along the EAR in a mixed use environment.[49]

[47] In reply to questions from the court on the last clause in policy 9.3(b), Mr Edmonds stated his preference was to achieve a mixed business environment by vertical

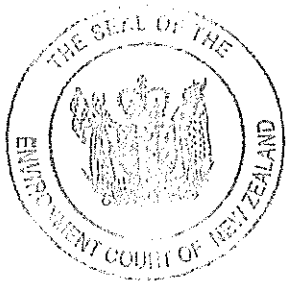


[44] Mead, EiC 14 February2014 [80]ff.
[45] Transcript 452.
[46] Transcript 479.
[47] Transcript 479.
[48] Transcript 480.
[49] J Brown, EiC 14 February 2014 [42] and Transcript 487.

mixing. He considered there was a low probability of achieving predominantly single storey buildings with a diverse horizontal mix because of the (high) land values involved. Although his answers were not supported by either land valuation or economics expertise, Mr Edmonds expected that retail would dominate at ground level interspersed with the occasional activity like a gymnasium with offices and commercial activities predominantly above.[50]

[48] On a related aspect, after assistance from the court on its interpretation, Mr Edmonds accepted that the second clause of policy 9.3(b) as worded by Mr Mead would be met by "... a single level building [on a site] enabling a mix of uses [along the road frontage]".[51] Mr Edmonds explained that he understood policy 9.3(b) to be concerned with ensuring more than just retail activities occurred at ground level in some places. In support of this position, he pointed to the policy's introduction which is concerned with ensuring that a mixed business environment results where retail "uses" do not predominate. To this extent he favoured policies that provide for a vertical mix of activities by requiring multiple storeys[52] and providing for a mix of uses on a site at ground floor level (in policy 9.3(b)). He envisaged that restricted discretionary activity consent would be required for anything less than "about two storeys".[53] He advised that if the policies are not written in a way to achieve these outcomes they should be amended.[54]

[49] In response to questions put in cross-examination, Mr Dewe indicated he was concerned that policy 9.3(b) "could well" hinder otherwise legitimate development. He gave as an example a person wanting to establish an educational activity needing to construct a second storey that was not required for the primary use which could not easily be leased for another activity or resulted in a bigger building than was otherwise required. He considered the policy may result in an inefficient use of resources and/or prevent legitimate activities from occurring. Mr Dewe supported the concept of achieving a mix of activities along the EAR corridor and thought this might be achieved through policies for the size of individual retail units and/or the ODP provisions. While



[50] Transcript 488 and 495
[51] Transcript 493.
[52] To be included in policy 9.6(b) in similar fashion to revised planners' JWS policy 9.6(c) "... building design should ... visibly express a two or more storey format".
[53] Transcript 490.
[54] Transcript 494.

he considered that a demand for uses could not be created where none existed, he acknowledged that requiring two storeys could encourage a mix of uses.[55]

[50] Mr J Brown helpfully distilled the strategic E2 issues down to two matters. Firstly, the identification of an appropriate mix of activities within jurisdiction and, secondly, securing the built form/amenity outcomes sought.[56] Although he considered the size of buildings to be important he did not expressly include multiple storeys amongst a list of significant built form measures.[57] He had this to say:

> ... I do not consider it necessary to compel developers to a minimum number of storeys particularly if the showroom retail activity may require a very high stud height in the part of the building fronting the EAR (for example a motor vehicle showroom which may have a void at the frontage and a mezzanine floor set back from the frontage). The requirement for multiple storeys should therefore be a site standard, so that if a one storey development is proposed at the EAR frontage, it would be assessed as a restricted discretionary activity.[58]

[51] In Mr Brown's opinion policy 9.3 in the planners' second JWS would be better re-framed by retaining sub-paragraph (a), deleting (b) and re-wording (c) to simply read "Encouraging multiple level development".[59] However, in a Supplementary Statement, he indicated that he was comfortable with either of the "slight differences" in policy 9.3 as finally preferred by Mr Mead and Mr Edmonds.[60]

Discussion and findings

[52] Policy 9.3 is concerned with achieving a mixed business environment along the EAR where retail uses do not predominate. We fully apprehend Mr Edmonds concern that the mixed use outcome that multiple storey development would facilitate, should not be foregone by policy 9.3(b) being met predominantly by single storey development with a horizontal mix of uses (the policy's second clause). Policy 9.3(b) is but one of a number of policies which are to give effect to objective 9. With the suite of policies in mind (including including policies on built form (policy 9.6)), we find that Mr Mead and Mr Edmonds were correct in identifying that policy 9.3(b) will deliver the mixed use environment sought be it vertically over two or more levels or horizontally at ground

[55] Transcript 460-463.
[56] Brown, EiC 14 February 2014 [25]-[26].
[57] Brown, EiC 14 February 2014 [27]-[28].
[58] Brown, EiC 14 February 2014 [37].
[59] Brown, EiC 14 February 2014 [42].
[60] Brown, Supplementary Statement 13 March 2014 [5] and [7].

level. It is significant that the latter requires a mix be achieved both on the site and at the road frontage. We understand Mr Brown to have also accepted policy 9.3(b) as finally drafted by Mr Mead. We find it highly probable that the EAR frontages will be attractive for mid-sized retail and if retail is not to predominate it is necessary there be positive provision for multi-storey development to enable and encourage other activities to establish. As Mr Edmonds and Mr Brown indicated, it may well be appropriate for multiple and single storey buildings to have a different activity status, and that is a matter for the lower order hearing.

[53] Mr Dewe was correct that demand for space cannot be conjured where none exists. However, he possibly overlooked that the E2 Activity Area emerged from first instance and court hearings and is based on the land needs assessment accepted by the court in the Interim Decision. The latter may well be an imprecise subject but the evidence is that Queenstown has strong growth prospects and will require space for activities of the type enabled by policy 9.1 in addition to retail. Also Mr Dewe's concession, fairly made, that providing for two storeys is likely to encourage a mix of uses is significant and counts in favour of policy 9.3(b) in the form preferred by other witnesses. It is possible that activities with an operational requirement for only one storey may emerge but we find they are likely to be outside the generality of cases and amenable to management through the resource consent process. We do not find Mr Dewe's concerns a sufficient reason to forego the benefits that policy 9.3(b) has for implementing objective 9A in particular.

[54] For the foregoing reasons policy 9.3 is confirmed in the form finally presented by Mr Mead except for sub-paragraph (c) which is deleted for the reasons given in the Convenience Retail Activities section above.

Policy 9.5

[55] Policy 9.5 follows:

> **Policy 9.5**
>
> To ensure buildings and site development results in a high level of visual interest when viewed from the EAR through a combination of generous areas of glazing at ground floor, building

modulation and detailing, positioning of main building entrances visible from the street, integration of signage with building design and appropriate landscape treatment.

[56] Policy 9.5 occupied a small amount of hearing time.[61] Ms A Hutton explained that the conferencing planners agreed unrestrained signage may impact adversely on AA-E2 amenity values; that QLDC typically imposes a consent condition on new buildings requiring signage platforms to prevent signs being "tacked on" and consequently a rule expressly allowing assessment of signage would be appropriate; and that policy support for such is required. To this end she recommended that policy 9.5 in the planners' second JWS be amended by inserting the words underlined above.

[57] Mr J Brown supported rules to achieve the design outcomes promoted by policy 9.5 including restrictions on signage and did not oppose Ms Hutton's recommended amendment.[62] Mr J Edmonds expressly agreed with it.[63]

Discussion and findings

[58] The amendment will better give effect to that part of objective 9B concerned with achieving "A high quality urban form" by enhancing policy direction on a specific matter and providing a "parent" for related rule(s). It is approved for inclusion.

Policy 9.6

[59] As noted, policy 9.6 is particularly concerned with built form along the EAR. The policy follows:

Policy 9.6

To ensure roadside interfaces become attractive spaces, by requiring:

(a) Buildings be developed close to road boundaries so activities within the ground floor of buildings are clearly visible to passing pedestrians and motorists;

(b) Buildings to provide an appropriate sense of scale to the streetscape through façade and roof design. Single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design. Multi-level

[61] Although it was not included amongst Mr Mead's final 11 March 2014 list of amended policies.
[62] Brown, EiC 14 February 2014 [39(c)].
[63] Edmonds, EiC 18 February 2014 [7.7].

buildings should visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes.

(c) Buildings to occupy at least half the road frontage of sites with car parking and loading areas located at the side or rear of each site so that they do not visually dominate road frontages. Storage of goods and refuse is to occur to the rear and be appropriately screened from view.

(d) Controlling the design and layout of drive through facilities.

[60] Mr Mead's proposed sub-paragraph (b) emerged during the course of the hearing as a re-worded/re-numbered version of the revised planners' JWS policy 9.6(c), which read:

(c) Building design to provide an appropriate sense of scale in the streetscape and visibly express a two or more storey format through the use of façade and roof modulations, material and finishes and variations in solid to void (windows, openings) ratios.

[61] Notable differences are deletion of the provision for two or more storeys and, by the inclusion of separate single and multi-level provisions, an expectation that single storey buildings are to be accommodated.

[62] Mr Mead explained that policy 9.6(b) above provides for a single storey building to have "... a similar sense of presence and scale as if it was a two level building ...".[64] He deposed that an acceptable outcome would be to have a single storey mix of activities along both sides of the EAR subject to "some sort of presence at the street frontage which while not being two storeys [would create] a sense of scale".[65] By way of illustrating what he meant by sense of scale he cited a retail showroom with a void or atrium behind a glass façade 6-8 metres high but with only one level of building. A building would not necessarily have to be up to 8 metres or two levels because 6-7 metres may suffice.[66] While cognisant of the danger of a "series of low, single ... three metre high buildings ... which [do] not create [a] quality environment",[67] Mr Mead was troubled by the words "express a two or more storey format" in the revised planners'

[64] Transcript 432.
[65] Transcript 436.
[66] Transcript 437.
[67] Transcript 438.

JWS policy 9.6(c). He searched for an alternative way to express his preceding evidence culminating in the policy 9.6(b) wording above.

[63] Responding to questions put in cross examination Mr Dewe indicated that he would be comfortable amending policy 9.6(c) in the revised planners' JWS by deleting the words "... visibly express a two or more storey format ...".[68]

[64] Mr Edmonds accepted substitution of "roof design" for "roof modulation" in the revised planners' JWS.[69] More significantly he did not accept that the words in 9.6(b) "to provide an appropriate sense of scale to the streetscape" were by themselves an appropriate substitute for the words "physically express a two or more storey format" in the revised planners' JWS.[70] In support of this opinion Mr Edmonds noted that the court's Interim Decision discusses creating an high quality urban space or streetscape along the EAR (at paragraph 509); ensuring both sides of the corridor "talk to each other"; and that there should be [a suitable] scale and proportion of buildings relative to the width of the EAR as emerged from earlier urban design conferencing. In reply to questions from the court,[71] he identified the importance of "putting scale along the EAR" and achieving a building scale of two storeys (be it in a conventional built form or an atrium of similar height possibly with a mezzanine floor). As previously noted, he considered that a resource consent should be required for buildings of reduced scale. Consistent with these opinions, he did not support the deletion of the words ".....and visibly express a two or more storey format ..." from the revised planners' JWS policy.[72]

[65] Finally, neither Mr Brown nor Mr Dewe supported Mr Mead's policy 9.6(d) as it suggests "drive through" facilities are anticipated in AA-E2.[73] Mr Brown was particularly concerned that the policy may facilitate "a boulevard of burger joints" (and other forms of fast food outlet). Following receipt of Mr Mead's final draft of policies on 11 March 2014, Foodstuffs filed a memorandum alerting the court to the possibility that particularly policy 9.6(d), together with policy 9.13(a)(ii), was not the subject of

[68] Transcript 461, noting policy 9.6(c) is re-numbered as policy 9.6(b) above.
[69] Transcript 473.
[70] Transcript 473.
[71] Transcript 490.
[72] Transcript 491. Ordered and labelled policy 9.6(c) in the 25 February 2014 version.
[73] Brown, Supplementary Statement 13 March 2014 [6].

evidence and formally not agreeing with or supporting their inclusion. Evidently before filing its memorandum Foodstuffs had first made inquiry with QLDC as to whether the wording for this policy was proposed during the course of the hearing, but it did not receive any assistance.

Discussion and findings

[66] Policy 9.6 is concerned in broad terms with achieving an attractive interface between built development and the EAR that implements objective 9B for a high quality urban form, and in particular its built form. We have determined that the policy and objective will generally be achieved better by multi-level development or similar than single storey as both Mr Mead and Edmonds recognised. That is not to say that all development must be two storeys or greater. As Mr Mead deposed, some enabled activities may be amendable to accommodation in buildings that demonstrate an appropriate sense of scale without literally being two storeys. Although it is a different matter, two storeys will also support the mixed use outcome sought by policy 9.3(b). As with some other subjects, we find it would be better if policy 9.6(b) were to also describe clearly the built form outcome to be avoided, which, Mr Mead acknowledged would be consistent with the scheme of the plan change.[74]

[67] For the preceding reasons we have determined that 9.6(b) needs to signal the desired policy direction in more explicit ways and find it should be amended to read:

> (b) Buildings to provide an appropriate sense of scale to the streetscape through façade and roof design. Unless the requirements of an activity otherwise entail this will be achieved by multi-level buildings which visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes. Any single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design such that there is an impression of two levels. Series of low, single level buildings are to be avoided.

[68] Leave is granted the parties to submit an amended wording that respects and gives effects to the court's wording should they wish. Any such amendment is to be done in consultation led by the QLDC and submitted as a joint memorandum.

[74] Transcript 438-439.

[69] Returning to Mr Mead's policy 9.6(d) we would have anticipated that QLDC having received Foodstuffs' memorandum would write to reassure the court and the parties that the policies supported by Mr Mead were the subject of evidence. It did not do so. We cannot find reference to these amendments in the transcript and without direction from QLDC as to our jurisdiction to approve policy 9.6(d) we decline to approve the amendments recommended by Mr Mead. We do so even though the policy may have merit when applied to drive through activities other than those associated with prepared food and beverage.

[70] We summarise the decision on policy 9.6 as follows:

(a) policy 9.6(a) and (c) are approved;

(b) leave is granted to the parties to comment by **11 May 2014**, suggesting amendments, on the court's wording of policy 9.6(b) on the basis indicated;

(c) policy 9.6(d) is not approved.

Policy 9.12

[71] Policy 9.12 is concerned with managing the effects of development and activities at the interface of Activity Areas C2 and E2, with the QLDC finally supporting the following wording:[75]

9.12 At the interface of Activity Areas C2 and E2.

(a) require subdivision and development to provide a laneway between the Activity Areas to enable physical separation of development while providing shared access;

(b) locate loading areas, ventilation ducts, outdoor storage areas and other activities generating noise and/or odour where effects from these are minimised in relation to residential activities in AA-C2;

(c) require building and roof designs to minimise visual effects including glare when viewed from within AA-C2. Exhaust and intake ducts and other mechanical and electrical equipment should be integrated into the overall roofscape and building designs.

[75] Mead via QLDC counsel email dated 11 March 2014.

[72] It was common ground between the planners that AA-E2's interface with AA-E1 is less problematic (than that with C2) as activities in the former will typically be of a lower amenity and therefore less likely to be adversely affected by E2 activities.[76] Both Mr Mead and Ms Hutton were concerned with the need for effective management at the interface of Activity Areas E2 and C2, with particular reference to the potential for activities in E2 to adversely affect residential amenity in C2. They noted, in particular, weekend and evening noise, the operation of air discharge vents and ventilation systems, the outdoor storage of goods and refuse, building design and roofscape views from neighbouring residences.[77] Mr Mead deposed, and we accept, that the policy in the planners' second JWS which requires a laneway between the two activity areas will help manage some but not all of the potential effects identified in the evidence.[78] In response to questions from the court, Ms Hutton did not consider shading relevant but acknowledged that glare may potentially be so and we note its inclusion in QLDC's finally preferred wording.[79] Mr Edmonds agreed with the revisions to policy 9.12 proposed by Mr Mead and Ms Hutton.[80] Mr J Brown did likewise, noting that they would operate in conjunction with AA-C2 policy 8.9(b) in the planners' second JWS[81] also concerned with the management of AA-E2/C2 interface effects.[82]

Discussion and findings

[73] The amendments to policy 9.12 proposed by Mr Mead and Ms Hutton would add limbs (b) and (c) to the corresponding planners' second JWS policy, which provided solely for a laneway between the two activity areas. We find the additional policy provisions, including the incorporation of glare, to be consistent with the purpose of the Act (s 5), ss 7(c) and (f) and a number of higher order PC19 provisions (objectives 1(b), 3(a), 5 and 8) which the policy will help implement. The amendments were not contentious and are endorsed for the reasons given.

[76] For example, Edmonds' Third Supplementary Statement, 14 February 2014 [5.1] and Hutton Fifth Statement, 14 February 2014 [20].
[77] Mead Fourth Supplementary Statement, 14 February 2014 [92]ff and Hutton Fifth Statement, 14 February 2014 [20]ff.
[78] Mead op cit [100].
[79] Transcript 468.
[80] Edmonds Third Supplementary Statement, 14 February 2014 [5.3].
[81] J Brown EiC 14 February 2014 [41].
[82] J Brown EiC14 February 2014 [41].

Policy 9.13

[74] Policy 9.13 concerns outline development plan requirements for AA-E2. For reasons given below, we reserve our decision on the objectives and policies pertaining to outline development plans.

TOPIC: Structure Plan

[75] By consent, the contents of the Structure Plan is approved, a copy of which is attached to this decision at Annexure B.

TOPIC: Foodstuffs (South Island) Ltd's standing to pursue relief for large format retail activities under its own appeal or SPL's appeal

Introduction

[76] Following the August 2013 procedural hearing the court, having reviewed generally the submissions and further submissions filed on the plan change, became concerned that it did not appear to have a record of Foodstuffs' submission seeking to enable large format retail activities.

[77] At the court's direction, QLDC filed a memorandum[83] in which it argued that Foodstuffs' submission and further submission on the plan change did not seek to enable (or extend) retail activities – specifically large format retail within the plan change area. Counsel advised her client did not contest the court's jurisdiction to determine Foodstuffs' appeal because Foodstuffs is a party to SPL's appeal which does (validly) put into issue retailing activities on its land (including land in which Foodstuffs has an interest).

[78] In Foodstuffs' view it does have standing to pursue the relief it is seeking under its notice of appeal.[84] SPL agreed with Foodstuffs' position.[85]

[79] The parties subsequently filed a joint memorandum submitting the court has jurisdiction to consider large format retailing as this activity falls within the category of

[83] Dated 7 November 2013.
[84] Foodstuffs' submissions dated 22 October 2013.
[85] SPL memorandum dated 5 November 2013.

"other retail", which is a discretionary activity in AA-E2.[86] On that basis the parties sought the jurisdictional hearing be vacated. Foodstuffs did not withdraw or abandon the relief under its notice of appeal and the court declined to vacate the hearing.[87]

[80] Foodstuffs' standing to pursue relief enabling large format retail activities on land over which it has an interest has three planks, summarised as follows:

(a) it has standing to pursue relief under its own appeal;
(b) it has standing to pursue relief as a party to SPL's appeal (pursuant to s 274); or
(c) the relief pursued falls within the category of "other retail" in PC19(DV).

(A) Foodstuffs' standing to pursue relief under its own appeal

[81] Foodstuffs argued that it has standing to pursue its relief under its notice of appeal. Referring to the High Court decisions of *Palmerston North City Council v Motor Machinists Ltd*,[88] *Clearwater Resort Ltd v Christchurch City Council*,[89] *Horticulture New Zealand v Manawatu-Wanganui Regional Council*[90] and *Option 5 Inc v Marlborough District Council*,[91] Foodstuffs submits the test for jurisdiction (which we generally accept) requires:

(a) the appellant to have made a submission that is on the plan change;
(b) the appeal must relate to one of the four matters referred to in clause 14(1) of the First Schedule; and
(c) the appellant must have referred to one of the clause 14(1) matters in their submission.

[82] Foodstuffs referred to two other High Court decisions as authority for its proposition that a broad approach should be adopted when considering matters addressed in the submissions/further submissions on the plan change. In particular:

[86] Joint memorandum dated 6 December 2013.
[87] Minute dated 10 December 2013.
[88] [2013] NZHC 1290.
[89] Christchurch AP 34/02 dated 14 March 2003.
[90] [2013] NZHC 2492.
[91] CIV-2009-406-144 dated 28 September 2009.

(a) *Re an application by Vivid Holdings Ltd* at [19] "in order to start to establish jurisdiction a submitter must raise a relevant resource management issue in its submission in a general way";

(b) *Option 5 Inc v Marlborough District Council* at [15] "as long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal".

[83] Addressing the notice of appeal, and referring to the High Court decision of *Power v Whakatane District Council and Others*[92] Foodstuffs urged care be taken not to subvert the legislature's objective in limiting appeal rights to those fairly raised by an appeal by taking an unduly narrow approach [we presume] in relation to its submission and further submissions on the plan change.

Foodstuffs' submission/further submission/notice of appeal

[84] Foodstuffs' submission on the plan change (dated 3 August 2007) explains that it had recently submitted a resource consent application for a supermarket. The location of the supermarket is outside PC19 and in an area that was the subject of a privately initiated plan change request. This second plan change was lodged by RPL and it sought to enable large format retail activities within the Remarkables Park Development Area (paragraph 1.6). Foodstuffs was concerned PC19 had the potential to inhibit large format retail within the Remarkables Park Development Area (paragraph 1.3). It asked that PC19 be assessed in conjunction with RPL's plan change, and to ensure that PC19 did not promote further retailing over and above the "social and economic needs of the community, and over and above the proposed large format retailing anticipated for Remarkables Park" (paragraphs 1.7 and 3.1).

[85] Foodstuffs lodged further submissions responding to submissions made by RPL, SPL and Five Mile Holdings Ltd.[93] Foodstuffs opposed Five Mile Holdings Ltd's submissions giving the following reasons:

- it will adversely affect the vibrancy and amenity of Remarkables Park;
- it would result in the dispersal of retailing activity, which is inefficient and contrary to the sustainable management purpose of the Act;

[92] High Court, CIV-2008-470-456, 30 October 2009 at [30].
[93] Further submissions are all dated 31 October 2007.

- it is not an appropriate response to the retailing demands of Queenstown and the wider Wakatipu Basin; and
- there is no provision for large format retail. In any case, large format retail is best located at Remarkables Park near the established commercial centre.

[86] Foodstuffs supported in full the outcome sought by RPL and SPL. In particular, SPL's submission on PC19 concerns land in which Foodstuffs has an interest. SPL opposed the plan change, seeking it be withdrawn. Alternatively, SPL sought the plan change be revised with provision to be made for business or business and/or industrial rear lot development on its land consistent with a realigned EAR.[94]

[87] SPL's relief is supported by a thoughtful, albeit a highly critical analysis of the notified plan change. This analysis addresses, amongst other matters, the proposed town centre within PC19 concluding that the Remarkables Park Zone could accommodate future shortfall in land for town centre activities; it makes a prediction of a significant oversupply of retail land and finally, it expresses a concern that given the proximity of PC19 to Remarkables Park it is unlikely that the latter's existing large retail centre will function efficiently in the medium to long term.[95] Addressing specifically large format retail activities SPL records its surprise that there is no provision for this in PC19, given a 2004 s 293 application for LFR principally on SPL's land.[96] Alternatively, SPL submits a superior location for large format retail would be the Remarkables Park Zone.[97] It states this matter will be further addressed in the submission. While the balance of the submission does not expressly refer to large format retail, the relief does seek that the plan change is revised with provision made (as previously stated) for business and industrial rear lot development consistent with a realigned EAR.[98]

[88] In its notice of appeal, Foodstuffs seeks the following relief:

(a) That the structure plan is amended to:

[94] SPL submission dated 3 August 2007 at paragraphs 2, 4.1 and 4.2.
[95] SPL submission dated 3 August 2007 at paragraph 3.3.1.
[96] The submission does not identify the Environment Court proceedings where this application arises and from the bar we were told that the proceedings are those involving Gardez Investments Ltd and Queenstown Lakes District Council.
[97] SPL submission dated 3 August 2007 at paragraph 3.3.2.
[98] SPL submission dated 3 August 2007 at paragraphs 2, 4.1 and 4.2.

i. include the Subject Site wholly within an activity area that enables large format retail; and

ii. locate the EAR alignment further to the west at the location shown in Appendix 7 of the Notices of Requirement.

