TAB 6

Hanton v Auckland City Council

The Planning Tribunal: His Honour Principal Planning Judge Sheppard, presiding; Mr J R Dart and Mr F Easdale.

13-17, 20 December 1993; 1 March 1994 Decision A 10/94

Land use consent — Discretionary activity — Establishment of service station in residential zone — Effect of broad Treaty of Waitangi claim covering appeal site — Whether duty to consult tangata whenua on resource consent applications — Effects of proposal — Weight to be given to proposed district plan which did not provide for service stations in residential zones — Assessment of effects of non-complying activity — Exercise of discretion under s 105(1)(b) — Treaty of Waitangi Act 1975, s 6(4A) — Resource Management Act 1991, ss 5(2), 6(e), 8, 104, 105(1)(b), 105(2)(b).

Practice and procedure — Consultation with tangata whenua — Whether s 8 created a duty of serious consultation with tangata whenua where proposal could affect interests in Maori ancestral land — Resource consent application for service station — Acts Interpretation Act 1924, s 5(j) — Resource Management Act 1991, ss 8, 93(1)(f).

District plan — Relevant instrument — Resource consent application to establish service station — Service stations provided for as discretionary activity in operative transitional district plan — No provision for service stations in applicable zone in proposed district plan — Relative weight to be given to proposed district plan — Resource Management Act 1991, ss 104(4), 105(2)(b)(ii).

This was an appeal against a decision granting land use consent for a new service station on an undeveloped site at 1380 Great North Road, Waterview, Auckland.

The appellants were nine residents of the Waterview suburb. The service station complex was planned to occupy about 3000 m^2 of the 1.6250 ha site, with the remainder of the site to be planted in trees and shrubs so that it appeared to integrate with an adjoining reserve. The proposal was for an office and shop building with a floor area of 150 m^2 and an eight-lane forecourt underneath a canopy with dispensers for petrol, diesel and LPG. No servicing or repairs to vehicles was proposed to be carried out on the site. The service station would be open for business 24 hours a day, seven days a week; though the noise level condition would effectively prevent the operation of the automatic car wash after 9 pm. The service station was designed for one-way traffic flow from north to south, with entrance from a 90-metre deceleration lane from Great North Road and signs designed to discourage right turns across southbound traffic lanes.

Under the transitional district plan (the former Auckland District Scheme) the land was in the Residential 5 zone in which service stations on arterial roads were conditional uses. Great North Road at Waterview was classified as an arterial road, so the proposal required land use consent as a discretionary activity. There was also a proposed district plan applicable to the site which was publicly notified on 1 July 1993. Under that plan the site was zoned Residential 6a, in which service stations were non-complying activities.

The site was formerly part of the Carrington Hospital, having been acquired by the Crown from the Ngati Whatua for valuable consideration in 1841. In 1989 the Auckland Area Health Board entered into a conditional agreement for sale and purchase of the property to the applicant, and the sale was completed in December 1990. The land was the subject of a general Waitangi Tribunal claim (WAI 121) which related to all land from Otahuhu to the Bay of Islands, and another claim (WAI 388) which related to the land in the Tamaki isthmus generally. Neither claim had been reported on or heard by the Waitangi Tribunal.

The tangata whenua of the area, Ngati Whatua, had not been consulted over the service station proposal, and had not been separately served with the application.

The appellants made eleven principal arguments in opposition to the service station proposal. It was argued, inter alia, that granting consent would compromise the objectives and policies of the proposed district plan; that the amenities of the site, which had come to be regarded as part of the public estate to be used for public purposes, would be adversely affected; that the proposal conflicted with the principles in Part II of the Act; and that there was a duty under s 8 of serious consultation with iwi and local hapu where a proposal could affect Maori interests in ancestral land which had not been complied with. In relation to this last argument, counsel for the respondent submitted that to the extent that the Tribunal in *Gill v Rotorua District* (1993) 2 NZRMA 604 determined that the Act requires consent authorities actively to consult with tangata whenua on resource consent applications, that finding was wrong in law.

An issue was raised as to whether, when assessing effect on the environment for the purpose of s 105(2)(b)(i), the Tribunal should have regard to the intensity and nature of to the existing use of the site (which was pastoral), or to the intensity and nature of development that would be permitted on the site as of right under the district plan.

Held (dismissing the appeal):

(1) The existence of the broad Waitangi Tribunal claims should not influence the decision on the present appeal. There was no evidence that the appeal site was excluded from the effect of s 6(4A) of the Treaty of Waitangi Act 1975 by which the Waitangi Tribunal was precluded from recommending return to Maori ownership of any private land. It was accepted that the applicant had a valid title to the property so that there was no basis for treating the land as part of the public estate to be used for public purposes.

(2) The respondent had no duty to notify the Ngati Whatua o Orakei Trust Board of the resource consent application. There was no evidence of probative value to suggest any particular relationship by Maori with the service station site, or that the site had any heritage value; and there was nothing to support the claim that the proposal would affect Maori interests in their ancestral land.

(3) A consent authority is not obliged to consult with the tangata whenua on resource consent applications. Section 8 was an important provision which should be given a fair, large and liberal interpretation; yet the Tribunal would not be entitled to give it an effect beyond the scope of the words used. The section requires consent authorities to take into account the principles of the Treaty of Waitangi, but, where a consent authority is not a Minister of the Crown, it does not impose on the consent authority the obligations of the Crown under the Treaty. Where it is known that natural or physical resources the subject of a resource consent application are the object of a valued relationship by Maori people, an adviser preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship. That was not required on the present facts.

(4) The planning effect of allowing the proposed activity would be minimal. Any effect on the integrity of the proposed plan, under which the service station was a non-complying activity, would be reduced by the fact that the application had been made and originally decided before the proposed plan had been published; that the reasons for omitting provisions allowing service stations in residential zones is not stated in the plan; and that the relevant provisions of the plan had been challenged.

(5) The proposed service station, if established and operated in accordance with the conditions imposed by the respondent, would promote the sustainable management of the resource represented by the applicant's property while avoiding, remedying, or mitigating any adverse effects on the environment. In particular, the proposal would not cause any adverse effects on the safe and efficient flow of traffic; there would be no more than minor adverse effect on the residential character of the area; and the operation of the proposed service station would not be likely to give rise to any significant adverse noise effects.

(6) There could be cases in which regard should be had to the provisions of both an operative and a proposed plan. The weight to be given to a proposed plan would generally be greater the further the relevant provisions had been exposed to testing along the course prescribed by Part I of the First Schedule to the Act. There was no general rule about the cases where a proposed plan was to prevail over an operative plan, or vice versa. Rather each case is to be decided individually according to its own merits. The Tribunal here would have regard to all relevant rules, policies and objectives of the operative (transitional) district plan, and of the proposed district plan, in reaching a discretionary judgment about the proposal.

(7) The Tribunal was not persuaded that assessing, for the purposes of s 105(2)(b)(i), whether any effect on the environment would be minor is to be gauged against possible effects of hypothetical permitted activities. Rather, the judgment was to be made in the circumstances as they stood. Overall, judged on the footing that the activity would be established and carried on in compliance with the conditions imposed by the respondent, the effects of the proposed activity on the environment would be no greater than minor. The second limb of s 105(2)(b) was also met in that there was no basis for concluding that the proposal would be contrary to any of the objectives or policies of the operative plan or of the proposed district plan.

Cases considered

Banks v Nelson City (Decision W 15/93)
Brewster v Dunedin City (Decision C 30/87)
Clark v Christchurch City (Decision C 36/83)
Design 4 Ltd v Queenstown Lakes District (1992) 2 NZRMA 161
Darroch v Whangarei District (Decision A 18/93)
Gill v Rotorua District (1993) 2 NZRMA 604
Haddon v Auckland Region [1994] NZRMA 49
Ireland v Auckland City (1981) 8 NZTPA 96
Lim v Hutt City [1994] NZRMA 183
New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142
New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513
New Zealand Rail Ltd v Marlborough District (1993) 2 NZRMA 449
New Zealand Rail Ltd v Marlborough District [1994] NZRMA 70
Ngatiwai Trust Board v Whangarei District [1994] NZRMA 269
Northern Contractors v Mt Eden Borough (1985) 11 NZTPA 151
Paynter Horticultural Enterprises Ltd v Hastings District (Decision W 25/93)
Sea-Tow Ltd v Auckland Region [1994] NZRMA 204
Stevens v Tasman District (Decision W 43/92)
Thomson v Queenstown Lakes District (1992) 2 NZRMA 189
Van Erkel v Queenstown Lakes District (Decision A 57/93)
Warde v Howick Borough (Decision A 88/83)

Appeal under s 120 of the Resource Management Act 1991.

K A Palmer for the appellants
D A Kirkpatrick for the respondent
R E Bartlett and *D A Allan* for the applicant
T B Childs for Waitemata Health Ltd (leave to withdraw)

The decision of the Tribunal was delivered by His Honour Judge Sheppard.

DECISION

This is an appeal under s 120 of the Resource Management Act 1991 against a decision granting land use consent (subject to conditions) for a new service station on a site at 1380 Great North Road, Waterview, Auckland City. By an amended notice of appeal the appellants sought that the respondent's decision be reversed and the application declined. It was common ground among the parties that by s 230 of the Resource Management Amendment Act 1993 the appeal is to be considered and decided as if that Act had not been passed. We accept the correctness of that.

The appellants are nine residents of the Waterview suburb. Waitemata Health Ltd, which has premises in the vicinity of the site, appeared at the commencement of the appeal hearing and announced that it did not wish to take part in the hearing.

The applicant had previously applied unsuccessfully for planning consent under the former Town and Country Planning Act 1977 for a service station on the same site, the Planning Tribunal's decision disallowing its appeal being Decision A 46/91 given in June 1991. There was no challenge to the applicant

being free to make the present application despite the fate of the previous application.

Since the previous decision the installation of traffic signals at the intersection of Herdman Street and Great North Road, and proposals by the respondent for improvements to Great North Road (especially proposals for a raised or painted median, redesign of a deceleration lane leading to the service station, a separate lane for traffic turning right from Great North Road into Herdman Street, a splitter island to the south of the intersection on Great North Road, and a recessed bus stop) have altered circumstances that were material reasons for the Tribunal's earlier decision to disallow that appeal. [The details of the proposal are summarised briefly in the headnote.]

Planning instruments

It was not suggested that any regional planning instrument contains provisions applicable to the appeal. The relevant planning instruments are the transitional district plan and a proposed new district plan.

Transitional district plan

The relevant transitional district plan is the former Auckland City district scheme. By that plan the land is in the Residential 5 zone, in which service stations on arterial roads are conditional uses. Great North Road at Waterview is classified as an arterial road. It was common ground that, under the Resource Management Act and in terms of the operative transitional district plan, the proposal is a discretionary activity. We therefore hold that the application requires land use consent in terms of the transitional district plan.

The plan contains some general criteria for consideration of conditional uses, and in cl 3.5:2.4 there are specific criteria for consideration of service stations. In Residential 5 zones a range of activities are permitted as of right including (as well as dwelling units) homes for the aged, pensioner housing, private hospitals for up to 21 patients, and private schools; and conditional uses (now discretionary activities) include (as well as service stations) buildings for arts and recreation, community welfare services, educational institutions, and private hospitals for 21 or more patients.

Proposed district plan

The respondent has prepared a proposed district plan under the Resource Management Act for the section of its district that includes the subject site, that is, the Auckland isthmus excluding the central area. The plan was publicly notified on 1 July 1993, and numerous submissions were received within the period prescribed (which elapsed on 30 September 1993); but at the time of the appeal hearing the respondent had not published a summary of the submissions to allow further submissions in support or opposition in the way provided for by cl 7 of Part I of the First Schedule to the Act. Indeed, although the period for lodging submissions had closed on 30 September 1993, by the time of the appeal hearing in mid-December the respondent informed us that it was unable to state whether it had received any submissions challenging any of the provisions of the proposed district plan that might bear on the applicant's proposals or on the proposed zoning of its land.

At the time it granted consent, in June 1993, the respondent had not yet notified its proposed district plan, so the service station application had been considered by it solely in terms of the transitional district plan. However, we

accept the respondent's submissions that on this appeal, now that the proposed plan has been notified, the application needs to be considered in terms of that plan as well: see the reasoning in *Ireland v Auckland City Council* (1981) 8 NZTPA 96 and the reference in s 9(1) to a use of land that contravenes a proposed plan.

By the proposed district plan as originally published, the site would be in the Residential 6a zone (which would also apply to the existing residential development on the western side of Great North Road). The proposed plan does not provide for service stations as permitted or discretionary activities in the Residential 6a zone or in any other residential zone. No reason for omitting provision for them in those zones is stated. Service stations are provided for as discretionary activities in the Business Activity zones. The provisions of the proposed plan about performance standards for hazardous facilities would also effectively prevent service stations in residential zones.

Although the respondent was unable to inform us of any relevant submissions received by it on the proposed plan, the applicant's planning witness was able to depose that submissions had been lodged seeking that service stations be provided for in residential zones; and a consultant planner called for the respondent deposed to his understanding that there had also been submissions from the public seeking rezoning of the subject site as Open Space. [The objectives of the proposed plan were described.]

It was common ground that the proposed service station, while not provided for in the relevant zone under the proposed plan, is not a prohibited activity as defined; and even if it were, by s 105(2)(c) the proscription against granting resource consent for a prohibited activity in a proposed plan would not take effect until the relevant part of the plan is beyond challenge. It was common ground therefore that the proposal must be considered as a non-complying activity in respect of the proposed district plan, and we so hold.

[The applicant was granted discharge permits for the discharge of storm-water to Oakley Creek and for the discharge into air of vapour from full tanks when being refilled.]

The appellants' case

The main grounds advanced for the appellants in opposition to the service station were:

1 That concerns expressed in the 1991 appeal decision about traffic safety remain substantially applicable, traffic densities having compounded at least 3 per cent per annum in the intervening period.
2 That service stations are not permitted in residential zones under the proposed district plan, and although decisions on submissions may affect the final content of the plan, it is unlikely that service stations will be added back in any residential zone; that neither of the threshold tests for grant of non-complying activity consent can be satisfied and that granting consent for a service station in a residential zone would compromise the objectives and policies of the proposed plan, bring its integrity into question, and affect public confidence in its administration.
3 That the proposal would have adverse effects on the amenities of the area by the impact of a large corporate service station on the residential environment, the loss of a significant area of "green belt", and detraction

from the amenity of the Oakley Creek walkway; and the site has come to be regarded as part of the public estate to be used for public purposes.

4 That there would be discharges of contaminants in the stormwater runoff to the Oakley Creek, and venting of fumes during the refilling of fuel tanks.

5 That the proposal does not (in terms of s 5(2)(c)) adequately avoid, remedy, or mitigate the adverse effects of the activity on the environment.

6 That the proposal conflicts with principles in Part II in that the scale of the development abutting the Oakley Creek, which has a natural habitat function, could raise matters of national importance, in particular: preservation of the natural character of wetlands and rivers and their margins (s 6(a)); protection of areas of significant habitats of indigenous fauna (s 6(c)); and the relationship of Maori and their culture and traditions with their ancestral lands (s 6(e)); and matters under s 7 which are relevant to the achievement of sustainable management, namely maintenance and enhancement of amenity values (s 7(c)); recognition of the heritage value of the site, its original purchase from Ngati Whatua and continued public purpose and use (s 7(e)); and maintenance and enhancement of the quality of the environment in that as a large structure the service station would not maintain and enhance amenity values nor enhance the quality of the environment (s 7(f)).

7 That duties under s 8 which apply to the territorial authority in the first instance, which may have a responsibility to alert an applicant of the duty of serious consultation with iwi and local hapu where a proposal could affect Maori interests in ancestral land, have not been complied with.

8 That storage of 100,000 litres of petrol would substantially exceed the maximum safe volume for the locality.

9 That the applicant's agreement for purchase of the site had originally been conditional on obtaining approval for a service station, but without obtaining that approval the applicant had waived the condition, so it must be taken to have assumed the risk that consent might not be granted.

10 That the Tribunal having refused the previous application, the council's subsequent grant of a similar application affects public confidence in the resource management decision system.

11 That an isolated small area should not be spot zoned, and although the current proposal is not formally a zoning, the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

On ground 2, counsel for the appellants accepted that it would not be proper for the Tribunal to speculate about the outcome of submissions on the proposed plan.

On ground 4, counsel for the appellants acknowledged that because the discharges had been the subject of separate applications which had not been notified, and no appeals arising from them were before the Tribunal, the Tribunal could not address those claims in these proceedings. We accept that because the requisite discharge permits have been granted, we should consider the proposal on the footing that any discharges of contaminants to the waters of the creek, and into the atmosphere, would be insignificant.

The appellants offered no direct evidence to support ground 8, which was based on the amount of petrol to be stored exceeding the limits prescribed in

the proposed district plan. In that respect, Mr Palmer accepted that the limit on the quantity of petrol that may be stored is not particularly reliable pending decision on submissions on the plan.

In support of their case, the appellants called no fewer than 16 witnesses. Regrettably, much of the testimony of many of those witnesses was not properly evidence but assertions of aspects of their case which had been fully presented by their counsel in his address to the Tribunal, and did little to provide a basis for judicial findings or otherwise advance their case.

The applicant's purchase of the site

The circumstances in which the applicant came to be the owner of the site are relevant to several references in the appellants' grounds of appeal, namely the claim that the site has come to be regarded as part of the public estate to be used for public purposes (see ground 3); the claimed applicability of the relationship of Maori with their ancestral lands, and the heritage value of the site (see ground 6); the claim that the proposal would affect Maori interests in ancestral land (see ground 7); and the reference to the applicant having waived a condition of purchase of the site (see ground 9). Despite those claims, there was not any conflict of primary fact on those topics, and we set out our findings on them.

Carrington Hospital land (which included the subject site) was formerly owned by the Auckland Area Health Board, successor to the former Auckland Hospital Board, being part of a 13,000 acre block (covering a large part of the Auckland isthmus) that had been acquired by the Crown from Ngati Whatua for valuable consideration in 1841, and most of which was purchased for public health purposes from various intervening owners.

The subject site had originally been set aside for school purposes in 1878 and was transferred to the Crown for health purposes in 1892. It was transferred to the Auckland Hospital Board in about 1980, and its successor, the Auckland Area Health Board sold it to the applicant by conditional agreement for sale and purchase that was made in 1989, made unconditional in November 1990, and completed in December 1990; and the transfer to the applicant was registered in 1991.

The land is the subject of a general Waitangi Tribunal claim (WAI 121) by W and E Manukau made in January 1990 (after the agreement for sale of the subject land to the applicant had been entered into) which relates to all land from Otahuhu to the Bay of Islands. Claim WAI 388 by the Ngati Whatua o Orakei Trust Board was made to the Waitangi Tribunal on 17 August 1993 and related to the land in the Tamaki isthmus generally.

Neither of those claims under the Treaty of Waitangi Act 1975 has been reported on or heard by the Waitangi Tribunal, and there is no evidence that the land is excluded from the effect of s 6(4A) of that Act (as inserted by s 3 of the Treaty of Waitangi Amendment Act 1993) by which that Tribunal is precluded from recommending return to Maori ownership of any private land. We consider that the existence of those broad claims should not therefore influence this Tribunal's decision on this appeal.

A witness for the appellants who is deputy chairman of the Ngati Whatua o Orakei Trust Board, Mr G P Hawke, deposed that the Auckland Area Health Board had not informed or consulted with Ngati Whatua o Orakei about the Health Board's intention to sell land in the vicinity, and that the Trust Board

would have expressed opposition on the grounds that the land was designated for health and educational purposes, not for development by a multi-national oil company.

A local resident who gave evidence for the appellants, Ms S C Abernethy, deposed that the land "should not be derogated from in any way by grants to commercial interests".

The respondent council has formally resolved not to purchase the site to add it to the adjoining reserve at this time.

By their counsel the appellants accepted that for the purposes of this appeal it should be assumed that the applicant has a valid and lawful title to the property. We accept that, and add that there was no evidence before us to suggest otherwise.

There is no basis for treating the land as part of the public estate to be used for public purposes; or for holding that its sale to commercial interests was a derogation from any special legal status precluding such a transaction. There is no evidence of probative value before us to suggest any particular relationship by Maori with the service station site, or that the site has any heritage value; and there is nothing to support the claim that the proposal would affect Maori interests in their ancestral land.

We accept that the applicant waived the condition of its purchase agreement and completed the purchase without having obtained approval for a service station on it, and thereby assumed the risk that consent might not be obtained. That was a commercial judgment, and we do not consider that it diminishes the applicant's case nor advances the appellants' case.

Consultation with the tangata whenua

One of the issues raised for the appellants was that there had been no, or no adequate, consultation with the tangata whenua. In that regard, their counsel submitted that under s 8, a duty of serious consultation with iwi and local hapu may be applicable where a proposal could affect Maori interests in ancestral land; and that the duty may apply to the territorial authority in the first instance, who may have a responsibility to alert an applicant.

In support of that submission, Mr Palmer relied on two Planning Tribunal decisions, *Gill v Rotorua District Council* (1993) 2 NZRMA 604 and *Haddon v Auckland Regional Council* [1994] NZRMA 49; and contended that s 8 overrides narrower obligations under the regulations and that the omission from the regulations of provision for consultation on a resource application with iwi may be overridden by the general obligation under s 8. Counsel also argued that the reference in s 8 extends the duty of consultation of the type referred to in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) to the consent authority, relying on s 5(j) of the Acts Interpretation Act 1924 for construction of s 8 to achieve the purpose and spirit of the provision. Mr Palmer observed that under s 93(1)(f) there is a discretion to require service of a resource consent application on an iwi authority.

It was established (and not challenged) that Ngati Whatua are the tangata whenua in the vicinity of the site, and it was common ground that they had not been consulted over the service station proposal, and had not been separately served with the application. Their attitude is that land surplus to requirements of public authorities in Auckland should be returned to Maori ownership and

not used for activities that the iwi consider unsuitable. It was also established that the applicant had given notice of the resource consent application to everyone on the list supplied to it by the respondent for that purpose, and had also sent copies of the application to everyone who telephoned for them.

Ngati Whatua are not parties to these proceedings. The deputy chairman of the Trust Board, Mr Hawke, stated in evidence that the Trust Board considered that the respondent had been in breach of the Resource Management Act in that as tangata whenua and owner of adjacent land the Trust Board had never been notified of the application. In cross-examination he acknowledged that the adjacent land referred to has access to Carrington Road; and that the Trust Board's objective is retention of the site as open space.

The subject site was held in separate freehold title by a private company at the time when the present application was lodged. The respondent, as consent authority, had no knowledge of the site containing any waahi tapu, and it is not shown in the proposed district plan as containing any archaeological feature or Maori Heritage site. Neither the Department of Conservation nor the Auckland Regional Council records show the site containing archaeological or historic sites. There is nothing to indicate that the adjacent land vested in the Trust Board would be affected in any way by the proposed service station. In the circumstances, we hold that the respondent had no duty to notify the Ngati Whatua o Orakei Trust Board of the resource consent application.

To the extent that the Planning Tribunal held, in *Gill v Rotorua District Council,* that the Act requires consent authorities actively to consult with tangata whenua on applications for resource consent, counsel for the respondent submitted that finding was wrong in law, and urged us not to follow it. He contended that while territorial authorities have an obligation under cl 3 of the First Schedule to consult with tangata whenua during the preparation of proposed policy statements and plans, they are not required to consult with anyone when considering applications for resource consents. Counsel observed that applicants for resource consents are obliged by s 88(6) and cl 1(h) of the Fourth Schedule to identify in their assessments of environmental effects those interested in or affected by a proposal, the consultation undertaken and any response to the views of those consulted. He also observed that consultation by a consent authority with tangata whenua would also be inconsistent with its position as the decision-maker in a judicial or quasi-judicial process, resulting in a degree of active participation by consent authorities which would be contrary to the principles of natural justice. Mr Kirkpatrick submitted that if Parliament had intended consent authorities engage in consultation on resource consent applications, it would have explicitly provided for that in the code of procedure for processing those applications. Counsel for the applicant adopted those submissions. The text of s 8 is:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

In *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) the learned President, delivering the Judgment of the Court, added some

> In the judgments of 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument . . . it would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale [of forestry cutting rights] without consultation.

In *Gill v Rotorua District Council,* the Tribunal said (at p 616):

> One of the nationally important requirements of the Act under the Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua: see *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).
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> The council itself does not appear to have actively consulted with the tribe over the proposal. In its report to council, the Statutory Hearings Committee stated, in the light of allegations that the council had not adequately consulted the Trustees, that: ". . . the records clearly indicate that the necessary advice was conveyed to the Trust, and from there it was a matter for the Trust to deal with".
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> This is not what the legislation requires. The council's actions appear to have been merely passive. The test which the council has to meet under all provisions of s 7 is a high one. It is required to have *particular regard* to the issues listed. We have no evidence that the council gave especial regard to the Maori issues in its investigations into the proposal. The section imposes a duty to be on inquiry. The evidence disclosed that the Maori people of the area had supported the Scenic Reserve designation in 1979. The council had, until this point, supported the Scenic Reserve designation also. It should have investigated further why the Maori people supported it originally and been on the alert as a consequence.