(b) That the plan change provisions are amended to enable large format retail within the Subject Site, specifically that:

i. Objective 10, and related policies are amended to recognise the appropriateness of large format retail in providing higher value use of the Subject Site;

ii. Rule 12.20.3.7 Table 1 - is amended so that "other retail" with a gross floor area more than 500m² per retail outlet is a controlled or limited discretionary activity within the Subject Site;

iii. the Subject Site is exempt from the control over continuous building length - Rule 12.20.5.2(iii);

iv. the Subject Site is exempt from the control over nature and scale of activities Rule 12.20.5.2(viii)(c); and

v. Section 14.2, Rule 14.2.4.1 - delete Clarification of Table 1 B. The carparking standards for the use intended should be a minimum requirement not a maximum requirement.

(c) Delete the requirement for an outline development plan process for Activity Area E.

(d) Any such alternative or consequential relief to the Plan Change provisions considered necessary or appropriate to address the issues and concerns raised in this appeal.

[89] During the course of the February 2014 hearing, Foodstuffs advised that it no longer pursued separate policy recognition for large format retail as a distinct category of retail, nor would it pursue a policy of encouraging large format retail activity in excess of 1000m^2.[99] Instead Foodstuffs would seek approval for large format retail activity in excess of 1000m^2 as a discretionary activity.[100]

Discussion and findings

[90] Clause 6 of the First Schedule provides that any person may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified under clause 5. PC19 (the notified version) alters the

[99] When referring to "large format retail" Foodstuffs means a store with a gross floor area in excess of 1000m^2.
[100] Transcript at 551-552.

status quo by rezoning Rural General land to enable urban development within the structure plan area. The plan change rezoned Rural General land owned by SPL (and others) to Activity Area C (AA-C). The objective for AA-C is to create a village centre (objective 8). AA-C is enabling of commercial activities of all scale, including small to medium format retail. The notified plan change contains a policy encouraging the development of a mainstreet village environment and [we interpolate] encouraging the design of any large format retail to achieve this (policy 8.5). The design facade of large format retail is required to mitigate its visual effects (policy 8.8). In apparent tension with the objective and policies for AA-C, the rules classify commercial activities in AA-C with a gross floor area greater than 500m^2 per retail outlet as non-complying activities (clause 12.19.3.6 Table 1).

[91] Following the approach in *Clearwater Resort Ltd v Christchurch City Council,* and paying particular regard to the extent that the plan change alters the status quo, we have no hesitation in finding Foodstuffs' submission was on the plan change. More troubling is whether the relief sought by Foodstuffs in its submission/further submissions was enabling of large format retail within PC19.

[92] While noting Foodstuffs' own submission to be equivocal,[101] nevertheless Ms Crawford submits that:

(a) by no longer seeking to reject PC19 in its entirety; and
(b) seeking to rezone rural land by providing for retail, including large format retail; and
(c) by no longer seeking retailing in the Remarkables Park Zone

Foodstuffs' notice of appeal is consistent with its original submission that "further retailing over and above the social and economic needs of the community not be allowed".[102]

[93] We do not accept Ms Crawford's submission. When comparing the notice of appeal with the submission, we find Foodstuffs' relief on appeal to be inconsistent with

[101] Transcript at 531, 544 and 600.
[102] Foodstuffs' submissions dated 22 October 2013 at [5(h)].

the substance of its submission. Distinguishing between retail and large format retail activities in its submission, Foodstuffs urged the Council to ensure PC19 "did not promote further retailing over and above the social and economic needs of the community, and [our emphasis] over and above the proposed large format retailing anticipated for Remarkables Park" (paragraphs 1.7 and 3.1). Foodstuffs' submission on large format retailing concerned the extent and specifically the location of this activity; Foodstuffs opposed large format retail activities within PC19.

[94] As a consequence of this finding we have looked to SPL and RPL to see whether a submission made by them would establish Foodstuffs' standing to pursue relief on appeal.

[95] As noted above, in its further submission Foodstuffs supported in full submissions lodged by SPL and RPL. SPL/RPL submissions distinguish between town centre activities and large format retail activities. The submitters assert PC19(DV) makes no provision for large format retail. This is not entirely correct as the policies anticipate this activity in AA-C – including on SPL's land, albeit the rules inconsistently classify retail exceeding 500m^2 a non-complying activity. (We note the activity status is different again under the s 32 Report where it is a controlled activity).

[96] Paragraph 3.3.2 of the submissions filed by SPL and RPL respectively, is generally supportive of large format retail within PC19 or alternatively within the Remarkables Park Zone. However, when the whole of the submission is considered, we find that it is a limited form of large format retail that is proposed for PC19. The relief in the submission substance was to enable business and industrial activities on its land. "Business" is not defined under the operative District Plan or the plan change. In their submissions, SPL and RPL had recourse to the s 32 Report which describes the purpose of business land which includes a limited form of retail activity, namely retailing of larger and bulky goods. We accept Mr Young's argument that the relief seeking "business" activities includes the retailing of larger and bulky goods.[103] This form of retail activity was specifically proposed for SPL's land, and is complementary to its proposed industrial rear lot development. Further to this we find the relief seeking "business" activities qualifies its general submission on "large format retail". In arriving

[103] Transcript at 567.

at this decision we have been particularly mindful of the caution given by Allan J in *Power v Whakatane District Council and Others* not to take an unduly narrow approach when considering the submissions.

[97] We find the subject matter of Foodstuffs' appeal and the subject matter of SPL's submission are different. Foodstuffs' appeal extends the purpose of the business land in the SPL submission to include the general enablement of large format retail over SPL land in which it has an interest and in furtherance of this Foostuffs seeks to include an objective, policies, rules and methods.

Outcome

[98] We conclude the relief sought on appeal was not reasonably or fairly raised in the submissions of Foodstuffs, SPL or RPL. It follows, Foodstuffs does not have standing to pursue the relief set out at paragraph [8(a)(i) and 8(b)] of its appeal pertaining to large format retail activities.

(B) Section 274 party to SPL's appeal

[99] In the alternative Foodstuffs argues that the court has jurisdiction to consider the relief it is pursuing by way of SPL's appeal, to which it is a party.

[100] When responding to Five Mile Holdings Ltd's submission (now QCL), SPL lodged a further submission opposing the liberalisation of commercial activities within Frankton Flats Special Zone (B). SPL submitted if the QLDC formed the view that some commercial/retail activity is needed within the plan change area then these activities are most appropriately located on SPL's land or on land immediately to its south.[104]

[101] SPL further submission also supported Foodstuffs' agreeing with it that the dispersal of retailing was undesirable and inefficient, and that large format retail should be enabled at the Remarkables Park Zone.

[102] We find SPL's further submissions responding to Five Mile Holdings and Foodstuffs to be inconsistent.

[104] Further submission dated 31 October 2007, 6 and 13.

[103] That aside, insofar as SPL's notice of appeal does address matters that were raised in its submission and further submission, Foodstuffs submits the court has jurisdiction to approve the relief it now pursues.

[104] Under its notice of appeal SPL, amongst many other matters, opposed activity areas E1 and E2 and sought a specific activity area, AA-E3, on its land. The proposed AA-E3 was to enable business and large format retail activities (paragraph 7.5(a)).[105] SPL sought a more flexible and permissive approach for business activities, particularly large format retailing (paragraph 7.5(e)). If AA-E3 was not approved, then SPL sought AA-E1 and E2 be amended to enable a range of business, large format retail and residential activities including the general and specific relief proposed for AA-E3 (paragraph 7.5(h)). SPL also desired a planning framework that separately provided for AA-D; expressly enabled business, large format retail and residential activities in the proposed AA-E3 and encouraged diversity of industrial uses in AA-E1 and E2 (paragraph 7.6(c)).

[105] SPL's general relief included the following:

> **Paragraph 8.1(v)**
> Refine the existing objectives, policies and rules for proposed Activity Areas E1 and E2 to introduce proposed Activity Area E3 which enables business, large format retailing and residential activities (referred to at 7.5 and 7.6 above) OR include a separate suite of objectives, policies and rules for proposed Activity Area E3 which enable business, large format retailing and residential activities.

Discussion and findings

[106] Foodstuffs is a s 274 party to SPL's appeal and, as such, it is not entitled to enlarge the scope of SPL's appeal.

[107] We find SPL's submission/further submission to be on the plan change. The submission (to the extent discussed) and further submission sought to include greater provision for retail activity, including large format retail, on SPL's land. SPL's appeal concerns the provisioning of large format retail activity.

[105] The notice of appeal also proposed residential activities, but for reasons we set out it did so without having sought this in submissions and further submissions on the plan change.

[108] In the Interim Decision the court, giving reasons, concluded that the proposed AA-E3 sub-zone was not the most appropriate way to achieve the purpose of the Act (commencing paragraph [528]). The court confirmed the AA-E2 sub-zone and listed activities it found to be appropriate for this sub-zone (at paragraph [508]). The list includes residential, convenience retail and "mid-sized retail suitably defined in the range 500-1000m^2". The court does not specifically address in the Interim Decision the status of activities that it considered to be appropriate. The list at [508] of the Interim Decision is not exhaustive. The court made findings on the evidence presented and if an activity, for example educational facilities, were not in dispute it has not commented upon the same.

[109] In addition to listing appropriate activities for AA-E2, at paragraph [509] the court approved a limitation of retail to activities between 500m^2 and 1000m^2 gross floor area, finding larger retail units are unlikely to give rise to the high quality streetscape as envisaged by the Hearing Commissioners, where built form is an important contributor.

[110] Referring to the evidence of Mr Mead and Mr Heath, Mr Young (on behalf of SPL) submitted that it is generally accepted that LFR is any retail activity that covers an area with a gross floor area of 500m^2 or more.[106] The Interim Decision enabled LFR in the form of showroom retail and "mid-sized retail" ranging between 500m^2-1000m^2 gfa. Mr Young submitted the decision enabling LFR within AA-E2, including "mid-sized retail" is final and therefore the court is *functus officio*.[107] We agree.

[111] Foodstuffs did not engage either with SPL's appeal or the Interim Decision when arguing jurisdiction remains for the court to approve Large Format Retail in excess of 1000m^2 as a discretionary activity. Its failure to do so may reflect the common position taken by the parties that the status of LFR either as a discretionary or non-complying activity is a matter for the lower order hearing as it comes within PC19(DV's) "other retail" category.[108]

[106] SPL submissions dated 14 November 2013 at [44].
[107] SPL submissions dated 14 November 2013 at [42]-[48] and Transcript at 561-562.
[108] Joint memorandum of counsel dated 6 December 2013.

[112] While the Interim Decision does not address the status of activities within AA-E2, it does make findings relevant to the plan change rules, methods and standards. In particular, the Environment Court found that mid-size retail suitably defined in the range between $500m^2$-$1000m^2$ gfa is an appropriate activity in AA-E2[109] and [we emphasise] the court separately approved the limitation of retail to activities between $500m^2$ and $1000m^2$ gfa.[110] The court did so having considered a substantial body of evidence concerning large format retail activities, giving reasons for its decision.

Outcome

[113] In the Interim Decision the court approved residential, mid-sized retail (limiting the size of large format retail) and convenience retail activities within AA-E2. SPL's notice of appeal sought relief for these activities. The court has subsequently determined that relief for residential activities is beyond the court's jurisdiction, in the absence of residential activities the court has determined the SPL appeal on convenience retail should be declined.

[114] Subject to an appeal to a higher court reviving jurisdiction, the Environment Court is *functus officio* on its decision at paragraph [508] to approve mid-sized retail activities and at paragraph [509] limiting the size of retail activities to $500m^2$ and $1000m^2$ gfa within AA-E2.

(C) Other retail

[115] Foodstuffs' appeal aside, counsel do not point to any appeal seeking to amend PC19(DV's) "other retail" activity so as to provide for large format retail exceeding $1000m^2$ and as a consequence the court makes no finding as to its jurisdiction under the balance of the appeals. If the parties wish to pursue this matter, they will need to address the findings of the court in the Interim Decision.

TOPIC: AA-A and the open space provisions

[116] In its first Interim Decision the court found that it was important to clarify whether AA-A was to remain in private ownership as it had no evidence on what the implications might be for the provision of open space in other parts of the structure plan

[109] Interim Decision at [508].
[110] Interim Decision at [509].

area if AA-A were to vest as reserve.[111] In its second procedural decision the court reserved its decision on whether there is jurisdiction under PC19(DV) and the notices of appeal to amend (now) objective 6 by inserting "private" before open space or to achieve the same outcome through s 293.[112]

[117] At the resumed hearing in February 2014 Mr Gordon for QCL submitted that whether AA-A remains in private ownership or vests in the District Council will have no bearing on its inevitable contribution to the overall amenity of the FF(B) zone. In his submission there is sufficient policy support to ensure that through the ODP approval process a satisfactory open space outcome is achieved across the zone, with any extant gaps now closed by amendments proposed by the planners through caucusing.[113]

[118] The planners' JWS records that the tenure of AA-A is ultimately a matter to be negotiated through the resource consent process provided for by (now) policy 6.4, with one possible outcome being that AA-A vests in the QLDC as reserve but at a value that reflects its limited recreational role. Alternatively, the land may remain in private ownership with the walkway/cycleway component recognised as a credit for reserve purposes under Council's Local Government Act development contributions policy. In this regard we note the planners' advice that "the principal purpose of AA-A is to mitigate the landscape and visual effects of development in the PC19 area, not to provide recreational space".[114]

[119] The latter is consistent with AA-A objective 6 and policy 6.1 as proposed to be amended by the planners in their second JWS, namely:

> **Objective 6**
>
> An open landscaped area adjacent to the State Highway that helps to maintain views of the surrounding outstanding natural landscapes and provides for public access and physical separation of buildings from the State Highway.

[111] [2013] NZEnvC 14 at [324].
[112] [2013] NZEnvC 224 at [116].
[113] Gordon, opening submissions [4]-[15].
[114] Second Planners' JWS 23 January 2014, 38.

Policies

6.1 To mitigate the adverse landscape and visual amenity effects of development by providing an attractive, comprehensively designed open landscaped area between State Highway 6 and Activity Areas C1, C2 and E2 that is free of buildings.

[120] We find that the objective and policy in conjunction with others identified by Mr Edmonds[115] provides sufficient context for both determining the ultimate tenure of AA-A and guiding the implementation of related aspects of QLDC's development contributions regime.

[121] We come now to the second aspect of this subject that has troubled the court through these proceedings and which underpinned the concern expressed in the first Interim Decision. Namely, if AA-A were to vest as reserve, might it constitute such a large part of the land owner's reserve contribution liability that insufficient reserves would be provided in other parts of the zone? The court was mindful in this respect of the size of AA-A (2.31 ha) and the QLDC's evidence that its development contributions policy is likely to yield reserves in the order of 4.9 ha, or some equivalent mix of land and money.[116] Finally, we were assisted on this matter by Mr Edmonds who, after initially expressing some uncertainty,[117] assured the court that Council's development contributions policy operates independently of the PC19(DV) zone standard[118] that requires:

vi **Minimum permeable surface**

The minimum area of landscaped permeable surface shall be:

a) 10% of the net site area in Activity areas C1, C2, D and E1 and E2 to be provided in a manner which enables the communal shared use of the space by those working in and visiting various sites in the proximity ....[119]

[122] Mr Edmonds' evidence was that this important zone standard works together with the rules for building coverage and outdoor living space for residential units in order to implement the open space objective and policies in PC19. The court heard evidence that this zone standard has a wider reach than open space policies, and the

[115] Edmonds Fourth Supplementary Statement 21 February 2014, Appendix 2.
[116] Wilson, EiC at [5.2] and Appendix C.
[117] Transcript at 326.
[118] Transcript at 327-328.
[119] PC19(DV) rule 12.20.5.2(vi).

same standard gives effect to the stormwater policies. Secondly, the rules and policies operate independently from the QLDC's reserves contribution policy developed under the Local Government Act.[120] Finally, this plan change requires resource consent for a group of activities [an ODP consent] to be granted before any activity occurs in activity areas C1, C2 and E2 (see rule 12.20.3.6 for Prohibited Activities). While the court has reserved again its decision on the objectives and policies pertaining to the use of the outline development plan, it is of the view that the provision of open space (whether public or private communal open space or outdoor living space associated with residential units) is an activity about which rules may be made, including the requirement to obtain resource consent.

[123] With Mr Edmonds' assurance in mind, the court is now satisfied that the development contributions and PC19 policies identified by Mr Edmonds, the ODP consent process and the minimum permeable surface zone standard as expressed in the Decisions Version[121] are collectively capable of delivering a satisfactory open space outcome of the type illustrated in a comparable development by Mr Barratt-Boyes.[122] The court is assisted materially by the words in the zone standard "... which enables the communal shared use of space". They indicate, firstly, that the 10% area is to be collocated and, secondly, that, in addition to serving by implication a stormwater management purpose (permeable surface), the land is to be used communally as open space.

[124] We heard no submissions or evidence on behalf of the QLDC or any other party which detracted from QCL's case on these matters, and which would cause us to reach different conclusions.

[125] For the reasons set out above the court endorses the AA-A objective and policies in the form set out in the planners' second JWS.

[120] Transcript at 326-336.
[121] If pursued the merits of the amended version of the minimum permeable surface zone standard contained in the Hutton/Ferguson version of PC19 and the jurisdiction for such are matters for the hearing of lower order provisions.
[122] Barratt-Boyes Third Supplementary Statement dated 18 February 2014 at [1.8ff].

TOPIC: Outline Development Plan Provisions

Introduction

[126] This part concerns an issue raised by the court as to whether a land use consent may be granted for an Outline Development Plan prepared in accordance with PC19.

[127] The issue was argued by the parties at the hearing in Queenstown on 24-27 February 2014, with Mr R Bartlett appearing as Amicus Curiae.

The provisions for outline development plans in PC19(DV)

[128] The operative Queenstown Lakes District Plan defines "Outline Development Plan" as meaning:

> ... a plan within a zone or over an area of land or a site which delineates the performance standards and/or activities in the identified areas of the zone, or on the site or area of land.

[129] PC19(DV) contains an objective, policy and rules concerning the use of Outline Development Plans within Activity Areas C1, C2 and E2.[123] While the parties propose amendments to the higher order provisions of PC19(DV), to provide a necessary level of context we set out the relevant provisions from P19(DV) next.

[130] Objective 2 is:

> To enable the creation of a sustainable zone utilising a Structure Plan and an Outline Development Plan process to ensure high quality and comprehensive development.

[131] As policy 2.1 provides, development in Activity Areas C1, C2 and E2 is to be undertaken in accordance with an Outline Development Plan (**ODP**):

> **Policy 2.1**
> To ensure that development is undertaken in accordance with a Structure Plan and Outline Development Plans in Activity Areas C1, C2, and E2, so that a wide range of urban activities can be accommodated within the Zone while ensuring that incompatible uses are located so that they can function without causing reverse sensitivity issues.

[123] All references are to PC19's decision version.

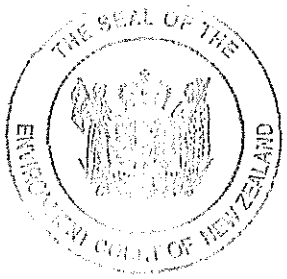
[132] The purpose of the ODP is expanded upon in a section titled the Explanation and Reasons for Adoption, which states that when considering ODPs it is important care is taken to ensure adjacent activities can co-exist while avoiding reverse sensitivity effects.

[133] A series of rules give effect to the objective and policy. Commencing with the rule for prohibited activities, rule 12.20.3.6 provides that where an ODP is required it shall be prohibited to undertake any activity until such time as an ODP has been approved. An ODP is approved by way of resource consent (rule 12.20.3.3(iii)). Rule 12.20.3.3(iii) states that an ODP is a requirement for activity areas C1, C2 and E2. While this rule does not identify any activities that would be expressly allowed if resource consent was granted, it does list extensive matters over which the District Council's discretion would be limited. This rule contains an advice note that any approval of an ODP shall not constitute an approval for any controlled, limited discretionary, discretionary or non-complying activity or building which shall require separate resource consent under the relevant rule(s) of this zone.[124]

[134] The following zone standard stipulates, amongst other matters:

> **12.20.5.2 Zone Standard (xvi)**
>
> (a) no resource consent shall be approved or development undertaken in the absence of an approved Outline Development Plan;
>
> (b) no development shall be undertaken in the absence of an Outline Development Plan; and
>
> (c) all development must be in accordance with an approved Outline Development Plan.

[135] Other rules classify activities as being permitted, controlled, limited discretionary or discretionary (rules 12.19.1.1 and 12.20.3.2-4). Each of these rules refer to the requirement for the activity to be in accordance with the plan's site and zone standards and Structure Plan and with any approved ODP for activity areas C1, C2 and E2.



[124] Queenstown Lakes District Plan at J-17.

[136] While the ODP provisions were challenged at the substantive hearing, in the Interim Decision the court found the method to have merit and provided guidance on the wording of the relevant objectives and policies. Responding to these directions, the planners conferenced and proposed amendments to the objectives and policies in their Joint Witness Statements dated 28 November 2013 and 23 January 2014.

Court's directions on vires

[137] Having reviewed the amended provisions in the first JWS (dated November 2013) the court sought advice from the parties whether an ODP that provides for the matters listed in a new policy 3.2 is a land use consent. When responding the parties were directed to consider the rules, methods and assessment matters relevant to ODPs.

[138] The expert witnesses in their second JWS discussed the purpose of the ODP provisions in the context of PC19. We come back to their evidence later.

[139] Having considered the planners' advice and prior to the hearing reconvening on 4 February 2014, the court issued a minute[125] identifying an issue with the vires of the ODP provisions and seeking legal submissions. When the hearing reconvened on 4 February 2014, and notwithstanding their clients' instructions to support the ODP provisions, counsel had yet to formulate their submissions on the provisions' vires.[126] The court adjourned the topic until 24 February 2014 and appointed Mr R Bartlett, Amicus Curiae.

[140] In subsequent minutes the court reiterated to the parties that the vires of the ODP provisions is a matter of statutory interpretation, and interpretation of the District Plan and PC19.[127] The merits of the ODP process were not in issue.[128]

Planners' Second Joint Witness Statement

[141] In their second JWS,[129] the planners advised that "ODPs are a land use consent".[130] ODPs are the main tool by which "mid-level urban structuring elements

[125] Dated 29 January 2014.
[126] Reconvened hearing 4-5 February 2014, Minute dated 11 February 2014.
[127] Minutes dated 30 January and 11 February 2014.
[128] Minutes dated 30 January and 14 February 2014.
[129] Dated 23 January 2014.
[130] Second JWS at 20.

within the relevant activity areas will be put in place".[131] These structuring elements include the minor/secondary road network (being roads not included in the Structure Plan), reserves and open spaces, walkway connections and building platforms. These activities are capable of being consented.[132] ODPs are also to include urban design assessment matters, which "technically" the planners did not regard as being an activity (the term "activity" appears to be defined by the planners as a "physical development that uses resources").[133]

[142] The following general principles are said to apply to ODPs:

(a) ODPs should not set out activity classifications within activity areas;
(b) ODPs should not change the main performance standards for an activity (e.g. height); and
(c) any criteria or assessment matters set out in the ODP must align with and develop the policies and associated outcomes within the plan change itself.