In its report to the Minister of Conservation in *Haddon's* case, the Tribunal said (at p 61):

> . . . it is clear to us that the parties had not taken into account the principles of being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed, or of how to give effect to some of the hapu's customary practices, early enough in the decision-making process.
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> It would appear that the duty "to take into account" indicates that a decision-maker must weigh the matter with other matters being considered, effect a balance between the matter at issue and be able to show he or she has done so. In this case the concerns which seem to have been taken into account are the general social concerns of the community. The cultural concerns of the community and its relationship with traditional resources do not seem to have been weighed and shown to be weighed (apart from in one small aspect).
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> The Court of Appeal has established that consultation is a principle of the Treaty. (See *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152 (CA)). That principle was not cited by any of the parties before us but as a party exercising a function and power under the Act, we too are required to take into account the principles of the Treaty. We have thus taken judicial notice of the existence of this principle and hold that it was applicable in this case. It is our view after hearing Mr Haddon that had all the parties entered into a dialogue with him and the hapu even before the formal notification had taken place, such consultation

> might well have circumvented the inquiry process or at least some of the issues raised before us.
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> We gained the clear impression that he should have been part of the process which formulated the application instead of, as he put it, being brought in only at the seventh stage in a nine stage process. Your counsel drew our attention to the Treaty principle of the Crown making informed decisions. To be informed all the parties under the RMA, including the ACC and ARC, must be informed where the interests of a Treaty partner is concerned and demonstrate in their various functions that they have taken those interests into account. To be properly informed therefore the parties must consult at the initial stages in the process.

In its decision in *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269 the Tribunal (differently composed) addressed the passages quoted above from *Gill's* case and *Haddon's* case and said (at pp 273-274):

> We do not think that, by these passages, it was intended to be understood that, in all cases where Maori people are known to reside in the vicinity of a site the subject of a resource consent application, or otherwise where local Maori community interests have registered some viewpoint or concern about the application, the council to whom the application is addressed must first consult with those involved, or their representatives, before proceeding to hear and determine the matter. Rather, the Tribunal appears to have focused in the cases mentioned upon the local authority parties' failure to follow up the special background of Maori significance present in each instance — both cases being intimately related to apparently long standing cultural issues of which the councils concerned could not have been unaware. We pause here to emphasise that nothing we are about to say should be construed as suggesting that a council planning officer, in preparing a report for pre-hearing distribution among the parties and for the council's assistance at the hearing, may not be under a duty (depending on the circumstances) to enquire into the views of the tangata whenua by consulting with their representatives, so as to ensure that the report is suitably comprehensive as to relevant issues upon which the council needs to be informed. If this point was, in effect, conveyed in the previous cases before the Tribunal, we likewise endorse it.

Then, after referring to the *Maori Council* case and the recent judgment of the Privy Council in *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, and quoting the text of s 8, the Tribunal continued (at p 275):

> . . . in approaching s 8 the particular function or power requiring to be performed or exercised by a particular person pursuant to a particular section or part of the Act must be considered in its context in order to analyse the nature and extent of the responsibility incumbent on the person under the section. In the process of such consideration, the underlying obligations and responsibilities of the Treaty, collectively explained in the line of well-known cases of high authority, and going to its essence and hence its workability as a living document, need carefully to be borne in mind. If the person's particular function or power requiring to be performed or exercised is perceived as affecting or likely to affect a matter founded upon or arising out of the Treaty, then the person concerned must take into account such Treaty principle or principles as are relevant to ensure that the intent of the Treaty in relation to the matter is maintained, in so far as that is practicable in achieving the Act's purpose under s 5.

> In this instance, the respondents proceeded to exercise their functions and powers, in relation to the applications made to them, by requiring the applicants to furnish supporting information and plans, and by requiring that various interested parties be notified, including the appellant. As bodies required to act judicially in hearing and determining the applications in the light of the evidence forthcoming from the applicants and others electing to participate, we do not see that either respondent, having regard to its relevant functions and powers, was under a duty to consult with the appellant (or with others within the appellant's auspices) before proceeding to hear the applicants and representatives of the appellant.

Because of its place in Part II of the Act, and because of its subject matter, s 8 is an important provision, to be given fair, large and liberal construction, and not read down. Yet we would not be entitled to give it effect beyond the scope of the words used. Consent authorities receiving and processing resource consent applications, such as the respondent in this case, are undoubtedly exercising functions and powers under the Act, and are bound to take into account the principles of the Treaty. That duty would include, in appropriate cases, taking into account the Crown's duties of active protection of Maori interests, and of informed decision-making where relevant: *Sea-Tow Ltd v Auckland Regional Council* [1994] NZRMA 204.

Although s 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. Where, as in *Haddon's* case, the consent authority is a Minister of the Crown, then it is to be expected that the Minister's decision would take into account those obligations. But where the consent authority is not a Minister of the Crown, but a local authority or some other person, we do not find authority in s 8 for the proposition that by exercising functions and powers under the Act it is subject to the obligations of the Crown under the Treaty. Rather the consent authority is to take those principles into account in reaching its decision.

The Crown's duty of consultation referred to by the Court of Appeal in the 1989 Judgment was found to exist in a context of sale by the Crown of assets in respect of which the good faith of partners was involved. In our view, the case of a consent authority, not being a Minister of the Crown, receiving and processing a resource consent application is distinguishable in three ways. First, in such a case a consent authority is not disposing of Crown assets in a way that might place them beyond reach of being available to compensate for grievances under the Treaty. Its function is confined to deciding whether a proposed use may be made by whomever of natural and physical resources consistent with their sustainable management. Secondly, the consent authority is following quite a detailed code of procedure which does not overlook the place of the tangata whenua, but which omits any express duty of consultation. Thirdly, the consent authority's function is to act judicially, and consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its function. With respect, we do not find in the judgment of the Court of Appeal anything which would support Mr Palmer's submission.

We would adopt, with respect, the discussion in the *Ngatiwai* decision of the earlier Tribunal decisions, and would follow the conclusion that a consent authority is not obliged to consult with the tangata whenua on a resource

consent application. We hold that no such duty is to be inferred from s 8 or the *Maori Council* case; and we do not accept the submission made by Mr Palmer for the appellants that the respondent was under a duty to consult with Ngati Whatua on the resource application.

We also agree that where it is known that natural or physical resources the subject of a resource consent application are the object of a valued relationship by Maori people, an adviser preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship. However that was not required on the facts of this case.

Criteria

We now consider the proposal by reference to the criteria set out in s 104 that are applicable.

Actual and potential effects

First we are required by s 104(1) to have regard to any actual and potential effects of allowing the activity.

We accept Mr Bartlett's submissions that consideration may be given to any positive effects as well as to any adverse effects of allowing the activity; and we find that positive effects of allowing it would include not only the service and convenience for customers of the fuel and other goods and services provided by the service station, but also the extensive planting proposed, which would add to amenity values of the area, and the ability for the council to recess the bus bay on the applicant's land, so that stopped buses do not restrict passing traffic.

Planning

We now consider whether there would be any actual or potential planning effects of allowing the activity.

It was the appellants' case that an isolated small area should not be spot-zoned, and although counsel acknowledged that the proposal is not for a zoning as such, he argued that the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

We do not accept that analogy. In terms of the zoning under the operative district service plan a service station may be permitted on the site as a discretionary activity. If a service station is established there, no change to the Residential 5 zoning of the land would be needed for the plan to retain its integrity. We do not overlook that a service station would not be an activity that the proposed district plan provided for on the site. To avoid prejudging an issue that may yet have to be decided by the Tribunal, our consideration of the planning effects in that respect should proceed on the assumption that the relevant provisions of the proposed plan will remain unchanged when that plan becomes operative. However a service station on the subject site would not be a prohibited activity there. If a service station is established pursuant to resource consent granted on the basis of it being a discretionary activity under the operative (transitional) plan, then even though it may be a non-complying activity in terms of the proposed plan (which had not been published at the time resource consent was applied for), a grant of consent for it would imply that a judgment had been reached that despite being a non-complying activity, land use consent deserved to be granted in all the circumstances. Any effect on

the integrity of the proposed plan would be reduced by the facts that the application had been made (and originally decided) before the proposed plan had been published; that the reasons for omitting provisions allowing service stations in the Residential 6a zone are not stated in the plan; and that the relevant provisions of the plan had been challenged, but those challenges had not been heard let alone decided. In addition, the planning suitability of the site for a service station by its physical characteristics, and in particular its large size, its location on an arterial route, and the lack of immediate neighbours; and the absence from the proposal of workshop and vehicle servicing facilities, would further reduce the planning effect of allowing the activity.

We find that the planning effect of allowing the proposed activity would be minimal.

[The remainder of the detailed discussion of the effects of the proposal has been omitted.]

Relative weight of the proposed plan

The criteria set out in s 104(4) include relevant rules, policies or objectives of a plan or proposed plan (paras (a) and (b)). In this case both an operative (transitional) plan, and a proposed plan exist. As mentioned already, those plans are not consistent in a material respect, in that the operative plan provides for a service station on the subject site to be a conditional use (so that by s 374 it is deemed to be a discretionary activity), but the proposed plan does not provide for a service station on the subject site at all, whether as a permitted activity or as a discretionary activity; and does not provide for storage of the quantity of petrol proposed to be stocked on the site, whether as a permitted or discretionary activity.

In the light of that difference, the parties made submissions about the way in which we should perform the duty imposed by s 104(4) of having regard to those provisions of the plan and the proposed plan.

Counsel for the appellants submitted that we could well consider the proposed plan to be the dominant document. He observed that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and argued that there is a clear inference of an intent to upgrade the importance of the proposed plans and to accord them equal importance. He relied on a Planning Tribunal decision in *Lim v Hutt City Council* [1994] NZRMA 183.

Counsel for the respondent observed that the proposed plan is at a very early stage in the planning process, and submitted that it may be regarded as "inchoate", as that term was used in the Tribunal's decisions in *Stevens v Tasman District Council* (Decision W 43/92) and *Banks v Nelson City Council* (Decision W 15/93). Mr Kirkpatrick also submitted that the correct approach is to consider which is the dominant plan. He argued that it would be in the interests of justice to regard the operative plan as dominant, given that the provisions of the proposed plan may be altered significantly. Counsel contended that it is also relevant to consider the expectations of the applicant, which had acquired the site at a time when the service station was conditional use, and has been continuing attempts to obtain consent. He submitted that it would be unfair to deny those expectations, referring to the Tribunal's decisions in *Northern Contractors v Mt Eden Borough Council* (1985) 11

NZTPA 151; *Brewster v Dunedin City Council* (Decision C 30/87) *Warde v Howick Borough Council* (Decision A 88/83); and *Clark v Christchurch City Council* (Decision C 36/83).

That approach was endorsed by an experienced consultant planner called for the respondent, Mr R M Dunlop. That witness deposed that until the new plan can no longer be altered through the submission and appeal processes, it would be good planning practice that the operative plan should form the dominant document, and that greater weight should be placed on the transitional plan. In cross-examination he agreed that the Act does not differentiate, giving one more or less weight.

Counsel for the applicant announced that he did not ask for a finding that the existing plan is the dominant document, explaining that the use of that term could be an apology for lack of clear thought. He observed that the proposed plan is at an early stage in the process of coming into force, that submissions have been made about absence of provisions for service stations in residential zones; that the applicant takes issue with the appellants' claim that it is unlikely that service stations will be added back as a discretionary activity; and that by contrast the operative plan has been the subject of a lengthy and relatively recent review process. Mr Bartlett submitted that there is no basis for preferring proposed provisions that have not been tested, that cannot be tested in these proceedings, and which are subject to strenuous opposition, and that the present application can proceed as a non-complying activity.

In *Lim's* case, the Tribunal considered the reference in s 105(2)(b)(ii) to the objectives and policies of the plan or proposed plan, and said (at p 185):

> We consider that this wording allows flexibility as to what weight the Tribunal would give to a proposed plan as opposed to an operative plan, that weight generally being greater as a proposed plan wends its way further through the notification and hearing processes. There may be occasions when regard must be had to the provisions of both.

In respect of the proposed variation in that case, the Tribunal took note of the fact that the variation was subject to many submissions which had not been heard by the council, and expressed the view that it could not hold that its provisions were sufficiently tested to influence the decision on that appeal.

We agree with the view expressed in that decision that there may be cases when regard is to be had to the provisions of both an operative plan and a proposed plan; and that the weight to be given to a proposed plan would in general be greater the further the relevant provisions have been exposed to testing along the statutory course prescribed by Part I of the First Schedule. We also agree with the proposition that there is a limit to the extent that description of an operative plan as the dominant document is useful in the new regime under the Resource Management Act. That term was used in cases under the Town and Country Planning Act 1977 as a shorthand for indicating that a proposed measure had not been sufficiently exposed to testing to prevail over the corresponding provisions of the operative scheme. However, the Resource Management Act provides a regime that, although similar in many respects, is different from that of the Town and Country Planning Act. It would avoid merely applying the thinking appropriate to the previous regime if the shorthand term was not applied in the new regime.

We accept Mr Palmer's submission that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and that it gives provisions of a proposed plan more significance; but we do not accept that the new Act accords proposed plans equal importance with operative plans for the purpose of deciding resource consent applications. Rather, the Act expects that consent authorities are to have regard to any relevant rules, policies and objectives (and, in cases to which the Resource Management Amendment Act 1993 applies, other provisions) of an operative plan or a proposed plan, implying that when there are rules, policies or objectives in any such plan, regard is to be given to them. That is not to say that those contents of plans are necessarily to be given full effect. That cannot be done where the proposal is a non-complying activity; nor can it be done in cases like this, where there has been a deliberate change of policy and the two plans are inconsistent.

We observe that the requirements of s 104 for having regard to various matters are related to the exercise of discretions conferred by s 105(1). That indicates that, rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, or vice versa, each case is to be decided individually according to its own circumstances. The extent (if any) to which the proposed measure may have been exposed to testing and independent decision-making may be relevant; so may circumstances of injustice (though not every case of disappointed aspirations or even expectations would create an injustice); and the extent to which a new measure (or, as in this case, the absence of one) may implement a coherent pattern of objectives and policies in a plan may be relevant too.

We therefore proceed to have regard to all relevant rules, policies and objectives of the operative (transitional) district plan, and of the proposed district plan. After we have had regard to them and to all other relevant considerations, we will then attempt to take into account all relevant matters in reaching a discretionary judgment whether to grant or refuse land use consent to the proposed service station. [The detailed consideration of the rules, and politics and objectives, of the relevant plans has been omitted from this report.]

Part II

The following provisions of Part II are potentially applicable in this case: avoiding, remedying or mitigating any adverse effects of activities on the environment s 5(2)(c)); the relationship of Maori and their culture and traditions with their ancestral lands etc (s 6(e)); the maintenance and enhancement of amenity values and the quality of the environment (s 7(c) and (f)).

It was the appellants' case that the proposal would not adequately avoid, remedy or mitigate the adverse effects of the activity on the environment in that the proposed service station would be a serious detraction from the visual appearance of an open green-belt area, would compromise the Oakley Walkway and natural habitat, would be a continuing disturbance for residents from 24-hour activities, would create risk of water and air pollution, would cause detrimental effects on traffic flow and safety, and increased interruption of traffic from the Herdman Street intersection, and increasing hazard to young people attracted to convenience goods.

By contrast it was the applicant's case that the proposal would promote the sustainable management of natural and physical resources in that the site is a physical resource with development potential; that it has no significant visual, cultural, social, botanical or other factors that warrant consideration of it as an important open-space resource, that the Tribunal is entitled to take as conclusive the residential zoning under both plans by which the site is zoned for development; and that the proposal would provide efficient and effective means of providing fuel to motorists.

For reasons given in earlier parts of this decision, we do not accept that the proposal would have the adverse effects cited by the appellants. In our judgment, if established and operated in accordance with the conditions imposed by the respondent, the service station would be a management of the resource represented by the applicant's property in a way which would enable people and the community to provide for their economic well-being in the refuelling of their vehicles without compromising the values expressed in paras (a) to (c) of s 5(2). We consider that the proposal, established and carried on in that way, would avoid, remedy, or mitigate any adverse effects of the activity on the environment.

We accept that the relationship of Maori and their culture and traditions with their ancestral lands etc is a matter of national importance (s 6(e)). However the evidence did not establish that the service station site is the object of any such relationship, even though we accept that it was once part of a larger area of land possessed by Ngati Whatua.

In our judgment the applicant's proposal, if established and carried on in compliance with the respondent's conditions, would maintain and enhance the amenity values and the quality of the environment.

Threshold tests

Because the proposed service station activity on the site would be a non-complying activity under the proposed district plan, resource consent may not be granted unless we are satisfied on one or other of the threshold tests set out in s 105(2)(b).

Effects on the environment

The first of those threshold tests is whether any effect on the environment would be minor. In that regard an issue was raised whether the effects of the proposal should be considered against any effects generated by the existing disuse of the land, or in terms of effects that could be generated by an activity permitted on the site as of right.

Counsel for the applicant submitted that when assessing effect on the environment for the purpose of s 105(2)(b)(i), the Tribunal should have regard not to the existing pastoral state of the site, but to the intensity and nature of development that would be permitted on the site as of right pursuant to the district plan. He reminded us that the Residential 5 zoning under the operative plan, and the Residential 6a zoning under the proposed plan, both provide for ranges of activities permitted as of right. Counsel submitted that a zero-based approach would be impractical and potentially inequitable; and contended that it cannot have been the intention that a non-complying activity that would have less effect than a permitted activity could not be considered. Mr Bartlett referred to three Tribunal decisions in which the potential of the site for other

development as of right had been considered: *Thomson v Queenstown Lakes District Council* (1992) 2 NZRMA 189; *Design 4 Ltd v Queenstown Lakes District Council* (1992) 2 NZRMA 161; *Van Erkel v Queenstown Lakes District Council* (Decision A 57/93). He argued that the effect should be seen in context (referring to *Darroch v Whangarei District Council* (Decision A 18/93)) so that we should take into account the nature and intensity of the development that could be permitted on the site as of right, when determining whether the effects of the proposal would be minor.

The passage in the *Darroch's* case to which Mr Bartlett referred was the following (at p 22):

> The actual and potential effects of the proposal are to be seen in context. The proposal is to make regular, but intermittent, use of stockyards that already exist for a permitted activity on an ample site in a rural area. We find that in the normal round of farming activities, it is not uncommon for hundreds of cattle to be mustered and yarded for various purposes such as drenching and weighing. That kind of activity could occur in the normal course of farming as frequently as twice a month or more often. It is against the background of that finding that we have regard to the actual and potential effects of the proposal.

It is evident that the passage related to consideration, under s 104(1), of the actual and potential effects of the proposal; and not to consideration of the threshold test under s 105(2)(b)(i) whether any effect on the environment would be minor. The same is true of the Queenstown cases relied on by counsel. The distinction was made by the Tribunal in *Paynter Horticultural Enterprises Ltd v Hastings District Council* (Decision W 25/93).

We are not persuaded that assessing, for the purposes of s 105(2)(b)(i), whether any effect on the environment of a non-complying activity would be minor is necessarily to be gauged against possible effects of hypothetical activities that according to the rules of the district plan would be permitted on the site. Although by use of the word "minor" s 105(2)(b)(i) implies a comparative judgment of degree, we have found nothing in the section to indicate a comparison with the effect of permitted uses on the environment.

We remember that those carrying on authorised activities have duties to avoid unreasonable noise (s 16) and to avoid, remedy or mitigate adverse effects on the environment (s 17). Rather, we consider that the judgment is to be made in the circumstances as they exist. In the present case, those circumstances include the absence of environmental effects from the current disuse of the site, and also its location fronting a busy road, adjacent to public open space used for informal recreation, and opposite an established residential area.

We make our judgment on the footing that the activity would be established and carried on in compliance with the conditions imposed by the respondent. The establishment works and the service station itself would be visible from certain houses fronting Great North Road, and from the path beside the creek, until the proposed screen planting becomes established. The proposal has been designed so that effects on traffic flow and safety would be minimal. Other effects on the environment, such as emissions of noise, light, and contaminants, would be restricted by the conditions. Considered overall, in its situation and circumstances already described, it is our judgment that the effects on the environment would be no greater than minor.

Objectives and Policies of Plans

By 105(2)(b)(ii) we have to consider whether we are satisfied that granting the consent would not be contrary to the objectives and policies of the district plan or those of the proposed plan. We have already referred to the relevant objectives and policies of those instruments. The understanding to be given to the word "contrary" has been explained in the Tribunal's decision in *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449 and in the judgment in the High Court in the same case ([1994] NZRMA 70).

Despite the opinion of Mr Brehmer [a qualified planner called for the appellants] that the proposal would be contrary to some objectives expressed in very general language, from our own findings about the proposal there is no basis for us to conclude that it would be contrary (in the sense mentioned) to any of the objectives or policies of either plan.

We are therefore satisfied that the proposal meets both the threshold tests in s 105(2)(b), and that consent to the activity could be granted even though it is a non-complying activity in respect of the proposed district plan.

Discretion

Having now addressed the various criteria and conditions stipulated by the Act, we now approach the discretionary judgment to grant or refuse consent (s 105(1)(b)). We start by considering various matters raised at the hearing which have not already called for consideration. [The Tribunal considered the geological stability of the site, the impact on reserves in the vicinity, and concerns about the applicant's proposed planting.]

Integrity of proposed plan

Mr Brehmer asserted that granting consent to a service station in the Residential 6a zone under the proposed district plan would seriously impair the integrity of that plan and would set a dangerous precedent for further exceptions to the plan.

In our opinion that overstates the position. It is to be remembered that the present application was made before the proposed plan was published; that the omission of provision for service stations in residential zones and the restrictions on the amount of petrol that may be stored in those zones have been challenged by submissions on the proposed plan; and that the respondent has not yet had the opportunity to consider those submissions and give its primary decision on them. The possibility of a reference on the topic to this Tribunal cannot be excluded.

It is also to be remembered that the applicant was entitled to apply for land use consent for its proposal; that we have found that the effects of the proposal on the environment would be minor; and that it would not be contrary to the objectives or policies of the operative district plan or those of the proposed district plan.

In those circumstances, although we will take into account that the proposal is a non-complying activity in terms of the proposed district plan, we do not accept that granting consent would seriously impair its integrity, or set a dangerous precedent.

Previous application

We refer to the appellants' claim that the Tribunal having refused the previous application, the subsequent grant of a similar application would affect public

confidence in the resource management decision system.

We do not accept that submission. The present proposal, while similar, is not identical with the previous application. In the meanwhile, relevant circumstances have changed, particularly the installation of traffic signals at the Herdman Street intersection and the respondent's proposals for other road works and traffic management measures. The Act does not restrain repeat applications, and it was not suggested that any rule of estoppel precluded the present application. We do not see that granting consent on the subsequent application, if that is in accordance with the law, and is held to be deserved on the merits, should affect public confidence in the resource management decision system. We decline to take into account the fact that a previous application for a similar service station on the same site was refused.

General

In our judgment, little weight should be placed on the provisions of the proposed district plan in the circumstances mentioned above. As a discretionary activity in terms of the operative district plan the proposal meets with criteria stipulated in that plan; the actual and potential effects of allowing the activity would be minor; the proposal would promote the sustainable management of natural and physical resources; and would not be contrary to the objectives or policies of either of the district plans. In our judgment, resource consent for the proposed service station deserves to be granted.

Conditions

Some minor improvements to the conditions imposed by the respondent arose during the course of the appeal hearing. References to NAASRA standards are now obsolete, as are references to Ministry of Transport recommendations. The definition of the convenience goods that may be sold from the service station requires refining to delete motorists' accessories from the schedule (the sale of them being part of the definition of a service station) and to stipulate that the sale of food should be ancillary to the service station activity. A condition should be added to require that an archaeological survey of that part of the site to be developed for the service station be carried out prior to development.

Counsel are asked to agree on the drafting of an amended set of conditions accordingly. Failing agreement, the Tribunal will receive memoranda from the parties and settle the conditions itself.

Determinations

For the foregoing reasons the Tribunal makes the following determinations:

1 The respondent's decision is amended to the extent of substituting a revised set of conditions in accordance with the preceding section of this decision.
2 To that extent only the appeal is allowed; and in all other respects it is disallowed.
3 The question of costs is reserved.

TAB 7

DOUBLE SIDED

Decision No. A068/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references under clause 14 of the First Schedule to the Act

BETWEEN **ANDREW VINCENT HASTINGS**

(RMA769/95)

MANUKAU HARBOUR PROTECTION SOCIETY INCORPORATED

(RMA 806/95)

Referrers

AND **THE AUCKLAND CITY COUNCIL**

Respondent

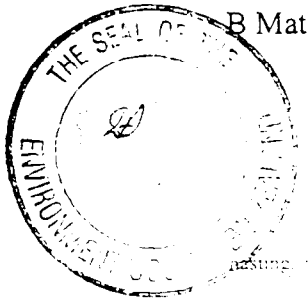
BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner J Kearney
Environment Commissioner I G McIntyre

HEARING at **AUCKLAND** on 28, 29, 30 and 31 May 2001

APPEARANCES

L J Newhook and K Littlejohn for A V Hastings
A Johnson for the Manukau Harbour Protection Society Incorporated
D A Kirkpatrick and E Child for the Auckland City Council
G Houghton for the Minister of Conservation
J Burns for the Auckland Regional Council
B Matheson for Tranz Rail Limited



DECISION

Introduction

[1] Mr A V Hastings and the Manukau Harbour Protection Society Incorporated have referred to the Environment Court provisions of the proposed Auckland City District Plan (Isthmus Section) about the zoning of land at Anns Creek, Westfield.

[2] The Auckland City Council had also lodged a reference raising a number of issues relating to Tranz Rail designations.[1] All those issues save one were resolved by a consent order made by the Court on 5 November 1998. The one remaining issue concerned a designation of part of the land at Anns Creek for a future rail link. By the time the references were called for hearing, the City Council and Tranz Rail had reached agreement about how that reference is to be dealt with, depending on the outcome of Mr Hastings's reference. So that reference is not a subject of this decision, but can be disposed of following determination of the references by Mr Hastings and the Manukau Harbour Protection Society.

The subject land

[3] The subject land has an irregular shape, contains 6.6087 hectares, and is located at 791-793 Great South Road, Westfield. It lies adjacent to the Manukau Harbour, and a watercourse known as Anns Creek (or St Anns Creek) flows through the land to the harbour.

[4] The land lies within the junction of two railway lines. The western boundary is the North Auckland Railway Line, which runs north towards Newmarket. The south-eastern boundary is the North Island Main Trunk Line, which runs north-east towards Orakei. There is a short north-eastern boundary fronting Great South Road, opposite the intersection with Sylvia Park Road. The northern boundary is irregular, and generally follows the edge of an old basalt lava flow. That boundary adjoins industrial land occupied by Trailer Rentals. A curved strip across the middle of the land is subject to an easement for a future railway link between the North Auckland Railway and the North Island Main Trunk Railway.

[1] The reference is identified as RMA936/95.

[5] In addition to the creek and the railway lines, the land is affected by other infrastructure. The northern part of the land is crossed above ground by a high-tension electricity transmission line, and underground by a natural gas pipeline. Near the north-eastern boundary, two above-ground pipelines pass across the site, generally parallel with Great South Road. One conveys water, and the other sewage. There is also a telecommunications conductor generally parallel with them.

[6] For many years the land was railway land owned by the Crown. Apparently this land was considered surplus to railway requirements, and in July 1990 Mr Hastings entered into an agreement with the Crown for sale and purchase of the land. In due course the agreement was given effect, and on 27 May 1999 Mr A V Hastings and Mrs I G Hastings were registered as proprietors of the land.

[7] The Minister of Conservation informed the Court that marginal strips created over the land on its disposition by the Crown have yet to be defined.[2] It is our understanding that, unless a reduction or exemption is consented to by a Minister of the Crown,[3] on sale of Crown land, strips of the land 20 metres wide along the landward margin of any foreshore and the bed of any stream that has an average width of 3 metres or more are deemed to be reserved to the Crown.[4]

[8] At least the lower part of Anns Creek as it flows through the subject land is tidal, so that creates foreshore. Further, at least parts of Anns Creek within the land have an average width of 3 metres or more. On the face of it, 20-metre wide marginal strips are deemed to have been reserved from the sale to Mr and Mrs Hastings.

[9] There was no evidence before us of Ministerial consent to a reduction or exemption, and no evidence of a survey definition of the marginal strips retained on the disposal of the land to Mr and Mrs Hastings. In the absence of evidence on those matters, it is appropriate for the purpose of these proceedings for the Court to assume that by operation of law strips of the land 20 metres wide have been retained by the Crown on each side of Anns Creek.

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[2] As to marginal strips generally, see Part IVA of the Conservation Act 1987, as inserted by s 15 Conservation Amendment Act 1990.
[3] See s 24A (power to reduce) and s 24B (power to exempt) Conservation Act 1987 (as so inserted).
[4] See s 24 Conservation Act 1987 as substituted by s 15 Conservation Amendment Act 1990.

Provisions of the transitional district plan

[10] Probably because of uncertainty over whether the land was within territorial authority districts or was part of the harbour, only parts of the land were zoned by the district schemes under the Town and Country Planning Act 1977 of the former One Tree Hill Borough Council and the former Mount Wellington Borough Council. More specifically, under the operative (transitional) district plan the north-western part of the land is zoned Industrial 2, and designated "North Island Main Trunk Line and Penrose Station"; and a small triangular piece at the southern end (between the two railway lines as they diverge) is zoned Industrial 3 and designated "North Island Main Trunk Railway". About 60% of the land, in the middle, which was not considered to be within the district of either of those former Borough Councils, is not zoned at all.

Provisions of the proposed district plan as notified

[11] The land is in the part of the Auckland City district to which the Isthmus Section of the proposed district plan applies. That section was publicly notified in 1993.

[12] The proposed district plan as notified contained a number of provisions affecting the subject land. We outline them first, then mention the provisions affecting adjacent land.

Provisions affecting the subject land

[13] First, the zonings. By the proposed district plan, two pieces of the land were to be zoned Special Purpose 3 (Transport Corridor). Those pieces were the curved strip crossing the middle of the land between the two railway lines, and a wedge-shaped piece adjoining it to the north-west. The rest of the land was to be zoned Open Space 1 (Conservation).

[14] Secondly, the whole land was the subject of a designation for Railway Purposes: North Island Main Trunk Railway. Tranz Rail is the responsible authority for that designation.

[15] Thirdly, a 5-metre wide strip along the Great South Road frontage was the subject of a building-line restriction for road widening. The City Council is the responsible authority in that respect.

[16] Fourthly, the land was also the subject of a requirement for a designation for Railway Purposes: North Auckland Railway. Tranz Rail is the requiring authority in that respect.

[17] Fifthly, most of the land was identified as being in the Coastal Management Area, to which restrictions on building and structures (other than network utility services) apply.

[18] Sixthly, the land was identified as being a geological feature.

[19] Seventhly, the land was subject to an Airport Approach Control for Auckland International Airport. (We were informed that in practice that control would not affect development on the land.)

Provisions affecting adjacent land

[20] The railway land to the west and south of the subject land was zoned Special Purpose 3 (Transport Corridor).

[21] Beyond the North Auckland Railway to the north-west of the subject land, there is land accessible from Hugo Johnston Drive zoned Business 6. (An electricity generating plant is now located in that area.)

[22] The land to the north of the subject land, occupied by Trailer Rentals, was mainly zoned Business 6, but an Open Space 1 zoning applied to a part adjoining the subject land which is also the subject of a registered conservation covenant.

[23] Land to the south of the subject land, beyond the North Island Main Trunk Railway, was mostly zoned Business 5, save for a drainage reserve vested in the City Council, which was zoned Open Space 2.

[24] Land on the eastern side of Great South Road opposite the subject land was zoned Business 4 and Business 5. That land is used for a range of business activities.

Submissions on the proposed district plan

Submissions by Mr Hastings

[25] Mr Hastings lodged four submissions on the proposed plan relevant to these proceedings.

[26] By Submission 6719 he submitted that the land should be zoned Business Activity 6 outside of the areas required for railway links and proposed railway reclamation work, and Special Purpose 3 for the piece at the southern end of the land where the two railway lines diverge. In that submission, Mr Hastings did not challenge the Special Purpose 3 zoning for the curved strip for the proposed link between the North Auckland Railway and the North Island Main Trunk Railway; nor did he challenge that zoning for the wedge-shaped adjoining piece in the north-western corner.

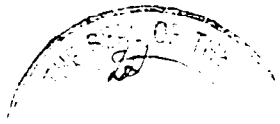
[27] By Submission 6717 Mr Hastings submitted that in the Open Space zone, earthworks, foreshore protection works and walls, carparking areas and building for recreation purposes should be either controlled or discretionary activities in that zone.

[28] By Submission 6716 Mr Hastings submitted that the rules for the Business Activity 6 zone should be amended to provide for commercial or public carparking, and earthworks, as controlled activities.

[29] By Submission 6718 Mr Hastings submitted that Sylvia Park Road and Great South Road should be a four-way intersection, with a road link terminating in the centre of Business Activity 6 zone to the north of the subject land; and that "allowance" should be made for two proposed rail links.

Submission by the Manukau Harbour Protection Society

[30] The Manukau Harbour Protection Society lodged a submission on the proposed plan seeking Open Space 1 zoning or Conservation zoning for the "Anns Creek wetlands".



Inferred submission by the Auckland Regional Council

[31] The Auckland Regional Council announced its participation in these proceedings as being under section 271A of the Act. That section provides for participation by any person who made a submission. Therefore we infer that the Auckland Regional Council had made a submission on the proposed plan relevant to these proceedings. If it had not done so, it would have sought to be heard under section 174 instead. However a copy of the Regional Council's submission was not produced in evidence, nor was evidence given of the contents of a relevant submission by it.

Decisions on submissions

[32] The City Council's decisions on the submissions did not accept Mr Hastings's submissions on the zoning of the subject land, save for retaining the Special Purpose 3 zoning of the curved strip the route of the proposed link between the railway lines. The wedge-shaped piece in the north-western corner (the zoning of which had not been challenged) also retained Special Purpose 3 zoning. The Open Space 1 zoning was retained for the rest of the land.

[33] The identification of the geological feature was omitted at that time, and the extent of the land in the coastal management area was reduced.

References on the proposed district plan

[34] By his reference to the Environment Court,[5] Mr Hastings sought "a zone change to B6 on all of this land" (and other relief relating to stormwater and sediment that was not pursued at the hearing).

[35] By its reference[6] the Manukau Harbour Protection Society sought "retention of the proposed Open Space 1 zone over the entire area of Ann's Creek wetland". The original reference also sought alteration of policies, but that was omitted from an amended reference.

[5] Mr Hastings's reference is identified as RMA769/95.
[6] The Society's reference is identified as RMA806/95.

Subsequent requirements affecting the land

[36] The land is affected by two further requirements for designations. They are identified as Plan Modification No 110 and Plan Modification No 128, and were both publicly notified on 23 September 1996

[37] Plan Modification No 110 is a requirement for designation of the land for Proposed Nature Reserve. The City Council is the requiring authority.

[38] The City Council received nine submissions on that requirement (including a submission in opposition by Mr Hastings, and a submission in support by the Manukau Harbour Protection Society). The hearing of those submissions was postponed pending decision on the determination of the district boundary (mentioned below) and decision of these references.

[39] Plan Modification No 128 is a requirement for designation of an irregular shaped piece of the land (having an area of 136 square metres) adjoining part of the strip on the north-eastern boundary that is subject to the building-line restriction for road widening. The requirement is that the piece of land be designated "building line for road widening purposes". The City Council is also the requiring authority in respect of that requirement.

[40] The City Council received two submissions on that requirement (one from Mr Hastings in opposition). The hearing of those submissions has also been postponed pending decision of these references.

Determination of district boundary

[41] There had been an issue about whether the land was within the district of the Auckland City Council, or came under the responsibility (for resource management purposes) of the Auckland Regional Council. That depended on the location of the boundary of the coastal marine area in relation to the land.

[42] After protracted efforts to seek resolution of that issue by agreement, in the end the issue had to be decided by the Environment Court, which declared that the landward extent of the coastal marine area is at the harbour end of the box culvert through which Anns Creek flows under the North Auckland Railway.[7] The effect of

[7] *Auckland Regional Council v Hastings* Environment Court Decision A130/2000.

that was that the land the subject of these references is within the district of Auckland City, so that the Isthmus section of the proposed district plan applies to it. Consequently the Auckland Regional Plan: Coastal does not apply to the subject land.

[43] In the meanwhile, the City Council had (with the Court's consent) made operative the rest of that section of its proposed district plan, but excluding the subject land, because of these two references and the unresolved reference by the Auckland City Council against rejection by Tranz Rail of a condition recommended by the City Council in respect of a designation affecting part of the land.

Defining the issues

[44] On Mr Hastings's behalf, it was submitted that the issues in these proceedings are whether the land (except the curved strip that is the route of the railway link) should be zoned Business 6 instead of Open Space 1 (on Mr Hastings's reference); and whether the curved strip should be zoned Open Space 1 instead of Special Purpose 3 (on the Manukau Harbour Protection Society's reference). However we are not able to accept that the issues can be defined in that way.

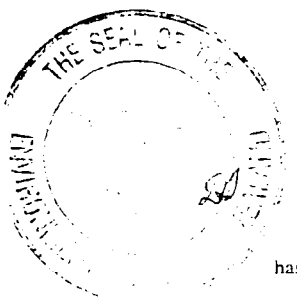
The coastal management area control

[45] Counsel for Mr Hastings announced that if the Court determines that Business 6 zoning is appropriate, then Mr Hastings seeks an order under section 292 (1) (a) or (b) that the coastal management area notation in respect of the land be removed on the ground that it would be inconsistent with other applications of that notation in the plan, and would frustrate the provisions of Business 6 zoning and the objectives and policies that it gives effect to.

[46] Counsel for the City Council announced that the City Council opposed removal of the coastal management area identification of most of the subject land.

[47] Section 292(1) provides–

> *(1) The Environment Court may, in any proceedings before it, direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of–*
> *(a) Remedying any mistake, defect, or uncertainty; or*
> *(b) Giving full effect to the plan.*



[48] That provision cannot be invoked to authorise the Court to consider the appropriateness of provisions of a district plan about which there is no mistake, defect or uncertainty, and which have not been challenged by a reference and the submission on which the reference was based.[8]

[49] It was contended on behalf of Mr Hastings that if his land is re-zoned Business 6, full effect could not be given to the zoning while the coastal management area controls continue to apply to it. However we are not persuaded of that.

[50] Certainly buildings and structures (other than network utility services) would need resource consent, and the criteria for deciding that consent include minimising disturbance of existing landform and vegetation, maintenance of natural character, and protection of water quality in the adjacent coastal marine area.[9] However that control is designed to enable the land to be used and developed in a way that respects its location in the coastal environment. It regulates, but does not prohibit, use of the land for the purposes of the Business 6 zone.

[51] The content of the four submissions on the proposed district plan lodged by Mr Hastings shows that he had identified detailed provisions of the district plan applying to the subject land on which he wished to make submissions. However he did not lodge a submission challenging the coastal management area control; nor did his reference to the Court refer to it.

[52] For the Court to consider removing the application of that control from that land in proceedings challenging the Open Space 1 zoning of the land would be to render pointless the provisions of the First Schedule and the regulations requiring statement in a submission of the relief sought, public notification of a summary of the submissions, and statement of the relief sought in a reference. It would involve the Court considering the appropriateness of provisions of a district plan which have not been challenged by a reference and the submission on which the reference was based.

[53] For those reasons we hold that it would not be an appropriate exercise of the power conferred by section 292 for the Court to consider in these proceedings removing the application of the coastal management area control. We decline to do

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[8] *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).
[9] Proposed district plan, Section 5B.7.

so. We proceed to our consideration of the zoning issues raised by these references on the basis that whatever the final zoning, the coastal management area control will apply to the subject land.

The attitudes of the parties on zoning

[54] We now describe the positions that were taken by the parties to the proceedings on the zoning issues raised by the references.

The rail link route

[55] First we address the zoning of the curved strip along the route of the proposed link between the North Auckland Railway and the North Island Main Trunk Railway, and the adjoining wedge-shaped piece in the north-western corner of the land.

[56] The Manukau Harbour Protection Society's reference challenged the zoning of this piece of the land as Special Purpose 3, and sought that it be zoned Open Space 1. That was the relief the Society sought at the Court hearing.

[57] At the hearing Mr Hastings opposed that, and sought Business 6 zoning. The relief sought in his reference was Business 6 zoning over the whole of the land. However that had not been the position he took in his original submission No 6719, in which he had sought Business 6 "outside the areas required for railway links and proposed railway reclamation work" (and Special Purpose 3 zoning for the piece at the southern end of the land where the two railway lines diverge). The text of the statement in the submission of the relief sought was–

> *I seek the following decision from the Council Zone the land BA6 and SPA3 see enclosed plan 34923 (amended).*

[58] Any decision requested of the Court on a reference has to have been fairly and reasonably within the general scope of the referrer's original submission, or somewhere in between that and the relevant content of the proposed plan.[10] The assessment of whether an amendment was reasonably and fairly raised in a submission has to be approached in a realistic workable fashion, rather than from the perspective of legal nicety.[11]

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[10] *Re application by Vivid Holdings* [1999] NZRMA 467.
[11] *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408 (HC).

[59] Mr Hastings's submissions on the proposed district plan were not the work of an amateur or layman, of which the true intent might be somewhat obscure, and the tolerance called for by this precept liberally given. His submissions were apparently prepared by a named consultant planner and surveyor.

[60] Even so however, reading the text of Mr Hastings's submission No 6719 in a realistic workable fashion, it is not capable of being understood as challenging the Special Purpose 3 zoning for this piece of the land (the curved railway link route), or as seeking any change in it at all. Furthermore, the plan attached to the submission is entirely consistent with the text. On that plan, the parts of the site for which the zoning was challenged had been outlined in bold, and abbreviations for the zonings sought were clearly marked. The curved strip of the land along the route of the railway link lies between the pieces marked in bold, and is marked "Proposed SPA 3". The wedge-shaped piece is beyond the bold outlining, and there is nothing to indicate that any change of its zoning was sought.

[61] From those contents of the submission, we infer that Mr Hastings accepted the proposed zoning Special Purpose (Activity) 3 for the curved link strip and the wedge-shaped piece in the northwestern corner, and sought no change in respect of either of them. For those reasons we find that to the extent that Mr Hastings sought Business 6 zoning for those pieces of the land, that was beyond the scope of his original submission.

[62] We have also to consider whether Business 6 zoning would be somewhere in between the Special Purpose 3 zoning shown in the proposed plan and the Open Space 1 zoning sought by the Manukau Harbour Protection Society. Business 6 zoning is intended to provide for heavy, noxious or otherwise unpleasant industrial activity. A wide range of industrial activities is provided for. The Special Purpose 3 (Transport Corridor) zone is applied to existing railway rights of way (and certain strategic roads) for maintaining transport corridors, and provides for continuation of railway and roading uses, alternative transportation modes, and utility services. The Open Space 1 (Conservation) zoning is the most restrictive zoning in the Isthmus plan. There are no permitted activities in that zone except for informal recreation.

[63] Having compared those zones, we find that the range of difference between Special Purpose 3 zoning and Open Space 1 zoning is between considerably restrictive to highly controlled. By contrast, the Business 6 zoning is liberal, and we find that it is well outside the bounds of the range between the other two.

[64] Therefore we hold that in these proceedings it was not open to Mr Hastings to ask the Court to zone those pieces of the land Business 6.

[65] The City Council opposed the Manukau Harbour Protection Society's case for Open Space 1 zoning, and maintained its position that the appropriate zoning for this piece of the land is Special Purpose 3.

[66] The Minister of Conservation took part in the proceedings under section 274 of the Act. The Minister supported Open Space 1 zoning for the whole site, without making any distinction of the curved strip from the rest.

[67] The Auckland Regional Council's case did not distinguish the curved railway link strip from the rest of the subject land. However its counsel announced that the Regional Council supported the City Council's case, and its witness said the same. So we infer that the Regional Council supported Special Purpose 3 zoning for the curved strip.

[68] Tranz Rail's case implied that decision of the zoning of the curved railway link strip should follow decision of the zoning of the rest of the subject land. Its counsel submitted that if the Court determines that Business 6 zoning is appropriate for the rest, then either a Business 6 or a Special Purpose 3 zone would be appropriate for the rail link, rather than Open Space 1 which (as counsel observed) would effectively be an isolated strip running through a Business 6 zone.

[69] Conversely, if the Court determines that an Open Space 1 zoning is appropriate for Mr Hastings's land, then Tranz Rail supported the City Council's case for Special Purpose 3 zoning.

<u>The rest of the subject land</u>

[70] At the hearing Mr Hastings contended for Business 6 zoning for the rest of the subject land. That was consistent with the relief sought in his reference. However in his original submission No 6719, Mr Hastings had sought Special Purpose 3 zoning for the piece at the southern end of the land, lying between the North Auckland and the North Island Main Trunk railway lines. In the light of that we have to consider whether he was entitled to ask the Court to direct Business 6 zoning for that part of the land.

[71] We have already quoted from the original submission the statement in it of the provisions the submitter wished to have amended. The text of the statement of the relief sought in the original submission was–

> *I seek the following decision from the Council Zone the land BA6 and SPA3 see enclosed plan 34923 (amended).*

[72] The plan attached to the submission is a copy of Railways Plan 34923, showing the subject land, and with markings in bold. The plan shows that southern piece of the land separately outlined in bold, and the abbreviation "Proposed SPA 3"within that bold outline. We infer that Mr Hastings was seeking that this piece of the land be rezoned Special Purpose (Activity) 3.

[73] We have referred to the process by which this question has to be decided. We find that the marked version of Plan 34923 referred to in, and attached to, Submission 6719, forms part of the submission. Reading the text of No 6719 and the markings on the plan together in a realistic workable fashion, the submission is not capable of being understood as seeking Business 6 zoning for the southern piece of the land outlined in bold as described, and notated in bold "Proposed SPA3". Only one realistic workable understanding is possible: that as submitter Mr Hastings was seeking that the part of the land so identified be zoned Special Purpose 3.

[74] For those reasons we find that to the extent that Mr Hastings later sought Business 6 zoning for this piece of the land, that was beyond the scope of his original submission. Further, it cannot be claimed that Business 6 zoning is somewhere in between the Open Space 1 zoning shown for that piece in the proposed plan and the Special Purpose 3 zoning sought by Mr Hastings's original submission. We remain of the opinion that Business 6 zoning lies beyond the bounds of the range of difference between those two zones.

[75] Therefore we hold that in these proceedings it was not open to Mr Hastings to request the Court to direct that this southern piece of the land be rezoned Business 6.

[76] The City Council's case was that all the rest of the land (other than the curved railway link strip) should be zoned Open Space 1. In that it was supported by the Minister of Conservation, and the Auckland Regional Council. Tranz Rail did not take a position on that question.

[77] The Manukau Harbour Protection Society supported Mr Hastings's position in respect of the parts of the land that had been zoned Industrial when (in 1990) he had agreed to purchase it; and supported the City Council's case for Open Space 1 zoning on the rest. However, Business 6 zoning of the parts formerly zoned Industrial was not relief that had been sought in the Society's original submission, nor in its reference. The Society's support for Business 6 zoning for those parts therefore depends on Mr Hastings's own submission and reference. Therefore it cannot extend to the southern piece for which Mr Hastings had sought Special Purpose 3 in his original submission, even though that piece (more or less) had been zoned Industrial 3 in 1990.

Summary of issues

[78] In summary, the subject land has to be considered in three parts.

[79] The first part is the curved strip of the land on the route of the proposed railway link, and the adjoining wedge-shaped piece in the northwestern corner. In those respects, the issue is whether they should be zoned Special Purpose 3 (as in the proposed plan as notified) or Open Space 1 (as sought by the Manukau Harbour Protection Society).

[80] The second part is the southern piece of the land, lying between the North Auckland and North Island Main Trunk railway lines as they diverge, for which Mr Hastings had sought Special Purpose 3 zoning in his original submission. That piece is zoned Open Space 1 in the proposed plan. Mr Hastings (supported by the Manukau Harbour Protection Society) sought Business 6 zoning, but neither he nor the Society was entitled to do so. There was no reference seeking Special Purpose 3 zoning for that part, and no party presented a case for that zoning of it. We hold that there is no issue for determination by the Court in respect of that part of the land. The Open Space 1 zoning in the proposed district plan remains.

[81] The third part is the rest of the subject land. Mr Hastings sought (and was entitled to seek) Business 6 zoning for that remainder. That relief was supported by the Manukau Harbour Protection Society to the extent that the land was zoned Industrial when Mr Hastings agreed to purchase it, namely a piece in the north-western part of the land, formerly in the district of the One Tree Hill Borough. That relief was opposed by all the other parties, who support the Open Space 1 zoning in the proposed district plan.

[82] It is convenient to consider the zoning of that land, before considering the zoning of the curved rail link strip and adjoining wedge-shaped piece.

Basis for deciding zoning

General

[83] Counsel for Mr Hastings and for the City Council both relied on the *Nugent* tests for deciding the appropriateness of district plan rules[12]–

> *In summary, a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual and potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.*

[84] Counsel for the City Council also cited this formulation for deciding a zoning issue[13]–

> *...whether the Council's proposed zoning of the appellants' lands:*
> *(1) accords with Part II of the Act; achieves integrated management of the effects of the use, development or protection of the land; and implements the objectives and policies of the proposed plan;*
> *(2) meets the section 32 tests – subject to an argument about the application of section 32(3) of the Act; and*
> *(3) satisfies the ultimate issue as to whether "on balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it.*

[85] On point (2) in that formulation, in this case no party raised an argument about the application of section 32(3) of the Act, and we do not need to consider the applicability of that subsection.

Zoning precluding reasonable use

[86] As already mentioned, the Open Space 1 zoning is considerably restrictive on the use and development that might be made of land so zoned. Counsel for Mr Hastings submitted that such zoning should not be applied to private land over the owner's objection, citing section 85 of the Act, and decisions under the Town and Country Planning Act 1977 and the Resource Management Act.

[12] *Nugent Consultants v Auckland City Council* [1996] NZRMA 481, 484.
[13] *Williamson v Hurunui District Council* Environment Court Decision C50/2000, paragraph [16].

[87] Counsel for the City Council refuted the notion that the law prohibits such zoning of private land.

[88] We have considered the several decisions cited by counsel. In resolving the difference for the purpose of this case, it is not necessary for us to deal with decisions under the former Town and Country Planning Act 1977. We should consider the applicability of the reasoning in the most relevant Court of Appeal decision under the earlier regime, and reach our own opinion on the basis of the Resource Management Act and decisions given under it.

[89] The most relevant Court of Appeal decision is the Whangamarino Wetland case *Auckland Acclimatisation Society v Sutton Holdings*.[14] The case concerned a proposal to drain part of the wetland for summer grazing. An application had been made for a water right under the Water and Soil Conservation Act 1967 to dam and divert a stream for the purpose. That was opposed by conservation interests concerned that the wetland habitats would be harmed.