[143] The planners conceived of an approved ODP as a "guiding plan, rather than a fixed blueprint".[134] They noted ODPs can be amended via a variation to the original land use consent, or by way of a new land use consent. In their view persons wanting to develop land are not bound by the ODP criteria as the ODP sits outside the District Plan but "such consents could draw upon the criteria as a guide as to what is appropriate".[135] At some point in time the need for a comprehensive ODP will likely fall away after all the roads, accessways and reserves have been established.[136]

[144] We set out next the sections of the Act relevant to our consideration of the vires of the relevant rules and methods.[137]

Relevant RMA Provisions

[145] As PC19 was publicly notified in July 2007 the applicable statute is the Resource Management Amendment Act 2005. Counsel did not address this statute but instead

[131] Second JWS at 19.
[132] Second JWS at 19-20.
[133] Second JWS at 20.
[134] Second JWS at 21.
[135] Second JWS at 22-23.
[136] Second JWS at 21-22.
[137] The version of the Act that applies, is the version immediately before the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

directed their submissions to the Act's most recent amendments. At the court's direction the parties filed a memorandum post-hearing in which they accepted that PC19 is subject to the law as it was prior to the 2009 amendments, but submitted the post 2009 amendments were not material to the submissions given.[138] We have applied (as best we can) their arguments to the correct statutory provisions. In doing so, we note s 87A, which was referred to extensively in submissions, prior to 2009 was numbered s 77B.[139] All other amendments to the RMA subsequent to the notification of the plan change have kept the same section number.

[146] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. The contents of District Plans are described in s 75(1). A District Plan must state the objectives for the district; the policies to implement the objectives; and the rules (if any) to implement the policies. A District Plan may also state, amongst other matters, the methods, other than rules, for implementing the policies for the district (s 75(2)(b)).

[147] Sections 76 and 77A address the making of rules in District Plans. Section 76 contains a general provision about rule making:

> (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 rules in a district plan.
>
> (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.
>
> (4) A rule may—
> (a) Apply throughout a district or a part of a district:

[138] Joint memorandum of counsel and Amicus Curiae, dated 20 March 2014 at [2] and [4].
[139] This section applied between 10 August 2005 to 30 September 2009, until substituted as from 1 October 2009, by s 60 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

(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 an activity causing, or likely to cause, adverse effects not covered by the plan.

[148] Pursuant to s 77A, rules may apply to the types of activities identified in s 77B:

77A Power to include rules in plans

(1) A local authority may make rules describing an activity as an activity in section 77B.

(2) When an activity in a plan or proposed plan is described as an activity in section 77B, the requirements, restrictions, permissions, and prohibitions specified for that type of activity apply to that activity in that plan or proposed plan.

(3) The power to specify conditions in a plan or proposed plan is limited to conditions for the matters in section 108 or section 220.

[149] Six types of activities are identified in s 77B being permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited activities. Three types of activity are particularly relevant to the issues at hand and in respect of those activities s 77B states:

Permitted Activities

(1) If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

Restricted Discretionary Activities

(3) If an activity is described in this Act, regulations, or a plan or proposed plan as a restricted discretionary activity, -

(a) a resource consent is required for the activity; and

(b) the consent authority must specify in the plan or proposed plan matters to which it has restricted its discretion; and

(c) the consent authority's powers to decline a resource consent and to impose conditions are restricted to matters that have been specified under paragraph (b); and

(d) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

Non-complying Activities

(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity, -

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.

[150] Resource consent has the meaning set out in s 87, and includes all conditions to which the consent is subject.[140] Section 87 describes five types of resource consent, although only two are applicable. These are:

Section 87

In this Act, the term **resource consent** means any of the following:

(a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**):

(b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**):

...

[151] Finally, s 9(1)(a) states (relevantly) no person may use land in a manner that contravenes a rule in a District Plan or Proposed District Plan unless the activity is expressly allowed by a resource consent. While the term "activities" features in the sections noted above, s 9 talks about the "use of land". Section 9(4) defines "use" in the following way:

In this section, the word **use** in relation to any land means—

(a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or

(b) Any excavation, drilling, tunnelling, or other disturbance of the land; or

(c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or

(d) Any deposit of any substance in, on, or under the land; or

(da) Any entry on to, or passing across, the surface of water in any lake or river; or

(e) Any other use of land -

and **may use** has a corresponding meaning.

[140] Section 2.

Vires of the provisions

Submissions in support by QLDC and QCL

[152] QLDC says it is artificial to treat an ODP as a mere "plan" which does not authorise any activity. A consent approving an ODP would allow the use of land for a range of activities, including the use of land for activities that are identified in Table 1 as being permitted activities[141] and the infrastructural elements of a development, some of which counsel notes.[142] QLDC's subtle argument turned on whether a consent for an outline development plan may be granted, with counsel arguing that it may provided that the consent authorises permitted activities.[143] The ODP may also include conditions unrelated to permitted activities.[144]

[153] QLDC argues the plan change rules have two features: the obtaining of consent for an ODP is a "requirement" of a permitted activity within the meaning of s 87A(1) and secondly, a permitted activity is to comply with an approved ODP.[145] The "requirement" is specified in the zone standards (clause 12.20.5.2 (xvi)). (NB: this submission was made as if s 87A applies, which it does not. The correct provision is s 77B.)

[154] While we were not told, we assume from QLDC's citation of *Re Application by Christchurch City Council* that it equates the term "requirement" which appears in s 87A, with the term "standard" in s 77B. We make no findings on whether the term "requirement" and "standard" are the same, but have considered QLDC submission on this basis. Thus we understand QLDC to say that for permitted activities the obtaining of an ODP consent is a standard specified in PC19. All activity types are subject to the same standard.[146]

[155] QLDC submitted a rule requiring consent to be obtained as a pre-condition to development is not novel. Such a rule is an example of the cascade or sieve approach

[141] QLDC opening submissions dated 27 February 2014 at [8].
[142] QLDC opening submissions at [14].
[143] Transcript at 621-622.
[144] Transcript at 626.
[145] QLDC opening submissions at [30]-[32].
[146] QLDC reply submissions at [21].

approved of in the Planning Tribunal decision of *Re Application by Christchurch City Council* [1995] NZLR 129.[147]

[156] QCL also submits that the effect of rule 12.19.1.1 (for permitted activities) and Table 1 is that certain specified uses of land will be permitted provided that they comply with an ODP. Until ODP activities are consented no use of land is permitted.[148] QCL argues:

(a) a consent for an ODP acts as a consent to use the land for permitted activities;[149]

(b) subject to a consent granted for an ODP, an activity may be permitted (either because it is listed in Table 1 as a permitted activity or it does not otherwise contravene a rule in the plan change – such as those activities that are not located in buildings);[150]

(c) without an approved ODP the use of land would contravene a rule in a Plan and therefore s 9(3) of the Act;

(d) provided that a consent is granted to allow one activity to take place that would otherwise contravene rule 12.20.3,[151] in particular allowing a permitted activity, it is a consent to do something that otherwise would contravene a rule in a District Plan;[152] and

(e) accordingly, the ODP is a resource consent within the meaning of s 87(a) of the Act.

Submissions of the amicus curiae

[157] Mr Bartlett was directed to present legal argument for and against the proposition that a land use consent may be granted for an ODP prepared in accordance with PC19. He had the advantage of seeing draft submissions of QLDC and QCL and was able to reply to these and we summarise next his key points.

[147] QLDC reply submissions at [13]-[14].
[148] QCL submissions dated 20 February 2014 at [15].
[149] QCL submissions dated 20 February 2014 at [16]-[17].
[150] QCL submissions dated 20 February 2014 at [18]-[27].
[151] The rule for permitted activities is rule 12.19.11 and in the context of the submissions we understand Mr Gordon to be referring to this class.
[152] QCL submissions dated 20 February 2014 at [28].

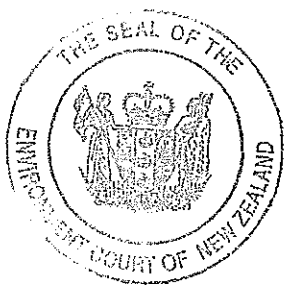
[158] Mr Bartlett says that the status of an activity derives from the Act and from its subsidiary planning instruments, not from a resource consent.

[159] Under the RMA the resource consent provisions predicate a connection to activities and to the implementation of rules. Resource consents:[153]

- entitle use of land in a manner that contravenes a district rule (s 9(3));
- are not real property but run with the land (s 122);
- if unimplemented, lapse on the date specified in the consent or if no date is specified, within five years (s 125(1));
- may have the lapse period extended subject to meeting criteria (s 125(1A));
- are permissive;
- may subsist with any other number of unimplemented and inconsistent consents on the same property;
- may be subject to an application for a change or cancellation of conditions by the consent holder (s 127);
- may be subject to cancellation by the consent authority (s 126(1));
- may be subject to review of condition by the consent authority (s 128/129);
- may be subject to an application for surrender (s 138).

[160] With reference to the above attributes of a resource consent, Mr Bartlett submits that it cannot have been Parliament's intention that a consent would prescribe the rules that are to apply to a consent granted for another activity.[154]

[161] In his view it is not possible to discern in PC19 whether a proposed activity is permitted or not because of the pre-condition that consent for an ODP be obtained first.[155] He summarises QCL's argument as "permitted activities only become permitted activities to those who have first obtained an outline development plan", and submits this is inconsistent with the definition of a permitted activity. A permitted activity is something that does not require a resource consent.[156] Finally, Mr Bartlett submits under QLDC's and QCL's approach activities that are not listed in the plan change and



[153] Bartlett submissions dated 27 February 2014 at [33].
[154] Bartlett submissions dated 27 February 2014 at [34].
[155] Bartlett submissions dated 27 February 2014 at [57].
[156] Bartlett submissions at [47].

which do not contravene a rule in the plan change, would need to be identified in an ODP to meet the requirements of s 9 that they are expressly allowed by a resource consent.

Consideration of vires

Purpose of the ODP provisions

[162] First, we acknowledge the premise in PC19(DV) that it is prohibited to undertake any activity within C1, C2 and E2 until such time as a resource consent is granted for an ODP (rule 12.20.3.6). Remarkably this rule was not referred to by QLDC and QCL.

[163] Secondly, we found it helpful to set out the scheme of the ODP provisions in this plan change. The scheme has four features:

(a) there is a requirement for a single application for resource consent for a group of activities [we refer to this as the consent for ODP activities];
(b) the timeframe for processing an application for ODP activities is set in the plan;
(c) until such time as there is consent for ODP activities the use of land is prohibited in three activity areas; and
(d) any use of land that does not comply with a consent for ODP activities is a non-complying activity.

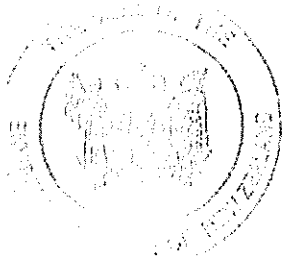
[164] We turn next to the issue identified by the court.

Issue: Is a land use consent granting an outline development plan a "consent" within the meaning of ss 9 and 87 of the Act?

Rule 12.20.3.3(iii) – the rule for limited discretionary activities

[165] An application for a consent for ODP activities is to be made pursuant to rule 12.20.3.3(iii).

[166] Counsel did not directly address rule 12.20.3.3(iii) and yet its subject matter is at the heart of the legal argument. The rule simply states "Outline Development Plan requirement for development within Activity Areas C1 C2, and E2" and then follows matters in respect of which the District Council's discretion is limited.



[167] While at times counsel and the planners spoke of outline development plans as if they were an activity (i.e. the plan is an *activity*), we understand in this plan change the term "outline development plan" means a consent granted for a bundle of activities. In the latter context, the QLDC and the planners also spoke about "outline development plans" as being a consent granted for the structural or structuring activities within the three activity areas. Assuming this is correct, rule 12.20.3.3(iii) does not actually identify the activities for which resource consent is required. Rather, the reader is left to deduce from the matters to which discretion is limited under this rule and also from the relevant policies, the activities that are the subject of an application for resource consent.

[168] In the absence of a rule specifying activities that are expressly allowed subject to a grant of consent, rule 12.20.3.3(iii) is ultra vires s 77A(1) & 77B(3). To come within s 77B (3), and to be consistent with the operative District Plan's definition of "outline development plan", rule 12.20.3.3(iii) is to list activities that are limited discretionary activities.

[169] If the court found difficulties with the plan change rules Ms Macdonald suggested introducing a new rule(s) requiring an application to be made for a series of ODP activities (not exhaustively listed). These activities would be classified as discretionary activities, as opposed to limited discretionary activities in the plan change.[157] Subject to what we say below Ms Macdonald's rule is a step in the right direction. However, with the classification of ODP activities having potentially changed from a limited discretionary activity under rule 12.20.3.3(iii) and the content of the rule not finalised, we make no final finding on the same.

Vires of the activity rules (rules 12.19.1.1 and 12.20.3.2-4)

[170] The amendment of the rule 12.20.3.3(iii)) or insertion of a new rule(s), would not address the matters raised by all counsel concerning the vires of the permitted activity rule and, more generally, all of the activity rules. The consideration of vires arises under two heads, as follows:

[157] QLDC opening submissions at [34].

(a) can the status of a permitted activity or indeed any activity be determined by a prior grant of consent?

(b) can a rule prohibit permitted activities in specified circumstances?

Issue: Can the status of a permitted activity, or indeed any activity be determined by a prior grant of consent?

[171] In accordance with s 77A the QLDC has categorised activities as belonging to one of six types of activities and has made rules for each type accordingly.

[172] QLDC says there is nothing in the Act which prevents a rule requiring as a pre-condition to any development, the approval of a resource consent. The obtaining of an ODP is a "requirement" within the meaning of s 87A(1) [we interpolate – a "standard" under s 77A]. Ms Macdonald submits all activities are subject to the same *requirement* as part of the rules' sieve process.[158] This argument had some initial attraction, until the standard was considered in the context of other rules and the plan change policies.

[173] We asked if a resource consent is required for the bundle of activities covered by an ODP what rule would be contravened if land were used without consent being granted? In her reply Ms Macdonald for QLDC submits that for the purpose of s 9,[159] the rule in the plan which is contravened is the zone standard (12.20.5.2 Zone Standards (xvi)). She advised this zone standard is a "requirement" within the meaning of s 87A(1).[160] We do not agree with this submission for the following reasons.

[174] Section 87(a) of the Act defines resource consent as meaning, amongst other things, a consent to do something that would otherwise contravene s 9. Section 9(1)(a) provides no person may use land in a manner that contravenes a rule in a District Plan unless the use is expressly authorised by a resource consent. In the absence of an ODP consent, all activities within AA-C1, C2 and E2 are prohibited (rule 12.20.3.6). Thus the rule in the plan that is contravened if land is used in the absence of a consent for ODP activities, is the prohibited activity rule (rule 12.20.3.6). If land is proposed to be

[158] QLDC reply submissions at [13-14, 21].
[159] QLDC, in common with other counsel, referred to s 9(3). The correct section is s 9(1). The amendments made to s 9 under the Resource Management (Simplifying and Streamlining) Amendment Act 2009 do not apply.
[160] QLDC reply submissions at [21].

developed, but not in accordance with any consent granted for ODP activities, then the rule in the plan that is contravened is the rule for non-complying activities (12.20.3.5 non-complying activities (ii)).

[175] We return to the rule for permitted activities which was the particular focus of QLDC and QCL submissions. Rule 12.19.1.1 identifies a garden centre and its ancillary activities,[161] and the activities in Table 1 as belonging to the class of permitted activities subject to compliance with:

- the site and zone standards;
- Structure Plan; and
- any approved outline development plan for activity areas C1, C2 and E2.

[176] The rule also provides that an activity is permitted if it is not listed as a controlled, discretionary, non-complying or prohibited activity.[162] Likewise the rules for controlled, limited discretionary and discretionary activities require compliance with any approved outline development plan.

[177] If the words "... compliance with ... any approved Outline Development Plan" in the permitted activity rule are given their natural and ordinary meaning, the rule requires compliance with a grant of resource consent for ODP activities; including all the conditions of a consent.[163] When these words are considered within the wider policy context, the purpose of the rule is to require all activities within C1, C2 and E2 to comply with a prior grant of resource consent. Arising out of the exercise of a discretionary power, a consent (including all of its conditions) is not a standard that is specified in the plan change.

[178] A second related difficulty with the permitted activity rule is that the classification of the activity proceeds from the exercise of the consent authority's

[161] Rule 12.20.1.1(b).
[162] We note the rule refers to Table 1 in rule 12.20.3.7 and also to Table 12.20.3.6. If the relevant rule is Table 1 in rule 12.20.3.7 there appears to be an error in its drafting.
[163] See s 2 definition of "resource consent".

discretion whether to grant a limited discretionary application for ODP activities. Thus the plan change does not convey in clear and unambiguous terms the use to which the land may be put.

[179] Given this, we find the rules requiring compliance with "any approved Outline Development Plan" to be ultra vires s 77B(1) of the Act.

[180] We address briefly the Planning Tribunal decision of *An Application by Christchurch City Council*[164] referred to us by QLDC in support of the rules. The Christchurch City Council was in the process of reviewing its Transitional District Plan, when it applied for declarations as to the validity of rules classifying activities subject to their compliance with certain standards. Those standards were likened to a sieve test, and QLDC says this description fits the rules in PC19(DV). The Planning Tribunal noted s 9 was the only section in the Act constraining land use activities and if there is no rule in a District Plan then a particular activity is not constrained by that section.[165] That said the Planning Tribunal declared:

> (i) That it is lawful for a district plan to contain a rule in respect of permitted activities having the following form:
>
> "Any activity which complies with the standards specified for the zone where the standards specified go to the effects which activities have on the environment rather than to their purpose."
>
> (ii) That under the provisions of the Resource Management Act 1991 a district plan may prescribe and categorise the consequence of non-compliance with specified standards and may restrict the exercise of the consent authority's discretion to particular standards specified in the plan.

[181] We have no evidence that the Christchurch District Plan either then, or now, has a rule classifying permitted activities subject to either a prior grant of consent for another activity or subject to compliance with the grant of consent for another activity. It follows we are not satisfied that the Planning Tribunal's declaration supports the approach taken in PC19(DV).

[164] [1995] NZRMA 129.
[165] *An Application by Christchurch City Council* at 16.

[182] We struggle to understand how the classification of permitted activities can proceed from a grant of a resource consent. In this regard we were not assisted by QLDC simply passing off the rule as being not excluded under the Act. The importance of this issue is captured by Justice Allen in *Power v Whakatane District Council*[166] where he observed (without deciding the particular matter):

> It is settled law that a Council may not reserve, by express subjective formulation, the right to decide whether or not a use comes within the category of permitted use: *McLeod Holdings Ltd v Countdown Properties Ltd* [1990] 14 NZTPA 362 at 372. It is arguable also that a rule which provides that an activity is a controlled activity only if it has been the subject of an approved outline plan is similarly invalid. That was the view expressed by Judge Sheppard in *Fletcher Development and Construction Ltd v Auckland City Council* [1990] 14 NZTPA 193. As Mr Ryan submits, a member of the public would have no way of ascertaining at any given point of time whether a particular development on the subject site would be a controlled activity or a discretionary one. That would have to await the settlement (or not as the case may be) of a development plan in consultation with the stipulated parties.

Outcome

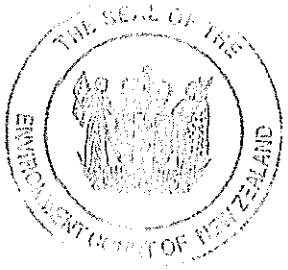
[183] We agree with Mr Bartlett that under s 87A (or correctly s 77B) the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are ultra vires s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.

Issue: Can a rule prohibit permitted activities in specified circumstances?

[184] As noted above, counsel did not address the rule for prohibited activities. It appears the prohibited activity rule is a method to secure a procedure under the plan change, namely the obtaining of a consent for ODP activities prior to any development of activity areas C1, C2 and E2.

[185] Section 77B(7) addresses prohibited activity status in this way:

> If an activity is described in this Act, regulations, or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.



[166] CIV-2008-470-456 at [45].

[186] There is at least one appeal seeking the deletion of this rule.[167]

[187] The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development*[168] considered definition of prohibited activity needs no elaboration. "It simply means an activity for which a resource consent is not available". PC19(DV) arguably extends the definition of prohibited activity, by including permitted activities. Having heard no submission on the rule we do not decide whether the rule has this effect.

Potential amendments

[188] Subject to jurisdiction we posit that what is intended by the rule prohibiting all activities is to create a deferred zoning over activity areas C1, C2 and E2 where land may not be used in accordance with the plan change until a specified event occurs. The event that would cause the lifting of the deferment is the obtaining of consent for a bundle of ODP activities. If this is correct, with the appropriate policy support a resource consent application for ODP activities and other land use and subdivision consents could be filed together and be processed sequentially.

[189] The purpose of rules 12.19.1.1 and 12.20.3.2 - 4 is to make a proposed land use activity non-complying, if the land use contravenes a consent granted for ODP activities within the relevant activity area.[169] We suggest that this purpose *may* be maintained and policies given effect to, if the rules are amended to delete reference in the rules to "...compliance with ... any approved Outline Development Plan"; delete or amend zone standard 12.20.5.2(xvi) which duplicates matters already provided under the rules classifying non-complying and prohibited activities; amend the rule for non-complying activities to add that "the use or development of land within activity areas C1, C2 and E2 in the absence of a consent granted for ODP activities is a non-complying activity" and to include an assessment matter ascertaining compliance with any applicable consent for ODP activities.

[167] Notice of appeal filed by Five Mile Holdings Ltd (in receivership).
[168] [2007] NZCA 473 at [41].
[169] See 12.20.3.5 non-complying activities (ii) which provides that any activity which is not listed as a prohibited activity and which does not comply with one or more of the relevant Zone Standards, shall be a non-complying activity.

[190] In contrast with the other types of resource consent, s 77B(5) does not stipulate that the activity must comply with any standards (terms or conditions) stipulated in a plan or proposed plan. Instead s 77B(6) states that the particular restrictions for non-complying activities are those specified in s 104D. Pursuant to s 104D(1)(b) the use of land not in accordance with a consent for ODP activities would be contrary to the objectives and policies for the plan change, which expressly provides for the use of Outline Development Plans as the central means to give effect to the objectives and policies.

[191] If the rule for non-complying activities were to be amended in the way suggested, this does not appear to offend s 77B(5). Such a rule may be described as a *procedural rule.* Mr Bartlett queried the vires of procedural rules without venturing an opinion on the matter.[170] However, we can see no impediment under the sections of the Act referred to above. The sustainable management purpose of requiring the consent of ODP activities prior to development is described fully in the objectives and policies, although there may need to be some refinement of these subject to confirming the bundle of activities comprising the ODP consent. Such a rule would more closely follow the scheme of the Act than those currently in PC19(DV).

[192] That said, the rule for non-complying activities will need to be developed in conjunction with the rule for ODP activities. In accordance with s 76(3) when formulating any rule regard shall be paid to the actual or potential effect on the environment of the activities that are the subject matter of a rule. This section is particularly important in order that the subject matter of the rules satisfy the lawful requirements of a resource consent. However, these are not matters which we need decide now; the merits and vires of these amendments will be the subject of further submissions from the parties.

Overall Conclusion on ODP provisions

[193] Under the rules for prohibited and non-complying activities, the District Council would retain a high level of control over future land development. The rules, if not circumscribed, have the potential to incur developers' significant costs both in time and

[170] Bartlett at paragraph [9].

resources. Vires aside, this potential must be relevant to a s 32(3) evaluation as to their appropriateness for achieving the plan change objectives.

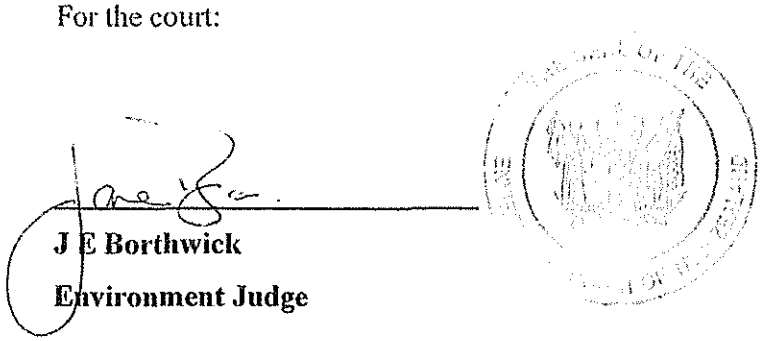
[194] The effect of these amorphous provisions is not well understood. While Ms Macdonald talked about the consent for ODP activities as a "detailed blueprint for future development",[171] the planners said it was a "guiding plan, rather than a fixed blueprint",[172] not binding on developers because it would fix criteria outside of the District Plan.[173] This difference of opinion alone gives us considerable cause for concern.

[195] We find that the rules for permitted, controlled, limited discretionary and discretionary activities (rule rule 12.19.3.1 and rules 12.20.3.2-4) are ultra vires the Act.

[196] Mr Bartlett was right to caution against making a finding on vires until the parties had settled the final wording of the rules, especially given the court's directions that counsel were to consider the policies, rules and methods at this hearing. We are heartened at Ms Macdonald's concluding remark that at most this is a technical issue and look forward to QLDC's response in due course.

[197] That said, we reserve our decision on the ODP objectives and policies pending a final determination of the rules. In doing so we take on board Mr Young's plea that there may be value in counsel reviewing the objectives and policies proposed by the planners. We agree and leave is granted for the parties to do the same and the provisions will be further considered at the same time as the lower order hearing.

For the court:



J E Borthwick
Environment Judge

[171] QLDC reply submissions at [18].
[172] At 21.
[173] At 22-23.

Objective 9 Activity Area E2 (Mixed-Use Business Corridor)

A. **A mixed–use business-orientated corridor for activities that benefit from exposure to passing traffic and which provides a transition between the adjoining residential and industrial areas, while maintaining the role of Activity Area C1/FFSZ(A) as a town centre.**

B. **A high quality urban form that complements the corridor functions of the Eastern Access Road, including its role as an important viewshaft.**

Policies:

9.1 To provide for a mix of offices, light industry, community, educational activities and mid-sized retail activities.

9.2 To exclude:

a. activities that are incompatible with a high quality mixed business environment due to the presence of harmful air discharges, excessive noise, use of hazardous substances or other noxious effects;

b. activities that would undermine Activity Area C1 as being the primary location for smaller scale retail.

c. large footprint structures that are incompatible with the intended urban form outcome for the Activity Area;

9.3 To ensure that a mixed use business environment establishes along the EAR where retail uses do not predominate by:

a. controlling the size of individual retail units;

b. requiring development that fronts the EAR to provide two or more levels of development with above ground floor areas that area suitable for activities other than retail, or otherwise provide for a mix of uses along the road frontage of the site

c. Enabling flexible occupation of floor space by:

(i) having a standardised car parking rate for non-retail activities;

(ii) floor to ceiling heights that enable a range of activities to occur within buildings.

9.4 To ensure that built form, site layout and landscape treatment of development establishes and maintains a high quality, attractive and visually cohesive interface along the EAR frontage

9.5 To ensure buildings and site development results in a high level of visual interest when viewed from the EAR through a combination of generous areas of glazing at ground floor, building modulation and detailing, positioning of main building entrances visible from the street, integration of signage with building design and appropriate landscape treatment.

9.6 To ensure roadside interfaces become attractive spaces, by requiring:

a. buildings be developed close to road boundaries so activities within the ground floor of buildings are clearly visible to passing pedestrians and motorists;

b. **Subject to directions:** *Buildings to provide an appropriate sense of scale to the streetscape through facade and roof design. Unless the requirements of an activity otherwise entail this will be achieved by multi-level buildings which visibly distinguish upper floors from ground floors through articulating facades and the use of glazing, materials and finishes. Any single level buildings should emphasise building heights at the street frontage through incorporation of vertical modulation into the design such that there is an impression of two levels. Series of low, single level buildings are to be avoided.*

Annexure A

c. *Buildings to occupy at least half the road frontage of sites with car parking and loading areas located at the side or rear of each site so that they do not visually dominate road frontages. Storage of goods and refuse is to occur to the rear and be appropriately screened from view.*

9.7 *To require any landscape treatment of frontages to complement and be integrated with building design and site layout. Landscape treatment should not be an alternative to high quality building design.*

9.8 *To achieve a high level of amenity on the northern edge of Activity Area E2 as viewed from State Highway 6 and Activity Area A.*

9.9 *To ensure that safe, convenient and attractive pedestrian footpaths and on-street parking are available within the road corridor, along both sides of the EAR as well as for pedestrian connections between activities within the Activity Area, and activities in Activity Areas C2 and E1.*

9.10 *To require adequate parking (staff and visitor), loading and turning of vehicles to occur within each site (or as part of a shared arrangement secured by an appropriate legal agreement), arranged so that all vehicles that exit onto the EAR can do so in a forwards direction.*

9.11 *To limit vehicle access to and from the EAR to either shared crossing points or accessways or alternative access locations, when subdivision or development occurs.*

9.12 *At the interface of Activity Areas C2 and E2:*

a. *require subdivision and development to provide a laneway between the Activity Areas to enable physical separation of development while providing shared access.*

b. *locate loading areas, ventilation ducts, outdoor storage areas and other activities generating outdoor noise and/or odour where effects from these are minimised in relation to residential activities in AA C2.*

c. *require building and roof designs to minimise visual effects including glare when viewed from within AA C2. Exhaust and intake ducts and other mechanical and electrical equipment should be integrated into the overall roofscape and building designs.*

9.13 **Not approved** *To require outline development plan(s) for development in the Activity Area to demonstrate, in addition to the matters set out in 3.2*

a. *how site layout (not uses), including vehicle access, building location and car parking, accessways and pedestrian and cycle connections are to be provided for in a manner that recognises multiple ownerships and achieves high quality urban form along, and the mixed-use business corridor function of, the EAR;*

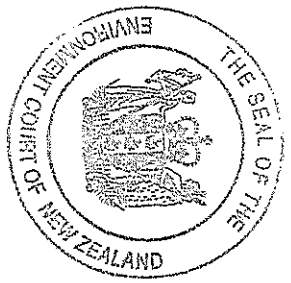
b. ~~*the location and size of retail activities.*~~ *Developments should enable a combination of different types of activities to occur within the sites covered by the ODP,* ~~*either arranged vertically (in multiple stories of buildings) or horizontally (adjacent to one another)*~~*: and*

c. *how car parking is to be managed so as to not to over provide car parking relative to the likely demand and to minimise the number of vehicle crossings onto the EAR:*

Explanation and Principal Reasons for Adoption

Activity Area E2 straddles the Eastern Access Road. The proximity of the highway and the Eastern Access Road provides a high level of visual exposure for this land, which in turn requires that there is a high quality

urban design and architectural response. This area is identified as a suitable location for a mix of high quality light industrial activities and mid-sized retail activities, which are not necessarily appropriate in a town centre environment, yet which benefit from visual exposure, as well as offices. Retail floor area restrictions, building and site design controls are in place to ensure that the area develops a mixed use character.



Objective 2 **Area A (Open Space)**

An open landscaped area adjacent to the State Highway that helps to maintain views of the surrounding Outstanding Natural Landscapes and provides for public access and physical separation of buildings from the State Highway.

Policies:

2.1 To mitigate the adverse landscape and visual amenity effects of development by providing an attractive, comprehensively designed open landscaped area between State Highway 6 and Activity Areas C1, C2 and E2 that is free of buildings.

2.2 To provide a public walkway and cycle path that is linked with the local network and that is compatible with the walkway/cycleway adjacent to the northern edge of the FFSZ(A).

2.3 To ensure that all of Activity Area A is comprehensively maintained and managed in a consistent manner and is not fenced or further developed in incompatible landscape styles.

2.4 To require that a resource consent be granted and implemented for development of Activity Area A prior to work proceeding in Activity Areas C1 and C2. The consent is to:

a. provide for the formation of a walkway and cycle path linked with the local network;

b. provide for consistent landscape treatment while not compromising the Area's open character, viewshafts to The Remarkables, and views to ONLs;

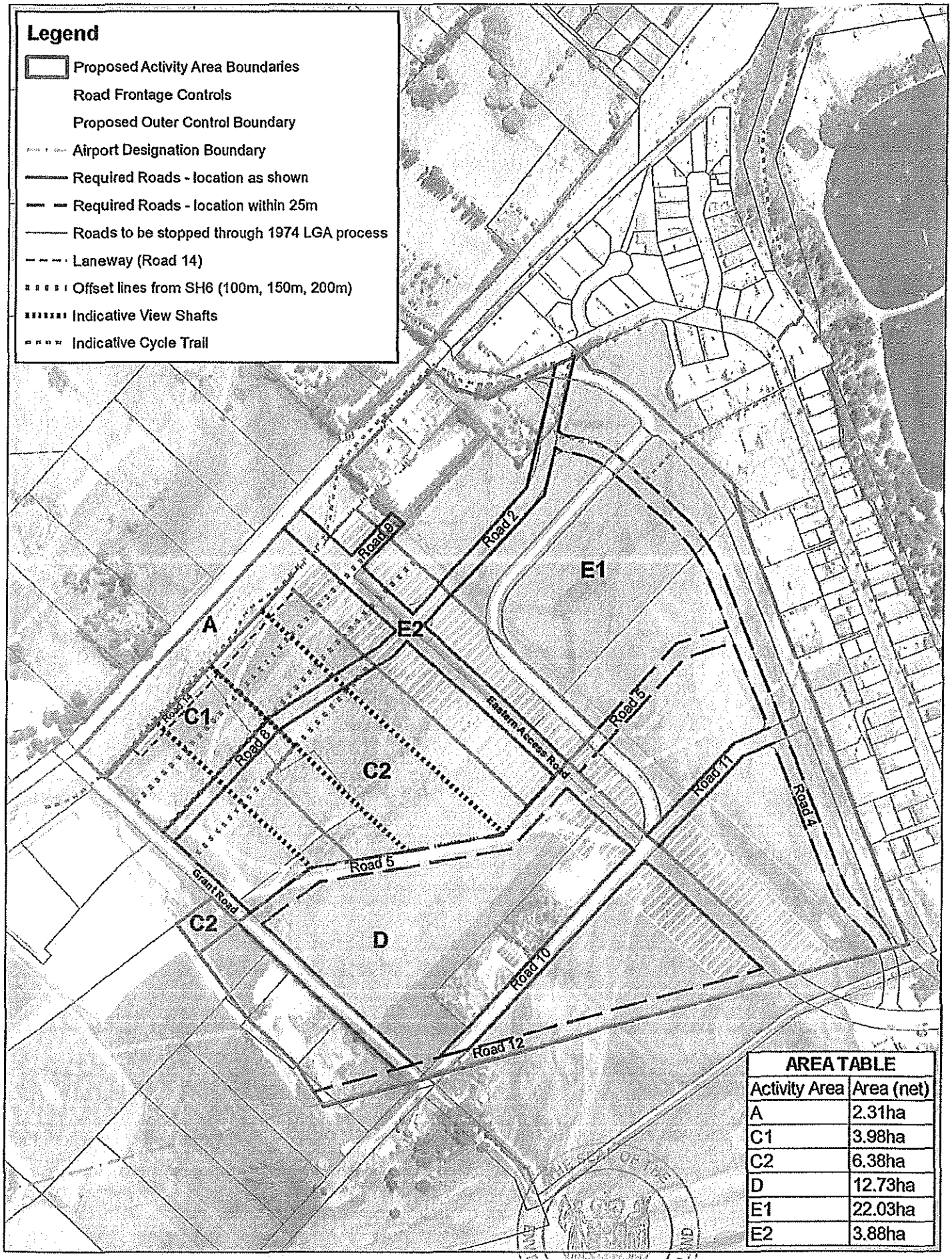
c. secure the Area's ongoing maintenance and management; and

d. secure permanent public use of the walkway and cycleway.

Explanation and Principal Reasons for Adoption

This Activity Area includes most of the land within 50m of State Highway 6 along the frontage of the zone. The area will remain free of buildings and will provide a landscaped open area between the State Highway and the built form in Activity Areas C1, C2 and E2. Public access through the activity area and its ongoing maintenance will be secured through the resource consent process.

Annexure B



AREA TABLE	
Activity Area	Area (net)
A	2.31ha
C1	3.98ha
C2	6.38ha
D	12.73ha
E1	22.03ha
E2	3.88ha

Frankton Flats B Zone Structure Plan

28 February 2014

0 50 100 Metres

N

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 056

IN THE MATTER of an application for declarations under Part 12 of the Resource Management Act 1991 ("RMA")

BY AUCKLAND COUNCIL

(ENV-2015-AKL-000138)

Applicant

Hearing at: Auckland on 12 February 2016; further materials and submissions lodged with the Court's leave up to and including 8 March 2016.

Full Court: Principal Environment Judge L J Newhook
Environment Judge B P Dwyer
Environment Judge J E Borthwick

Counsel: J Hodder QC and M G Wakefield for Applicant
T Daya-Winterbottom for Viaduct Harbour Holdings Ltd, in support
W S Loutit and K M Stubbing for Fletcher Construction Developments, Tamaki Redevelopment Co and Kauri Tamaki Ltd, in support
D R Clay and A F Theelen for Ngati Whatua Orakei Whai Rawa Ltd, in opposition
R B Enright for Wiri Oil Services Ltd, in opposition
K R M Littlejohn and K and D Schweder, in opposition
Dr R J Somerville QC as *Amicus Curiae*

Date of Decision: 24 March 2016

Date of Issue: 24 March 2016

INTERIM DECISION OF FULL COURT OF THE ENVIRONMENT COURT ON APPLICATION BY AUCKLAND COUNCIL FOR DECLARATIONS REGARDING THE LAWFULNESS OF FRAMEWORK PLAN PROVISIONS IN THE PROPOSED AUCKLAND UNITARY PLAN

REASONS FOR DECISION

Introduction and key issue

[1] Auckland Council has applied to the Court for four declarations under Part 12 of the RMA concerning the lawfulness of inclusion of Framework Plan ("FP") provisions in its proposed Auckland Unitary Plan ("PAUP"). These provide that consent is required to be sought for the FP itself, and the activity status of land use activities will differ depending on whether that has first been done. That question is (in summary) the key issue.

[2] The issue is of quite widespread interest nationally because numbers of councils have been including similar provisions in plans (called, somewhat inconsistently, by several different names like "structure plans", "concept development consents" "comprehensive development plans", "outline development plans" and "management plans"), and in recent times there have been Court challenges to them. Given the national importance of the issue, the Principal Judge assigned a Full Court of three Environment Judges to hear the case.

[3] The PAUP has been promulgated by Auckland Council under the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") which expressly provides for the development of the first combined plan by Auckland Council.

[4] Submissions on the PAUP are currently being heard by a specialist Independent Hearings Panel. During the course of their hearings, questions have been raised about the lawfulness of the Framework Plan provisions, and expressly as to whether they might be *ultra vires* the RMA.

The declarations sought

[5] These were:

A: On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LGATPA) and Part 5 RMA (commencement), the Council's proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for Framework Plans (FPs) – for specified geographical areas (precincts) – as set

out in Annexures 'H' and 'I' to the affidavit of Rachel Claire Dimery filed in this proceeding, and also attached to the Council's application dated 14 October 2015, to be assessed as an activity and sought by means of a resource consent application for a land use under Part 6 of the RMA *(FP Application)*.

B: On commencement, the PAUP may lawfully provide that an activity in a precinct may be classed (in terms of section 77A and 87A of the RMA) as a non-complying activity or as a discretionary activity until an approved FP exists for that precinct and thereafter classed otherwise.

C: On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved FP for that precinct is, in terms of section 104 of the RMA, a matter to which regard must be had by the consent authority.

D: On commencement, the PAUP may lawfully include provisions designed to include FP applications for precincts, which provisions are more advantageous for resource consent applications if an approved FP exists for that precinct than would otherwise be applicable.

Background

[6] There is no question (and none was raised) that the Court has the appropriate statutory jurisdiction to consider and determine the application for declarations under s311 RMA.

[7] The key question is regarded as highly important by the council, other parties, and the Independent Hearings Panel. Hence the allocation of a Full Court bench, and allocation of a priority fixture without the need for formal application for same.

[8] The key issue was regarded as sufficiently important by the Independent Hearings Panel that it sought legal advice from Dr R J Somerville QC. With the consent of the parties, we subsequently appointed Dr Somerville as *Amicus Curiae*. At the commencement of case management, party status was accorded those who had lodged submissions on the topic in the PAUP, without formal process being required. The proceedings were served by the council as directed by the Court, and the parties whose appearances are recorded above variously lodged notices of support for, or of opposition to, the application.

[9] The application was supported by affidavits by Mr J M Duguid, the council's General Manager – Plans and Places, and a consultant planner Ms R C Dimery, previously a Principal Planner in the Unitary Plan Team at the council.

The cases of the parties as first presented

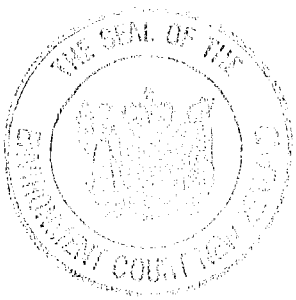
[10] Somewhat regrettably, but perhaps understandably given the views of certain parties as to the usefulness of this type of planning, we were treated to a great deal of evidence about alleged merits on the one hand, and problems on the other. For example, a good deal of the evidence on behalf of the council, notably in the affidavit and exhibits of Ms Dimery, focused heavily on alleged benefits of using the Framework Plan technique, while affidavit material filed on behalf of parties in opposition, focused on alleged problems.

[11] We were at pains during the course of the hearing to emphasise that the nature of our enquiry is strictly one of legal interpretation, and that matters concerning the merits of the technique are the province of the Independent Hearings Panel, not this Court. We took the trouble to consider all materials, but found it important to focus on a relatively small part of what was placed before us, in particular legal submissions and some of the cited authorities.

What are Framework Plans in the PAUP context?

[12] We start with two provisions of the PAUP that are at the core of the debate, the definitions of *"Framework Plan"* and *"approved Framework Plan"*. They are as follows:

> Framework Plan[1]
>
> A voluntary resource consent that establishes the location and form of land use, sub-division and/or development for a land area specified in the Unitary Plan rules. If approved, the Framework Plan authorises land uses such as the transport network, open spaces and infrastructure or as otherwise prescribed in the Unitary Plan rules.



[1] Adding to the complexity of matters in this case, Mr Hodder announced late in the hearing that the Council had deleted this definition from the latest version of the provisions under consideration by the Independent Hearings Panel, ostensibly get rid of confusion because it "replicated some erroneous material in the Plan". See Transcript 143-144.

Approved Framework Plan

A Framework Plan that has been granted consent by the Council and the consent has commenced under s116 of the RMA. In addition, where Comprehensive Development Plans have been approved under previous district plans prior to the Unitary Plan rules requiring a Framework Plan taking legal effect, those Comprehensive Development Plans are deemed to be an approved Framework Plan for the purposes of this definition.

[13] Rule 1.2, *'Activities'* provides in relevant part as follows:

The type, form and scale of different activities are managed by rules in the Unitary Plan. All rules within the Unitary Plan have the force and effect of a statutory regulation. One of the Council's functions is to implement rules, and matters to which rules may pertain are outlined in s30 and s31 of the RMA. They include the following:

- to manage the effects of land use and development;
- to encourage the efficient use and development of natural and physical resources;
- to maintain and enhance the quality of the environment;
- to ensure appropriate development on land subject to natural hazards;
- to prevent and mitigate adverse effects associated with hazardous substances;
- to control the sub-division of land;
- to control the emission of noise and to mitigate the effects of noise;
- to maintain and enhance amenity values.

There follows a description of the classification of activities by status as prescribed by the RMA.

[14] Rule 2.6 in Part 3 – Chapter G: "General Provisions" offers lengthy provisions which were summarised by Mr Hodder concerning the essential features of a Framework Plan as follows:

(a) A voluntary resource consent;
(b) Applies within specific precincts;
(c) Land within Brownfield and Greenfield development areas that are proposed to be urbanised or intensified;
(d) Enables landowners to demonstrate and achieve integrated development and or sub-division of such areas;
(e) Authorises the location and physical extent of roads/open spaces, transport network, infrastructure and a range of land uses and subdivision activities;

(f) Generally applied for as a restricted discretionary activity, without public notification; and

(g) Operates as an assessment criterion for the subsequent development/sub-division consent applications (although these may be accompanied by an application to amend or replace the FP).

[Emphasis supplied by us]

[15] Also provided is that if a person makes an application for development or subdivision consents without having made a prior Framework Plan application, or without lodging a contemporaneous one, a more onerous activity status will apply, asserting that this will "allow the full consideration of potential effects and modification subject to the usual RMA tests".

[16] A particular feature of Rule 2.6, and the subject of complaint by Messrs K and D Schweder, is that:

> An application for a Framework Plan must apply only to land of which the applicant is the owner, or the owner's nominee, unless otherwise specified in the precinct. The Council encourages the preparation of joint Framework Plans. Where this opportunity is not taken up by landowners, the Unitary Plan requires the Framework Plan for individual sites or multiple sites held in single ownership to demonstrate how the development or subdivision integrates with neighbouring sites and achieves the objectives of the precinct.

[17] As against that, the council was keen to point out through the submissions of Mr Hodder, that it considered Rule 2.7.3 highly relevant. That rule requires compliance with other information requirements as well as plans and information on overall context, in relation to existing buildings, open spaces, context for site contour changes, location of streets, cycle and pedestrian routes, public open spaces, infrastructure, landscaping concepts, historic heritage or natural features, and staging of developments (in relation to infrastructure and services in the wider area).

[18] We understand that these objectives might be considered laudable by some, but we reiterate that the merits are not for consideration by us in these proceedings.

[19] Mr Hodder pointed to some provisions proposed in the PAUP for a precinct known as the Hobsonville Corridor, from which he noted the following:

(a) the status of an application for a Framework Plan complying with clause 3.2 will be restricted discretionary (RD) – and without such compliance will be non-complying (NC);

(b) the status of a development in conjunction with a Framework Plan will be RD – but if not in such conjunction it will be NC;

(c) an application for a Framework Plan (or for amendment or replacement thereof) will be considered by the council without notification, although limited notification may be undertaken;

(d) a Framework Plan must apply to the whole of a sub-precinct, and apply only to land where the applicant is the owner (or if there is joint application by all landowners);

(e) a Framework Plan must seek consent for specified (and limited) land uses – earthworks, public open spaces, roads and pedestrian linkages, stormwater management devices, and vehicle access ways and slip lanes;

(f) applications for resource consents for buildings, development or subdivisions (RD) within an area subject to an approved Framework Plan will be subject to the council discretion (restricted – principally to consistency with the Framework Plan);

(g) consistency with an approved Framework Plan will be relevant to consideration of a RD activity consent application in relation to design, location and scale.

[20] Drawing on these provisions as an example, Mr Hodder stressed that the method was valuable in seeking to achieve the integrated management of physical and natural resources, a key plank of the RMA in his submission. The context in which he said this was occurring was that the FP has a dual role as a planning tool (not amounting to a consent "to do something") and also a conduit to a consent for a bundle of land uses and activities.[2]

[21] Mr Hodder submitted that the provisions fitted comfortably with the statutory architecture of the RMA, particularly Parts 5 and 6. He submitted that there was nothing in the Act to proscribe the flexibility and purpose of Framework Plan provisions.

[2] See Transcript 10-11.

[22] Given that the first of the four declarations sought is over-arching in nature, Mr Hodder advanced his submissions as to declarations B, C, and D, before turning to A.

Declaration B: FP impact on activity class

[23] Declaration B as sought, was, to reiterate:

> On commencement, the PAUP may lawfully provide that an activity in a precinct maybe classed (in terms of section 77A and 87A of the RMA) as a non-complying activity or as a discretionary activity until an approved FP exists for that precinct and thereafter classified otherwise.

[24] Mr Hodder submitted that the essential legal question here was whether the categorisation of an activity in terms of those two sections of the RMA must be fixed in a plan or may be changed (made less onerous) by the existence of an approved FP.

[25] By sections 67(1) and 75(1) RMA, a plan must state the objectives for the relevant area, the policies to implement the objectives, and rules (if any) to implement the policies. In contrast, Mr Hodder submitted, s77A(1) provides that a local authority may (not 'must') categorise activities and make rules in a plan for each class of activity. He submitted that therefore the classification of activities is discretionary rather than closely prescribed. As a result, he submitted, the focus of a plan should relate to its purpose or objective of 'integrated management'. He reiterated that a FP would provide a major platform for integrated management [once again a matter we find going to the merits, not legal interpretation]; and that therefore the "state of affairs is not objectionable or unlawful, but is sensible, desirable and consistent with the RMA".