[90] The following passage from the judgment of the Court (delivered by Justice Cooke, as he then was) states the part of the Court's reasoning that is relevant for the present purpose–[15]

> *In his approach to the case Barker J was much influenced by the concept that it would require very clear words to justify freezing land in private ownership without rights of compensation for the owners. He invoked the principle that a statute should not be held to take away private rights without compensation. Counsel for the appellants strongly disputed the relevance of that principle.*
> *While the High Court Judge was of course quite right about the existence of the principle, its scope in planning law is limited and we have to say that it cannot be imported into the present field. From 1 April 1968 the 1967 Water Act, s 21, vested certain rights regarding water in the Crown – including the sole right to dam any river or stream, to divert or take natural water, to use natural water. There are various exceptions and provisos, including some protection for lawful existing uses, but none is material here. The farmers have the ordinary rights of landowners to use their land in its natural state, but the effect of the 1967 Act is that they have no right to divert the natural water that is on the land. Ownership of the land does not of itself carry the right to alter the natural conditions in that way. The scheme of the Act means that to refuse the water rights applied for would not be to deprive the landowners of anything. Rather, it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of refusal.*

[91] Next we quote section 85 of the Resource Management Act[16]–

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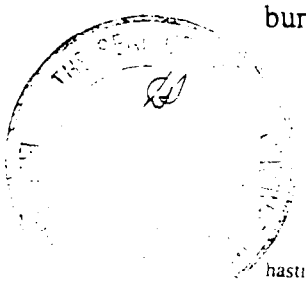
[14] [1985] 2 NZLR 94.
[15] Page 98, line 50, to page 99, line 14.
[16] As amended by s 43 of the Resource Management Amendment Act 1993.

> ***85. Compensation not payable in respect of controls on land–*** *(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*
> *(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds -*
> *(a) In a submission made under Part I of the First Schedule in respect of a proposed plan or change to a plan; or*
> *(b) In an application to change a plan made under clause 21 of the First Schedule.*
> *(3) Where, having regard to Part III (including the effect of section 9(1)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of the First Schedule, may–*
> *(a) In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and*
> *(b) In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.*
> *(4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of the First Schedule.*
> *(5) In subsections (2) and (3), a "provision of a plan or proposed plan" does not include a designation or a heritage order or a requirement for a designation or heritage order.*
> *(6) In subsections (2) and (3), the term "reasonable use", in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.*
> *(7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of the First Schedule on a reference under clause 14.*

[92] From the Whangamarino case we take it that legislation regulating use of natural resources may modify the general principle that a landowner's right to use land in its natural state should not be taken away without compensation. From section 85 we take it that in enacting the Resource Management Act 1991, Parliament deliberately ruled out rights to compensation for planning controls, and provided two other remedies instead. First, a person having an interest in land affected by a plan provision that would render the interest in land incapable of reasonable use (without significant effects on the environment) can challenge the provision in a submission on the plan when it is proposed. Secondly, such a person is able to apply for a change to the plan, if it renders the interest in land incapable of reasonable use (without significant effects on the environment), and places an unfair burden on any person having such an interest.



[93] In *Cornwall Park Trust Board v Auckland City Council*[17] the landowner referred to the Environment Court the zoning of land Open Space 2, seeking that it be rezoned Open Space 3. The Court rejected as too simplistic a proposition that in the absence of adverse effects off-site, it is not for the Council to tell a private landowner how to manage the use of his or her land. The Court applied the *Nugent* tests, and found that the Open Space 2 zoning more closely reflected the actual use and character of the land, and achieved the objectives and policies of the proposed plan, than did the zoning contended for by the appellant.

[94] In *Capital Coast Health v Wellington City Council*[18] the Environment Court considered a reference about Open Space B zoning of private land which was capable of residential development. The Court endorsed Inner Residential zoning instead. The Court expressed the opinion that if a Council wishes to protect land for open space, that purpose should be achieved by designation or acquisition, and observed–

> *However this general principle is always subject to the provisions in Part II of the Act. Where particular land has such significance in terms of any of the factors listed in s.6 and s.7 of the Resource Management Act 1991 that its use or development ought to be substantially limited or precluded, then land use controls which may have that effect may be appropriate regardless of the ownership of that land (but subject to s.32 and s.85).*

[95] Those two decisions are examples where the Court has considered challenges to restrictive Open Space zonings on the merits of the particular case, by applying the same tests as it would to other zoning challenges.

[96] We hold that even where the owner of an interest in land considers that proposed zoning would render that interest in land incapable of reasonable use, the remedies intended by Parliament are those described in section 85; and that on a challenge to such zoning the tests derived from the Act are to be applied to the merits of the case. We do not accept that it is necessarily unreasonable for a territorial authority to persist with such a zoning of private land in the face of the owner's objection, particularly where the territorial authority asserts that other use of the land would have significant effects on the environment.

[97] Counsel for the City Council submitted that a demonstrated commitment by the Council to designate and/or acquire the land or to compensate the owner may make reasonable an otherwise unreasonable zoning, where this furthers the purpose

[17] Environment Court Decision A58/97.
[18] Environment Court Decisions W101/98 and W4/2000.

and principles of the Act. It may do, in some circumstances. However when zoning is challenged by a reference to the Court, the main task is to apply the tests that are to be inferred from the Act (including where appropriate the test that can be inferred from section 85) and determine the appropriate zoning.

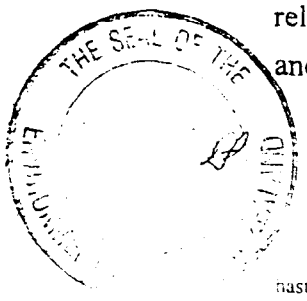
[98] Section 85 contemplates an owner of an interest in land challenging a plan provision on the ground that it renders an interest in land incapable of reasonable use. On a reference derived from such a submission, the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

[99] In this case, the private property rights of the owners have been recognised by the City Council to the extent of its requirement for designation of the land for a proposed nature reserve. That gives the owners the opportunity afforded by section 185 to have the City Council acquire the land. The City Council has passed resolutions confirming its intention to acquire the land, but its purchase negotiations with Mr and Mrs Hastings have not been successful. Counsel for Mr Hastings summarised the City Council's position as being "We will buy if the price is right". That may be, but a public authority is accountable for not paying more than the value of the land, as best that can be ascertained.

[100] Yet it remains the case that the City Council has not acquired the land, and (subject to the deemed reservation of marginal strips) it remains in the private ownership of Mr and Mrs Hastings.

Relevance of other plan provisions

[101] Next we consider whether, in deciding the appropriate zoning of the land, the other provisions of the proposed plan affecting the land are relevant. We have already given our reasons for holding that the coastal management area control is relevant. We now consider, separately, the relevance of the existing designations, and the pending requirements for designations.



Are designations relevant?

[102] Under the regimes of the Town and Country Planning Acts, land that was designated in district schemes had also to have what was called "underlying" zoning, that would have effect if and when the designation was removed.[19] Therefore in deciding the appropriate zoning for designated land in those regimes, the existence of the designation had to be ignored.[20] An advantage of ignoring the designation was that the underlying zoning of private land provided a basis for assessment of compensation on acquisition of the land for the designated purpose.

[103] However the Resource Management Act 1991 contains no corresponding direction. In the proposed plan, the City Council has followed a practice of applying zonings to designated land that are consistent with the designated purpose, where that zoning indicates the actual or likely use of the land. That practice forsakes the former advantage in assessing compensation, but that is not the concern of this Court. But the practice also eliminates the reason, valid in the former regimes, for ignoring the existence of a designation over the land in deciding the appropriate zoning.

[104] In our opinion, in deciding the zoning of designated land in a district plan in which zoning is not intended to regulate the use and development of the land if and when the designation is removed, it would be appropriate to have regard to the existence of the designation as another provision of the district plan.

Are requirements relevant?

[105] Requirements are different. Although they have interim effect,[21] they are really proposals for designations, that may or may not survive the statutory process of submissions and appeals.[22] While those processes are incomplete, it would not be appropriate to presume any particular outcome; and a zoning decision should not be influenced by supposing that the requirements will be confirmed, nor by supposing that they will be cancelled.[23]

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[19] See the Town and Country Planning Act 1953, s 33A; the Town and Country Planning Act 1977, s 121.

[20] See for example, *Minister of Railways v Auckland City Council* (1969) 3 NZTCPA 214; *Henderson Borough v Corbans Wines* [1975] 1 NZLR 699; 5 NZTPA 278 (SC).

[21] S 178.

[22] Ss 169-174.

[23] *Hall v Rodney District Council* [1995] NZRMA 537.

Is the previous Industrial zoning relevant?

[106] The referrer's cases placed some reliance on the Industrial zoning of parts of the land under the previous district schemes at the time Mr Hastings agreed to buy it. However we do not consider that the previous zoning under the former regime is relevant. We adopt this passage from the Court's decision in the *Cornwall Park Trust Board* case–[24]

> *The test is whether the zoning is appropriate for the purpose of, and in terms of the current legislation, not whether an alteration to the zoning given the land by an instrument made under former legislation is justified.*

Zoning of northern part (except rail link)

Relevant constraints

[107] In general, the appropriate zoning of land is determined by reference to its physical attributes, but without regard to its ownership. In the case of this piece of land, while ignoring ownership, it would be artificial to ignore constraints on the way in which it might be used or developed that are imposed by law through easements, designations, and other instruments.

[108] First, whatever the zoning, the use and development of this piece of the land is constrained by the easements to which it is subject for the existing lines for electricity transmission, natural gas, sewage, water supply, and telecommunications. In addition the piece of the land under consideration is divided by the curved strip that is subject to the easement for the proposed railway link between the two lines.

[109] Secondly, whatever the zoning, most of this piece of the land is subject to the Coastal Management Area control already described.

[110] Thirdly, the use or development of much of the land would be constrained by being deemed to have been reserved to the Crown as marginal strips under the Conservation Act. Marginal strips are held for conservation, public access and recreational purposes.[25]

[24] Environment Court Decision A58/97, page 8.
[25] Conservation Act s 24C (as inserted by s 15 Conservation Amendment Act 1990).

[111] Fourthly, all this piece of the land is subject to the existing designation for Railway Purposes: North Island Main Trunk Railway.

[112] Fifthly, the only frontage the land has to a road is affected by a building line restriction for road widening.

[113] Another possible constraint is the stormwater drainage function of Anns Creek itself. The stream drains a catchment having an area of 870 hectares. A catchment management plan prepared for the City Council recommended construction of stormwater cleansing and sediment ponds on the subject land. Although there is some doubt about whether the treatment ponds will be constructed there (and we are not aware that any requirement or resource consent application has been made for the purpose), the size of the catchment and the geographic position of the land at its lowest point makes almost unavoidable the continued function of the creek for drainage.

Physical features

[114] The land is open and is low-lying in comparison to surrounding land. Two streams discharge into the land on its eastern boundary, the northern being Anns Creek, the southern an un-named stormwater discharge. Anns Creek has been canalised for the first 150 metres of its passage through the land, and has a lateral channel connecting it with the southern discharge. The water then passes in a channel parallel with and adjacent to the southern boundary to join the main channel about 160 metres into the site and discharge through a culvert under the North Auckland Railway.

[115] The land lies at a convergence of two basaltic lava flows. A lower shelf of basalt lava flow from the Mt Richmond volcanic centres to the south extends over the eastern half of the land close to current sea levels. A more recent lava flow from the Mt Wellington volcanoes extends on to the northern part of the land, forming an irregular face extending on to the property. Geologically recent marine deposits have partially covered the lower basalt flow and form a soft unconsolidated layer on the western half of the site.

[116] A culvert under Great South Road and the North Island Main Trunk Railway, and railway embankments across the western end of the land, affect the levels of sediments and the extent of tidal flows. Due to the size of the present culvert under

the North Auckland Railway, there is insufficient capacity to drain under that railway embankment during periods of high flow, and much of the present site is on occasion inundated by ponding of floodwaters.

[117] In summary, the northern third of the property is raised land formed by new spoil deposits and old lava, and the substrate of the southern two-thirds of the land is primarily mud-silt.

Botanical and ecological features

[118] There is a mosaic of five vegetation communities on the site: weedfield, saltmarsh, mangrove estuary, freshwater wetlands and remnant shrubland.

[119] Weeds predominate on the railway and Great South Road embankments and the lava outcrops. On the mudflats, weeds are replacing native species.

[120] There is about 0.6 hectares of saltmarsh community, mostly in the eastern portion on the mudflat edges. There are four vegetation types: Bolboschoenus (a brackish water community), Batchelors button (adjacent to the Bolboschoenus zone), glasswort (adjacent to the edge of the mangrove forest) and Wiwi/Oioi (between the largest lava tongue and raised land).

[121] About 1.6 hectares is covered in mangrove forest. There is one main raupo wetland, of around 1200 square metres, in a northern area between the raised weedland and the main mangrove forest.

[122] The remnant shrubland is small areas on the lava tongues and escarpment edges in the west and north-west of the land, where scattered native shrubs persist in amongst weeds on undisturbed ground. They include akeake (*Dodonea viscosa*), *Coprosma crassifolia, Plagianthus divaricatus,* and the scramblers *Muehlenbeckia complexa* and *Calystegia soldanella.*

[123] The akeake *Dodonea viscosa* appears to be known now only from the Anns Creek embayment, it is absent from the shoreline back to Onehunga

[124] The presence of *Coprosma crassifolia* is of some botanical interest, as the wider area along the stretch of shoreline from Onehunga to Anns Creek is the type locality of this species, being the place where the first collection was made (by

William Colenso in the 1840s). Such a collection is an important scientific reference point, so the persistence of the plants at the type locality of the species is valuable should the species or its genus be re-examined using modern techniques such as DNA analysis.

[125] This species of coprosma exists in a number of other locations in the Auckland region, including a large population on Hamlins Hill nearby, and at Bethells, but on the Auckland isthmus it occurs only in this corner of the Manukau Harbour. Although the type locality of the *Coprosma crassifolia* extends along the rocky coastline, the bulk of the genetic diversity of the remaining population at this locality is within the subject land.

[126] A botanical consultant called for the City Council, Dr R O Gardner, gave the opinion that the heritage value of the persistence of the plant at its original locality is also important. He deposed that, apart from *Coprosma crasssifolium*, only two other native higher plants were described from collections made on the Auckland isthmus, namely *Astelia grandis* (Ponsonby Road) and *Potamogeton cheesemanii* (St John's Lake). Only the latter of those two persists, and in a vastly altered habitat. The witness urged that it should be a matter of civic pride, as well as one of botanical significance, that the coprosma be preserved on its native ground at Anns Creek.

[127] Two native geranium species to be found on the southern lava tongue at Anns Creek (*Geranium retrorsum* and *Geranium solanderi*) have been classified as regionally threatened and declining, and are the largest currently known populations of each. There are approximately 100 individual plants of *Geranium solanderi* and 10 of *Geranium retrorsum.*

[128] Seed could be taken from the akeake, coprosma and geraniums on the land and sown in Hugo Johnson Reserve, and at other locations along the Onehunga shoreline to enhance the population of them in this locality. However the ability to take seed does not alter the botanical value of the subject land.

[129] The vegetation of the non-terrestrial part of the embayment consists of mangrove, saltmarsh and freshwater swamp.

[130] Approximately the southwestern half of the embayment has until recently carried a dense growth of mangroves (*Avicennia marina)* 2 to 3 metres tall and of fair age and good health. Approximately the northeastern half of the wetland area,

across to Great South Road, is covered by a saltmarsh turf dominated by the native glasswort (*Sarcocornia quinquefolia*) and batchelor's button (*Cotula coronopifolia*). Parts of the saltmarsh at a slightly higher level carry a weedy growth of tall fescue and sea orache (*Atriplex hastata*). There are also colonies of cordgrass (*Spartina* sp.).

[131] There is freshwater swamp more or less centrally on the northern side of the embayment, and in the south-eastern corner against the North Island Main Trunk Railway and Great South Road. The most conspicuous native plant species of these two areas are raupo (*Typha orientalis*) and *Bolboschoenus fluviatilis*.

Ecotone sequence

[132] We have stated our findings about the plants of botanical interest on the subject land. The pattern of the various plant communities in the transition from foreshore to terrestrial habitat makes up an ecotone sequence that has greater value than the sum of the parts. On the subject land there is a sequence of freshwater communities merging into saltmarsh and then mangrove with remnant adjacent coastal lava shrubland.

[133] Very little is now left of the vegetation that originally grew over the wide areas of basaltic volcanic deposits of the Tamaki Ecological District. The vegetation at Anns Creek is one of the few remaining fragments of basalt flow vegetation. It is a mosaic of vegetation types, with significant ecotones (transitions) of rare basalt lava flow vegetation into freshwater and saltmarsh areas and into the mangroves. These ecotones do not occur anywhere else within the Tamaki Ecological District. The Anns Creek lava flows are significantly raised above the tidal influence and have strong freshwater influence. All other lava-flow remnant vegetation areas adjacent to estuaries are much lower and more exposed to the coastal influences. The vegetation composition at each known site reflects this difference.

[134] The saltmarsh supports a wide range of species, with concentrations of batchelor's buttons (*Cotula cornopifolia*), jointed wire rush, and glasswort present on the intertidal sediment. The lava flows still support elements of a natural indigenous shrubland on lavaflow ecosystem. These elements reflect the low saline influence at this site. Here are found a number of species that grow in terrestrial ecosystems including *Coprosma crassifolia*, akeake (*Dodonea viscosa*), karamu (*Coprosma robusta*), and mahoe (*Melicytus ramiflorus*).

[135] None of the vegetation types or communities present is rare, threatened or botanically or ecologically critical to the region or district. All the species that are found at Anns Creek can be found in similar associations in the Waitakere, Awhitu, and Manukau Ecological Districts. Other places have saltmarshes and wetlands typically containing raupo, ribbonwood, Wiwi/Oioi, glasswort, batchelor's button and mangrove; and some are very large areas.

[136] The future value of the communities is questionable, due to degradation from pervious works on the land, invasion of weeds and colonisation by mangroves. Even so, the land provides a characteristic example of the ecology of the local area, the wetlands contribute to the ecological viability of surrounding areas and biological communities, and it is a genetically valuable part of the type locality of *Coprosma crassifolia*.

[137] The only other area that has both the equivalent terrestrial vegetation as well as the saltmarsh and mangrove is approximately 500 metres west on the esplanade reserve at the mouth of the next creek westward.

[138] A consultant ecologist called for Mr Hastings, Dr V F Keesing, deposed that construction of the rail link would require earthworks, access by machines for construction, create bared areas on which weed species would establish, and possibly restrict tidal influence, resulting in loss of saline communities, so that the land would lose most of the current ecological and botanical values that it has.

[139] However Dr Keesing's evidence in that respect depended on his assumption about the method of construction of the railway link. Tranz Rail has reached agreement with the City Council that if the land is zoned Open Space 1, the railway would cross Anns Creek on an elevated viaduct. In cross-examination, Dr Keesing agreed that the effects could be minimised.

[140] No doubt some disturbance would be caused, by whichever method the railway link is constructed; but the extent of environmental damage described by Dr Keesing is not inevitable.

Locations of features within parts of subject land

[141] There was no evidence directly locating the various botanical features in relation to the route of the proposed railway link or to the parts of the site to which

the remaining zoning issues relate. The absence of authoritative definition of the extents of the marginal strips also makes it difficult for us to make the findings necessary to decide those issues. We have to make our findings by inferences from the marked railways plan attached to Mr Hastings's submission 6719, the verbal descriptions by the witnesses, and the marked aerial photographs produced in evidence, interpreted with the aid of our own observations on visiting the site in the company of botanists appointed by Mr Hastings and the City Council.

[142] On those foundations, we find that it is more probable than not, that most of the *Coprosma crassifolium* (except for two small patches in the second, southern piece of the land) is in northern section of the third piece of the land, north of the curved railway link easement; and that some of the *Dodonea viscosa* is in that northern section of the third piece, the rest being in the piece that is subject to the easement for the railway link.

[143] From the same sources, we find that it is more probable than not that the main geranium populations are in the second, southern part of the land, in respect of which the Open Space zoning is not in issue in these proceedings, and also, more probably than not, are in a part of the land within 20 metres of Anns Creek deemed to have been reserved from sale as marginal strip.

[144] So in considering the zoning of the third, northern, piece of the land we take into account the presence on it of the *Coprosma crassifolium* and the *Dodonea viscosa* in the section to the north of the railway link designation. The southern section of the northern piece of the land contains mangroves and batchelor's button. As the geraniums are in the second piece of the land in respect of which the zoning is not in issue, we do not take them into account.

Part II

[145] The sustainable management purpose of the Act is elaborated in section 5(2)–

> *5. **Purpose**– (1)The purpose of this Act is to promote the sustainable management of natural and physical resources.*
> *(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–*
> *(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> *(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[146] Plainly, zoning the northern piece of the land Business 6 would respond better to the element of enabling people (Mr and Mrs Hastings) to provide for their economic well-being than would zoning it Open Space 1.

[147] There are several constraints that would apply to use and development of that part of the land in accordance with that zoning. We have in mind the existing physical infrastructure, the high mound of spoil on the northern boundary on which the transmission tower is located, the coastal management area control, earthworks control, the 20-metre wide marginal strips along Anns Creek, the designation for the North Island Main Trunk Railway, the general earthworks controls in the regional and district plans, and the road-widening building-line restriction would all limit the development and use that could be made of that part of the land.

[148] Enabling the owners to provide for their economic well-being is an element of sustainable management that may conflict with other elements of sustainable management. The marginal strips, the coastal management area control and the earthworks control would limit development or use of that part of the land in a way that would conflict with the goals described in paragraphs (a) to (c) of section 5(2).

[149] Those goals are elaborated in section 6 of the Act–

> ***6. Matters of national importance–*** *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, ... and their margins, and the protection of them from inappropriate subdivision, use, and development:*
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
> ...

[150] The coastal management area control, the earthworks control and the marginal strips would serve to recognise and provide for those matters in constraining development and use of the northern part of the land in accordance with Business 6 zoning.

Consistency with superior instruments

[151] Section 75(2) explains the relationship of contents of a district plan with certain superior planning instruments under the Act–[26]

> ***75. Contents of district plans–***
> ...
> *(2) A district plan must not –*
> *(a) Be inconsistent with any ... New Zealand coastal policy statement; or*
> ...
> *(c) Be inconsistent with–*
> *(i) The regional policy statement; or*
> *(ii) Any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV*

NZ Coastal Policy Statement

[152] The New Zealand Coastal Policy Statement 1994[27] extends beyond the coastal marine area to the whole of the coastal environment, and is relevant to the zoning of the subject land.

[153] Policy 1.1.2 states that –

> *It is a national priority for the preservation of the natural character of the coastal environment to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in that environment by:*
> *(a) avoiding any actual or potential adverse effects of activities on the following areas or habitats:*
> *(i) areas and habitats important to the continued survival of any indigenous species; and*
> *(ii) areas containing nationally vulnerable species or nationally outstanding examples of indigenous community types;*
> *(b) avoiding or remedying any actual or potential adverse effects of activities on the following areas:*
> *(i) outstanding or rare indigenous community types within an ecological region or ecological district;*
> *(ii) habitat important to regionally endangered or nationally rare species and ecological corridors connecting such areas; and*
> *(iii) areas important to migratory species, and to vulnerable stages of common indigenous species, in particular wetlands and estuaries.*
> *(c) protecting ecosystems which are unique to the coastal environment and vulnerable to modification including estuaries, coastal wetlands, mangroves and dunes and their margins; and*
> *(d) recognising that any other areas of predominantly indigenous vegetation ... should be disturbed only to the extent reasonably necessary to carry out approved activities.*

[26] As amended by s 16, Resource Management Amendment Act 1997.
[27] NZ Gazette 5 May 1994 page 1563.

[154] Policy 1.1.3 is–

> *It is a natural priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:*
> *(a) landscapes, seascapes and landforms, including:*
> *(i) significant representative examples of each landform which provide the variety in each region;*
> *(ii) visually or scientifically significant geological features;*
> *(iii) the collective characteristics which give the coastal environment its natural character including wild and scenic areas.*
> ...
> *(c) significant places or areas of historic or cultural significance.*

[155] The effect for the present proceedings is that high value has to be accorded to protecting any areas of significant indigenous vegetation on the land, particularly habitats important for the survival of indigenous species, or to regionally endangered species, and vulnerable coastal ecosystems; to the collective characteristics which give the coastal environment its natural character; and to significant places of historic significance.

Regional Policy Statement

[156] The purpose of a regional policy statement is described in section 59–

> ***59. Purpose of regional policy statements–*** *The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.*

[157] So the Auckland Regional Policy Statement may be taken to provide appropriate policies and methods to achieve sustainable management (as defined) of the natural and physical resources of the Auckland region. The contents of the district plan are not to be inconsistent with the Statement.

[158] The regional policy statement contains policies for evaluation of natural heritage resources. There was a difference between the parties on whether the Regional Planning Statement identifies the wetland areas of the subject land as significant natural areas. The difference arose because the relevant map in the Statement does not identify them as such. However Appendix B to the Statement identifies areas of regional or greater significance for natural heritage values. The list includes this item–[28]

[28] Appendix B, item 217.

Wetlands (mangroves, saltmarshes, and eelgrass) ... Areas of particular importance include:- ... Ann's Creek ...

[159] So despite the regrettable ambiguity between the text and the map provided to illustrate the text, we find that the wetland (mangrove and saltmarsh) areas of the subject land are identified in the Auckland Regional Policy Statement as significant natural areas.

[160] Relevant policies call for use and development of those resources to be controlled so that the values of significance are preserved or protected from significant adverse effects, or where that is not practically achievable, remedied or mitigated.[29]

Proposed Regional Plan: Coastal

[161] The proposed Auckland Regional Plan: Coastal was prepared before it was determined that the land was not within the coastal marine area. It classifies the subject land as in Coastal Protection Area 1, but now that it has been determined that the land is not within the coastal marine area, the proposed plan will be amended so that this classification no longer applies to the land.

Isthmus Plan

[162] The Isthmus plan contains provision for protection and identification of threatened vegetation populations that warrant conservation.[30] Section 5A.5, under heading Habitats, refers to preparing an inventory of significant ecological areas on the isthmus with a view to their protection or enhancement. Annexure 2 to the plan[31] describes Significant Natural Environment Features, and identifies Anns Creek as an ecological area.