[26] Mr Hodder noted that the relevant categorisation for an activity will be that set by s88A, that is at the time of making an application for consent. He submitted that having regard to all of these provisions, together with ss104B and 104C, the provisions of Part 6 are:

> designed to ensure that activities are, at some point (initial categorisation and related consent process) considered by reference to the overall purposes of the RMA, not least the integrated management of the natural and physical resources of an area.

[27] He submitted that the categorisation of activities is a means to that end, but that the legislation authorises flexibility about categorisation of an activity, so was not explicitly or necessarily implicitly, constrained.

[28] Mr Hodder submitted that from a 'rule of law prospective', there was nothing problematic in a landowner contemplating a resource consent application for an activity classed in one way at a point where no FP was approved, with a reconsideration of status if an approval were to occur.

Declaration C: Relevance of FP to resource consents

[29] Declaration C as sought, was, to reiterate:

> On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved FP for that precinct is, in terms of section 104 of the RMA, a matter to which regard must be had by the consent authority.

[30] Mr Hodder submitted that the essential legal issue was whether any aspect of the RMA prevented consistency with an approved FP being a valid consideration for a consent authority in assessing and determining a resource consent application for an activity in the relevant precinct. Noting again the "integrated management functions" of councils under ss30 and 31 RMA, he submitted that s104 provided ample authority for an approved FP to be a relevant consideration in the assessment of a resource consent application, and illustrated the importance of the relevant PAUP provisions in such an assessment. In this, he identified the provisions of subsections (b)(vi), and (c), of s104(1) RMA.[3]

[31] Mr Hodder noted the evidence of Ms Dimery in her evidence in chief4 that the PAUP FP provisions were revised significantly in light of the decision of the Environment Court in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council.*[5] He submitted that the essential feature of those revisions was to remove any indication that an approved FP would be a precondition to any ground of

[3] Matters to be had regard to on considering an application for a resource consent and submissions received, include, by (b)(vi), a plan or proposed plan; and by (c) any other matter that consent authority considers relevant and reasonably necessary to determine the application.
[4] Paragraphs [39]-[44] and [56].
[5] [2014] NZEnvC 93.

resource consent in the precinct, while providing for consistency with a FP as a discretionary consideration.

[32] Mr Hodder noted (by way of obiter) that the Court had offered helpful suggestions about potential amendments to the Outline Development Plans under consideration in that case. He then however made the submission that "beyond that historical but important role, the Queenstown Airport judgment is not of direct relevance to declaration C – nor to the other declarations sought".

Declaration D: Encouragement of FPs

[33] To reiterate, declaration D, as sought, was:

> On commencement, the PAUP may lawfully include provisions designed to encourage FP applications for precincts, which provisions are more advantageous for resource consent applicants if an approved FP exists for that precinct then would otherwise be applicable.

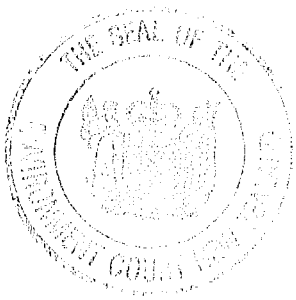
[34] This declaration undeniably addresses the merits; likewise Mr Hodder's submissions on it.

[35] Mr Hodder submitted that there was nothing in the RMA prohibiting the inclusion in the PAUP of such provisions. We reiterate that we cannot delve into the merits, and we will not make findings about whether FP provisions are "more advantageous for resource consent applicants.

Declaration A: The general validity of FPs

[36] To reiterate, declaration A sought by the council is that:

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's proposed Auckland Unitary Plan may lawfully include the provisions proposed for Framework Plans – for specified geographical areas (precinct) – as set out in Annexures "H" and "I" to the affidavit of Ms Dimery filed in this proceeding and also attached to the Council's application dated 14 October 2015, to be assessed as an activity and sought by means by means of a resource consent application for a land use under Part 6 of the RMA (FP Application).



[37] Mr Hodder's simple submission was that given that he considered the declarations B, C and D could appropriately be made, the FP provisions are valid and are an

important methodology for delivering the council's integrated management obligations and thus the RMA s5 purpose.

[38] Leaving aside the merits argument which emerges once again, Auckland Council seemed to accept that declaration A stands or falls with declarations B, C and D.

The cases in support of the Auckland Council application

Ngati Whatua Orakei Whairawa Ltd ("Whairawa")

[39] Counsel for Whairawa indicated a neutral stance in relation to declaration B (having previously opposed an aspect of it), and support for declarations A, C and D.

[40] Whairawa is the commercial entity of Ngati Whatua Orakei and is responsible for managing their commercial assets and advancing the commercial aspirations of that Iwi. This includes Quay Park in central Auckland, a 20 hectare piece of commercial land owned by Ngati Whatua Orakei. The land is subject to plan provisions called the Quay Park Precinct ("QPP"), including a sub-precinct to which a FP applies.

[41] In addition to offering commentary on the desirability of such provisions from the point of view of integrated management and serving the purpose of the Act in s5, Counsel largely supported the legal submissions on behalf of Auckland Council. He submitted that the decision of the Environment Court in the *Queenstown Airport* case was not directly applicable because the council proposes to amend the relevant PAUP provisions. He did not elaborate on that point.

[42] Counsel took us through relevant provisions relating to the QPP, which for present purposes bore some similarity to the Hobsonville provisions described above. Notably, activity status alters significantly between situations in which there is not a previously or contemporaneously approved FP (non-complying), and when there is (restricted discretionary once again); and application may be made for consent to a Framework Plan as though it were a land use activity, in addition to one or more of some listed activities including buildings, subdivision, transport network, infrastructure, public open space network, earthworks, and contamination removal.

[43] The objectives and policies set up a policy framework for those controls.

[44] It was submitted that FPs address relevant and valid planning in environmental matters, directly relevant to the purpose of the Act and scope, and the council's powers and functions to include provisions in plans to address integrated management, environmental effects, and achieve sustainable management. Reliance was again placed on s104(1)(b)(vi), and s104(1)(c). It was submitted that matters for assessment when considering and determining FPs are comprehensive and wide in scope, similar to information requirements for consent applications. It was also submitted that such matters are directly relevant to the additional development potential within the precinct (a matter, we consider, going to the merits).

[45] Interestingly, Counsel submitted that FPs are justified as a "use" or "activity" for which resource consent is required under section 9, either as a specific example of the definition of "use" in the RMA (e.g. roads or earthworks) or under the generic reference to "any other use of land".

[46] We tested Counsel on this submission, because we observed that we thought that the definition of "use" in s2 of the Act did not allow of that sort of extended connotation.[6] Having regard to what we record in footnote 6 below, we are confirmed in our view that the suggested extended connotation advanced by counsel is wrong.

Tram Lease LTD, Viaduct Harbour Holdings Ltd and Viaduct Harbour Management Ltd ("VHHL")

[47] Counsel for VHHL, Mr Daya-Winterbottom formally adopted the written submissions on behalf of Auckland Council. He described the general nature of FP provisions in the PAUP against the backdrop of the same provisions of the RMA as discussed by Mr Hodder, and described a Framework Plan in place over land owned by

[6] We had in mind the well known canon of construction *"ejusdem generis"* providing that when general words follow the enumeration of persons or things of a specific meaning, the general words will be construed as applying only to persons or things of the same general class as those enumerated; see for instance Garner's Dictionary of legal usage, 3rd edition 2011. Note also in relation to District Plans that s9(3) RMA provides that no person may use land in a manner that contravenes a district rule unless the use is expressly allowed by a resource consent or is allowed by s10 or is an activity allowed by s10A [emphasis supplied]; and referring to the decision of the Environment Court *Re Anzani Investments Ltd* decision number A076/00, which held that "use" essentially encompasses dynamic activities on land and does not relate to consents (if a proposed activity would alter the status of adjoining land, such as by vesting recreation reserve as road reserve, the future circumstances applicable to the site should be examined). Subsequent to the hearing we have recalled that the Court of Appeal held in 1998 that *"'Activity' is not a defined term but in general appears to have the same meaning as "use", as can be seen from ss 9 and 10":* see *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513 AT 515; (1998) 4 ELRNZ 461.

his clients in central Auckland's Wynyard precinct. The provisions concerning that precinct clearly operate, once again, in a similar way to others drawn to our attention, and it is clear that VHHL supports that approach (a matter going to the merits and beyond our jurisdiction in this case). The provisions here derive in large measure from legacy Auckland City Council district plan provisions.

[48] Concerning relevance of FPs to resource consents, counsel submitted that the cascade approach effectively addressed the concerns raised by the Court in the *Queenstown Airport* decision. He submitted that there was no constraint on permitted activities or on resource consents being obtained for non-complying activities, and that the assessment criteria provided in the relevant rule are "likely to be relevant when deciding whether the proposed activity passes the gateway tests in s104D(1) of the RMA".

[49] Counsel noted that there are incentives relating to increased building height and floor area in the majority of sub-precincts. He nevertheless submitted that FPs are a valuable method for integrating management whether or not incentives are present (once again a merits matter).

[50] Counsel submitted that the provisions were fully tested under a plan change process called Plan Modification 4 in the Operative Plan, but acknowledged to the Court that they were not tested in any Court hearing, because the precinct provisions were ultimately the subject of a Consent Order under seal of the Court (one party having indicated that the validity of the provisions would be tested, which did not occur because that party withdrew from the appeal process). Counsel also submitted that the provisions had been subjected to close scrutiny under s32 RMA during the Plan Modification 4 process, but we find that factor also straying into the merits which are not before us. There followed discussion of the "relative ease" with which the proposed provisions operate in the precinct, again a matter going to the merits with which we cannot concern ourselves.

Fletcher Construction Developments, Tamaki Redevelopment Co, and Kauri Tamaki Ltd

[51] Mr Loutit appeared on behalf of these three parties, adopting the written submissions for Auckland Council, describing the property development operations of his clients, and stressing the importance of the Framework Plan approach for them.

Amongst other things relating to the merits, he submitted that the FP approach promotes best practice in master planning, and that the technique was critical for this to occur: the only alternative under the RMA being for a landowner seeking to achieve integrated development, to apply for a private plan change. His clients favoured the certainty provided by a FP process, and the "development uplift" importantly achieved. He identified that a shorter time frame would be experienced for obtaining resource consents compared to the private plan change process.

[52] Mr Loutit addressed the issue of determining activity status from the plan, noting that the *Queenstown Airport* decision expressed concern about a proposed permitted activity rule where the classification of the activity proceeded from the exercise of the consent authority's discretion whether to grant a limited discretionary activity consent for an Outline Development Plan. Counsel before us stressed that the PAUP FP provisions had been drafted to refer to the "existence of an approved Framework Plan", and not compliance with a plan as in the *Queenstown* case. He submitted that the key issue was whether the rule was certain, and that "the existence of a FP will be a matter which is certain". He submitted that it was not unusual to have to refer to other documents or to check aspects of a proposal or development when determining activity status.

Cases in opposition to the application

Wiri Oil Services Ltd ("WOSL")

[53] On behalf of WOSL Mr Enright offered a mix of submissions addressing the law and the merits. We must differentiate between the two.

[54] Mr Enright submitted that while FPs might be a useful tool in achieving integrated management, they are not a necessary feature of integrated management; and that there is no reference to them in the RMA, whether in s30, s31, or elsewhere. The recognised methods include plan rules and assessment criteria, plan change processes, many forms of staged resource consent, deferred zoning and LGA development contributions. He submitted that plan change processes allow for greater public input into integrated development.

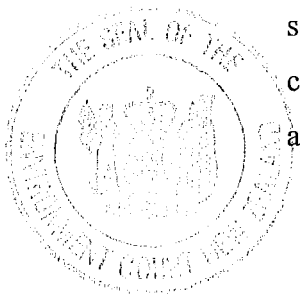
[55] Mr Enright explained WOSL's interest in the proceedings deriving from its concern about reverse sensitivity impacts on regionally significant infrastructure that it owns and operates, storing and supplying petroleum and aviation fuel, receiving supply via pipeline from the Marsden Oil Refinery, and supplying Auckland Airport by pipeline, amongst other modes of transportation. The company opposed the use of resource consents to achieve an outcome that could (and Mr Enright submitted should) otherwise be achieved by a plan change along with more onerous notification and public input requirements. He submitted that the status of an activity should not depend on the existence of a privately held consent.

[56] Mr Enright focused on the terminology of declarations B and D requiring that an approved Framework Plan "exists" for a precinct, with activity status being delegated to a council consent process. He submitted that the putative reason that a consent must "exist" was to avoid the validity issue identified in the *Queenstown Airport* decision. He considered that compliance at any time might be difficult to assess and require evaluative judgement, and that the status of an activity would require prior exercise of consent authority discretion (that is whether or not to grant a FP consent).

[57] He submitted that if a consent holder failed at any point to "comply" with the resource consent, then activity status might revert back to discretionary or non-complying, and there would be no certainty at any point in time as to activity status. He submitted that the alternative was that activity status should be fixed by [definitive] rules in a plan.

[58] Mr Enright submitted that there had been an attempt to side-step the validity issue identified in *Queenstown Airport*, resulting in the council creating a fresh species of error. The "existence" of a consent would still require the exercise of a discretionary power, and create a loophole in consequence. He submitted that it should be treated as invalid for the same reasons as recorded in *Queenstown Airport*.

[59] Mr Enright submitted that if the "existence" of an approved Framework Plan is the sole requirement, there would be nothing to stop a consent holder from obtaining a FP consent but not exercising it. In reliance on such "existence", a developer could then apply for and obtain subsequent consents, but not be bound by the FP consent (which



would exist but might not be exercised). The consent holder would then receive the benefit of reduced activity status, but not the burden of compliance.

[60] That the last submission tended in part to address the merits as well as the *vires* question, was we thought, confirmed by the following observation from Mr Enright that the presence of this loophole suggests that council's argument that FPs achieve integrated management, is overstated. We consider that both the council position, and Mr Enright's observation, address the merits as much as the validity issue.

[61] Mr Enright returned to relevant matters in supporting the submission of *Amicus* that a Framework Plan should more properly be included as a condition of consent or an information requirement in the plan provisions, but not as a rule defining activity status. He also supported the submission that a FP consent is not an "activity", rather it is a "plan about an activity", as submitted by *Amicus*.

[62] Mr Enright also advanced concerns about PAUP provisions creating grandfather status for Comprehensive Development Plans contained in predecessor District Plans, by deeming them to be approved Framework Plans. He submitted that there was an invalidity under the RMA on account of the creation of a factual fiction, while at the same time excluding assessment of relevant environmental effects, citing *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council.*[7] The factual fiction identified in this case by Mr Enright was that it is deemed that the CDP had been created ("granted") having regard to all the PAUP Framework Plan criteria including provision of infrastructure, open space and roading; this could not be correct because it could be demonstrated that each had been granted under different operative plan criteria. He submitted that CDP consents should instead simply rely on existing use rights under s10 RMA.

K and D Schweder

[63] Mr K Schweder filed an affidavit explaining the opposition of himself and D Schweder. He alleged that they are affected by notification in the PAUP of something called the Pukekohe Hill Precinct. Their land is in a FP area along with land that they do not control. His concern was with provisions that restrict applications for resource

[7] [2014] NZHC 3191, at [189], [193] and [195].

consent for a Framework Plan (or amendments thereto) to situations in which the application must apply to a whole precinct or a whole sub-precinct, and possibly apply only to land that the applicant owns, or to sites in multiple ownership where all land owners make a joint application. He was concerned that development of his land could not proceed without agreement of other landowners within his sub-precinct.

[64] Furthermore, he expressed concern that one of his properties, over 8ha of land, had been "arbitrarily cut in half for no good reason, thereby allocating it to two different Framework Plan areas and consequently requiring the owner to deal with even more neighbours".

[65] The matters the subject of Mr Schweder's affidavit are essentially matters going to the merits which we cannot address in these proceedings. However the Schweders engaged counsel, Mr Littlejohn, who offered submissions primarily addressing the legal validity issue in a focused and helpful way.

[66] Mr Littlejohn reiterated the reasons for his clients' anxieties, and although they primarily addressed the merits of the situation, we have recorded them above for completeness.

[67] Mr Littlejohn submitted that an approved FP consent does not authorise any activity to occur on the land. He said the approval of new titles and any development work to create them requires further subdivision and possibly other resource consents. His explanation for this submission was that the vesting of roads, or the definition and creation of easements for piped (and unpiped) infrastructure, could occur within a resource consent (i.e. by a survey and deposition of a land transfer plan etc...), merely by the offer of the landowner and the acceptance of the benefactor of the grants. He submitted that therefore the rule merely prescribes a process, the outcome of which is a plan to then be paid heed to in the course of the actual use and development of a land, which may still require other resource consents to be obtained.

[68] Mr Littlejohn illustrated his clients' concern with a hypothetical scenario. He postulated:

(a) sites 1 and 2 are within a FP area. Site 1 is owned by Party A, and Site 2 by Party B.

(b) Party A wishes to develop, but is unable to persuade Party B to lodge a joint Framework Plan Consent Application (FPCA) for sites 1 and 2.

(c) Party A proceeds to lodge a FPCA for the whole FP area as required by the rules (i.e. for both sites 1 and 2). As applicant, she promotes a design that favours her development aspirations (in terms of lot yield) and locates public infrastructure on Party B's land.

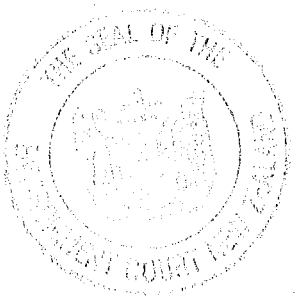
(d) Party B is notified of the application on a limited basis because of being potentially adversely affected by the application (s95B of the Act), and makes a submission in opposition.

(e) at the hearing, or any subsequent appeal the decision-maker determines the application and approves a FPCA for the FP area, consistent with that sought by Party A.

(f) Party A completes development in accordance with her FP consent. Party B remains opposed to the approved FP. To advance development of site 2 inconsistent with the FP consent he must either proceed on a non-complying basis, or seek to amend the FP consent. However unless he can solve the reliance of site 1 on his land for public infrastructure, he will struggle to amend the FP.

[69] Mr Littlejohn submitted that in the absence of landowner agreement, there was no District Plan method that can fairly adjudicate competing aspirations of landowners so as to achieve the purpose of the Act. She who controls the FPCA, controls the FP Area, and also what her neighbours can and cannot do. Conversely, her rights under the FP consent could be frustrated by what her neighbours choose to do, or not do.

[70] He submitted that Part 6 RMA procedures were simply not designed to resolve the appropriate planning outcome for areas in multiple ownership: that is what Part 5 processes are for.



[71] Mr Littlejohn noted some uncertainty in the council's position as to whether the rules provide (or might be changed to provide) that the owner of some of the land within

a FP Area can make a complying FPCA for only their land, or not. If the former, his clients' anxiety would recede to some degree.

[72] Turning to strict issues of legality, Mr Littlejohn noted that the council had submitted that propositions B, C and D can be answered in the affirmative, and that consequently the over-arching proposition A can similarly be answered in the affirmative. He decried the lack of legal analysis put forward to support proposition A, and we noted for ourselves that Mr Hodder's written submissions on proposition A were remarkably brief.

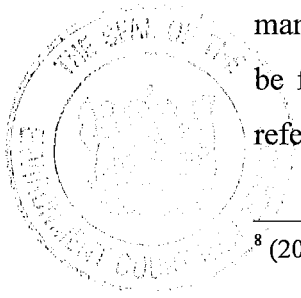
[73] Mr Littlejohn submitted that the logic was flawed, relying on the premise that the provisions are prima facie lawful to answer the 2 subsidiary propositions (B and C) and then using the outcome of that analysis to assert the validity of the initial premise. He submitted that the reasoning was unhelpfully circular.

[74] As have we, Mr Littlejohn noted the emphasis in the council submissions on the allegedly laudable provisions about integrated management, utility, and other perceived benefits. He submitted that those intentions of themselves were not relevant in the determination of their lawfulness. He cited an observation of the High Court in *Western Bay of Plenty District Council v Muir*:[8]

> Whilst of course the purpose of the Act is sustainable management of natural and physical resources and as a consequence rules must be necessary to achieve the purpose of the Act, simply because such a rule might be directed towards that purpose does not of itself make the rule lawful if the rule itself is *ultra vires*.

[75] The subdivision-related subject matter in the *Muir* case was different, but we consider that the quoted proposition is clear. It may be of relevance in the present case.

[76] Mr Littlejohn submitted that while the purpose of the Act is set out in Part 2, it is the duties and restrictions in Part 3 that form the scope (and scale) of the Act's management objective in its subsequent Parts 5 and 6; the Act sets out the procedures to be followed to create the regional and district rules and obtain the resource consents referred to in the Part 3 restrictions on activities affecting natural and physical resources.



[8] (2000) 6 ELRNZ 170 at [27].

Those processes are different. Rules to implement policies and objectives are included in plans that are rigorously developed by local authorities in accordance with the provisions of Part 5. They are then publically contested in accordance with First Schedule processes.

[77] Resource consents are sought for specific activities in relation to natural and physical resources. Section 87 RMA defines "resource consent" expressly by reference to the Part 3 restrictions on activities in ss9,11,12,13,14,15,15A, and 15B of the Act. Part 6 prescribes the process for their preparation, lodgement, processing and determination.

[78] Mr Littlejohn submitted that Part 5 plan-making procedures directly influence the Part 6 processes to be followed on a case by case basis by resource consent applicants. The outcome of the former (objectives, policies, rules) can dictate the extent of the procedural and substantive scrutiny brought to bear on the latter.

[79] He submitted that essential to the nature of a resource consent is that it enables activities to occur in relation to resources (that is to do things), specifically:

- use land – s9 (noting the definition in s2 that we have previously commented on);
- subdivide land – s11;
- use the coastal marine area – s12;
- use the beds and lakes of rivers – s13;
- take, use, dam or divert water – s14; and
- discharge contaminants into the environment – ss15, 15A, and 15B.

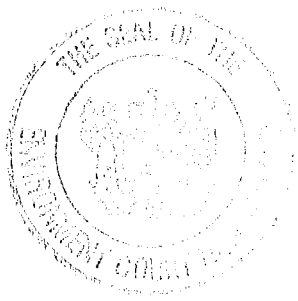
[80] Mr Littlejohn submitted that the Act does not contemplate resource consents being sought for permission to do things that do not involve an activity identified in s87 and Part 3. Such an application would not, by definition, be for a resource consent. He submitted that to do otherwise would be to purport to use the Part 5 plan-making process for purposes not contemplated by the scheme of the Act, namely to use the resource consent processes for plan-making purposes. He submitted that the provisions under scrutiny offended that simple principle.

[81] In answer to an opinion of Ms Dimery and submissions on behalf of the council, that FP consents would authorise uses of land including new roads and infrastructure and open space, Mr Littlejohn submitted that the requirements in the plan for the provision of supporting information for a FPCA, listed nothing relating to activities in the strict sense. Rather, they are concerned with context, topography of the land, the "location" of public infrastructure, and landscape concept and staging. He submitted that it was some sort of "information" that was required to be "approved".

[82] Put somewhat starkly, Mr Littlejohn submitted that in the guise of a District Rule, the council has essentially delegated its planning functions to landowners. He submitted that declaration A [the over-arching item] must be refused.

[83] We indicated to the parties towards the conclusion of the hearing that we thought that there was some force in these submissions.

[84] Mr Littlejohn proceeded to submit that if the over-arching provisions were invalid, then it was strictly unnecessary to consider propositions B and D. On the classification issue, he adopted the submissions of *Amicus* (which we shall come to), and agreed with his essential submission that the different activity classification proposal included in the FP provisions offended the principle in the decision of the Environment Court in *Queenstown Airport* that the status of an activity must derive from provisions of the Act and its subsidiary planning instruments, and not from a resource consent. The council having shifted its focus to the existence of a FP rather than the terms of the consent, Mr Littlejohn submitted nevertheless that they would still offend the principle in *Muir*, that the activity classification must not be expressed as contingent on another process beyond the plan being successfully finalised. He submitted that rules using classification of an activity status to incentivise applicants to follow certain procedures must, as a general proposition, be of questionable legality for the same reasons already advanced. That is, that they would not be a valid rule as they would not relate to any activity for which a resource consent can be sought.