[163] Ms K J Dorofaeff, the senior planner called for the City Council, acknowledged that there may be parts of the land that, on their own, are not of significant value. However she gave the opinion that the land has to be taken as a whole, and that there would be little point in having pockets of business zoning that could not be used for that purpose. The witness deposed that there would be merit in having the less valuable parts of the land serving more of a buffer function for the

[29] Policy 6.4.1.
[30] Section 1.2.
[31] A non-statutory annexure intended to assist users of the plan.

highly valuable areas, and that they may be able to be enhanced to be more compatible with the other parts that have more value.

[164] Ms Dorofaeff also referred to Part 4A of the Isthmus district plan which provides rules governing earthworks, by which resource consent would be required for earthworks over a certain limit. The witness deposed that on a grant of consent for earthworks, the Council could impose conditions to protect indigenous vegetation. However Ms Dorofaeff deposed that the vegetation on the land is not protected by the general tree protection controls, and expressed concern that it could be removed before an application for earthworks consent is made. That was the basis for her opinion that the earthworks controls would not be as effective to protect the natural values of the land as Open Space 1 zoning would be. The objective of the Open Space 1 zone is to provide for the conservation and protection of areas of particular scenic, heritage, natural or habitat value.

[165] Although consents would be required for earthworks and for building within the coastal management area even if the land is zoned Business 6, the focus of those controls is more on seeing if proposed development could be modified partly to protect values. The witness gave the opinion that the Council would not have the same degree of control of adverse effects and protection of natural values as it would if the land is zoned under Open Space 1.

Exercise of judgment

[166] The purpose of our consideration of the provisions of the Act and the planning instruments is the need to decide between the Open Space 1 zoning for better protection of the natural values of the land, and Business 6 zoning to enable the owners to have some opportunity to use and develop at least parts of the land for their economic wellbeing. That opportunity would be subject to the constraints of the existing infrastructure and designation on the land, and the coastal management area and earthworks controls. Those controls would not themselves afford quite as full protection of the natural values as Open Space 1 zoning would. However Open Space 1 zoning would preclude any use or development of the land that would enable the owners to provide for their own economic well-being from their investment in it.

[167] We find that, in terms of section 85 of the Act, Open Space 1 zoning would render the land incapable of reasonable use and would place an unfair burden on the

owners. The City Council maintained that its willingness to buy the land from Mr and Mrs Hastings adequately addressed that concern. However that willingness was qualified. It did not necessarily extend to purchasing if the land is zoned Business 6. The City Council has not been able to purchase the land yet, and our decision has to be made on the basis that it remains privately owned.

[168] In this case, the conflict between enabling economic use of the land and precluding all economic use to protect the undoubted natural values of the land is not quite as stark as that. Leaving aside the prospect of protection by the proposed designation for nature reserve, and eventual public acquisition, even Business 6 zoning would not allow unrestrained development of the remainder of the northern piece after excluding the marginal strips, the railway link easement, the other infrastructure elements, and the building line restriction. Although they would not be as fully effective to protect the features of natural value as Open Space 1 zoning, the coastal management area control and the earthworks control have the potential to provide considerable protection. In the unlikely event of activity to remove valuable indigenous vegetation in advance of a resource consent application (the risk mentioned by Ms Dorofaeff) a combination of sections 17 and 320 would provide a backstop.[32] By contrast, there is no corresponding moderation in Open Space 1 zoning to allow for any development to enable economic use, even development that does not have any significant adverse effect on the environment.

[169] Sustainable management of natural and physical resources is a single concept. Where conflict arises between elements of the concept, it is often possible to moderate them so that the essence of each element is preserved. However in the end a decision has to be made about what provision best meets the purpose of the Act.

[170] In this case there is a conflict between two important elements of sustainable management of the subject land, the important natural values and enabling the owners to provide for their economic well-being from it. The result of our consideration of the conflict is our judgment that Business 6 zoning of the northern part of the land would more fully serve the purpose of the Act than would Open Space 1 zoning.

[32] See for example, *Auckland Regional Council v Hastings* Environment Court Decision A89/99.

[171] In conformity with that judgment, we find that Business 6 zoning, rather than Open Space 1 zoning, accords better with Part II of the Act, would assist the City Council to carry out its function of control of actual or potential effects of the development of the land, and is the more appropriate means of the Council exercising its function of achieving the purpose of the Act.

[172] If the City Council realises its wish to purchase the land, then Open Space 1 zoning could be reconsidered.

Zoning of rail link route

[173] We have now to consider the zoning of the curved strip of the land, the subject of the easement for the proposed railway link between the North Auckland Railway and the North Island Main Trunk Railway.

[174] The City Council maintained that the strip should be zoned Special Purpose 3 (Transportation Corridor), and the Manukau Harbour Protection Society sought Open Space 1 zoning. The Minister of Conservation supported the Society, and (to the extent that it took an attitude on the question) the Regional Council supported the City Council. As we have concluded that the rest of the northern part of the land should be zoned Business 6, Tranz Rail's stance supports that of the Councils. Mr Hastings had sought Business 6 zoning for this piece of the land, but as there was no foundation for that in his submission on the proposed plan, we hold that he is not entitled to seek that relief in these proceedings.

[175] Although they were the protagonists for change, neither the Minister nor the Society called evidence. The only evidence bearing on the issue that, from our analysis of the submissions, is properly before the Court in respect of this land was that of Ms Dorofaeff.

[176] Ms Dorofaeff gave the opinions that the Special Purpose 3 zoning is a means of achieving the statutory purpose in respect of this piece of the land, particularly enabling people and communities to provide for their social, economic and cultural well-being and for their health and safety, by use of it for a strategic transport connection. The witness also deposed that the zoning conforms with sustaining the potential of physical resources (the North Auckland Railway and the North Island Main Trunk Railway) to meet the reasonably foreseeable needs of future generations.

[177] Ms Dorofaeff also explained that a railway bridge on the land for a railway link would be a permitted activity, but earthworks exceeding 25 cubic metres in volume or 250 cubic metres in area would need resource consent, the criteria for which include adverse ecological effects on natural habitats, watercourses, wetlands, estuaries and coastal waters. The witness deposed that a railway embankment would require resource consent under the coastal management area control. She gave the opinion that in those ways the Special Purpose 3 zoning would assist the Council to carry out its function of control of actual or potential effects of the development of the land.

[178] Ms Dorofaeff's evidence in those respects was not challenged by cross-examination of contradictory evidence, and we accept them.

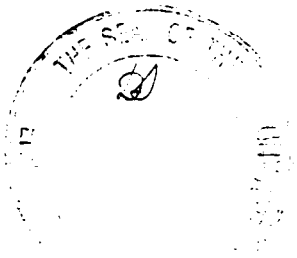
[179] The case of the Manukau Harbour Protection Society for Open Space 1 zoning instead of Special Purpose 3 zoning was that the latter would encourage further filling of Anns Creek, which would further diminish the potential environmental value of the land. The Society urged that Open Space 1 zoning would not preclude a railway link, but would have the effect that it would be provided on an elevated structure rather than on an embankment. However it accepted that this issue is secondary to the zoning of the rest of the land, and that if the rest is to be zoned Business 6, "then there is little value in arguing over the zoning underlying a rail connection."

[180] It appears that the Minister of Conservation took a similarly pragmatic view of this issue, as her counsel did not make specific submissions in respect of the zoning of the curved railway link strip.

[181] It is our opinion that in the light of our decision that the rest of the northern part of the land should be rezoned Business 6, the appropriate zoning for the curved railway link strip is Special Purpose 3.

Determinations

[182] For those reasons, the Court makes the following determinations.



[183] Reference RMA 769/95 is allowed to the extent that the Auckland City Council is directed to zone Business 6 the pieces of the subject land outlined in bold on the plan incorporated in Mr Hastings's Submission 7619 and marked "Proposed BA 6"; and in all other respects is disallowed.

[184] Except to the extent that the relief granted in the preceding paragraph meets relief sought by it, Reference RMA806/95 is disallowed.

[185] We recognise that the complexities of the site and of the proceedings will have made the case more costly for the principal parties than district plan references generally. Even so, our provisional view is that each party should bear his or its own costs. However in case any party wishes to contend for an order for costs, the question of costs is reserved.

Disclaimer

[186] Nothing in this decision should be taken as expressing or implying any opinion about the merits of the City Council's requirement for a proposed Nature Reserve designation of the land.

DATED at **AUCKLAND** this 6th day of August 2001.

For the Court:

D F G Sheppard
Environment Judge

TAB 8

ORIGINAL

Decision No. C010/2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references under clause 15 of the First Schedule to the Act

BETWEEN **INFINITY GROUP**

(RMA337/03)

DENNIS NORMAN THORN

(RMA352/03)

Appellants

AND **QUEENSTOWN-LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner M P Oliver

HEARING at Wanaka on 21, 22, 23, 24 and 25 June, and 20, 21, 22, 23 and 24 September, 2004.

APPEARANCES:

W P Goldsmith and J M Crawford for Infinity Group
P J Page and A Durling for D N Thorn
G M Todd and (from 20 September 2004) K Rusher for the Queenstown-Lakes District Council
J R Haworth for the Upper Clutha Environmental Society Incorporated.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

INTERIM DECISION

Table of Contents

Introduction

[1] Lake Wanaka and its setting are renowned for their outstanding natural beauty. The main issue in these proceedings was whether a proposed extension of Wanaka town on a peninsula to the north-east should be disallowed or restricted because of adverse effects on landscape and visual amenity values.

[2] The Queenstown-Lakes District Council, at the request of the developer, proposed a special zone for the 75-hectare site that would enable a mixed-density residential development with up to 240 residential units, and open space areas. After hearing submissions, the Council increased the number of residential units from 240 to 400.

[3] Two reference appeals were lodged with the Court. One, brought by the developer, sought amendments to the special plan provisions. The other, brought by an opponent, sought that the previous Rural General zoning of the site remain.

[4] The two references were heard together. The parties were the developer (Infinity Group), which generally supported the special zoning for residential development; the Council, which also generally supported the special zoning; the other referrer, Mr D N Thorn, who opposed the special zoning for development; and the Upper Clutha Environmental Society, which opposed provision for development at the lake end of the site.

[5] The references having been lodged in May 2003, prior to the commencement of the Resource Management Amendment Act 2003, there was no dispute that the proceedings have to be decided as if that amendment Act had not been enacted.[1]

The site and its environment

[6] The site is roughly rectangular in shape, and has an area of 75.484 hectares. It is located on the Beacon Point Peninsula, immediately north of a residential area served by Rata Street and Hunter Crescent; and east of another residential area known as Penrith Park. To the north, the site abuts a recreation reserve, which in

[1] Resource Management Amendment Act 2003, s 112(2).

turn abuts Lake Wanaka. The adjoining land to the east is exotic forest, and to the south-east, pasture.

[7] The southern boundary of the site is about 2.3 kilometres from the Wanaka Town Centre. The western boundary of the site is about 700 to 800 metres from Lake Wanaka, and the northern boundary is about 120 metres from the lake edge.

[8] The site is generally rolling, with shallow gullies, rounded ridges and a predominantly westerly aspect. The northern boundary is near the top of a steep scarp which drops to the lake. The eastern boundary is about 130 to 300 metres from a ridge.

[9] The average level of the lake is about 279 metres above sea level. The highest point on the site is about 360 metres above sea level, and the lowest point about 305 metres above sea level.

[10] Most of the site has a slope pattern that ranges from 1 in 7 to flatter than 1 in 20, but there are areas near the eastern boundary, the south-western end and the north-eastern end that slope between 1 in 7 to 1 in 3. The escarpment down to the lake beyond the northern end of the site is generally steeper than 1 in 3.

[11] In pre-historic times, the site was overrun by glacial advances which left morainic deposits, more recently about 23,000[2] and 18,000[3] years ago. The younger (Hawea) moraine generally lies between the 300- and 360-metre contour lines on the site.

[12] The vegetation of the site is mainly exotic pasture grasses, and there are scattered stands kanuka and matagouri mainly at the northern end of the site and along parts of the eastern boundary. There are also pockets of kanuka in gullies and patches elsewhere on the site.

[13] The site is visible to varying degrees from parts of Lake Wanaka, and from parts of West Wanaka, including the Millennium Walkway along the western shore, and residential areas to the west and south of the site. More particularly, the northern part of the site is visible from the lake, and the elevated slopes near the

[2] The Mt Iron Advance.
[3] The Hawea Advance.

eastern boundary are visible from the west and south, as well as from parts of the lake.

[14] Some people cross the south-eastern corner of the site to gain access to walking and cycle tracks in the adjacent plantation, and others use cycles on tracks through the kanuka at the northern end. The owner has acquiesced in that, but the site is private property and there is no public right of access over it. There is a popular walking path through the lakeside reserve to the north of the site.

Relevant planning instruments

[15] There are three planning instruments applicable to the site: the Otago Regional Policy Statement; the transitional district plan; and the partly operative Queenstown-Lakes District Plan.

Otago Regional Policy Statement

[16] The Otago Regional Policy Statement became operative on 1 October 1998. Among other matters, there are objectives and policies of protecting natural features and landscapes from inappropriate subdivision, use and development;[4] ensuring public access opportunities to and along margins of lakes are maintained;[5] protecting areas of natural character, outstanding natural features and landscapes of lakes;[6] consolidation of urban development to make efficient use of infrastructure;[7] avoiding, remedying, or mitigating adverse effects of subdivision, land-use and development on landscape values;[8] and maintaining the natural character of areas with significant indigenous vegetation.[9]

The transitional district plan

[17] The transitional district plan had been prepared under the former Town and Country Planning Act 1977, and is deemed to be the operative district plan under the

[4] Objective 5.4.3, Policy 5.5.6, and Objective 6.4.8.
[5] Objective 6.4.7 and Policy 6.5.10.
[6] Objectives 6.4.8 and 9.4.1(c).
[7] Policy 9.5.2(a).
[8] Policies 9.5.4 and 9.5.5(c).
[9] Policy 5.5.7(i); Objective 10.4.3 and Policy 10.5.2.

Resource Management Act 1991[10] until replaced by a district plan prepared under the 1991 Act.

[18] By the transitional plan, the northern part of the site (Mr J C Kyle estimated about one-quarter to one-fifth) is zoned Rural L (Landscape Protection), and the rest is zoned Rural B.

[19] There is a policy of ensuring that areas of high visual amenity are protected by zoning.[11] The zone statement for the Rural L Zone records that the shores of Lake Wanaka in the vicinity of Wanaka town are worthy of protection; and states an objective of providing for greater development of the town in depth, complemented by the Rural L zone restricting development around the lake margin.[12]

[20] The Rural B zone is a general rural zone applying to land suitable for pastoral use, although other uses compatible with scenic values and land stability are also permitted.[13]

The Queenstown-Lakes District Plan

[21] The proposed Queenstown-Lakes District Plan was prepared under the Resource Management Act, and was publicly notified on 10 October 1995. The site was in the Rural Downlands Zone, but by decision on submissions, it was included in the Rural General Zone, a zone which primarily encourages retention of land for farming carried out in such a way that protects and enhances nature conservation and landscape values.[14] The plan provides objectives, policies and methods applicable to managing the effects of subdivision and buildings that address landscape and visual amenity values.

[22] The proposed district plan was made partly operative from 11 October 2003, but many provisions of Sections 4 and 5 (District-wide Issues and Rural Areas), among others, are not yet operative.

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[10] S 373(1).
[11] Policy 3.5.02.
[12] Section 3.5.01.
[13] Sections 3.3.01 and 3.3.02.
[14] Section 5.3.1.1.

[23] The plan states a vision of community aspirations for a sustainable district. this contains a statement that undeveloped ridgelines and visually prominent landscape elements that contribute to the District's well-being (among other features) are protected from activities that damage them.[15]

[24] In Chapter 4 on district-wide issues, there are (among others) objectives of preserving the remaining natural character of lakes and their margins, protecting natural features.[16] There are (among others) policies of long-term protection of geological features;[17] of sites having indigenous plants of significant value;[18] and of avoiding adverse effects on the environment.[19]

[25] The district-wide provisions relating to landscape and visual amenity, provide for classification of rural landscapes into three classes: Outstanding Natural Landscape, Visual Amenity Landscape and Other Rural Landscape.[20] Specific policies and assessment matters apply to rural landscapes in each of those classes. However the Plan does not identify urban landscapes, nor does it provide specific policies and assessment criteria in respect of them.

[26] Even so, there are policies on future development that are not specific to particular classes of rural landscape. They include a policy of avoiding, remedying or mitigating adverse effects of development where the landscape and visual amenity values are vulnerable to degradation;[21] and of encouraging development in areas with greater potential to absorb change without detraction from landscape and visual values.[22] There is a policy of avoiding sprawling subdivision and development along roads in visual amenity landscapes.[23] There is also a policy of ensuring that the density of subdivision and development does not increase so the benefits of further planting and building are outweighed by adverse effects on landscape values of over-domestication of the landscape.[24] The environmental results anticipated from

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[15] Section 3.6, 2nd paragraph.
[16] Objective 4.1.4.1.
[17] Policy 4.1.4.1.1, 4.1.4.1.4, and 4.1.4.1.12.
[18] Policies 4.1.4.1.4 and 4.1.4.1.11.
[19] Policy 4.1.4.1.7.
[20] Section 4.2.4.
[21] Policy 4.2.5.1(a).
[22] Policy 4.2.5.1(b).
[23] Policy 4.2.5.6(d).
[24] Policy 4.2.5.8(a).

implementing the policies and methods relating to landscape and visual amenity include protection of the visual and landscape resources and values of lakes.[25]

[27] For an objective of efficient use of energy, there is a policy of promoting compact urban forms which reduce the length of and need for vehicle trips.[26]

[28] In a part of the plan about urban growth, the Council identified an issue of protecting landscape values and visual amenity.[27] In that context there is an objective of growth and development consistent with the maintenance of the quality of the natural environment and landscape values.[28] There is a related policy of protecting the visual amenity, and avoiding detracting from the values of lake margins.[29] Associated with another residential growth objective are policies of enabling urban consolidation where appropriate and encouraging new urban development in higher density living environments.[30] The environmental results anticipated from implementing the policies and methods relating to urban growth include avoidance of development in locations where it will adversely affect the landscape values of the district.

[29] Similarly, in a part of the plan about residential areas (district-wide), there is a policy of enabling residential growth having primary regard to protection of the landscape amenity.[31] In respect of Wanaka in particular, there is an objective that residential development is sympathetic to the surrounding visual amenities of the rural areas and lakeshores.[32]

[30] A resource management consultant, Ms N M Van Hoppe, gave the opinion that the Rural General zone is an inappropriate zoning for the site, on the grounds that it is not efficient or commercially viable to farm it due to its small area, being adjoined on two boundaries by residential activities, and only being accessible through residential areas. The witness also considered the Rural General zoning of the site inappropriate because it does not allow for the residential development that the site is capable of absorbing.

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[25] Para 4.2.6(vi).
[26] Para 4.5.3.1.1.
[27] Para 4.9.2.
[28] Section 4.9.3, Objective 1.
[29] Ibid, Policy 1.1.
[30] Ibid, Policies 3.1 and 3.2 for Objective 3.
[31] Section 7.1.2, Policy 1.4.
[32] Section 7.3.3.

[31] The zoning of a piece of land in a proposed plan can be changed by the Court on an appropriate appeal. To that extent evidence about the appropriateness of the existing zoning of the land might be relevant on appeals arising from such a variation. However, the issue on appeals arising from a variation is focused on the appropriateness of the zoning and other provisions proposed by the variation. If those provisions are not upheld, and the variation is cancelled, the existing zoning remains.

Variation 15

[32] The Council proposed the special zoning for Infinity Group's site by publishing a variation (identified as Variation 15) to its proposed district plan. We will summarise the contents of the variation, and the sequence of events in respect of it. We will then address the question whether the variation has merged with the proposed district plan, and describe further amendments to the special zone agreed on by Infinity Group and the Council, and presented by them to the Court.

Contents

[33] Variation 15 creates a special Peninsula Bay Zone and proposes that the site be rezoned accordingly. The zone includes a layout and design plan for development of the site, which identifies separate activity areas (or subzones) in the site.

[34] The Variation also provides statements of issues, objectives and policies, and implementation methods for the Peninsula Bay Zone. The implementation methods including rules containing site and zone standards governing (among other things) the development of sites, including lot sizes, the extent of earthworks, the heights, locations, density and appearance of buildings, and the heights and appearance of plantings. The rules also govern the classes of activities in the zones.

[35] In terms of Variation 15 as notified, the zone would limit development to a total of 240 residential units. There were to be four activity areas:

- Area 1 would be a low-density residential area (minimum lot size 1000 square metres) in the centre of the site, covering about half the area of the zone, in which complying buildings would be permitted activities:

- Area 2, about 20 % of the area of the zone, was to be a rural-residential area along the northern and eastern edges of the zone, in which buildings would be discretionary activities.

- Area 3 was to be a higher-density residential area in the middle of the site, about 5% of the zone area, in which complying buildings would be permitted activities:

- Area 4 was to be for open space and recreation, applying to about 20% of the site area around the residential areas, in which buildings would be non-complying activities.

The sequence of events

[36] The Council publicly notified Variation 15 on 13 October 2001, the time for lodging submissions closing on 23 November 2001, by when 19 submissions in opposition had been lodged.

[37] On 15 March 2002, before it had notified a summary of submissions for further submissions to be lodged, the Council purported to put the variation on hold. The purpose was to await a community consultation process under the style Wanaka 2020, for which a workshop was to be held in May.

[38] On 19 July 2002, a Council committee discussed the views expressed at the workshop, and decided to proceed with Variation 15. The Council then asked the developer, Infinity Group, for amended layout and zone provisions to allow for 400 dwellings.

[39] On the next day the Council published its summary of the submissions on the variation. The time for lodging further submissions closed on 26 August, by when 35 further submissions from 5 people had been lodged (including 12 by Mr Thorn).

[40] On 29 October 2002 Infinity Group provided the Council with an amended plan increasing the maximum number of dwellings in the zone from 240 to 400, increasing the extent of Area 3 (higher-density residential), and reducing the minimum lot size from 1000 square metres to 700 square metres (Area 1).

[41] In February 2003 the Council heard the submitters following which, on 17 April 2003, it reached its decision on the submissions, altering the special zone provisions in these respects in particular:

(a) Creating new Areas 5a and 5b at the northern end of the site, and making provision for protection of native vegetation in Area 5b;

(b) Increasing to 400 the maximum number of residential units in the zone;

(c) Reducing the minimum lot size in Area 1 to 700 square metres;

(d) Identifying 24 additional sites in Area 1; and

(e) Providing for multi-unit development in Area 3.

[42] On 2 May 2003 the Council gave notice of its decisions on the submissions; and on 26 May Infinity Group and Mr Thorn lodged with the Environment Court reference appeals arising from the variation.

[43] By their appeal, Infinity Group sought deletion of Rule 12.19.3.5 prohibiting removal of native vegetation, disturbance of earth, structures and residential and visitor accommodation activities in Area 5b; and consequential amendments to other rules and to the layout and design plan.

[44] By his appeal, Mr Thorn sought that the site be zoned Rural General. In effect he sought that Variation 15 be cancelled.

[45] The Council contended that the Variation should be confirmed, albeit with some amendments to the provisions for the Peninsula Bay Zone:

(a) Prohibiting removal of kanuka outside nominated residential building platforms in Areas 2 and 5b;

(b) Specifying maximum building heights by reference to datum levels for residential building platforms in Areas 2 and 5b;

(c) Deleting the exemption for earthworks within residential building platforms in Areas 2 and 5b, so that assessment criteria encouraged carrying them out in the period between 1 May and 31 October.

[46] The Upper Clutha Environmental Society contended that the zoning should be amended to prohibit development of the part of the site at the northern end, effectively Area 5.

The effect of the merger of Variation 15

[47] A question arose about the significance of Variation 15 having, by clause 16B of the First Schedule to the Act, merged in the proposed district plan, both being at the same procedural stage.

[48] Mr Todd, for the Council, submitted that the Court should start with the existing Rural General zoning, consider the zoning proposed by the variation, and that it is open for it to come to a determination allowing for something within that spectrum.

[49] Counsel for Infinity Group, Mr Goldsmith, addressed this question in his closing submissions. He observed that in considering a resource-consent application in respect of the site, the consent authority would have regard to the district plan as amended by Variation 15; and the former Rural General Zone would not form part of the evaluation of the application.[33] Otherwise it would be faced with the complex and unwieldly task of assessing an application by reference to three (or possibly more) planning instruments.

[50] Counsel then addressed the question whether that approach should apply to consideration of a variation. He remarked that there is an inherent conflict between the two subclauses of clause 16B, and that this case is further complicated by the proposed plan being partly operative. Mr Goldsmith also submitted that there is no presumption in favour of any particular zoning of the site, the proceedings being more in the nature of an inquiry,[34] from which the Court has to determine the most appropriate zoning for the land.

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[33] *Awly Developments v Christchurch City Council* Environment Court Decision C103/2002, para 53; *Peat v Waitakere City Council* Environment Court Decision A82/04, para 66.

[34] *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[51] Clause 16B(1) prescribes that a variation shall be merged in and become part of the proposed instrument as soon as the variation and the proposed instrument are both at the same procedural stage.

[52] Variation 15 reached the stage of being subject to determination of reference appeals to the Environment Court on 26 May 2003, when these appeals were lodged. The proposed district plan was also at that stage then. It did not become partly operative until 11 October 2003. So we find that by Clause 16B(1), the variation merged in and became part of the proposed district plan on 26 May 2003.

[53] That does not mean that the Rural General zoning of the site provided by the proposed plan as amended by decisions on submissions is irrelevant. At the least, if the variation is cancelled, so the special Peninsula Bay Zone no longer applies to the site, the application to it of the Rural General zoning would be revived.

[54] Even so, we accept Mr Goldsmith's submissions that there is no presumption in favour of any particular zoning of the site, the Court being required to determine the most appropriate zoning for the land (with the limit, submitted by Mr Todd, that it falls within the range between the status quo and that proposed by the variation).

[55] We doubt whether clause 16B(2) affects that. We infer that subclause (2) is intended to apply to resource-consent applications and enforcement action, not to reference appeals.

Amendments to Variation 15

[56] The Council amended Variation 15 by its decisions on submissions. By its appeal Infinity Group sought further amendments. By the time of the appeal hearing, Infinity Group and the Council had reached agreement on numerous further amendments to the provisions of the special Peninsula Bay Zone. Without detailing them all, the more important are these:

[57] Altering the layout plan so that 6 lots in Area 5 are returned to Area 1, and identifying 11 sites with building platforms in Area 5a, instead of 6 larger sites with no identified platforms:

(a) Inserting objectives, policies, implementation methods, explanation and reasons specific to Area 5:

(b) Making buildings in Area 5a controlled activities on identified building platforms, otherwise discretionary activities:

(c) Reclassifying removal of native vegetation, earthworks, structures, residential and visitor accommodation activities in Area 5b from prohibited to non-complying;

(d) Amending the control on buildings in Area 5a that break a ridgeline as viewed from any public place so that it applies only to views from up to 700 metres from the shoreline;

(e) Reducing building height limits for Area 5a from 5 metres to 4.5 metres, and providing for a limit of 11 units in that area.

[58] Subsequent to the agreement between Infinity Group and the Council on those amendments, Infinity Group proposed further amendments to the special Peninsula Bay Zone provisions, both prior to, and during the appeal hearing. Infinity Group proposed the further amendments on the basis that the hearing was an iterative process intended to achieve the best zoning outcome for the land, including the most appropriate zone provisions.

[59] We accept that the Variation contains elaborate zoning provisions for comprehensive development of a considerable area of land in ways that are intended to avoid, remedy and mitigate adverse effects on the environment. But the successive amendments, however well intentioned, certainly presented the opposing parties and the Court with a proposal that continued to be altered up to the end of the appeal hearing. So we doubt that the proposal presented by Infinity Group to the Council in 2001 had been prepared with sufficient care having regard to the importance of the site and the scale of the development.

Authority for increased density

[60] In the variation as notified in 2001, the special Peninsula Bay Zone provided for a maximum of 240 residential units, and a minimum site area of 1000 square metres. By its decision on the submissions, the Council increased the maximum number to 400, reduced the minimum size to 700 square metres, and made consequential changes to the layout plan. Mr Thorn challenged the Council's

authority to make those amendments in that way, contending that no submission on the variation had sought them.

Arguments and evidence

[61] Mr Thorn's planning witness, Mr W D Whitney, gave the opinion that people who had not lodged submissions on the variation might have done so, if it had provided for 400 residential units, with the consequential increase in traffic effects. He observed that anyone wishing to debate the merits or otherwise of the amendments had been deprived of the opportunity to do so, as the amendments had not been provided for in a submission notified for further submissions.

[62] In cross-examination, Mr Whitney accepted that in hearing the submissions, the Council had had before it a traffic engineer's report which, at the Council's request, had considered the effects arising from a 400-unit development. The witness also accepted that a person who had read the original notification of the variation but had not checked the notification of submissions could find that the outcome is different from what was originally notified, but he observed that people do have opportunity to respond to what is in submissions.

[63] The Council relied on a primary submission on the variation by Ian and Sally Gazzard, in which they had stated that they had no objections to high density housing in suitable areas as they believed there is also a need for small sites. That submission had been notified in summary form for further submissions.

[64] Its planning witness, Ms N M van Hoppe, stated that the Council had obtained specialist reports during its decision-making process which had concluded that increased traffic volumes due to increase in density and volume within the zone would result in no more than minor effects that could be absorbed by current and proposed services.

[65] Infinity Group submitted that the assessment of whether the increase in residential density was reasonable and fairly raised by submissions should be approached in a realistic workable fashion, rather than from the perspective of legal nicety.[35] Mr Goldsmith also relied on *Haslam v Selwyn District Council*.[36]

[35] *Royal Forest & Bird Society v Southland District Council* [1997] NZRMA 408 pg 10.
[36] Environment Court Decision C71/93, p 10.

[66] Infinity Group relied on the Gazzards' primary submission, and on a further submission by the Wanaka Residents' Association supporting the Gazzards' statement about high-density housing and need for smaller sites. Infinity Group also relied on the report of the Wanaka 2020 workshop that community discussion had indicated that the Peninsula Bay development could be beneficial with greater density.

[67] Mr Page (counsel for Mr Thorn) contended that the Gazzards' submission had not raised an increase in density, as it did not state any relief sought by them; and that it can only be understood as support for the high density residential area (Area 3) of the zone as notified. On the Wanaka Residents' Association's further submission, counsel argued that a further submission cannot extend the scope of a primary submission.

[68] Mr Whitney gave the opinion that what the Gazzards had sought by their submission was that adequate infrastructure be planned and installed before further development takes place. They had not sought a decision increasing the number of residential units or reducing the lot sizes. The witness also gave the opinion that the Wanaka Residents' Association, by its further submission, had supported the Gazzards' submission on high density housing "provided adequate surrounding infrastructure can be provided".

[69] Mr Whitney observed that the Wanaka 2020 workshop report was an informal document that did not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of Section 74(2)(b)(i) of the Act. The report summarised general conclusions from workshop discussions, and responses to those conclusions developed by facilitators and the technical support team. Mr Whitney gave his reasons for suggesting that an increase in density in response to that report might be promoted closer to Wanaka town centre than increased density at Peninsula Bay.

[70] Mr Whitney did not agree with Ms Van Hoppe's opinion that the Wanaka 2020 workshop should be considered as part of the consultation for the variation, because once a variation is notified, consideration is limited to its contents and to the submissions and further submissions lodged in response to it.

Consideration

[71] In considering this question we state our understanding of the law; state our findings about the contents of the relevant submissions; address the significance for this purpose of the Wanaka 2020 workshop report; reach our conclusion; and then consider the consequences of it for the case.

The law

[72] It has been part of New Zealand planning law for decades that despite arguments about the realities of the situation, and appeals to common sense, a planning authority cannot alter a variation except to the extent that the alteration is sought by a submission lodged in accordance with the prescribed procedure.[37] The application of this principle to the Resource Management Act regime was confirmed by the High Court in *Countdown Properties v Dunedin City Council* [38] and in *Royal Forest & Bird v Southland District Council*[39] cited by Mr Goldsmith. A planning authority cannot alter a variation beyond what is reasonably and fairly raised in a submission. For example, a submission seeking co-ordinated development does not provide a basis for deleting a zone.[40] However the process of deciding whether an alteration is beyond that limit is not to be bound by formality, but approached in a realistic workable fashion, rather than from a viewpoint of legal nicety.[41]

[73] A further submission is confined to either supporting or opposing a submission.[42] It cannot introduce additional matters.[43]

[74] The decision in *Haslam* is not quite in point. It related to amendments to a proposal the subject of a resource consent application, not to a planning authority's decision on submissions.

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[37] See *Wellington City v Cowie* [1971] NZLR 1089 (CA); *Whitford Residents' Association v Manukau City Corporation* [1974] 2 NZLR 340 (SC); *Nelson Pine Forest v Waimea County Council* (1988) 13 NZTPA69 (HC).
[38] [1994] NZRMA 245 (HC).
[39] [1997] NZRMA 408 (HC).
[40] *Weatherwell-Johnson v Tasman District Council* Environment Court Decision W181/96.
[41] *Royal Forest & Bird Society*, supra.
[42] First Schedule, clause 8.
[43] *Hilder v Otago Regional Council* Environment Court Decision C122/97.

The contents of the relevant submissions

[75] The Gazzard's submission on the variation was produced in evidence.[44] It is a completion of a standard form issued by the Council. In the part where submitters are to state the specific provisions of the variation that the submission relates to, the Gazzards had entered : "A suitable infrastructure to supply adequate services, i.e. roads, water, electricity and sewage." In the section for stating the decision sought from the Council, the Gazzards had entered: "That adequate infrastructure is planned and installed before further development takes place. Roads widened, or do you restrict parking to only one side of roads?[45]

[76] In the section for stating the nature of the submission, the Gazzards set out their concerns about infrastructure being provided. They also set out their submission about the design of the development, referring to colours, materials, and tree plantings. That is the context in which this passage appears:

> We would like to see more open spaces between older existing established areas and understand 'Infinity' are addressing that issue with those concerned.
> We have no objections to High Density housing in suitable areas as we believe there is also a need for small sites.
> The narrowness of existing entry roads to the proposed area virtually precludes two way traffic when cars are parked on both sides of the road.

[77] The Council and Infinity Group did not rely on any other submission. We have examined the other submissions produced in evidence, and have found nothing in them that would support their argument that the Council was entitled to make the changes in question to the variation as notified.

[78] The further submission by the Wanaka Residents Association states support for the Gazzards'submission in this way:

> We support the part of the submission 15/8/1 – "Have no objection to high density housing in suitable areas, as believe there is a need for smaller sites."

[79] The Association's further submission gave this statement of its reasons:

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[44] Exhibit 2.
[45] Underlining in the original.

> The Wanaka 2020 Workshop identified this area as one suitable for some increased density. We support this provided adequate surrounding infrastructure can be provided.

The significance of Wanaka 2020

[80] We now consider whether the Wanaka 2020 Workshop referred to by the Wanaka Residents Association in its further submission is significant in deciding whether the Council was entitled to make the changes in question to the variation as notified.

[81] Mr Thorn contended that Wanaka 2020 was a non-RMA process, was not required to be consistent with Part II of the Act, or with the provisions of the partly operative district plan, and does not provide a lawful basis for the alterations to the variation in question.

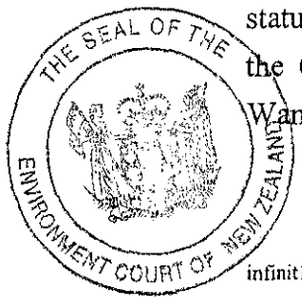
[82] Mr Whitney did not criticise the Wanaka 2020 programme, but gave the opinion that the report of the workshop is an informal document, and observed that it is described as:

> ... a summary of general conclusions from workshop discussions, and responses to those conclusions developed by the facilitators and the technical support team.
> It is a first step only ...

[83] Mr Whitney considered that the report does not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of section 74(2)(b)(i) of the Act.

[84] The Council acknowledged that the findings of the Wanaka 2020 report have no statutory basis, but contended that they confirmed the position the Council took in its decision. Ms Van Hoppe stated that in the Wanaka 2020 workshop the community had indicated that the proposed zone could absorb greater density.

[85] Infinity Group maintained that the Council's decision is supported by the findings of the community planning exercise recorded in the Wanaka 2020 report. A planning consultant, Mr Kyle, stated that although the Wanaka 2020 plan has no statutory basis in terms of the Local Government Act, it is intended to form part of the Council overall community plan required by it, and is reflective of how the Wanaka community wishes to deal with urban growth issues.



[86] Whatever value the Wanaka 2020 programme may have, it is not a substitute for the well-established process under the Resource Management Act by which the public are entitled to notice of proposals to alter planning instruments, and have legal rights to take part in formal hearings about them. There is no evidence that the public were given notice that the Wanaka 2020 workshop might lead to increasing the density under the Peninsula Bay Zone the subject of Variation 15 from 250 to 400 residential units. The evidence indicates that expressions of views on that topic were the subject of development by facilitators and a technical support team, but we are unable to form an opinion on whether that was an objective process. Further, people interested in the content of Variation 15 were entitled to confine their attention to steps in the procedure prescribed by the Resource Management Act, and should not be prejudiced by not having taken part in the Wanaka 2020 exercise, however valuable that might have been for other purposes.

[87] In short, we find that conclusions of the Wanaka 2020 workshop, or any report of it, cannot be relied on to justify the Council's decisions to make the alterations in question to Variation 15.

Decision

[88] We now consider whether the alterations to the number of units and minimum site area made by the Council were reasonably and fairly raised by the Gazzards' submission, approaching the Council's task in a realistic, workable way, rather than being bound by formality or legal nicety.

[89] Reading their submission as a whole, we do not accept that it indicated any wish by the Gazzards for any increase in the number of residential units provided for by the variation. Variation 15 as notified contained provision for a higher-density residential area (Area 3). The Gazzards' submission on the variation was about adequate and timely provision of infrastructure in a development that included that provision for a higher-density residential area. There is nothing in the submission capable of being understood as a wish for more extensive higher-density development.

[90] Rather, the Gazzards' statement that they had no objection to high-density housing, can only be understood in its context as stating no more than this: they had no objection to high-density housing on suitable areas, as they believed there was a need for smaller sites, but they wanted the infrastructure services provided first.

[91] This is not to form an opinion bound by formality, or legal nicety. We place no great weight on the absence of anything about density in the section of the submission form for stating the decision sought from the Council. We have considered the document as a whole. We find that its contents do not support a finding that the Gazzards wanted more high-density development, nor that they wanted an increase in the number of residential units.

[92] We have also read the Gazzards' submission as a whole to consider whether it indicated any wish by them for a reduction in the minimum lot size provided for by the variation. The only reference to lot size is in the same sentence in which they stated that they had no objection to high-density housing. In that sentence the Gazzards were stating that they had no objection to high-density housing as they believed there is a need for smaller sites. In context, they were not asserting that site sizes should be smaller than the variation provided for. Rather, they were expressing their support for its provision for smaller sites (ie 1000 square metres), but urging that adequate infrastructure should be installed before development takes place.

[93] Again, we do not place reliance on points of form or of legal nicety. It is a matter of reading the sentence in its context. We find that reading it in that way does not support a finding that the Gazzards were wanting the variation to provide for site sizes that would be smaller than those provided for. To the contrary, they had no objection to what the variation provided in that respect, and they wanted the Council to provide that the infrastructure for the development must be provided first.

[94] The Residents Association's submission supported the Gazzards' submission in that respect. Even if the Residents Association had wanted even higher density, or even smaller sites, the Association would not have been able to give effect to that merely by lodging a further submission supporting the Gazzards' primary submission, because a further submission cannot go further than the primary submission to which it relates. In the absence of a primary submission seeking more residential units or smaller sites than the notified variation provided for, the Council could only have given effect to such a wish by promoting a further variation.

[95] To conclude, we uphold Mr Thorn's challenge in this respect, and find that the Council did not, in the circumstances, have power to amend Variation 15 as it purported to do:

(a) by increasing from 240 to 400 the maximum number of residential units; nor

(b) by reducing the minimum lot size from 1000 square metres to 700 square metres.

Consequently the variation has to be treated as if it had not been amended in those respects; and as if the amendments made to the layout and design to give effect to those amendments had not been made.

The consequences of the finding

[96] Infinity Group contended that if the Court were to come to that conclusion, it should issue an interim decision allowing them opportunity to propose an amended layout and design plan providing for a maximum of 240 residential units; and observed that Infinity Group would be free to pursue an additional 160 units by further application. The alternative would be to revert to the layout and design plan the subject of the notification of the variation.

[97] As the latter no longer represents what any party wants, it would be preferable (depending on the outcome of other issues in these proceedings) to accede to Infinity's proposal. If Infinity Group should later apply for consent to increase the maximum number of residential units, natural justice would require that the application should be notified.

The draft stakeholders' deed

[98] Infinity Group maintained that a significant positive environmental outcome that would result from confirmation of Variation 15 is the Area 4 park and central facility that would be provided for the general public. The developer would have an obligation under a stakeholders deed to be entered into between Infinity Group and the Council to construct them, to maintain them for 5 years, leaving the Council with a choice that they vest in the Council as a recreation reserve, or continue as a privately-owned facility accessible by the public at large.

[99] *Counsel accepted that the proposed stakeholders' deed would represent a* private contract, the parties to which would be free to vary or cancel it at any time; and that no-one else would be entitled to enforce compliance with it.

[100] The Council accepted that even if the Council were to enter into such a deed, it could have little significance for the Court's decision in these proceedings; that if the park and facility were vested in the Council, their value could be taken into account in assessing the amount of any financial contribution levied on the developer; but that the Council could not bind or fetter its judgment in that regard in advance.

[101] The Court invited further submissions from Infinity Group on the significance of the proposed deed. Infinity Group stated that it was content to leave the central facility (and the possibility of it containing a swimming pool) to be settled with the Council in future, and did not rely on its provision as a positive outcome that would necessarily result from confirmation of the variation. In respect of the proposed park and proposed re-vegetation of it by the developer, Infinity Group offered amendments to zone provisions to ensure that the park and re-vegetation would be implemented.

[102] Infinity Group submitted that the proposed stakeholders' deed would have lesser significance to the proceedings and may have none. It did rely on the intention that the Council, which has responsibility under the Act, would be a party to the deed, and that the public could reasonably expect that it would enforce agreements that it has entered into, while acknowledging that the public would not be able to resort to enforcement proceedings if the Council failed to do so. Counsel also contended that there would be a positive advantage in that a future owner of land in the zone would not be able change the outcomes provided by the deed through a consent or variation process.

[103] In our judgement the Court should not place weight on the proposed stakeholders' deed in deciding these appeals for these reasons:

(a) Infinity Group and the Council have not entered into such a deed; and although Infinity Group may genuinely intend to do so if the Council is willing, there is no basis for assurance that the deed will be entered into.

(b) Even if such a deed was entered into, the processes under the Act for variation and enforcement of plan provisions would not apply in respect of it. As a private contract, the parties could agree –for purposes that might have nothing to do with the purpose of the Act– to vary or cancel it; and the public would in practice have no recourse in law.

[104] Where a private promoter of a variation or plan change wishes that intended public facilities be taken into account as positive environmental outcomes, the better practice is for the obligation to provide them be imposed by rules or other implementation methods in the plan.

Compliance with Section 32

[105] Mr Thorn contended that the Council had failed to comply with its duties under section 32 of the Act in respect of the objectives, policies, rules and other methods in Variation 15 in these respects:

(a) The Council had not itself independently performed those duties, but had simply adopted documentation in that respect that had been prepared by or on behalf of Infinity Group. Counsel argued that the obligation fell on the Council, and that it could not pass the responsibility to a developer and merely adopt its documentation.

(b) The variation does not achieve Part II of the Act as expressed in district-wide objectives and policies of the plan that are no longer in contention by reference appeal, and is not consistent with those objectives and policies–

i. In that they discourage development in landscapes that are vulnerable to change and contribute significantly to amenity values; and

ii. In not making a comparison with likely benefits and costs of development on alternative sites.

[106] The Council contended that it had fulfilled its duties under section 32 in respect of the variation in that, although the preparatory work had been done for Infinity Group, the Council had ensured that the work had been done properly in accordance with the requirements of the Act.

[107] Infinity Group observed that although a submission on the variation had arguably raised compliance with section 32, this issue had not been raised by Mr Thorn in his reference, and contended that the issue is not before the Court. Infinity Group also contended that on the evidence the variation did comply with section 32, in that:

(a) Variation 15 is the most appropriate means of exercising the Council's functions;

(b) Variation 15 would not be contrary to the district-wide objectives and policies of the district plan on landscape values, particularly as the issue is whether the site is appropriate for further development in relation to all the objectives and policies:

(c) There is no obligation under the section to make a comparison with development of alternative sites.

[108] As the Court has to decide these appeals as if the 2003 Amendment Act had not been enacted, we refer to the version of that section as originally enacted, and incorporating the amendments to it made by section 2(1) of the Resource Management Amendment Act (No 2) 1994. Subsection (1) directed that before adopting an objective, policy, rule or other method in relation to a function described in subsection (2), the person concerned was to have regard to certain matters described in paragraph (a), carry out an evaluation described in paragraph (b), and be satisfied of matters described in paragraph (c). Subsection (2) provided that those duties applied (among others) to a local authority in relation to the public notification under clause 5 of Schedule 1, of a variation, and in relation to a decision made by a local authority under clause 10 of Schedule 1, on any variation.

[109] Subsection (3)[46] provided:

> A challenge to any objective, policy, rule or other method, on the ground that subsection (1) of this section has not been complied with, may be made only in a submission made under–
>
> ...
>
> (b) Schedule 1.

[110] However the Environment Court can take into account any inadequacy of a section 32 analysis to determine the appropriateness of any part of the plan on its merits; but does not have jurisdiction to declare the instrument invalid on that account.[47]

[46] As substituted by the 1994 amendment.

[47] *Kirkland v Dunedin City Council* (2001) 7 ELRNZ 44 (HC); upheld on appeal [2001] NZRMA 529; 7 ELRNZ 227 (CA).

[111] Consideration of a challenge to the adequacy of compliance with the section is restricted to cases in which that issue was raised in the submission giving rise to the reference.[48] However that does not preclude the Court from taking into account matters referred to in section 32 in deciding the appropriateness of contents of a variation on their merits.

[112] Because he was absent from the district at the time, Mr Thorn did not lodge a primary submission on Variation 15. He did lodge further submissions in support of primary submissions that had been lodged by Jadwich Fryckowska, R and P McGeorge, D J Cassells & others, G and H Crombie, Heather Hughes, Martin White, Lindsay Williams, and N Brown; and in opposition to a primary submission by Infinity Group. None of the primary submissions in respect of which Mr Thorn lodged further submissions in support contained a challenge based on failure to comply with section 32, nor did Mr Thorn's further submissions in support of them.

[113] The primary submission by Infinity Group, in respect of which Mr Thorn lodged a further submission in opposition, did contain this assertion:

> The section 32 Report was adequate and appropriately addresses the proposal. In particular it identified relevant issues, assessed objectives and policies, assessed rules and methods, and outlined consultation. The Variation will not detract from the landscape values of the District.

[114] Although that primary submission expressly asserted that the section 32 report had been adequate and appropriately addressed the proposal, Mr Thorn's further submission in opposition to that primary submission did not raise a challenge on the basis that section 32 had not been complied with.

[115] Mr Thorn's reference to this Court of Variation 15 did not contain an allegation to the effect that the Council had failed to comply with the duties imposed on it by section 32 in respect of the variation.

[116] So we find that,–

(a) having not lodged a primary submission challenging the variation on the ground that section 32(1) had not been complied with,

[48] Ibid, paras 15 and 20 of the Judgment of the HC; and para 17 of the Judgment of the CA.

(b) having not lodged a further submission supporting someone else's primary submission containing such a challenge,

(c) having not lodged a further submission opposing Infinity Group's assertions in that respect, and

(d) having not alleged non-compliance with the section in his reference,[49]

– Mr Thorn was not entitled to contend, in these proceedings, that the Council had failed to comply with those duties. Therefore we reject Mr Thorn's contention to that effect.

[117] To the extent that Mr Thorn's contentions and evidence relate to the appropriateness of contents of the variation in respects that may be influential to the outcome of his appeal, we consider them on the merits in other sections of this decision.

The basis for decision

[118] Infinity Group submitted that there is no presumption in favour of any particular zoning of the site, and that the basis for deciding these appeals is that the variation has to–

(a) be necessary in achieving the purpose of the Act;

(b) assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose;

(c) be the most appropriate means of exercising that function; and

(d) have a purpose of achieving the objectives and policies of the Plan.

[119] Those submissions were founded on earlier decisions[50] and derived from provisions of the Act. They were not contested.

[49] An allegation to that effect in the reference would not have sufficed without having arisen from a submission containing a challenge that s 32 had not been complied with.
[50] Eg *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[120] Mr Thorn contended that in considering whether the proposed zoning of the site is necessary to achieve the purpose of the Act, that purpose should be determined by looking at the settled objectives and policies of the plan, as was done in *Suburban Estates v Christchurch City Council.*[51] Infinity Group disputed that and contended that a number of objectives and policies remain subject to challenge, a presumption that the purpose of the Act is fully represented by the objectives and policies of the plan would not be justified, citing *Dickson v North Shore City Council.*[52] Mr Thorn contested that any material objectives and policies were still subject to challenge; and urged that the Court's analysis should begin with the question whether the variation would achieve Part 2 as expressed through the district-wide objectives and policies of the plan.

[121] A variation is a method by which a local authority can propose an alteration to a proposed planning instrument.[53] This is done by a process of publication, opportunities for submissions and further submissions, hearing and reasoned decision by the local authority, and opportunity for appeal to the Environment Court.[54]

[122] The scope of a variation is not restricted by objectives and policies of the proposed plan. Indeed it is permissible for a variation to alter general objectives and policies. The process is comparable with that for adopting the proposed plan itself.

[123] The *Suburban Estates* and *Dickson* cases were appeals about the contents of proposed district plans, not about variations to them.

[124] Because the scope of a variation is not restricted by objectives and policies of the proposed instrument that is being altered, we do not accept Mr Thorn's submission that it has to be necessary to achieve the purpose of the Act as incorporated even in settled objectives and policies of the instrument. Rather, we hold that in this respect a dispute about a variation should be tested–

(a) by whether it achieves the purpose of the Act stated in section 5; and

(b) by whether it has a purpose of achieving the settled objectives and policies of the instrument that are not being altered by the variation.

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[51] Environment Court Decision C217/2001.
[52] (2002) 8 ELRNZ 172.
[53] See definition in s2(1).
[54] First Schedule, cl 16.

[125] In accordance with section 32(1), the criterion in item (a) gives effect to the overarching importance of the purpose of the Act; and the criterion in item (b) should ensure that if the variation is upheld, the instrument as altered retains its coherence.