[85] As to the council's submissions about consistency of a proposed activity with an existing FP consent being a matter to which regard is to be had by a consent authority

under s104 RMA when considering an application, Mr Littlejohn submitted that such did not expressly appear in s104.

[86] He noted that s104(1)(c) allows a consent authority to have regard to any matter it considers relevant and reasonably necessary to determine a resource consent application, and that this discretion is broad. He submitted however that a declaration about mandatory consideration of such matters in the FP context would not be appropriate, going beyond a simple discretion.

[87] Under s104(1)(a), Mr Littlejohn acknowledged that existing consents are potentially relevant to the extent that they are included in the existing environment (if likely to be implemented),[9] and have an impact on the assessment of actual and potential effects of the application seeking consent. He submitted however that this effects-analysis technique does not extend to an enquiry into consistency between existing and proposed consents. Furthermore, he submitted, as resource consents that do not allow a use of land, FP consents cannot generate any adverse effects on the environment that would be available for assessment in any subsequent proposal.

[88] As to s104(1)(b)(iv) RMA, Mr Littlejohn posed the question as to whether an existing resource consent is a "relevant provision of a district plan". He submitted that it was not. It is simply an extraneous document brought into existence after the promulgation of the plan in question and cannot be lawfully treated as a provision of it. That, he said, told against proposition C.

Submissions of Amicus Curiae

[89] Dr Somerville considered the Environment Court's *Queenstown Airport* decision in considerable detail, and updated us with subsequent changes in legislation and findings in subsequent decisions of the High Court and Environment Court.

[90] He set out with care the relevant provisions of the PAUP as attached to the affidavit of Ms Dimery, modified, so the council had submitted, in order to overcome the findings of the Court in *Queenstown Airport*. Following a careful analysis of the

[9] *Queenstown-Lakes District Council v Hawthorn Estates Ltd* (2006) ELRNZ 299.

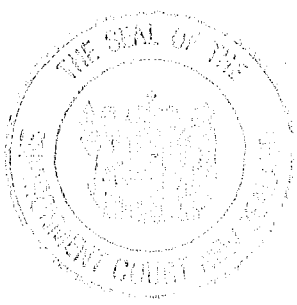
changes the council had made, and considering the law as he submitted it to be, Dr Somerville submitted that the council had not succeeded.

[91] Dr Somerville took the particular example of the Hobsonville Corridor Precinct as placed before the Court by Ms Dimery. He summarised those provisions in the following way:

(a) Framework Plans which comply with rule 5.16.3.2 are restricted discretionary activities;
(b) subsequent new buildings and/or subdivision that are the subject of an approved Framework Plan are also restricted discretionary activities;
(c) a more onerous activity status (non-complying) is triggered for subsequent new building and/or subdivision depending on whether or not there exists an approved Framework Plan.

[92] Dr Somerville submitted that, following the reasoning of the Court in *Queenstown Airport*, a rule which requires the obtaining of resource consents for FPs does not come within the term "requirement" in terms of s87A RMA, and is therefore *ultra vires*. We record his reasoning, somewhat summarised, as follows.

[93] In the *Queenstown Airport* case, the instruments concerned, described in the provisions of Plan Change 19 (PC19), were called Outline Development Plans ("ODPs"). They contained the following features of relevance, amongst other things: ODP plans which delineate the performance standards and/or activities on an area of land; the relevant objective and policy were for the purpose of ensuring high quality and comprehensive development; a rule provided that it would be a prohibited activity to undertake any activity on the land until an ODP had been approved; an ODP itself was required by another rule to be approved by way of resource consent as a limited discretionary activity; other rules provided that permitted, controlled, limited discretionary, and discretionary activities each contained a requirement for the activity to be "in accordance with" an approved ODP for the area; any use of land which did not comply with a consent for ODP activities would be a non-complying activity.



[94] The PC19 provisions were required to be tested against s77B RMA, in force prior to the 2009 Amendment Act. That section relevantly provided:

77B Types of activities

(1) If an activity is described in this Act, regulations, a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if complies with the **standards, terms, or conditions**, if any, specified in the plan or proposed plan.

...

(3) If an activity is described in this Act, regulations or a plan or proposed plan as a restricted discretionary activity, –

(a) a resource consent is required for the activity; and

(b) the consent authority must specify in the plan or proposed matters to which it has restricted its discretion; and

(c) the consent authority's powers to decline a resource consent and to impose conditions are restricted to the matters that have been specified under paragraph (b); and

(d) the activity must comply with the **standards, terms or conditions**, if any, specified in the plan or proposed plan

...

(5) If an activity is described in this Act, regulation, or plan or proposed plan as a non-complying activity, –

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the consent with or without conditions or decline the resource consent. **[emphasis added]**

[95] The Court in *Queenstown Airport* considered that two questions should be posed in considering the *vires* of the provisions as against s77B:

(a) is a land use consent granting an ODP a "consent" within the meaning of the RMA?

(b) can the status of an activity be determined by a prior grant of consent?

[96] Under the relevant rule an application for an ODP had limited discretionary activity status. However the Court held that the term ODP does not constitute an "activity", and found as follows:[10]

> While at times Council and the planners spoke of Outline Development Plans as if they were an activity (i.e. the plan is an activity), we understand in this plan change the term "Outline Development Plan" means a consent granted for a bundle of activities. In the latter context, the QLDC and the planners also spoke about "Outline Development Plans" as being a consent

[10] [2014] NZEnvC 93 at [167].

> granted for the structural or structuring activities within the three activity areas. Assuming this is correct, rule 12.20.3.3(iii) does not actually identify the activities for which resource consent is required, rather, the reader is left to deduce from the matters to which discretion is limited under this rule and also from the relevant policies, the activities that are the subject of an application for resource consent.

[97] As to the second question, as to whether the status of an activity can be determined by a prior grant of consent, the Environment Court held in relation to permitted, controlled, restricted discretionary, and full discretionary activities, must derive from the Act and its subsidiary instruments, rather than from a resource consent.[11]

[98] The provisions were held to be *ultra vires* in terms of s77B RMA. It is clear from the discussion that the Court was considering, in particular (3)(d) which provides that a restricted discretionary activity must comply with the standards, terms and conditions specified in the plan or proposed plan.

[99] The legislative change we mentioned above, was the replacement of s77B by the new s87A in the 2009 Amendment Act. To assist comparison, the principal changes within relevant subsections was to replace the phrase "**standards, terms, or conditions**", with the phrase "**requirements, conditions, and permissions**". The change does not seem to us to be significant. What is of more significance however is that subsection (5), dealing with non-complying activities, brings in the requirement of compliance with these terms, unlike the replaced provision.

[100] Section 87A, which governs the situation placed before us, provides as follows:

> 87A Classes of activities
>
> (1) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the **requirements; conditions, and permissions**, if any, specified in the Act, regulations, plan, or proposed plan.
>
> ...
>
> (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and:

[11] *Queenstown Airport* at [158] and [183].

> (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
>
> (b) if granted, the activity must comply with the **requirements, conditions, and permissions**, if any, specified in the Act, regulations, plan, or proposed plan.
>
> ...
>
> (5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may
>
> (a) decline the consent; or
>
> (b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the **requirements, conditions, and permissions,** if any, specified in the Act, regulations, plan, or proposed plan.
>
> **[emphasis added]**

[101] Based on the reasoning of the Court in the *Queenstown Airport* decision, classifying an activity as non-complying on the basis of an absence of a consent granted for FP activities, would arguably now be *ultra vires*.

[102] Dr Somerville submitted that the relevance of the *Queenstown Airport* decision in terms of his Question 1 was:

(a) the Court's finding that to come within s77B (now s87A), a resource consent must be for an activity, and an ODP is not an activity for which consent can be obtained;

(b) it would be artificial to seek resource consent for an ODP or FP. These are not activities for which consent can be obtained. Rather, consents should be sought for the land use and subdivision activities concerned;

(c) subsequent decisions have all recognised that granting resource consent for a plan was problematic because a plan is not an activity for which consent can be sought.

[103] We infer that Dr Somerville did not consider the above-mentioned slight change in terminology as between the sections to be of moment, and remained focused on

"requirements" etc as needing to be specified in the Act, regulations, a plan or proposed plan.

[104] We offered the parties the view at the end of the hearing that we considered this, amongst some other things, to be clear and correct.

[105] As to Question 2, Dr Somerville submitted that the council's attempt to deal with the *Queenstown Airport* decision by deleting reference in the proposed rules to the phrase "compliance with" [a FP], and instead frame them so as to relate to the "existence" of one, would not assist, because obtaining a consent for a FP would not in itself be a requirement specified in the plan (for the purposes s87A(1), (3) and (5)).

[106] Also the Court in *Queenstown Airport* held that the obtaining of an ODP would not be a "standard" within the meaning of the then legislation.

[107] Dr Somerville noted that the final outcome for QLDC's PC19 is set out in the Environment Court's final decision about it.[12] QLDC had by that stage changed its proposal to require an applicant to produce a Spatial Layout Plan ("SPL") as part of the information accompanying an application for land use consents or subdivision. SPLs were not in themselves to be activities for which consent was required. Further, the fact of filing a SPL by an applicant would change the activity status of either the land use or subdivision. This approach attracted the approval of the Court subject to removal of a reference to SPLs being "approved", as they comprise information accompanying an application for resource consent and not an activity for which consent is (or indeed can be) sought.[13]

[108] Dr Somerville offered submissions about some subsequent decisions of the High Court and Environment Court, as we have noted. We do not need to analyse those decisions in detail, but have considered them. The decisions are generally consistent

[12] *Queenstown Airport Corporation Ltd v Queenstown-Lakes District Council* [2014] NZEnvC 197.
[13] Final decision, *Queenstown Airport* at [63].

with the approach of the Environment Court in *Queenstown Airport*, with one minor qualification in relation to the last of the decisions (both High Court and Environment Court) that we list in the footnote below.[14]

[109] Dr Somerville concluded by submitting that, following the reasoning of the Environment Court in *Queenstown Airport*, and noting the various changes between the old s77B and s87A, a rule which provides that an activity is a restricted discretionary activity only if it is the subject of an approved FP, is unlawful in terms of the latter. He reiterated that it was not simply a matter of amending the FP provisions to remove any reference to "compliance with", as proposed by the council, because the underlying rationale for the findings in the *Queenstown Airport* case was that the status of an activity derived from the RMA, and not from another resource consent, and that obtaining a consent for an ODP or a FP is not in itself a standard or requirement that is specified in a plan or proposed plan.

[110] Dr Somerville offered three constructive options for a way forward if the council was prepared to make changes to the provisions. They were as follows:

(a) include objectives and policies relating to FPs and require an application to be accompanied by a proposed FP for the relevant area as part of the information accompanying the application. On this approach, there would no longer be any requirement for a FP to be approved through the resource consent process;[15]

(b) include objectives and policies relating to FPs and require applications for consent for activities to include a proposed FP as part of the conditions of a land use and/or subdivision consent. Again, there would no longer be any

[14] *Cook Adam Trustees Ltd v Queenstown-Lakes District Council* [2014] NZEnvC 117. Final report and decision of Board of Enquiry re *Ruakura Development Plan Change*, Hamilton, 15 September 2014. *Fountainblue Ltd v Mackenzie District Council* [2014] NZEnvC 209. *Appealing Wanaka Inc v Queenstown-Lakes District Council* [2015] NZEnvC 196. *Yovich v Whanagrei District Council* [2015] NZEnvC 199. *184 Maraetai Rd Ltd v Auckland Council* [2014] NZEnvC 105, followed by [2015] NZEnvC 213, where the EC had first proceeded on the basis that a certain rule and "comprehensive development consent" were assumed valid in a case that was focused on whether the CDC had been given effect to prior to its lapse date; with doubts nevertheless expressed about validity and the potential for complications.

[15] Dr Somerville considered that this mirrored the final solution reached in the *Queenstown Airport* litigation, although we are not so sure.

requirement for a FP to be approved through the resource consent process;[16]

(c) include as a zone standard the requirement that a FP address certain matters (such as requiring roading and cycleway links), so that a breach of the standard would render the activity discretionary or non-complying.

[111] Recognising that the council had placed some importance on incentivising applicants through imposing the more onerous activity status if a FP had not been previously or contemporaneously proposed, he submitted that there should be no need for this approach. He suggested that if a consent application did not meet the requirement that a FP be provided as part of the information requirements, the application could be rejected as incomplete under s88 RMA.

[112] Concerning declaration C (consistency of an activity with an approved FP), Dr Somerville submitted that providing one of his three suggested options was chosen, it could be lawful for the council to include assessment matters for consents that draw on information contained in the FP so as to assess how the activity contributes to those matters.

[113] Concerning declaration D (encouragement through provisions more advantageous where an approved FP exists), a rule providing (by way of example) for building height increases with an approved FP in place, would be *ultra vires* s76(3) RMA (which requires the council, when making a rule, to have regard to the actual or potential effect on the environment of activities, including any adverse effect).

Reply on behalf of Auckland Council

[114] Mr Hodder approached the prime issue of the structure of s87A in the following way. He rightly submitted (correctly in our view) that s87A should be considered in full context, noting that the section provides that for controlled, restricted discretionary, discretionary and non-complying activities where a resource consent is granted, the activity must also comply with the requirements, conditions, and permissions, if any specified in the Act, regulations, plan or proposed plan.

[16] Dr Somerville considered that this approach mirrored the approach adopted in the *Cook Adam,* and *Appealing Wanaka* cases.

[115] He then proceeded to focus on the words "requirement" and "condition". We understood him to submit that the proposed FP provisions were not of the character of either of those things. He offered some case law from the Higher Courts about interpretation of limitations found in the RMA, both explicit and implicit, and to "participatory process" and "legislative status" in plans. In this, we understand that Mr Hodder was mindful of the distinction between subsections (3)(a) and (3)(b) of s87A, but was focussing on (3)(b). For ourselves we recall that the *Queenstown* decision was primarily concerned with the then equivalent of (3)(b), and it concerned us here that Mr Hodder was not squaring up to the provisions of (3)(a). This shortcoming was a major aspect of the indications we provided to the parties at the conclusion of our one day hearing.

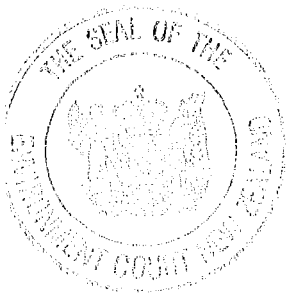
[116] Mr Hodder also submitted[17] that:

> The short response by the Council is that the PAUP has been framed in a manner quite different from that of the subject matter of the *Queenstown Airport* proceedings. Most notably there is much greater clarity and specificity about the nature and content of a Framework Plan, there is no constraint on permitted activities, there is no precondition created for other resource consent applications, and concurrent applications are expressly provided for.

[117] Relying on his earlier submissions as just recorded, he submitted baldly that the status of an activity under the PAUP did in fact derive from the Act and the terms of PAUP itself. Our inability to accept that proposition by the end of the hearing, also underpinned the thinking that we then outlined for the parties.

[118] Given that by the start of the hearing, we had pre-read all submissions and case materials, Mr Hodder's presentation essentially took the form of a question and answer session between the Bench and himself.

[119] Mr Hodder took the opportunity to develop what he considered to be a key proposition in relation to the over-arching declaration A, that a FP as contemplated



[17] In paragraph [8.15] of his submissions.

under the Unitary Plan has a dual role, i.e. it is a planning tool in addition to providing for consent to be granted to uses or activities.[18]

[120] Mr Hodder continued to advance the proposition that, having regard to the "architecture of the Resource Management Act", there would no objection to differentiation of activity status depending on whether a FP was in place. Regrettably, we considered that this seemed to sidestep the question of the apparently clear requirements of s87A.

[121] During the course of answering questions from the Bench, Mr Hodder, with assistance from Mr Wakefield, endeavoured to point out to us that the Framework Plan provisions under scrutiny contemplated application also being sought for some "activities" as defined in the Act; for instance he pointed to rule 3.2(1)(d) providing that a Framework Plan application must seek consent for earthworks, public open spaces, roads and pedestrian linkages, stormwater management devices, vehicle accessways and slip lanes.[19] He acknowledged that there was also a requirement that the application seek consent for a Framework Plan; and he returned to his theme about the provisions playing a "dual role", that is seeking consent for activities, and for a planning tool.[20]

[122] There then followed a series of questions and answers about the meaning of the *Queenstown Airport* decision, and as to whether the problem tentatively perceived by our Bench was semantic or structural. If the former, it was postulated that it could perhaps be cured by some redrafting of the provisions. Mr Hodder continued to submit that the problem would at most be semantic, with the members of the Court offering observations that it might instead be structural. These sentiments also underpinned our remarks at the end of the hearing, with Mr Hodder seeking and obtaining an adjournment and leave to attempt a redraft of certain provisions.

[123] By subsequent Minute, the Court directed that any re-draft lodged in Court should be accompanied by an amended application for declarations, given that the

[18] See Transcript 10-11.
[19] See Transcript 28.
[20] See Transcript 28-29.

application as first filed might no longer reflect materials exhibited to the affidavit of Ms Dimery.

[124] The council subsequently lodged an amended application for declarations, redrafted plan provisions, and supporting submissions. Pursuant to leave granted by the Court, the parties and *Amicus* have taken the opportunity to comment on the new material submitted.

The revised provisions

[125] In response to the Court's concerns Auckland Council revised Chapters G and K (the "revised provisions") and made consequential amendments to the declarations sought.[21]

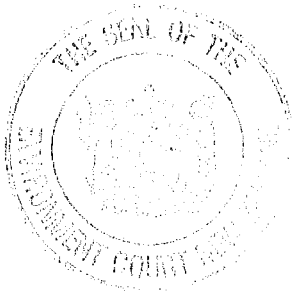
[126] The other parties were accorded an opportunity to make further submissions in response. We are grateful to those parties who did respond despite the very tight timeframe. While we have not summarised the individual submissions in detail, we assure the parties we have given them our close attention.

[127] In the next section we describe the essential features of the revised Framework Plan provisions.

Revised Chapter G: General Provisions

[128] It is now proposed to amend Chapter G to make it clear that the purpose of a framework plan is the authorisation of a range of land use activities within certain precincts.[22] Auckland Council regards the requirement to obtain consent for a bundle of specified activities as being necessary for the integrated development, urbanisation and/or redevelopment of land within those precincts.

[129] Framework plans are now referred to as "framework plan applications" or "approved framework plan applications". Chapter G helpfully sets out the purpose of "Framework plan applications" as follows:



[21] Amended application for declarations dated 1 March 2016.
[22] We understand these provisions may apply to a precinct, sub-precinct or where specified land other than a precinct. See Auckland Council memorandum dated 1 March 2016, footnote 1.

> The purpose of Framework plan applications is to enable full or staged development of brownfield and greenfield land to achieve integrated development and to obtain land use consent for key enabling works.

[130] While not directly stated we understand that the precincts are all either brownfield or greenfield sites.

[131] Unless special circumstances apply, an application for a framework plan is categorised as a restricted discretionary activity and will be assessed without the need for public notification. (The merits or otherwise of such an approach is not a question before us). Chapter G sets out the matters for discretion and the assessment criteria that apply when a framework plan application is considered by the council.

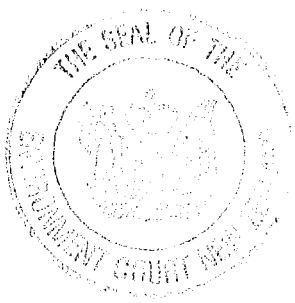
Revised Chapter K: Hobsonville Corridor precinct

[132] Chapter K contains the provisions that would apply to the Hobsonville Corridor precinct. The council presented two revisions for consideration; preferring the first of these, Option A. The second option, Option B, was requested to be considered only if the Court was of the view that Option A was *ultra vires* the Act. In the text that follows, Option A relates to Amended Declarations A, B, C and D; while Option B relates to an Amended Declaration AA that is sought if the Court refuses A and B.

[133] The important features of each option are summarised as follows :

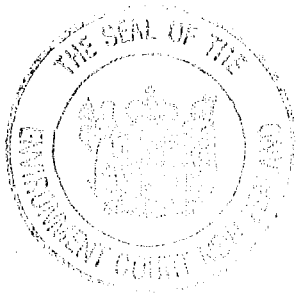
Option A

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table identifies the status of certain activities within the particular precinct:



- where consent has been granted for a framework plan application, buildings[23] and subdivision on sites that are the subject matter of an approved framework application, are restricted discretionary activities;
- in all other cases applications for buildings and subdivision are non-complying activities;

- an application for a framework plan and separately, applications for buildings and subdivision that are the subject of an approved Framework Plan, will be considered without the need for public notification. Juxtaposed against this rule is the statement that limited notification may be required (2. Notification);
- the land use activities that comprise an application for a framework plan are set out in a rule (3. Framework plan applications). These activities are not included in the Activity Table;
- different development controls apply to buildings subject to whether consent has been granted for a framework plan application (4. Development Controls);
- framework plan applications are restricted discretionary activities (Activity Table). The council would restrict its discretion to matters listed in revised Chapter G (2.6.1) and any other matter listed in Chapter K. The assessment matters for an application for a framework plan include those set out in revised Chapter G (2.6.2);
- for buildings and subdivision on sites that are the subject of an approved framework plan, the matters of discretion include consistency with the approved framework plan (5.1 Matters of discretion). The assessment criteria for buildings also include their consistency with land uses that are the subject of an approved framework plan (5.2 Assessment criteria);
- an application for a framework plan is to be accompanied by certain information, the requirements of which are listed in this chapter (6. Special Information requirements).

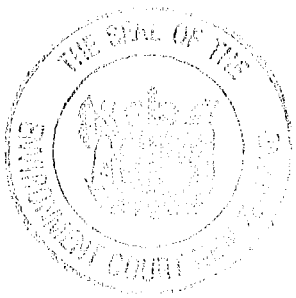


[23] When "buildings" are referred to in the revised Activity Table and Chapter K this means buildings, and alterations and additions to buildings on sites that are the subject matter of an approved framework plan application.

Option B

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table identifies the status of certain activities within the particular precinct;
- in contrast with Option A:
  - the land use consents that comprise a framework plan application are identified in the Activity Table and are restricted discretionary activities;
  - all buildings and subdivision are restricted discretionary activities. (The status of these activities does not change);
  - buildings and subdivisions that are not the subject of an approved framework plan will be subject to the tests for notification under s 95 to 95H of the Act;
  - the matters of discretion for land use consent for buildings are the same as those for framework plan applications (Chapter G, 2.6.1). Two additional matters are listed. The first of these examines the relationship of the building location relative to roads etc and the second, the design, bulk and location of buildings;
  - the matters of discretion for subdivision consent include the relationship of the development layout relative to roads etc. Yet to be included in the revised chapter are the matters of discretion relevant to the other restricted discretionary activities listed in the Activity Table;

- in common with Option A:
  - an application for a framework plan and applications for buildings and subdivision that are the subject of an approved framework plan, will be considered as a restricted discretionary activity without the need for public notification. Juxtaposed against this rule is the statement that limited notification may be required;

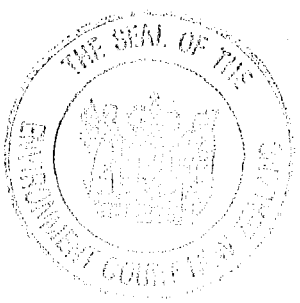


- the land use activities that comprise an application for a framework plan are set out in a rule (3 Framework Plan Applications). These activities are also included in the Activity Table;
- framework plan applications are restricted discretionary activities (Activity Table). The council would restrict its discretion to matters listed in revised Chapter G (rule 2.6.1), and any other matter listed in Chapter K. The assessment matters for an application for a framework plan include those set out in revised Chapter G (rule 2.6.2);
- different development controls apply to buildings subject to whether consent has been granted for a framework plan application (4 Development controls);
- the assessment criteria for buildings and subdivision are separately provided (5.2 Assessment criteria);
- an application for a framework plan is to be accompanied by certain information, the requirements of which are listed in this chapter (6 Special information requirements).