Landscape and visual amenity effects

[126] We now address the main issue in the decision of these proceedings: Whether and to what extent the development provided for by the variation would have adverse effects on the landscape and amenity values of the locality. There was no question in respect of the development of most of the site. The issue was limited to development of two discrete areas of the site: Areas 2 and 5.

[127] It was Mr Thorn's case that parts of those areas are vulnerable to change and are not capable of absorbing the development on them that the variation provides for; and that the controls proposed by the variation would not be sufficient to protect the landscape and the natural amenity values of Lake Wanaka. Area 2 slopes up to the pine forested ridge which runs along the east of and above the site. Mr Thorn urged that the integrity of that ridge as a rural backdrop to Wanaka should be maintained. Area 5 is at the northern end of the site, farthest from existing development and closest to Lake Wanaka. Mr Thorn (supported by the Environmental Society) contended that the part of this area where development could be visible from the lake and lakeshore should be left undeveloped.

Classification of landscape

[128] An important question in considering the effects on landscape and visual amenity values is whether the site is in an outstanding natural landscape (ONL), or a visual amenity landscape (VAL); or whether it is not part of a rural landscape at all, but part of an urban landscape. The classification identifies which objectives and policies are applicable.

[129] Infinity Group's primary position was that the landscape of which the site forms part is not a VAL, but instead is part of the Wanaka urban landscape. If that is so, the policies applicable to VAL landscapes are not directly relevant. But if the Court finds that the site **is** part of a VAL, then Infinity Group contended that confirmation of Variation 15 would be consistent with those policies.

[130] The Council contended simply that the site is entirely in a VAL; but Mr Thorn contended that the part of the site (being in Area 5) between the lake shore and the ridge above it is correctly classified as being part of the ONL that includes the lake itself; and that the rest of the site is in a VAL. He contended that it is not open in law to classify it as being in an urban landscape.

[131] Three witnesses who were qualified in landscape and visual amenity matters gave evidence: Mr D J Miskell, Mr B Espie, and Ms D J Lucas.

[132] Mr Miskell gave the opinion that the site is not part of an ONL, a VAL, or an ORL; but being adjacent to existing residential areas in the south and west, is a natural extension of Wanaka town.

[133] Mr Espie gave the opinion that two landscapes meet in the vicinity of the site: a rolling agricultural landscape to the south-east, and a more remote and dramatic landscape to the north-west. Each contains pockets that share characteristics of the other, and a line between them would be arbitrary. He classified the former as a VAL, and the latter as an ONL; and as the site does not contain any outstanding natural feature, he classified it as part of a VAL.

[134] Ms Lucas gave the opinion that the VAL extends across the site to the lakeside ridge; and that from the ridge to the lakeshore is included within the ONL of the lake.

[135] The site is adjacent to the urban area to the west and south, is adjacent to a rural area to the east, and to the lake to the north. The site itself contains no urban development, but has a rural appearance. We are not persuaded by Mr Miskell's reasons for treating it as part of the urban landscape.

[136] Setting aside for separate consideration the northern part of the site beyond the ridge above the lake, we accept the opinions of Ms Lucas and Mr Espie that it is in a VAL.

[137] Mr Espie extended that classification to the northern part of the site beyond the ridge above the lake because it does not contain any outstanding natural feature. He acknowledged that the VAL meets an ONL in the vicinity of the site, and that the boundary between them would be arbitrary. Ms Lucas included the part beyond the

ridge in the ONL because in landscape and visual terms it is part of the landscape of the lake.

[138] We find Ms Lucas's approach more persuasive. The fact that the site is one land holding should not influence its landscape classification. The topography of the site lends itself to separate classification of the part beyond the northern ridge, visible from the lake and locations from which the lake can be viewed.

[139] In summary, we find that the northern part of the site beyond the ridge above the lake is correctly classified ONL; and the rest of the site is correctly classified VAL.

Assessment of landscape and visual amenity effects

[140] Next we have to consider the landscape and visual amenity effects of the development that would be provided for by the variation.

The parties' attitudes

[141] Mr Thorn contended that the higher parts of the site adjacent to the eastern boundary (Area 2) and Area 5 are vulnerable to change and not capable of absorbing the development that the variation would provide for; and that the variation would not sufficiently protect the natural and landscape values associated with the lake. He contended that this area should be left largely undeveloped, and in that he was supported by the Environmental Society.

[142] Infinity Group accepted that the backdrop ridge is important and acknowledged that stricter controls are required for Area 2 (than elsewhere in the zone) to ensure an appropriate interface between the lower land and the higher pine-clad ridge behind. It contended that the level of development proposed for Area 2 is appropriate, and would not have effects on landscape and visual amenities sufficient to warrant the land being given some form of non-residential zoning.

[143] All parties agreed that the most sensitive area of the site in landscape and visual amenity terms is Area 5 at the northern end. Infinity Group urged that the development provided for in that area had been very carefully assessed. This had included computer-aided inter-visibility analysis, and preparation of a video-simulation based on computer-modelled dwellings built to maximum permitted

heights and within the identified building platforms, taking into account controls on external colours and the requirement to retain existing kanuka vegetation. It contended that the development provided for in Area 5 would not have adverse effects on landscape and visual amenity values which would warrant that area of land being zoned in a way which would exclude development.

The evidence

[144] Ms Lucas gave the opinions that the development provided for by the variation would have significant adverse effects on the important landscape and natural amenity values of the lake and its enclosing landform; and on the eastern ridge which provides a natural backdrop and context for the town. She expressed concern that even with strict location and height controls for residences along the lakeside ridge, the landscape protection would be dependent on the kanuka vegetation being adequately retained. That witness gave the opinion that with premium prices for such sections, expansive views would be sought from inside and outside each house; protection of the kanuka screening could not be assured; and that any buildings visible on that ridge would reduce the naturalness of the lake experience.

[145] Mr Espie gave the opinion that the Peninsula Bay zone would have the effect of extending the area of Wanaka townscape up the slope that forms the middle-ground of views that are available from the west. This extension would take the form of a horizontal strip behind existing development but, because the existing ridgeline would not be broken, the appreciation of landscape that is had by observers to the west of Peninsula Bay would not fundamentally change. His opinion depended on ensuring the retention of existing kanuka, and controlling building heights and colours.

[146] Mr Miskell considered that sensitive design controls would protect and enhance the amenity values which are the most vulnerable to change. He acknowledged that residential buildings would inevitably alter the appearance of the site from some viewpoints in the surrounding landscape, but considered that the site has the ability to absorb the changes because an effective rural setting will remain.

[147] Mr Miskell considered that the natural character of Lake Wanaka would be altered only to a minor degree because the site is only a minor part of the surrounding landscape. Views from the lake to the north of the site would

effectively be unchanged, and views from the west would be seen in the context of existing development. He gave his opinion that overall amenity values would be enhanced by the creation of a pleasant living environment, recreational attributes would be enhanced, and much of the remnant kanuka will be retained.

Our findings

[148] We accept that the development provided for elsewhere on the site than in Areas 2 and 5 would not have significant adverse landscape and visual amenity effects. However we do not accept that the potential effects of development in Areas 2 and 5 would or could be adequately or appropriately avoided, remedied or mitigated by the controls on the height, bulk, location or appearance of buildings, nor by requirements to retain vegetation.

[149] While it remains alive in suitable locations and height, vegetation can hide, or at least soften the view of development. But hiding development, or softening its appearance, does not excuse providing for development that should not be provided for in an ONL, or in a VAL where it would not have potential to absorb change without detraction from landscape and visual values.

[150] Further we do not have confidence that district plan requirements for retaining vegetation will necessarily be effective in the long term. As well as being vulnerable to fire, disease, and natural mortality, the continued life of vegetation may depend on the extent to which it is perceived to obstruct valued views.

[151] If there is to be development in sensitive areas, there should certainly be controls on earthworks, and on the height, bulk, location and appearance of buildings and on sealed surfaces, so that their appearance recedes into the background. However the question in these proceedings is whether development should be provided for in those areas at all.

[152] We bear in mind that Area 5 is largely in an ONL, in which development would be visible from public places, and detract from views of otherwise natural landscape. Area 2 is in a part of the VAL, and development would be visible from public places and affect the naturalness of the landscape. We find that both areas are vulnerable to change, and neither is capable of absorbing the development the variation would provide for.

[153] In respect of the development of Area 2, we have not been persuaded by Mr Espie's opinion that the appreciation of the landscape from the west would not fundamentally change. From there the present landscape is rural, and possesses visual amenity. However much the sight of it is hidden or softened by vegetation, however much its prominence is mitigated by compliance with controls on earthworks and the height, bulk, location or appearance of buildings, that part of the landscape would no longer be rural. It would be changed to rural-residential.

[154] Counsel for Infinity Group submitted that, by comparison with Mr Miskell, Ms Lucas had made only an extremely cursory assessment of the potential effects of buildings in Area 5, limited to brief comments in two paragraphs of her rebuttal evidence. We do not criticise Mr Miskell, but we found Ms Lucas's reasons for her opinions realistic and persuasive.

[155] We accept Ms Lucas's opinions, and find that the development provided for by the variation in Areas 2 and 5 would have significant adverse effects on landscape and visual amenity values.

Application of criteria

[156] Having come to our findings on that critical issue, we now consider the variation by reference to the four criteria already identified, to assist our decision whether it should be upheld or cancelled.

Is Variation 15 necessary to achieve the purpose of the Act?

[157] The first criterion is whether the variation is necessary to achieve the purpose of the Act.

[158] Infinity Group submitted that in applying this test, the word 'necessary' should be understood in the sense of being desirable or expedient in achieving the purpose.[55] It contended that the purpose of the Act would be better achieved if provision is made in the district plan for a special zoning to enable a mixed-density community development on the site, rather than it retaining a rural zoning, in that:

[55] Citing *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145, 152 (FC).

(a) The proposed Peninsula Bay Zone represents a logical extension of the residential part of east Wanaka:

(b) It supports the Council's strategy of managing growth in and around urbanised areas:

(c) It is consistent with the findings of the Wanaka 2020 community planning report:

(d) Overall amenity values would be enhanced through creation of a pleasant living environment with improved recreational opportunities and retention of much of the remnant kanuka, enhancing the certainty that these environmental outcomes would be achieved.

[159] Three qualified planners gave evidence on this topic: Mr Kyle, Ms Van Hoppe, and Mr Whitney.

[160] Mr Kyle gave the opinion that the variation is necessary to achieve the purpose of the Act on four main grounds:

(a) There is not enough land zoned residential at Wanaka to accommodate continuing growth:

(b) The proposed Peninsula Bay zone serves the Council strategy of urban consolidation and development of compact urban forms centred on existing settlements in accommodating urban growth:

(c) It gives effect to the recommendations of the Wanaka 2020 report favouring increasing density to avoid sprawl:

(d) The site is suitable and the development would not give rise to adverse environmental effects or impinge on significant landscape values.

[161] Ms Van Hoppe gave the opinion that Variation 15 would be effective in achieving the purpose of the Act in that sustainable management of natural and physical resources would be achieved in these respects:

(a) The high and low density residential use would be an efficient use of the site:

(b) The Peninsula Bay zone would provide a practical and logical boundary for Wanaka avoiding sprawling subdivision:

(c) The rate of residential development would be consistent with proposed capacity of service infrastructure:

(d) The character of the Wanaka residential zone would be retained:

(e) Natural resources in the site having significant value, such as native vegetation, and ecological values, would be protected.

[162] Mr Whitney questioned whether the variation is necessary in achieving the purpose of the Act. He referred to research by a Council official, Ms V Jones, that had been reported to the Council's Strategy Committee, showing that the existing zoning provided capacity for 2843 additional dwellings at Wanaka; for 679 more in Rural-Residential and Rural-Lifestyle zones; together with further capacity in nearby townships. From that Mr Whitney concluded that there is no urgency for providing additional residential-zoned land at Wanaka.

[163] Mr Whitney also gave the opinion that development to the south-east of the town would provide for growth of the town in areas accessible to the town centre, business and industrial zones, and other services available in central Wanaka.

[164] Ms Van Hoppe concurred with Mr Whitney that, based on Ms Jones's research, there is no immediate urgency in providing for residential growth at Wanaka; but she observed that –

(a) Ms Jones's research had assumed that all consents for residential subdivision and development would be exercised, and owners of land zoned residential with capacity for further subdivision or development would do so prior to the Council providing for further growth;

(b) As market forces would dictate the pace of residential development within the Peninsula Bay zone, it might be some time before its full capacity would be realised.

[165] Mr Kyle responded that Ms Jones's model does not respond to the preferences and aspirations of individual landowners, so the rate of release of land for infill development cannot be predicted reliably.

[166] We accept Infinity Group's submission that in applying this test, the word 'necessary' has to be understood as desirable or expedient. But the variation has to be desirable or expedient for achieving the purpose of the Act, being the sustainable management of the natural and physical resources concerned. The explanation in section 5(2) of sustainable management refers to two main elements: the enabling of people and communities to provide for their social, economic, and cultural well-being, health and safety; and the constraints referred to in paragraphs (a), (b) and (c), which include safeguarding the capacity of ecosystems, and avoiding, remedying and mitigating adverse environmental effects.

[167] The first consideration then is whether provision for a further 240 dwellings at Wanaka is desirable or expedient. There are indications both ways.

[168] In support, it may reasonably be inferred that upholding the variation would enable Infinity Group, and ultimate occupiers of dwellings provided in accordance with the Peninsula Bay Zone, to provide for their social and economic well-being.

[169] Without implying any criticism of Ms Jones's valuable work, we understand the limitations of the results that were mentioned by Ms Van Hoppe and Mr Kyle. We also accept that it would take some years before the full capacity of the Peninsula Bay zone would be realised. Even so, the considerable extent of the unused capacity for further dwellings in the current provisions of the plan leaves ample scope for the market to respond to the preferences and aspirations of landowners and would-be residents without the site being developed at all.

[170] The Council's wishes to consolidate residential growth at Wanaka so as to avoid sprawl, and to provide a variety of densities, could be achieved without providing for the site to be zoned as proposed. If those wishes were achieved without the proposed rezoning of the site, the significant native vegetation on the site would not be placed at risk; nor would the landscape and visual amenity values, to which the northern and eastern edges of the site could continue to contribute if undeveloped.

[171] In short, the zoning may be favourable for those taking part in the development, whether as developer, or as purchasers of residential lots or dwellings, or as users of the recreational facilities to be provided. However we have not been persuaded that residential development of the site is needed now to accommodate the growth of Wanaka, or to enable the community to provide for its social or economic well-being.

[172] In our judgement, Variation 15 is not necessary to achieve the purpose of the Act, even giving the word 'necessary' the meaning of desirable or expedient. The environmental and ecological outcomes would not be improved by upholding the variation rather than by cancelling it.

Would Variation 15 assist the Council to control effects?

[173] We now apply the second criterion: Whether the variation would assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[174] Infinity Group contended that the variation would assist the Council to do so by managing Wanaka's growth, planning for the future of the site in an integrated manner designed to enhance overall amenity values without detracting from the landscape values and natural character of Lake Wanaka.

[175] Mr Kyle supported that contention, referring to the variation enabling mixed density development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. He gave the opinion that the resulting development would be in harmony with the landscape and visual amenity values of the area, and would not be incongruous with the residential development surrounding the site.

[176] Mr Whitney gave the opinion that integrated management of effects of the use, development or protection of the land resource is fundamental. He observed that the variation would provide for development at the northern extreme of Wanaka, rather than providing for a compact urban form.

[177] We accept Mr Whitney's point in that respect. We find that the Council's function of controlling effects of the use and development of the site would be assisted by the provisions of the variation identified by Mr Kyle, as far as they go. But they do not go far enough to assist it to control development so that it avoids adverse effects on the landscape and visual amenity values of the environment of development at the northern and eastern edges of the site.

Would Variation 15 be the most appropriate means?

[178] The third criterion is whether the variation is the most appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[179] Infinity Group contended that the variation is the most appropriate means of doing so, in that the Peninsula Bay Zone would ensure that amenity values, and the quality of the environment, is maintained and enhanced, while retaining and protecting large areas of vegetation. It also relied on the benefit to the general public of the proposed park and central facility proposed for Area 4. It urged that those outcomes would not be achieved if the variation is cancelled so that the rural zoning of the site would be reinstated.

[180] In his evidence in this respect, Mr Kyle listed aspects of the variation that he considered are beneficial, including the provision for mixed-density residential development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. The witness concluded that those provisions are efficient, appropriate and effective in assisting the Council to manage Wanaka's urban growth.

[181] Mr Whitney observed that the report to the Council on the analysis and evaluation of the variation in terms of section 32 had advised that the Council had to consider thorough investigations of alternative sites and directions for growth (advice with which the witness agreed). Mr Whitney stated that he had found no evidence of a thorough investigation of alternative sites and directions for growth at Wanaka having been undertaken. As already mentioned, this witness identified other means of providing for growth of Wanaka, and gave the opinion that investigation of alternative sites and directions for growth should occur.

[182] The criterion is whether the variation is the most appropriate means of exercising the Council's function. The use of the word 'most' gives effect to section 32(1)(c)(ii), which directs that a person adopting a method in a planning instrument is to be satisfied that it is–

> ...the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

[183] On its face, that direction calls for a comparison between the means proposed and other possible means of exercising the Council's function, in order to achieve the Act's purpose.

[184] In his evidence on this topic, Mr Kyle identified provisions of the variation that he considered beneficial. He acknowledged that there are a number of sites around Wanaka that are suitable for accommodating growth. He addressed other means than variation of authorising development of the subject site (resource consent, district plan review, privately promoted plan change). But he did not address the question whether the variation, containing those provisions for development of the subject site, is the *most* appropriate means of exercising the function.

[185] Infinity Group contended that in these proceedings consideration of other possible sites for accommodating growth would not be correct or appropriate, and consideration should not be given to whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites. Counsel argued that on a variation there is no obligation to do so, relying on the High Court Judgment in *Brown v Dunedin City Council.*[56]

[186] In that Judgment the High Court held that section 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. The learned Judge affirmed that the assessment should be confined to the subject site, and observed it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the task of eliminating all other potential sites within the district.

[56] [2003] NZRMA 420, Chisholm J.

[187] *Brown's* case related to a plan change rather than a variation. But having considered the learned Judge's reasoning, we see no basis for not applying it to a site-specific variation, such as that the subject of these proceedings. Accordingly we accept Infinity Group's contention, and hold that this criterion does not require consideration of whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites.

[188] Even so, no planning witness gave the opinion that the provisions of the Peninsula Bay Zone would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[189] Mr Kyle identified a number of beneficial aspects of it. So did Ms Van Hoppe, but she identified respects in which, even with amendments agreed on by Infinity Group and the Council, there may result in too little control over development in Area 5 at the northern end of the site (which is sensitive for landscape and visual amenity values). In cross-examination by counsel for Infinity Group, Ms Van Hoppe resiled on the status of removal of native vegetation not in public view; and accepted that later amendments proposed had addressed another point about building heights.

[190] Mr Whitney gave the opinion that the provisions for development of elevated parts of the site (especially at the northern end) would not preclude adverse effects on visual amenity from the lake surface and elsewhere, nor make adequate provision for public access there.

[191] Reviewing the evidence as a whole, we do not find in it an adequate foundation for finding that the revised provisions of the Peninsula Bay Zone (as proposed at the Court hearing) would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

Does Variation 15 have a purpose of achieving the objectives and policies?

[192] We now consider the variation by the fourth criterion, whether it has a purpose of achieving the settled objectives and policies of the Plan. Logically this

criterion only applies in respect of methods that do not implement objectives and policies specific to the variation.

[193] We have summarised the relevant objectives and policies. They include protection of natural resources including the natural character of lakes, outstanding rural landscapes, and visual amenity values. They also promote urban consolidation and compact urban forms by higher density living environments.

[194] Infinity Group maintained that the variation is generally consistent with the objectives and policies of the plan; that it achieves those addressing the peripheral expansion of urban areas; and respects those relating to landscape and visual amenity.

[195] Mr Thorn contended that the variation would not achieve Objective 4.2.5.1 and associated Policies 1(a) to (c), relating to identification of parts of the district with greater potential to absorb change in preference to those vulnerable to degradation. His counsel argued that once the parts of the district most capable of change have been identified, an assessment is required to ensure that development harmonises with local topography and ecological systems and other nature conservation values as far as possible. He contended that as the process has not been carried out, the proposed zoning does not have a purpose of achieving that objective and associated policies.

[196] Counsel for Infinity Group responded that in considering Variation 15 as a whole, Objective 4.2.5.1 should be applied on a 'macro' basis rather than a 'micro' basis. He contended that the issue is whether in relation to that objective the site is appropriate for further development. He urged that although landscape and visual amenity issues are important, it is equally important to provide for the growth being experienced and to provide for open space and for recreation.

[197] We quote Objective 4.2.5.1, and the associated policies in question:

> Objective:
> Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values.
> Policies:
> 1 Future Development
> (a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.

(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.
(c) To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.

[198] Mr Thorn may be right in suggesting that Policies 1(a) and (b) involve identifying parts of the district with greater potential to absorb change and those vulnerable to degradation. But that has not yet been done, no doubt because the plan is not yet fully operative. By definition variations are proposed at the stage when the plan is not fully operative. So we do not accept the fact that Variation 15 is proposed prior to the Council giving effect to its policy of identifying parts of the district should influence our decision on whether the variation should be cancelled.

[199] Rather we consider that the appropriate question is whether the development that the variation would authorise–

(a) would avoid, remedy or mitigate adverse effects on landscape and visual amenity values;

(b) would do so in an area where they are vulnerable to degradation, rather than having potential to absorb change without detracting from those values; and

(c) would harmonise with local topography and ecological systems and other nature conservation values as far as possible.

[200] From the findings we have already stated, we do not accept that the development that the variation would authorise would, in respect of the northern end and the eastern edge, achieve the objective or Policy 1(a), corresponding to items (a) and (b) in the previous paragraph. To that extent we find that Variation 15 does not have a purpose of achieving the objectives and policies of the plan.

[201] So far we have focused on the particular objective and policies relied on by Mr Thorn. We now expand our focus to include all the objectives and policies of protecting natural resources, including the natural character of lakes, outstanding rural landscapes, and visual amenity values. In our judgement, development of the northern and eastern edges of the site, that would be visible from the surface of the lake and elsewhere, would not serve those policies either. Nor would development of the site, even where the development itself is higher density, achieve the

objectives and policies of promoting urban consolidation and compact urban forms. On the contrary, it would extend the town further.

[202] In short, we judge that the variation would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

Summary of findings on criteria

[203] We have considered the variation by reference to each of the four criteria already identified.

[204] The variation would assist the Council in its function of controlling the effects of residential development of the site if it is to be developed for that purpose.

[205] However the variation is not necessary (in the sense of desirable or expedient) in achieving the purpose of the Act; it would not be the most appropriate means of controlling the actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose; and it would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

Specific provisions of Variation 15 in issue

[206] There were issues raised concerning several specific provisions of the variation on which we have to give our rulings.

Link Road

[207] A question was raised about the possibility of a road on the site being available for access to and from future development of land to the east of the site.

[208] Infinity Group recognised that provision for such a link road could have value. It did not itself propose it, but was willing to facilitate any option that achieved the objectives of all parties.

[209] Whether the district plan should be altered to provide for urban development of the land to the east of the site is not in issue in these proceedings. Nothing in this decision should be taken as endorsement of it. On that basis, we see no point in making provision for access to and from it through the site.

Public open space

[210] The next question concerned whether the Court has authority to reduce the public open space Area 4 of the proposed development by removing Area 4b as proposed at the hearing.

[211] Infinity Group responded that the variation had never provided that Area 4 would be public open space at all; but it volunteered to dedicate all of Area 4 except Area 4b as public open space.

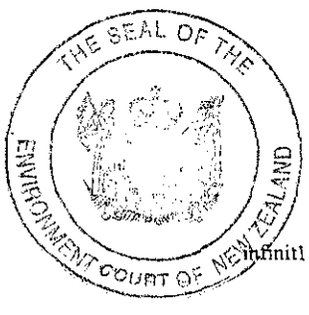
[212] We apprehend that this supposed issue arose from misunderstanding. We have found no evidence that raises an issue requiring the Court's ruling.

Residential flats

[213] Then there was a question about whether the effect of upholding the variation would be that there could be 400 residential units and also 400 additional residential flats on the site. Evidently this arose because of a general provision in the district plan which is understood to have effect that an owner of a residential unit is also entitled to have a residential flat on the same site.

[214] Infinity Group responded to the point by stating that if the Court had any concern over this, it would have no objection to an amendment providing that in the Peninsula Bay Zone, a residential unit does not include an entitlement to a residential flat on the same site.

[215] Because an issue had been made about the total number of dwellings provided for by the variation, we continue our consideration of the variation on the basis that if it is upheld, it would be amended accordingly.



[216] Development of such a large area would be likely to take place over a considerable period, and might be undertaken by more than one developer. We question the practicability of administering a limit on the total number of residential units in those circumstances.

Status of removal of kanuka

[217] There were also differences about the status of the activity of removing kanuka vegetation in certain areas of the site: whether it should be a discretionary activity, a non-complying activity, or a prohibited activity.

[218] The Council submitted that removal of kanuka outside nominated building platforms in Areas 2 and 5 should be a prohibited activity.

[219] The importance of protecting the kanuka is two-fold. First, it is valued for its inherent worth as native vegetation. Secondly, while it survives it could to some extent screen development in those areas from view from the lake surface and elsewhere.

[220] However retaining the kanuka would not necessarily be perceived by successive owners of lots in those areas as being in their own interests, particularly in commanding the widest views of the superlative lake and mountain-scape.

[221] The high value of retaining the kanuka could be shown by prohibiting its removal. However in our judgement, owners are more likely to moderate their desires to maximise views if there is provision for applying for consent, and conditions and criteria published for consideration of proposals.