Statutory provisions

[134] For convenience of reference in this section of our decision, we again set out the provisions relevant to restricted discretionary activities under Options A and B (with our emphasis shown):

> **77A Power to make rules to apply to classes of activities and specify conditions**
>
> (1) A local authority may—
>
> (a) categorise activities as belonging to one of the classes of activity described in subsection (2); and
>
> (b) make rules in its plan or proposed plan for each class of activity that apply—
>
> (i) to each activity within the class; and
>
> (ii) for the purposes of that plan or proposed plan; and
>
> (c) specify conditions in a plan or proposed plan, but only if the conditions relate to the matters described in section 108 or 220.
>
> (2) An activity may be—
>
> (a) a permitted activity; or
>
> (b) a controlled activity; or
>
> **(c) a restricted discretionary activity**; or



(d) a discretionary activity; or

(e) a non-complying activity; or

(f) a prohibited activity.

(3) Subsection (1)(b) is subject to section 77B.

77B Duty to include certain rules in relation to controlled or restricted discretionary activities

(1) Subsection (2) applies if a local authority makes a rule in its plan or proposed plan classifying an activity as a controlled activity.

(2) The local authority must specify in the rule the matters over which it has reserved control in relation to the activity.

(3) Subsection (4) applies if a local authority makes a rule in its plan or proposed plan classifying an activity as a restricted discretionary activity.

(4) The local authority must specify in the rule the matters over which it has restricted its discretion in relation to the activity.

87A(3) Classes of activities

...

(3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

104C Determination of applications for restricted discretionary activities

(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

(2) The consent authority may grant or refuse the application.

(3) However, if it grants the application, the consent authority may impose conditions under section 108 **only** for those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

The questions for determination

[135] In support of the revised options Auckland Council posed four questions for determination. These are:

(a) what is a "framework plan application"?
(b) what are the statutory foundations for revised Chapters G and K?
(c) do the revised provisions require resource consent "approval" for something that is not an "activity"?
(d) is it unlawful for the categorisation of an activity to change on the approval of a framework plan application?

[136] While the other parties did not respond directly to all of the questions posed, we found the questions generally helpful in teasing out the arguments for and against the declaratory orders being made. Given this, we use these questions to frame the issues for the Court.

Question: What is a "framework plan application"?

[137] Auckland Council has clarified its intention that framework plan applications are for resource consents for certain land use activities. It is intended that the consents be obtained in such a way that will enhance integrated management of the relevant resources of the particular area.[24] We consider that if this intention is achieved by the provisions in the Unitary Plan it would satisfy many of the parties' concerns.

[138] With that in mind we return to definition of Framework Plan in the Unitary Plan, which the council proposes to delete.[25] For convenience we set out that definition again:

> Framework Plans
>
> A voluntary resource consent that establishes the location and form of land use, sub-division and/or development for a land area specified in the Unitary Plan rules. If approved, the Framework Plan authorises land uses such as the transport network, open spaces and infrastructure or as otherwise prescribed in the Unitary Plan rules.

[24] Auckland Council memorandum dated 1 March 2016 at [8].
[25] Auckland Council memorandum dated 7 March 2016 at [35].

[139] We are not surprised that the council proposes deletion of this definition given the definition's conflation of forward planning and land use consenting requirements. Under this definition the intent or purpose of a framework plan was quite uncertain.

[140] It is Auckland Council's view that the definition of "framework plan application" is now adequately provided for in the first paragraph of revised Chapter G which reads:

> Framework plan applications are for resource consents that seek authorisation for land use activities (such as roads, public open space, infrastructure, e.g. stormwater and wastewater networks, earthworks, and buildings) that are necessary for the integrated development, urbanisation and/or redevelopment of land within identified precincts.

[141] WOSL submits that a definition should be included in the Plan. We agree with Auckland Council that there is no need to include a separate definition in the plan if the definition in Chapter G is clear and certain. But it is not.

[142] In context the phrase "[approved] framework plan applications" is somewhat clumsy and confusing.[26] The reader is required to interpret "[approved] framework plan applications" as either *an application for a framework plan* or as *the consent granted for a framework plan.* Read in this way, what is to be consented is a "plan" and not an application for a bundle of land use activities. Uncertainty remains. In that regard we generally accept the submissions of Messrs Littlejohn and Enright. The meaning of these terms is integral to the declarations sought. They are not matters strictly confined to the merits to be addressed by the Unitary Plan Independent Hearings Panel.

[143] Further, we are attracted to Mr Littlejohn's suggested rewording of Chapter G, as it expressly places the focus on the requirement to obtain land use consent for a bundle of activities, which he labels a "Framework consent".

[26]The court has not proof-read the revised Chapters but recommends that this be done. In addition to the matters raised by Mr Littlejohn, development yield (which we anticipate will be a controlling factor in decisions made about infrastructure) is treated as a matter of discretion in the untracked version of Chapter G. In contrast the tracked version of Chapter G has this as part of the assessment criteria.

Special Information Requirements

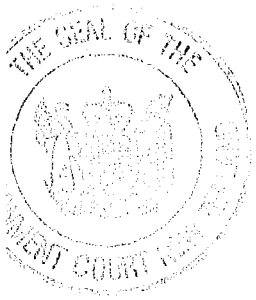
[144] On the related matter of special information to accompany an application for a framework plan, Auckland Council submitted the special information provided in support of an application for a framework plan does not form part of the "activity" to be "approved". The reference to the "approval of the framework plan application" is instead a convenient and sensible phrase which means the relevant land use consents and the context of the plans and other matters considered in the information requirements.[27]

[145] We find the requirement to provide special information in support of the application for a Framework Plan to be *intra vires* s75(2)(g) and (h) of the Act.

[146] While we may be persuaded to accept Auckland Council's submission in the context of its assessment criteria (5.2), we do not accept the submission in relation to the matters over which the council proposes to restrict its discretion (5.1). Auckland Council is proposing to restrict its decision-making discretion to consistency with information provided to support an application for consent but not forming part of the consent itself. Such a provision would be void for uncertainty as it assumes that the decision to grant consent was based on the correctness of that information.

Deemed consents

[147] WOSL remains concerned with the validity of a provision in a plan which deems consents granted under earlier ("legacy") planning instruments for equivalent framework plans ("outline development plans" and the like) to be an "approved framework plan" for the purposes of these rules.[28] We have not lost sight of this, and its concern could yet be satisfactorily resolved through further amendments to Chapter G (if undertaken to our satisfaction) or by the Court's decision declining to make declaratory Order A. If its concerns are not resolved by what follows, WOSL is granted leave to file further submissions on this matter.



[27] Auckland Council memorandum 1 March 2016 at [20].
[28] Submissions dated 3 March 2016 at [16]-[18]. Memorandum dated 24 February 2016 at [8]. Memorandum dated 4 March 2016 at [6]-[8].

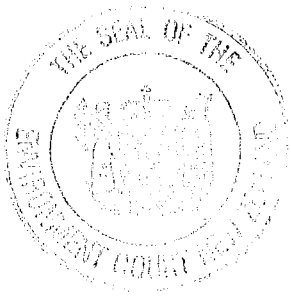
Question: Do the revised provisions require resource consent "approval" for something that is not an "activity"?

[148] We accept the submission by Mr Littlejohn that a rule that provides for an integrated application for consents for all necessary land use activities associated with the physical preparation of land for (re)development would be *intra vires* the Act.[29] Indeed we do not understand any party to disagree with that proposition.

[149] The parties will recall the Court's concerns as to whether the land use activities said to comprise the framework plan application for the Hobsonville Corridor Precinct were activities for which consent is required under the Unitary Plan. We reiterate our four-fold concerns with the version of the Chapters annexed to Ms Dimery's affidavit:[30]

(a) the activities were not listed in the precinct Activity Table;
(b) the relevant rule stipulating the land use activities to be applied for as part of an application for a framework plan in the Hobsonville Corridor (3.2.d) might be void for uncertainty – it being debatable whether an activity labelled "roads and pedestrian linkages" or "public open space" is adequately described;
(c) land use and subdivision activities are conflated; and
(d) it was uncertain whether the activities listed in the rule were in fact the subject matter of either the underlying zone rules or Auckland-wide rules.

[150] We accept Mr Littlejohn's submission that the same activities in a District Plan may have a different status where consent for those activities is sought as part of an integrated application.[31] However, the poorly described activities in the version of Chapters G and K set out in Ms Dimery's affidavit created the strong impression that what was to be consented was a plan for future activities; and not a consent for land use activities.[32]



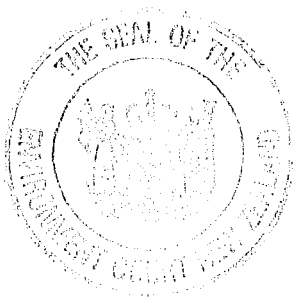
[29] At [5].
[30] Annexure J.
[31] At [7].
[32] Annexures G, H and J of Ms Dimery's affidavit.

[151] The Environment Court in *Queenstown Airport* at paragraph [168] held that a rule which did not specify the activities that are expressly allowed subject to a grant of consent would be *ultra vires* s77A(1) and s77B(3) of the Act. In that case a person could make an application for consent for outline development plan activities pursuant to rule 12.20.3.3(iii) of the plan change. This rule stated "Outline Development Plan requirement for development within Activity Areas C1 C2, and B2", but did not actually identify the activities for which consent was required.

[152] During the hearing the Court raised concerns about the identity of the activities for which land use consent is required under the Unitary Plan. Auckland Council responded, submitting generally (and as far as it goes, correctly), that a resource consent can only be required for an activity and that "activity" means physical activity or dynamic use of land.[33] However, the Court would have been better assisted had the council turned its mind to the drafting of the land use activities in the revised Chapters. Contrary to Mr Hodder's[34] and Mr Loutit's[35] submissions the framework plan provisions do not make clear that these are activities for which consent can be granted, although we acknowledge that that appears to be the council's wish.

[153] While the general subject matter of the activities for which land use consent is required as part of a framework plan application is identified under both versions of the Chapters considered by the Court, most of the detailed activities for which consent is required are not. To illustrate, in relation to the rule requiring resource consent for "roads" [a noun] it is arguable the provision is *ultra vires* s77A(1) and s77B(3) RMA as no activity in relation to roads is identified. Alternatively, the rule may be void for uncertainty.

[154] That said, with the focus now being on an integrated application for land use consents, we should leave the drafting (including content) of the land use activities for the Unitary Plan Independent Hearings Panel. That is because the land use activities that will comprise the applications for a framework plan will not be the same across all precincts.



[33] Auckland Council memorandum dated 1 March 2016 at [20(a)].
[34] Auckland Council memorandum dated 1 March 2016 at [26].
[35] At [3]-[6].

Question: What are the statutory foundations for Chapters G and K?

Question: Is it unlawful for the categorisation of an activity change to be based on the approval of a framework plan application?

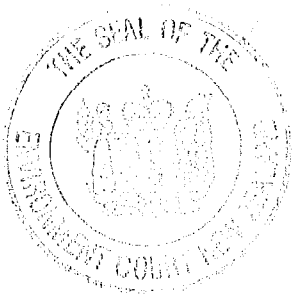
[155] It is convenient to address these two issues together. In relation to the second question we observe "change" *per se* is not the issue. We can envisage circumstances where the activity status for the same activity may be differently categorised depending on context.

[156] As Mr Somerville correctly observes, the Court in *Queenstown Airport* was engaged with the *vires* of each of the six types of activities listed in s77A; contrary to Auckland Council's submissions this decision was not limited to the *vires* of permitted activities.[36] However in contrast with the restricted discretionary activity rule in the *Queenstown Airport* decision, it is not proposed under the Unitary Plan that if granted, a building or subdivision consent must comply with the requirements (conditions or permissions) specified in a consent granted for a framework plan. As Option A does not test the *vires* of 87A(3)(b), the Court's findings at paragraph [177] of the *Queenstown Airport* decision are not applicable.

[157] Instead, s87A(3)(a) is engaged by the matters over which the council's discretion is proposed to be restricted. Under Option A, buildings and subdivisions on sites that are the subject of an approved framework plan application are restricted discretionary activities.[37] The matters over which Auckland Council would restrict its discretion include consistency with an approved framework plan application.[38]

[158] The council submits that nothing in the Act either expressly or implicitly requires that a categorisation of activity status is fixed and cannot change upon the occurrence of a subsequent change in circumstance – in particular, the later approval of a framework plan application.[39]

[159] Mr Littlejohn regarded the issue that arises in respect of the different status for the same activity, somewhat differently.



[36] Auckland Council memorandum dated 1 March 2016 at [23(f)].
[37] Option A, Activity Table (1).
[38] Option A, 5.1, Matters of Discretion.
[39] Auckland Council memorandum dated 1 March 2016 at [23(c)].

[160] During the hearing he had submitted the matters over which the council's discretion is restricted must (in context) be specified in the Unitary Plan. He characterised the Framework Plan provisions as applicant-led structure planning, agreeing with the Court that, in effect, it is the consent holder which has restricted the exercise of the discretion and not the council.[40] While he did not expand on this submission in response to the revised Chapters (which retain the substance of this discretion for Option A), he reiterated the issue that arises under s77A and s87A is whether a plan may lawfully provide that an activity within a discrete area may be classified as non-complying until an approved resource consent for a framework plan exists for that area, and thereafter classed otherwise.[41]

[161] Expressed in terms of *vires*, we consider the issue that arises under Option A is whether for the purpose of s77B and s87A(3)(a), a future grant of resource consent is a matter over which the consent authority's discretion may be restricted?

[162] To test for *vires* we first asked ourselves 'how would the rule be applied in practice'?

[163] If an activity is classified as a restricted discretionary activity, the consent authority's discretion whether to grant or refuse consent and the imposition of conditions on a grant of consent is limited to matters over which it has restricted the exercise of its discretion.[42] Thus what is being restricted is the consent authority's future decision-making discretion. It does not strain the language of s104C(1) to say that Auckland Council would restrict its discretion to the consideration of whether an application for building or subdivision consent is consistent with another resource consent. Likewise, what conditions may be imposed under ss104C(3) and 108 are restricted to those matters that would achieve consistency with that resource consent.

[164] The restriction of discretion in Option A is redolent of the principle in *Hawthorn Estates Ltd v Queenstown Lakes District Council*[43] where the environment embraces the

[40] Transcript at 124.
[41] Mr Littlejohn supplementary submissions dated 7 March at [10]. In this submission he mentions both non-complying and discretionary activities. We could find no reference to discretionary activities and assume this was in error.
[42] Section 104C.
[43] [2006] NZRMA 2014 at [84].

future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented.

[165] The efficacy of the rule depends on the correctness of the unstated assumption: that is the resource consents, in particular the land use consents for the framework plan, are likely to be given effect to. If that assumption is incorrect or is only correct in part, then consistency with the Framework Plan may not be the most appropriate way of achieving the objectives for the precinct (*per* s32 RMA).

[166] An application for a building or subdivision on a site that is the subject of an approved framework application is a restricted discretionary activity. That is so whether or not the application is to implement the approved framework plan and equally whether or not the consent for the approved framework plan has or will be implemented. It is entirely conceivable, for example, that assumptions made in a framework plan application about building yield may be modified, for instance in response to changes in the economy necessitating future changes to roading layout and parks. The restriction of discretion invites a "yes" or "no" response – neither of which may be entirely correct.

[167] In our view consistency with a consent for a framework plan is a matter best left as an assessment criterion.

[168] This is one example of provisions that are inherently complicated: Option A being more so than its alternative. This is a matter, however, that goes to the merits of the provision, which ultimately is for the Independent Hearings Panel to decide. This particular complication does not arise under Option B.

Outcome

[169] Auckland Council seeks declaratory orders that the council may lawfully include the provisions proposed for the framework plan application as set out in revised Chapters G and K. Declaratory Orders A and AA address both the merits and lawfulness of their respective provisions. While the merits and lawfulness of the two options are closely intertwined, the Environment Court cannot step into the shoes of the Independent Hearings Panel and adjudicate merits.

[170] The intention of the council is to include a provision in the Unitary Plan enabling an integrated application for a bundle of land use consents. Our tentative view is that such a rule would be *intra vires* the Act. However for reasons that we have stated we are not yet satisfied that this has been achieved under either option. There is a legal uncertainty arising in relation to the phrase "approved framework plan application" and following *Queenstown Airport*[44] a rule that does not specify the activities that are expressly allowed subject to a grant of consent would be *ultra vires* s77A(1) and s77B(3) of the Act. The land use activity rules[45] are arguably *ultra vires* s77A(1) and s77B(3) RMA as the activity for which land use consent is required is not identified. Alternatively, the rule may be void for uncertainty.

[171] For the above reasons we will decline to make Declaratory Order A. Declaratory Order A contextually over-arches Declaratory Orders B and D. As the context no longer exists, we also intend to decline to make these orders. (We observe that even if we were minded to do so we would have modified the broadly framed Order B).

[172] The Court is tentatively of a mind that it could make a declaration in terms of C in the Amended Application, but with modifications suggested in the next paragraph of this decision, although we record that such declaration might have no utility unless Declaration AA is capable of being made (and if not so capable, C should be refused). C is presently worded as follows:

- on commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s104 of the RMA, a matter to which regard must be had by the consent authority.[46]

[173] We favour submissions made on behalf of the Fletcher parties that changes could be made in Chapter K to Section 5.1 "Matters of discretion" and 5.2 "Assessment criteria", and on behalf of Messrs Schweder to make a link to activities authorised by other resource consents granted over the land likely to be given effect to (the

[44] At [168].
[45] For both options either the Activity Table and/or the rule for Framework Plan Applications (Rule 3).
[46] Declaration C.

"Hawthorn" test) and relevant to the activities for which consent is being sought. These appear to have been carried through into Option B at 5.1.2(b) and 5.2(b). The parties are to confirm whether this is the case.

[174] In the circumstances the Court is faced with no option but to offer one more opportunity for the parties to place material before the Court on which two positive declarations could possibly be made. We adjourn the proceeding in relation to Declaratory orders AA and C, and (as noted) will make further directions for party input in relation to the same, in line with the comments we have offered about various parties' recent submissions. A Minute will shortly be issued. If the declarations are made, they are likely to be in a modified form.

[175] The Court recognises that the subject matter of the present proceedings is urgent, but it is also complex and being attended to by the Court and parties under great pressure. The Court expresses its appreciation to the council and all other parties for the co-operative approach taken to resolving it, and hopes that this spirit continues.

Decision

[176] Pursuant to s313(c) the Environment Court declines to make the following Declarations A, B and D in the council's Amended Application of 1 March 2016:

- on becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the council's Proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for framework plan applications for specific geographical areas (precincts) as set out in the attachments to this amended application marked "G1" and "AK1" to be sought by means of a resource consent application for land uses under Part 6 of the RMA;[47]
- on commencement, the PAUP may lawfully provide that an activity in a precinct may be classed (in terms of s77A and s87A of the RMA) as a non-complying activity or as a discretionary activity until a framework plan

[47] Declaration A.

application has been approved for that precinct and thereafter classed otherwise;[48] and

- on commencement, the PAUP may lawfully include provisions designed to encourage framework plan applications for precincts, which provisions are more advantageous for resource consent applicants if a framework plan application has been approved for that precinct than would otherwise be applicable.[49]

L J Newhook
Principal Environment Judge

B P Dwyer
Environment Judge

J E Borthwick
Environment Judge

[48] Declaration B.
[49] Declaration D.

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 65

IN THE MATTER	of an application for declarations under Part 12 of the Resource Management Act 1991 ("RMA")
BY	AUCKLAND COUNCIL (ENV-2015-AKL-000138) Applicant
Hearing at:	in Chambers
Full Court:	Principal Environment Judge L J Newhook Environment Judge B P Dwyer Environment Judge J E Borthwick
Counsel:	J Hodder QC and M G Wakefield for Applicant T Daya-Winterbottom for Viaduct Harbour Holdings Ltd, in support W S Loutit and K M Stubbing for Fletcher Construction Developments Ltd, Tamaki Redevelopment Co and Kauri Tamaki Ltd, in support D R Clay and A F Theelen for Ngati Whatua Orakei Whai Rawa Ltd, in opposition R B Enright for Wiri Oil Services Ltd, in opposition K R M Littlejohn and K and D Schweder, in opposition Dr R J Somerville QC as *Amicus Curiae*
Date of Decision:	15 April 2016
Date of Issue:	15 April 2016

FINAL DECISION OF FULL COURT OF THE ENVIRONMENT COURT ON APPLICATION BY AUCKLAND COUNCIL FOR DECLARATIONS REGARDING THE LAWFULNESS OF FRAMEWORK PLAN PROVISIONS IN THE PROPOSED AUCKLAND UNITARY PLAN

A: Pursuant to s 313(a) of the Resource Management Act 1991 the Environment Court makes the following declaration:

Declaratory order AA

On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K".

B: Pursuant to s 313(c) of the Resource Management Act 1991 the Environment Court declines to make the following declaration:

Declaratory order C

On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

REASONS FOR DECISION

Introduction

[1] In March 2016 the Environment Court released its Interim Decision on Auckland Council's application for declaratory orders regarding the lawfulness of framework plan provisions in the proposed Unitary Plan.[1]

[2] The Court, having declined to make three of the five declaratory orders sought, directed Auckland Council to confer with the other parties and file submissions responding to the Interim Decision and to address five specific concerns raised by the Court.[2]

[1] [2016] NZEnvC 56.
[2] Minute dated 29 March 2016.

[3] Auckland Council filed its further submissions,[3] with separate submissions being filed on behalf of Fletcher Construction Developments Ltd and Tamaki Redevelopment Company,[4] Messrs K and F D Schweder[5] and Wiri Oil Services Ltd.[6]

[4] Once again we are grateful for counsel's diligence when responding to the Court's directions within the timeframe set.

The outstanding declaratory orders

[5] This decision concerns Auckland Council's application for amended declaratory orders AA and C as follows:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for framework plan applications for specific geographical areas (precincts) as set out in the attachments to this amended application marked "G1" and "BK1" to be sought by means of a resource consent application for land uses under Part 6 of the RMA.

Declaratory order C

> On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

Further Revision to Chapters G and K

[6] Attached to Auckland Council's submissions are further revisions to Chapters G and K of the Unitary Plan, and these are referred to in this decision as the second revision.

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[3] Memorandum dated 7 April 2016.
[4] Memorandum dated 7 April 2016.
[5] Memorandum dated 11 April 2016.
[6] Memorandum dated 13 April 2016.

[7] In the second revision Auckland Council proposes to adopt the language of 'framework consents' proposed by counsel for K and D Schweder, Mr Littlejohn. The provisions clearly differentiate between "an application for a framework consent" on the one hand and, following approval, "a framework consent" on the other. It is now clear for the reader of the Unitary Plan as to whether it is the application or the consent that is spoken of.

[8] The concept of a framework consent is well defined and consistently applied in Chapter G (second revision).

[9] The concept of a framework consent follows:

> Framework consents are resource consents that authorise activities associated with the first stage of urbanisation and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

[10] The purpose of a framework consent is:

> The purpose of framework consents is to ensure the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.
>
> [our emphasis]

[11] Mr Littlejohn submits "enable" and not "ensure" is semantically more consistent with the Act and better reflects the fact that a consenting regime is permissive, not mandatory.[7] We accept his submission.

[12] The advantages of a framework consent are then expanded upon as follows:

> The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:
>
> - objectives and policies that articulate the development outcomes for the precinct or sub-precinct;
> - rules that give effect to those development outcomes;
> - mechanisms that incentivise the use of framework consents as a first stage process for land development;
> - assessment criteria that need to be addressed as part of applications for framework consents;

[7] Memorandum Schweder at [4].

- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

[13] Chapter K (second revision) contains the template for rules pertaining to 33 precincts or sub-precincts. In summary, the template for Chapter K (second revision) are as follows:

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table that identifies the status of certain activities within the particular precinct. An application for a framework consent is a restricted discretionary activity. The table is to separately list those land use activities which may be sought as part of an application for a framework consent as restricted discretionary activities;
- buildings and subdivisions that are not the subject of a framework consent are subject to the tests for notification under ss 95 to 95H of the Act;
- an application for a framework consent and applications for buildings and subdivision on sites that are the subject of a framework consent, will be considered as a restricted discretionary activity without the need for public notification. Limited notification may be required, where any owner of land within a precinct or sub-precinct has not given their approval to the application for consent;
- a rule requires an applicant for framework consent to apply for land use consent for certain land use activities which are listed;[8]
- different development controls may apply to buildings subject to whether consent has been granted for a framework consent (5 Controls);
- in respect of an application for a framework consent the council would restrict its discretion to matters listed in Chapter G at 2.6.1, and "the overall development layout, being the layout and design of roads, pedestrians linkages, open spaces, earthworks areas and land contours, and infrastructure location";[9]

[8] Rule 3 Framework Consents.
[9] There may be other relevant matters of discretion for an individual precinct which the template notes has yet to be identified.

- for applications for buildings (including alterations and additions) and applications for subdivision, the matters of discretion include consideration of the buildings and subdivision "relative to overall development, including...". We observe that the phrase "relative to overall development" is ambiguous. For present purposes we have assumed the phrase refers to both the environment in the *Hawthorn Estates Limited v Queenstown Lakes District Council*[10] sense and secondly, the building or subdivision activities for which consent is sought (6.1 Matters of discretion);
- regardless of whether an application for framework consent has been granted, for all building applications the matters of discretion include the same matters that would apply to an application for framework consent (2.6.1). We make the further observation that the merits of this rule is a matter for the Independent Hearing Panel. It is unclear to us whether 2.6.1 is to be applied insofar as those matters are relevant to the particular application building or subdivision consent or something else (6.1 Matters of discretion);
- the assessment matters for applications for a framework consent, buildings and subdivision include the relationship of the matters requiring consent to the activities authorised by other resource consents granted in respect of the precinct or sub-precinct (6.2 Assessment Criteria); and
- an application for a framework consent is to be accompanied by certain information, the requirements of which are listed in this chapter (7 Special information requirements).

Consideration

[14] We are satisfied that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development[11] of land is *intra vires* the Act. Provided that the consent expressly allows the consent holder to use land in a manner that contravenes a district rule (s 9(3)), the

[10] [2006] NZRMA 2014 at [84] i.e. the future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented.
[11] See purpose statement in Chapter G (second revision).

rule is *intra vires* the Act even though other resource consents will be required to authorise further development of the land.

[15] A district council's ability to make rules is constrained by ss 77A and 87A. If the consent does not authorise the consent holder to use land in a manner that contravenes a district rule, but instead purports to authorise a plan about the future use of land, such a rule would be *ultra vires* the Act. Ngati Whatua Orakei Rawa Ltd, supporting the second revision, captured the *vires* issue neatly in its submission that the revision helps remove the previous ambiguity that framework consents are planning tools observing "[a] framework consent is not something for which consent must be obtained of itself".[12]

[16] Subject to the comment we make above concerning the matters of discretion and assessment criteria (which are matters for the Independent Hearings Panel) we considered the template provisions in Chapter K (second revision) to have a clear, succinct structure with its key terms "applications for framework consents" and "approved framework consents" applied consistently throughout.

Other matters

Fletcher Construction Developments Ltd and Tamaki Redevelopment Company ("Fletchers")

[17] Fletchers filed further submissions attaching a revised version of Chapters G and K for the Tamaki Precinct. Counsel for Fletchers thought it would be of assistance to the Court to see how the template provisions in Chapter K would work for a specific precinct.

[18] In the Tamaki Precinct example, Fletchers has further developed the concept of a 'framework consent' by differentiating between 'integrated consents' on the one hand and 'development consents' on the other. 'Integrated consents' is used to describe the

[12] Memorandum Auckland Council at [37].

enabling phase of land use consents.[13] The term 'development consents' is used to describe the delivery land use phase of the project.[14]

[19] We make the observation that there may be little or no synergy between the content of an application for an 'integrated consent' and the land use activities identified for an integrated consent. To illustrate, in the Tamaki Precinct it is proposed that an integrated consent must be sought for one or more identified land use activities; one of which is archaeology. An application for an 'integrated consent' must include, amongst other matters, (c) development yield/density, (g) subdivision and stage, (h) interface with surrounding environment/lots. It is difficult to understand how these matters are relevant in the circumstances where the activity to which the application relates is archaeology and at first blush Fletcher's integrated consent appears to be a plan for the future.

[20] As the content of each individual precinct is a matter for the Independent Hearing Panel to decide, and in the absence of any response from Auckland Council (or other interested parties) on the Fletchers' precinct provisions, we shall not comment further.

K and D Schweder

Clarification of activity status in absence of neighbours' approvals

[21] The Schweders seek that Chapters G and K (second revision) be amended to make explicit that an application for a framework consent can only be made in respect of all of the land in a precinct or sub-precinct where the applicant owns all of the land or, where land is in multiple ownership, the application is made with the written consent of all of the landowners. If these circumstances do not apply then a landowner may still apply for resource consent (without being disadvantaged by activity status) and have their proposal assessed in the normal way. The Schweders propose amendments to each chapter in support of their submission.

[13] Integrated consents were previously referred to as Framework Plan or Framework Consent in the council's latest version.
[14] Memorandum Fletchers at [7]-[9].

[22] We consider Chapters G and K adequately address the Schweders' concerns. Based on the template provisions, if an application for building or subdivision consent is lodged for sites that are not the subject of a framework consent the applicant is not disadvantaged in terms of activity status. An application for a building or subdivision consent is a restricted discretionary activity whether or not a framework consent has been granted. What changes is the notification process, with the tests for notification under ss 95 to 95H applying.

[23] As the submission largely concerns the clarity around specific provisions the Unitary Plan, it remains open to the Schweders to pursue this matter before the Independent Hearing Panel.

Incentives

[24] The notification process and land use and development controls are used to incentivise the application for framework consents. It is not clear whether the status of the activity will change depending on whether there is an approved framework consent, it may do.

[25] In the form of land use and development controls Chapter K (second revision) retains the incentive of greater development rights which are to be conferred if the framework consent process is followed (5, Control). More particularly, Chapter K gives by way of an example different height limits which will apply to buildings depending on whether or not a framework consent has been granted. We are not told what the status of a building application that does not comply with the controls would be. Height limits are one incentive; other incentives include site intensity and building coverage.

[26] On the topic of land use and development control type incentives in the Interim Decision the Court declined to make Declaratory Order D, finding Declaratory Order A (which the Court also declined to make) contextually over-arches Declaratory Order D.[15]

[15] Interim Decision at [171].

[27] Declaratory order D states:

> On commencement, the PAUP may lawfully include provisions designed to encourage framework plan applications for precincts, which provisions are more advantageous for resource consent applicants if a framework plan application has been approved for that precinct than would otherwise be applicable.

[28] Mr Littlejohn submits in declining to make the declaration implicitly the Court accepted the submissions of the *Amicus Curiae*. Therefore, he submits, the precinct plans cannot include incentivised development rights.[16] We doubt Mr Littlejohn is right in his last submission and upon further reflection, it would have been helpful to the parties had the Interim Decision addressed directly the *vires* of the incentives in the context of both options being pursued by the Council at that time.

[29] In March 2016 Dr Somerville, as *Amicus*, submitted that a rule providing for building height increases with an approved framework plan is *ultra vires* s 76(3) of the Act. This section requires the territorial authority to have regard to the actual or potential effect on the environment of activities, including any adverse effect.[17] The language used by s 76(3) makes this a mandatory requirement – "in making the rule, the territorial authority shall have regard…".

[30] While Wiri Oil Services is generally supportive of the position taken by Mr Littlejohn, in its view it is only where an incentive leads to a differential activity status can it be said that the provision is *ultra vires*.[18]

[31] We gained little assistance on this topic from the affidavit of Ms Dimery, who does not address s 76 (3) but rather the merits of the incentive provision.[19]

[32] The parties will recall that the Court explored this topic with counsel during the March hearing. The Court was left with the impression that the actual or potential effects of activities that are subject to the relevant land use and development controls is a matter to be determined under an application for the former "framework plan". This reinforced a view that what would be applied for was in the nature of a plan.

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[16] Memorandum Schweder at [9]-[14]. No doubt Mr Littlejohn is correct in this last submission.
[17] Submissions of Amicus Curiae at [5].
[18] Memorandum Wiri at [10].
[19] Sworn 14 October 2015 at [72(c)].

[33] The Court is usually hesitant to be drawn on policy matters where the views of the territorial authority are not known. Chapter K is a template for 33 precincts and sub-precincts. The Court is being asked, in effect, to make a declaration on the *vires* of a provision without evidence on what actually is proposed, and without the benefit of evidence addressing s 76 (3). The Court will not make declaratory orders in an evidential vacuum, and we confirm the decision to decline Declaratory Order D.

Description of Activities

[34] At paragraphs [149]-[154] of the Interim Decision the Court repeated concerns expressed during the course of the hearing that the rules requiring consent for certain land use activities as part of a framework application were either *ultra vires* s 77A(1) and s 77B(3) of the Act or alternatively void for uncertainty.

[35] Auckland Council responded by advising that the Chapter K provisions are template provisions only. [20] They are not, and never were, intended to demonstrate what the final Chapter K (which makes provision for 33 precincts) would look like in the PAUP.

[36] We understand Auckland Council would have the land use activities listed in Chapter K (second revision) treated as if they were placeholders, carrying little or no semantic information. Auckland Council has now clarified that:

> The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site characteristics and development outcomes and objectives for particular precinct, as will the provisions relevant to framework consents.[21]

[37] This clarification is important, because the description of the land use activities reinforced the Court's impression that what was proposed to be granted *ultra vires* the Act would be a consent for a plan and not a consent authorising a bundle of land use activities.

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[20] Attached to Ms Dimery's initial affidavit and the amended application for declarations dated 1 March 2016.

[21] Memorandum Auckland Council at [10]. The statement is contained in Chapter K (3 Framework consents)

Deeming consents

[38] Finally, at paragraph [147] of the Interim Decision we recorded Wiri Oil Services Ltd's concern with the validity of a provision in a plan which deems consents granted under earlier ("legacy") planning instruments to be an "approved framework plan".

[39] Auckland Council makes clear it will seek the definition "approved framework plan" be deleted from the Unitary Plan. If the Independent Hearings Panel makes this decision, then we with agree with Auckland Council and the *Amicus Curiae*[22] there would be no deeming provision.[23] The Council has accepted that consents granted under the legacy instruments cannot be deemed to be "framework consents", as these consents have not been assessed and approved pursuant to the provisions in Chapter K.[24]

[40] Auckland Council is correct in its observation that a resource consent granted pursuant to an earlier "legacy" planning instrument will remain a resource consent despite the legacy planning instrument (under which the consent was granted) being replaced by the Unitary Plan. That is because any consent, until declared invalid by a Court with competent jurisdiction, is to be administered and enforced in accordance with its terms.

[41] That said, we do not necessarily agree with Auckland Council's unqualified submission that consents granted under the legacy planning instruments are of enduring relevance. The relevance of any resource consent is nuanced. This is implicitly recognised in Auckland Council's submission in relation to the assessment criteria that "planners will need to consider any approved framework consents (or equivalent framework consents), which are a part of the receiving environment (as per *Hawthorn Estates Limited v Queenstown Lakes District Council* [2006] NZRMA 2014 at [84])". The Court of Appeal is talking about the future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented: per *Hawthorn Estates Limited v Queenstown Lakes District Council* at [84]. We recognise consent authorities are challenged on a daily

[22] Dr Somerville email dated 6 April 2016.
[23] Memorandum Auckland Council at [16].
[24] Memorandum Auckland Council at [18(b)].

basis by the requirement to reach an informed view as to the likelihood of resource consents being implemented.

[42] We are aware of difficulties that may arise for consent holders where the planning environment changes upon a new District Plan becoming operative. Auckland Council alludes to this at paragraph [18(d)] of its submission.[25] Consents granted under legacy planning instruments may, however, bring different challenges, particularly for those consents that do not actually authorise any works. The difficulty administering such consents is the subject matter of the Environment Court decision *184 Maraetai Road Ltd v Auckland Council.*[26]

[43] As the content of the Unitary Plan, including its interface with framework plan type consents, is not a matter for us to determine, we will not comment further.

[44] Returning to Wiri Oil Services Ltd, we record that this party accepts the concerns that it raised in relation to deemed consents have now been addressed.

Declarations

[45] On 1 March 2016 Auckland Council amended its application for declarations. The amendments reflect the wording of revised Chapters G and K that are the subject matter of the Interim Decision.

[46] The Council has not amended the application to respond to the second revision of Chapters G and K.

[47] The Court is prepared to make, with modifications, Declaratory Order AA.

[48] Attached to and forming part of these orders are Chapters G and K (as modified by the Court). The modifications to these chapters address issues of *vires* and issues of

[25] The Council submits "There may be situations where specific provisions or development controls used in ("legacy") planning instruments refer to equivalent framework consents. In that instance the Chapter K provisions for those particular precincts may need to preserve those provisions or development controls through tailored provisions that ensure that those provisions will endure. This can only be achieved by way of a case-by-case review of the Chapter K precinct provisions against the legacy planning instruments that provide for equivalent framework consents".

[26] [2015] NZEnvC 213 at[8]-[9].

uncertainty which have been the focus of our decision. The content and merits of Chapters G and K as they may be applied in the context of the 33 precincts and sub-precincts is to be determined by the Independent Hearings Panel.

[49] The Court will decline to make Declaratory Order C. In the second revision of Chapters G and K reference to the "consistency of that activity with an approved framework plan" in the matters of discretion or assessment criteria was deleted with new provisions substituted. Auckland Council advises this was done in order to remove from the Council's determination of any restricted discretionary activity any assessment against "consistency", and also to remove perceived uncertainty and possible contravention s 104(1)(b) raised by other parties.[27] Declaratory Order C has not been amended to follow suit. Given the amendments made to Chapters G and K the Court declines to make Declaratory Order C as there remains no live issue for the Court to determine.

Outcome

[50] Pursuant to s 313(a) the Environment Court makes the following declaration:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K"..

Declaratory order C

[51] Pursuant to s 313(c) the Environment Court declines to make the following declaration:

[27] Memorandum Auckland Council at [13(d-h)].

On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

L J Newhook
Principal Environment Judge

B P Dwyer
Environment Judge

J E Borthwick
Environment Judge

Part 3 - Chapter G: General provisions

2.6 Framework Consents

Introduction

Framework consents are resource consents that authorise activities associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

The purpose of framework consents is to ~~ensure~~ enable the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.

The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:

- objectives and policies that articulate the development outcomes for the precinct or sub-precinct
- rules that give effect to those development outcomes
- mechanisms that incentivise the use of framework consents as a first stage process for land development
- assessment criteria that need to be addressed as part of applications for framework consents
- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

Applications for framework consents will generally be categorised as restricted discretionary activities that will be assessed without the need for public notification, unless special circumstances exist. The Auckland-wide provisions and rules, and any applicable overlay provisions, apply to applications for framework consents, unless otherwise specified in the identified precinct provisions.

Matters of discretion

1. Unless otherwise stated in the precinct rules, the Council will restrict its discretion to the following matters for applications for framework consents:
   - i. the location, physical extent and design of the transport network
   - ii. the location, physical extent and design of open space
   - iii. the location and capacity of infrastructure to service the land for its intended use
   - iv. integration of development with neighbouring areas, including integration of the transport network with the transport network of the wider area
   - v. earthworks and suitable land contours for development
   - vi. staging of development and the associated lapse period for applicable resource consents
   - vii. staging and funding of infrastructure and services

Assessment criteria

2. Unless otherwise specified in the identified precinct rules, applications for framework consents will be assessed against the following assessment criteria:

i. The location, physical extent and design of the transport network
   - The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.

ii. The location, physical extent and design of open space
   - Public open spaces are generally provided in the location(s) identified in the precinct plan to meet the needs of the local community. Where no location is identified, open space should be provided to and located to serve the future needs of the local community.

iii. The location and capacity of infrastructure to service the intended use of the land and, in particular, significant infrastructure
   - Adequate infrastructure is provided to service the proposed development of the land, including transport, stormwater, wastewater, water supply, electricity, gas and telecommunications.
   - Stormwater management methods that use low impact stormwater design principles and improved water quality systems are encouraged.

iv. Where applications for framework consents relate to particular sub-precincts, integration of the proposed development with neighbouring sub-precincts and the balance of the precinct generally, including integration of the transport network with the transport network of the wider area
   - Where applications for framework consents relate to a sub-precinct, the application should demonstrate how the proposed development achieves the overall objectives of the precinct, including the integration of the transport network, open spaces and other infrastructure that will serve the development.
   - Applications for framework consents should show how the results of an Integrated Transport Assessment have been taken into account.

v. Earthworks and land contours suitable for development
   - Earthworks, including bulk earthworks for the provision of infrastructure and the final contouring of land should be consistent with the scale of development.
   - The finished land contours and scale of the earthworks should be commensurate to the amenity anticipated in the precinct.
   - The assessment criteria set out in H4.3 Land Disturbance apply.

vi. Staging of development and the associated lapse period for the framework consent
   - Applications for framework consents should provide details of how the proposed development will be staged and how that staging coincides with provision and integration of infrastructure, bulk earthworks and services across the wider area. The council may impose conditions enabling a lapse period longer than five years.

vii. Staging and funding of infrastructure and services
   - Applications for framework consents should provide details and information that addresses how infrastructure and services will be staged and funded to support the proposed development. The timing of infrastructure should coincide and be coordinated with the expected staging of the proposed development to facilitate integrated transport and land use planning.

2.7.3 Framework consent applications

1. Unless otherwise stated in the identified precinct rules, applications for framework consents must be accompanied by the information listed in the general information requirements (clauses 2.7 – 2.7.9.2) as well as plans and supporting information which demonstrate the following:

a. the overall context of the application area, including a site development concept plan for the relevant precinct or sub-precinct area
b. existing infrastructure and street pattern
c. details of how the development on the application site will be staged
d. details of how the staging of the development coincides with provision of infrastructure and services in the wider area.

CHAPTER K – Precinct rules

[Precinct name]

The activities, controls and assessment criteria in the [specify underlying zones] and Auckland-wide rules apply to the [precinct name] precinct unless otherwise specified below.

Refer to planning maps for the location and extent of the precinct [and sub-precincts].

1. Activity table

1. The activities in the [underlying zone] apply in the [precinct name] precinct, unless otherwise specified in the activity table below.

Activity	Activity Status
Commerce/Accommodation/Industry	
[insert activities relevant to the specific precinct e.g. retail, retirement villages, offices]	[X]
Framework consents	
Applications for framework consents for land use consents for an entire precinct or sub-precinct complying with clause 3.1 below	RD
Development	
Minor cosmetic alterations to a building that does not change its external design and appearance	P
Buildings, and alterations and additions to buildings	RD
[List each activity associated with an application for a framework consent (as set out in Clause 3) as a separate activity, using the same terminology for the activities as appears elsewhere in the PAUP. ~~*For example:*~~ ~~*Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations.*~~ ~~*Roads*~~ ~~*Pedestrian linkages*~~ ~~*Water, wastewater and stormwater infrastructure*~~ ~~*Earthworks, landscaping and construction of parks infrastructure for the purpose*	RD ~~*RD*~~ ~~*RD*~~ ~~*RD*~~ ~~*RD*~~

~~*of establishing open space]*~~	
Subdivision	
Subdivision	RD

2. **Notification**

1. The council will consider applications for framework consents as a restricted discretionary activity without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

2. The council will consider applications for buildings, alterations and additions to buildings, on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

3. The council will consider applications for subdivision on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

4. The council will consider applications for buildings, alterations and additions to buildings, on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

5. The council will consider applications for subdivision on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

3. **Framework consents**

Purpose: to ~~ensure~~ enable the integrated development of land within identified precincts and to authorise the key enabling works necessary for that development to occur.

1. Applications for framework consents must seek land use consents for the following activities:

[Clauses a – e are provided by way of example only. The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site

characteristics and development outcomes and objectives for particular precincts, as will the provisions relevant to framework consents.]

~~*a. Roads*~~

~~*b. Pedestrian linkages*~~

~~*c. Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations*~~

~~*d. Water, wastewater and stormwater network infrastructure*~~

~~*e. Earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space*~~

4. Development Controls

1. The development controls in the [underlying zone] apply in the [precinct name] precinct unless otherwise specified below.

5. Control [X]

~~*[Insert relevant land use and development controls e.g. Building height, site intensity, building coverage etc. For example:*~~

~~*1. Buildings must not exceed the heights specified on precinct plan X, prior to the approval of a framework consent.*~~

~~*2. With an approved framework consent, buildings must not exceed the heights specified on precinct plan X.]*~~

6. Assessment – Restricted discretionary activities

6.1 Matters of discretion

For development that is a restricted discretionary activity in the [precinct name] precinct, the council will restrict its discretion to the following identified matters and the matters specified for the relevant restricted discretionary activities in the underlying zone:

1. Applications for framework consents
   a. The matters of discretion in clause 2.6.1 of the general provisions apply.
   b. The overall development layout, being the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
   c. *[Specify relevant matters of discretion in addition to clause 2.6.1 for the specific precinct]*
2. Buildings, alterations and additions to buildings

a. The matters of discretion in [clause X] of the underlying zone rules for new buildings and/or alterations and additions to buildings apply.
b. The location, bulk and scale of buildings relative to overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
c. Design, bulk and location of buildings.
d. The matters of discretion in clause 2.6.1 of the general provisions apply.

3. Subdivision
   a. The matters of discretion in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The proposed subdivision layout relative to the overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.

[Insert matters of discretion for other activities that are classified as restricted discretionary activities in the activity table, such as: roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example
x. Roads
xx. The location, physical extent and design of the transport network]

6.2 Assessment criteria

Unless otherwise specified below, for development that is a restricted discretionary activity, the following assessment criteria apply in addition to the criteria specified in the underlying zone rules:

1. Applications for framework consents
   a. The assessment criteria in clause 2.6.2 of the general provisions apply.
   b. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.
   c. *[Specify relevant assessment criteria for specific precinct]*

2. Buildings, alterations and additions to buildings
   a. The assessment criteria in *[clause X – include a cross reference to Part 2 of the Unitary Plan which provides the specific provisions]* of the underlying zone rules for buildings and/or alterations and additions to buildings apply.
   b. The proposed building, alteration or addition relative to the location of infrastructure servicing the area and open space should result in an integrated network that is adequate to meet the needs of the overall development area.

c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

3. Subdivision
   a. The assessment criteria in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The location of infrastructure servicing the area servicing the area, and open space, should result in an integrated network that is adequate to meet the needs of the overall development area.
   c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

[Insert assessment criteria for other activities that are classified as restricted discretionary activities in the activity table, such as roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example

d. Roads
   i. The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided for in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.
   ii. The physical extent and design of the transport network should be multimodal, providing for cycle and pedestrian movement.
   iii. Block layout and design should enable the creation of sites which can meet the development controls of the precinct and relevant underlying zone provisions.]

7. Special information requirements

1. Applications for framework consents must be accompanied by the following information:
   a. [Insert information requirements relevant to the specific precinct.]

[The following are provided by way of example only]
b. where changes to site contours are intended, the relationship of those site contours to existing and proposed streets, lanes, any adjacent coastal environment, and, where information is available, public open space
c. the location, width, design and function of proposed streets, cycle routes and pedestrian routes
d. the location, dimension, design and function of public open spaces
e. the location of stormwater, wastewater, and water supply, electricity, gas and telecommunications infrastructure
f. the landscaping concept for the application area
g. the location of any historic heritage or natural features

h. the location and volume of earthworks and intended final contours]

2. Buildings, and alterations and additions to buildings, and subdivision on sites that are not the subject of an approved framework consent must provide the following information:
   a. A compilation and assessment of approved resource consents relevant to the application site.