[222] Accordingly we will continue to consider the variation on the basis that removal of kanuka from those areas would be a non-complying activity, with conditions and criteria designed to ensure that consent would only be granted if the removal would not reduce the extent that landscape and visual amenity values are maintained.

Building height limits

[223] Some differences of opinion about the basis for determining the maximum height of buildings led to Infinity Group and the Council preferring use of height limits above a datum, rather than above supposed ground levels, in Areas 2 and 5. The Council urged inserting an additional criterion for deciding earthworks, to encourage carrying them out in the period between May and October.

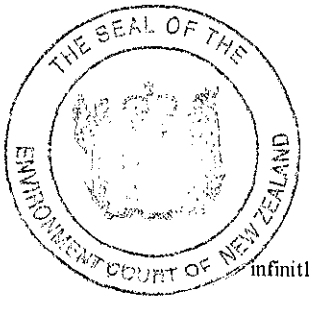
[224] We accept that this method might encourage additional excavation, but Infinity Group accepted that earthworks for residential buildings should then be part of the controlled activity consent process for buildings. The criterion encouraging earthworks between May and October was not opposed.

[225] We accept that setting maximum building heights by reference to datums provides certainty and enforceability, and is preferable to the general district plan mechanism which has difficulties in both respects. So we will continue to consider the variation on the basis that the building height limits in Areas 2 and 5 would be set by reference to appropriate datums; that earthworks for residential buildings should then be part of the controlled activity consent process for buildings; and that there be a criterion encouraging earthworks between May and October.

Building appearance

[226] Another issue of detail related to the extent to which the Council would have control over the external appearance of buildings in Areas 2 and 5a. Infinity Group proposed that this be done by stating that the external appearance of buildings, including design, cladding, colour and reflectivity, and consistency of design and appearance of garaging and outbuildings with the principal dwelling be matters in respect of which the Council would have control when considering, as controlled activities, the addition, alteration or construction of all buildings in those areas.

[227] In our judgement that appears to be appropriate, and we will continue to consider the variation on the basis that it is amended accordingly.



Future driveways and walkways

[228] There was also some reference to the routes of future driveways and walkways. Infinity Group accepted that they are shown conceptually on the plans, and the routes had not been fixed by survey or by reference to topography.

[229] We continue our consideration of the variation on that basis.

Exercise of power under section 293

[230] Infinity Group proposed that, if the Court held (as it has) that the maximum number of residential units is limited to 240, the Court should act under section 293 to raise the limit to 400 residential units. Consequential changes would involve increasing the extent of Area 3 and reducing the minimum lot area in Area 1 from 1,000 square metres to 700 square metres.

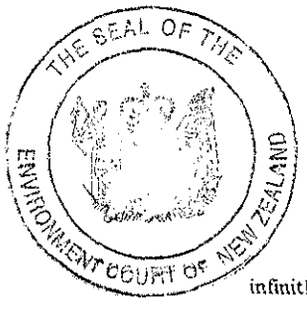
[231] Infinity Group argued that because the possibility of there being 400 residential units is already before the public from the Council decision on submissions, public notification of the proposed amendment should not be required. However the Council submitted that if the Court found that a reasonable case had been made for the amendment, it should direct public notification.

[232] Mr Thorn opposed this proposal, contending that the Council should be given an opportunity to reconsider its position, it having clearly signalled that it did not favour a 240-dwelling development, but preferred a higher density. He urged that this could only be done by cancelling the variation.

[233] In reply, counsel for Infinity Group submitted that the Council's preference for a higher density supports rather than counts against the proposition; and that there is no need to give it further opportunity for reconsideration.

[234] We quote the relevant parts of section 293:

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



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

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

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

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

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

...

[235] In considering those provisions, we apply the law explained by the High Court. The power is to be exercised cautiously and sparingly.[57] Before the Court has jurisdiction to invoke the section it must consider, first, that a reasonable case (strong enough to have a reasonable chance of success) has been presented and, secondly, that some opportunity should be given to interested parties to consider the proposed change. The requirement for further public notification and submissions is an integral component of the package. Even if the Court considers that a reasonable case has been presented, it will be exceedingly rare where the Court would exercise the power even within the scope of the reference, because interested parties will have had their opportunity to consider the proposed change.[58] There must be a nexus between the reference and the changed relief sought.[59]

[236] We now consider whether the conditions in which the power may be exercised exist in this case; and if they do, we can then form our judgement whether in the circumstances it should be exercised.

Has a reasonable case been presented?

[237] The first condition of the Court's power is that on the hearing of the appeal, the Court considers that a reasonable case has been presented for the change in question, understanding a reasonable case as one strong enough to have a reasonable chance of success.

[238] Infinity Group and the Council maintained that there is a reasonable case for increasing the density of the zone from 240 to 400 residential units on the ground that the report of the Wanaka 2020 workshop supported development of Beacon

[57] *Gisborne Refrigerating Co v Gisborne District Council* (1990) 14 NZTPA 336 (Greig J).

[58] *Canterbury Regional Council v Apple Fields* [2003] NZRMA 508; 9 ELRNZ 311 (Chisholm J) paras 41, 45, 47, 50.

[59] *Hamilton City Council v NZ Historic Places Trust* (HC, Hamilton; 11/08/04, Harrison J, para 25).

Point (which includes the site) should be more intensely developed to avoid continuing sprawl and scattered development.

[239] Mr Kyle stated that the findings of the Wanaka 2020 process are highly reflective of how the Wanaka community wishes to deal with the urban growth issues affecting the town. He also gave the opinion that the increase in the density is consistent with the objectives and policies on urban growth, with its primary focus on urban consolidation and avoidance of development where it would adversely affect landscape values or involve costly extensions to, or duplication of, urban infrastructure.

[240] Ms Van Hoppe observed that the changes would not affect the overall configuration of the Peninsula Bay Zone, but would make more efficient use of the land in Areas 1 and 3.

[241] Mr Whitney considered that the proposed development of the site can be regarded as urban sprawl rather than consolidation, and observed that it is some distance from existing schools, shopping and employment areas of Wanaka.

[242] It is not for us to make a final judgement in these proceedings on those issues. Our duty is to decide whether the case for the changes to the variation is strong enough to have a reasonable chance of success.

[243] In that respect we are not influenced by the outcome of the Wanaka 2020 workshop. That process was managed by facilitators and a technical support team who prepared the report, and we have no information about whether they had a particular agenda. It was not a process under the Resource Management Act that people with an interest in Variation 15 would necessarily take part in; nor would they expect that the recommendations might be relied on for making important changes to the variation. At best the report represented the views of the people who chose to take part in the workshop.

[244] We do not accept that simply because there could result 400 residential units instead of 240 on a 75-hectare site, that amounts to a case for the changes strong enough to have a reasonable chance of success

[245] On the difference between Mr Kyle and Mr Whitney on whether the increased density would appropriately serve the policies of consolidation and compact urban form, we find more plausible and prefer Mr Whitney's opinion that increasing the density of development on the site so far from the town centre represents sprawl rather than consolidation.

[246] In summary, we do not consider that a reasonable case, one strong enough to have a reasonable chance of success, has been presented for the changes in question. This condition of the Court's power under section 293 does not exist.

Should opportunity be given to interested parties to consider the amendment?

[247] The first condition of the Court's power under section 293 to direct the changes to the variation is that the Court considers that some opportunity should be given to interested parties to consider them.

[248] Contrary to what might seem to be its own interest, counsel for Infinity Group submitted that public notification is not necessarily required. However we have no doubt at all that, if a reasonable case had been presented for the changes in question, opportunity should be given to interested parties to consider them, and if they wish, make submissions and present evidence on them.

Should the power be exercised?

[249] If we had found that a reasonable case had been presented for the changes, we would then have to make a judgement whether in the circumstances the power should be exercised.

[250] Infinity Group proposed that the changes should be assessed by the factors identified in the *Apple Fields* case,[60] and contended that those criteria are fulfilled.

[251] Because we have found that the first condition of the Court's power has not been fulfilled, there is no need for us to make a point-by-point consideration of the proposed changes to Variation 15 be reference to those criteria. It is sufficient for us to refer to item (3), which we quote:

[60] [2003] NZRMA 508; 9 ELRNZ 311 paras 13, 55-62.

> That the discretion must be exercised cautiously and sparingly for these reasons:
> (a) It deprives potential parties of interested persons of their right to be heard by the local authority;
> (b) The Court has to discourage careless submissions and references;
> (c) The Court has to be careful not to step into the arena – the risk of appearing partisan is the great disadvantage of inquisitorial methods.

[252] On item (a), in this case exercise of the power would continue to deprive people of the opportunity to be heard by their elected local authority on the changes.

[253] On item (b), the cause of the proposal in this case is not careless submissions or references, but the Council's unsound assumption of authority to make the changes. The Court should, and does, discourage, rather than encourage, that.

[254] On item (c), although in this case the changes are proposed by a party, not on the Court's own initiative, the Court should still be careful not to step into the arena, as it might have to make a final judgement, later, on a dispute over the appropriate density of future development of the site.

[255] For those reasons, even if both conditions of the Court's power to act under section 293 were fulfilled, we would not exercise the power.

Part II of the Act

[256] In coming to a judgement on the variation overall, we have duties under Part II of the Act, which states its purpose and principles. Part II contains sections 5 to 8. Section 5 states the purpose and explains what is meant by sustainable management. As the remaining sections are supportive of and more particular than section 5, we consider them first.

[257] Section 6 imposes a duty on functionaries to recognise and provide for a number of matters of national importance. Some of them are raised by this case and we will address them.

[258] Section 7 imposes a duty on functionaries to have particular regard to certain other matters. Some of them were relied on in this case, so we address them too.

[259] The parties were agreed, and we accept, that the variation does not raise any issue in respect of the duty imposed by section 8 to take into account the principles of the Treaty of Waitangi.

Matters of national importance

[260] We quote section 6:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[261] Mr Kyle gave the opinion that the variation would preserve the natural character of Lake Wanaka and its margins, would protect significant areas of kanuka, would enhance public access to the margin of the lake, and would not impact on Maori ancestral lands, water, sites, lakes or rivers.

[262] Ms Van Hoppe gave the opinion that the northern area of the proposed zone would not impact on the natural character of Lake Wanaka's margin; and that any potential effect of visibility of development could be mitigated or avoided by the proposed zone provisions. This witness stated her belief that the proposed public walkways and open space would enhance public access to and along the lake, and that the development would have no more than minor effects on the existing walkway.

[263] Mr Whitney gave the opinion that subdivision and development of the northern end and elevated eastern edge of the site would be inappropriate because it would be visible from the margin of the lake, and from the surface of the lake (itself an outstanding natural landscape) to the north, and from the north-east, and generally from west. This witness also stated that residential development at the northern end

of the site would be likely to present a private atmosphere that would not enhance public access at the lakeshore.

[264] Earlier in this decision we stated our findings that the variation would provide for development in Area 5 that would have significant adverse effects on landscape and visual amenity of Lake Wanaka and its shores. Based on those findings, we hold that the variation would not recognise and provide for the preservation of the natural character of the lake and its margin. In our judgement, development of parts of the site that would be visible from the surface or the margin of the lake, even if existing kanuka or other vegetation did not exist, would not be appropriate; and the variation would not sufficiently protect the natural character from it, nor protect the outstanding natural feature and landscape of the lake from it. It would not fulfil the Council's duty under section 6(a) and (b).

[265] The variation contains measures designed to protect some of the areas of significant indigenous kanuka vegetation on the site, though not all of them. To the extent that it does not, the variation would not fulfil the Council's duty under section 6(c).

[266] The variation recognises and contains some provisions for maintenance and enhancement of public access to and along the lake. Although the presence of private development might mean that some people's enjoyment of that access is less, in our judgement that does not deserve categorising as a failure on a matter of national importance.

Matters for particular regard

[267] We quote the relevant parts of section 7:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (aa) The ethic of stewardship:
>
> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:
>
> (e) [Repealed.]
>
> (f) Maintenance and enhancement of the quality of the environment:
>
> (g) Any finite characteristics of natural and physical resources:
>
> (h) ...

[268] Mr Kyle gave the opinion that the variation would achieve the relevant matters set out in section 7. He stated that the development would make efficient use of existing service infrastructure and roading (paragraph (b)); that amenity values would be maintained (paragraph (c)); that ecosystem values at the site would be preserved and enhanced (paragraph (d)); the development would enhance the quality of the environment by provision of reserve areas and formalised access to the margin of the lake, and by facilities to be located on reserve areas, and would not exhaust future resources.

[269] Mr Whitney gave the opinion that development of the part of the site that overlooks the lake would not be consistent with the ethic of stewardship (paragraph (aa)), exemplified by the Lake Wanaka Preservation Act 1973 and subsequent community protection of the lake. He questioned whether the development authorised by the variation could be found to be an efficient use of resources (paragraph (b)) without a thorough investigation of alternative sites and directions for growth.

[270] On the maintenance and enhancement of amenity values (paragraph (c)) and of the quality of the environment (paragraph (f)), Mr Whitney gave the opinion that the amenity values of the site are enjoyed by those who view the land as a backdrop to the town, including from the surface and margins of the lake. He considered that the need for the land to be used to accommodate urban growth should be demonstrated before those amenity values, and that quality, is sacrificed. Similarly the witness observed that the finite characteristic of the land resource should be considered before a decision is made to allocate it for residential subdivision and development.

[271] Although the variation would allow development that may be visible from the lake, it contains provisions designed to minimise the effect on the natural character of the lake and its visual amenities. In those circumstances we judge it disproportionate to find that the Council failed to have particular regard to the ethic of stewardship in that respect.

[272] On paragraphs (b) and (g), the Council does not appear to have examined options for growth of Wanaka adequately. Nor did it explain the limit on the number of residential units, be it 240 or 400. We would have expected a comprehensive assessment of the development capability of a site of this size. However we consider that it would be disproportionate to find that the Council had failed to have particular

regard to the efficient use of land and of existing service infrastructure, or of the finite characteristics of the land resource, in that regard.

[273] On paragraphs (c) and (f), the variation does contain provisions designed to maintain and enhance amenity values and the quality of the environment. We do not find that the Council failed to have particular regard to those important matters.

[274] In summary, we do not find that the Council failed in its duty to have particular regard to the applicable matters listed in section 7.

The purpose of the Act

[275] The purpose of the Act is stated in section 5, which we quote:

> **5 Purpose**– (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[276] The Act has a single purpose, and it is our duty to consider the aspects of the variation that might serve it, and those that would not, in coming to a judgement whether it should be upheld or cancelled.

[277] The main resources concerned are the land of the site, the lake and its margins, the landscape and visual amenity values, and the significant native kanuka vegetation. The physical resources, particularly roads and other service infrastructure, are in this case less important.

Judgement

[278] Earlier in this decision, we reviewed the evidence and gave our reasons for finding that Variation 15 :

(a) Is not necessary to achieve the purpose of the Act;

(b) Has not been shown to be the most appropriate means of exercising the Council's functions to achieve the Act's purpose;

(c) Would not achieve the settled objectives and policies of the partly operative district plan about protecting natural resources; and

(d) Would not sufficiently protect the natural character of the lake (an outstanding natural feature and landscape) from inappropriate development.

[279] On those bases, it is our judgement that the variation would not serve the purpose of the Act of promoting sustainable management (as described) of natural and physical resources.

Determinations

[280] For those reasons, the Court determines:

(a) That Appeal RMA352/03 is allowed:

(b) That Variation 15 is cancelled:

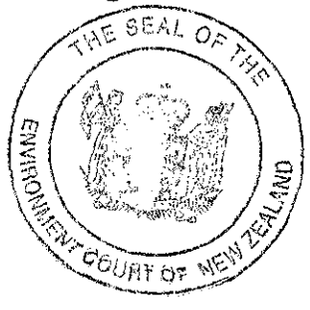
(c) That Appeal RMA337/03 is consequentially disallowed.

Costs

[281] The question of costs is reserved. Any application for costs may be lodged and served within 15 working days of the date of this decision. Any response may be lodged and served within 15 days of receipt of the application.

DATED at Auckland this 26th day of January 2005.

For the Court:



D F G Sheppard
Alternate Environment Judge

Issued: 28 JAN 2005

TAB 9

IN THE COURT OF APPEAL OF NEW ZEALAND

CA422/2015
[2017] NZCA 24

	BETWEEN	MAN O'WAR STATION LIMITED Appellant
	AND	AUCKLAND COUNCIL Respondent

Hearing:	29 June 2016
Court:	Harrison, Miller and Cooper JJ
Counsel:	M E Casey QC and MJE Williams for Appellant B O'Callahan and J A Burns for Respondent R B Enright and M C Wright for Environmental Defence Society Incorporated P R Gardner for Federated Farmers of New Zealand Incorporated
Judgment:	24 February 2017 at 12 pm

JUDGMENT OF THE COURT

A We answer the questions of law as follows:

(1) Is the identification (including mapping) of an outstanding natural landscape in a planning instrument prepared under the Resource Management Act 1991 for the purpose of s 6(b) of that Act informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

No.

(2) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Resource

Management Act 1991 changed (being elevated) as a result of the degree of protection required for an outstanding natural landscape (particularly in the coastal environment) by reason of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*?

No.

(3) Where a landscape has been identified as an outstanding natural landscape under a policy framework and approach to outstanding natural landscape identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

No.

(4) Is it relevant to the identification of an outstanding natural landscape (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an outstanding natural landscape should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

No.

(5) Was the High Court correct to find that in assessing whether or not a landscape is an outstanding natural landscape there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

In assessing whether or not a landscape is an outstanding natural landscape a regional council should consider whether the landscape in question is outstanding in regional terms.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] Man O'War Station Ltd (MOWS) owns land at the eastern end of Waiheke Island and on the nearby Ponui Island in the Hauraki Gulf. The landholding comprises 2,364 ha. Substantial parts of it are in pasture and MOWS operates it as a farm.

[2] Proposed change 8 to the Auckland Regional Policy Statement (ARPS) introduced new policy provisions for outstanding natural landscapes (ONLs) in the Auckland Region. The identified ONLs were shown on maps forming part of the proposed change. Two ONLs, referred to as ONL 78 (Waiheke Island Eastern End) and ONL 85 (Ponui Island) together covered 1,925 ha of MOWS's land.

[3] The proposed change underwent the normal public notification and submission process. MOWS made submissions because it was concerned that ONLs 78 and 85 would inhibit the ongoing use and development of its land for pastoral farming and other activities. Following the receipt of submissions the Council undertook further landscape assessment work, which resulted in a revised set of ONL maps when the Council released its decisions on the submissions in 2010. Ten appeals were filed in the Environment Court against the Council's decisions, one of them by MOWS.

[4] A process of alternative dispute resolution followed, which resulted in a memorandum of counsel setting out an agreed basis for settlement of all but three of the appeals. A new version of the proposed change was produced showing changes to the text agreed between the parties with the exception of MOWS. In the absence of unanimity the Environment Court was not able to formally resolve the appeals by consent, but it proceeded to hear the outstanding appeals on the basis of the new version of the change agreed by the other parties. Its decision was based on this version of the change, which it referred to as the "Hearings version".[1] We understand MOWS did not oppose that approach.

[5] MOWS did not succeed on its appeal in the Environment Court. Apart from some limited amendments, the Hearings version of the proposed change was confirmed by the Environment Court. MOWS appealed to the High Court on questions of law, but its appeal was dismissed.[2] MOWS now appeals to this Court on questions of law pursuant to leave granted by the High Court under s 308 of the Resource Management Act 1991 (the Act) and s 144 of the Summary Proceedings Act 1957.[3]

[6] We set out the five questions raised below.[4] They reflect MOWS's concerns that in identifying the ONLs the Council, and subsequently the Environment Court, set the bar too low, and that the strict approach to avoidance of adverse effects in outstanding areas of the coastal environment flowing from the Supreme Court's

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1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167, [2014] NZRMA 335 at [2].
2 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329.
3 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 1537.
4 Below at [31].

decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* will impede the reasonable use and development of its land.[5]

The Environment Court decision

[7] The Court recorded that a number of matters had been agreed between MOWS and the Council.[6] Significantly, it was agreed that all of the areas where the ONL classification was disputed had sufficient *natural* qualities for the purposes of s 6(b) of the Act.[7] Appendix F-2 of the proposed change gave descriptions of each of the ONLs, dealing separately with, among other things, their "Landscape Type, Nature and Description", "Expressiveness" and "Transient Values".[8] The Environment Court did not set out the relevant provisions of the Appendix, but it will be helpful to mention some of them at this point. The Landscape Type, Nature and Description for ONL 78 included the following:

> Very extensive sequence of rolling to steep hill country and rocky/embayed coastline at the eastern end of Waiheke Island, including large areas of remnant native forest intermixed with open pasture and vineyards, and a convoluted shoreline. (Includes the Stoney Batter historic defence features and landscape context).

It was ranked as high or very high in respect of other attributes mentioned in the Appendix. Under the heading Expressiveness it was described as a "[v]ery iconic sequence of landforms and natural/pastoral landcover flanked by a wild and highly scenic coastal edge". Under the heading Transient Values it read: "Highly atmospheric interaction with the Hauraki Gulf, affected by weather and light conditions, time of year/day. Abundant coastal birdlife."

[8] ONL 85's Landscape Type, Nature and Description was described as follows:

> Very extensive island feature, comprising a natural sequence of coastal headlands, cliffs, bays and beaches framed by [an] inland backdrop of rolling

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

6 *Man O'War v Auckland Council*, above n 1, at [4].

7 Section 6(b) refers to the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development

8 The drafting of the Appendix and the headings used was clearly designed to address the factors set out in Environment Court decisions articulating a methodology for landscape assessment, such as *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) [*WESI*].

> hill country that contains a mixture of remnant native forest and open pasture.

Under Expressiveness the wording was as follows:

> Extensive and relatively cohesive combination of remnant forest, open pasture and natural coastal margins contribute to a landscape that displays many of the hallmarks of the archetypal Hauraki Gulf landscape.

[9] The Court noted that MOWS called evidence that ONL 78 comprised coastal and interior landscape character areas with only parts of the former being an ONL. The Court referred to a related dispute about whether the "quality bar" for an ONL should be set at a regional or national level, MOWS arguing ("with a degree of equivocation") that the latter should apply.[9] There was also a contest about the boundaries of ONLs 78 and 85 in five specific locations.[10]

[10] The Court referred to the decision of the Supreme Court in *King Salmon*, which had been delivered after the Environment Court hearing, noting that it had received submissions from the parties discussing the potential impact of the decision. The Court then summarised the law applicable at the time of the hearing of the appeals in May 2013. In the course of the summary, the Court referred to the fact that under s 62(3) of the Act, a regional policy statement must give effect to a New Zealand coastal policy statement. The Court later quoted provisions of the New Zealand Coastal Policy Statement 2010 (NZCPS) of particular relevance. These included, amongst others, policy 13, which includes the following:

> **Policy 13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development;
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

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9 *Man O'War v Auckland Council*, above n 1, at [5(c)].

10 At [5(d)].

including by:

(c) …

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

[11] The Court also referred to policy 15, which relevantly says:

> **Policy 15 Natural features and natural landscapes**
>
> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;
>
> including by:
>
> (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district …

[12] Also included in the Court's summary of the relevant law was a discussion of the factors for assessing the significance of landscapes set out in previous Environment Court decisions.[11]

[13] After largely rejecting a challenge by MOWS of the use of the term naturalness in various provisions of the proposed change, the Court discussed the possible impact of *King Salmon* on both the wording of parts of the proposed change, and on the proper extent of mapping of ONLs on the properties owned by MOWS on Waiheke and Ponui Islands. It is clear from this discussion that the Court was aware of the key aspects of the decision.

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[11] At [14], citing *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 (EnvC) and *WESI*, above n 8. The Environment Court referred to the landscape assessment considerations as the *WESI* factors.

[14] The Court noted that there was substantial agreement about the wording of the relevant issues, objectives and policies of the proposed change, with argument confined to a "handful of aspects".[12]

[15] In the course of its judgment, the Court dealt specifically with concerns advanced by MOWS about Method 6.4.23.2(i), a provision providing for the control of subdivision but contemplating the avoidance of further subdivision, particularly where ONLs are also areas of high natural character and areas of significant indigenous vegetation and significant habitats of indigenous fauna. The associated statement of reasons for the method was also challenged by MOWS. The Court found the challenged provisions were appropriate:

> [52] We have determined that retaining the contested Method in the ARPS is consistent with national and regional planning documents and meets the requirements of pt 2 RMA. In giving effect to the RPS objectives and policies, our current view is that Method 6.4.23.2(i) is appropriate in ensuring that Policy 15 of the NZCPS is addressed in district plans by avoiding adverse effects of subdivision on outstanding natural landscapes in the coastal environment. It also recognises the importance of protecting outstanding natural landscapes required by s 6(b) and provides an appropriate mechanism for achieving this.

[16] However, leave was reserved for the parties to make further submissions on the wording of the provisions discussed in the light of the *King Salmon* decision.[13] This aspect of the decision was summarised at the end of the judgment as follows:

> [151] The current indication is that the Hearings Version text of PC8 should be confirmed except for the limited amendments indicated in the body of the decision. This conclusion is tentative however in light of the recent decision of the Supreme Court in *King Salmon*.

[17] We were advised by Mr Casey QC, counsel for MOWS, that MOWS did not take up the opportunity to make further submissions on the text of the proposed change that the Environment Court afforded to it, taking the view that it was clear that the policies would be made more restrictive in future as a result of the *King Salmon* decision. There was also the opportunity to further engage (which we were told MOWS did) with both the relevant objectives and policies and the extent of the

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12 At [40].
13 At [54].

provision for ONLs on its land in the Auckland Unitary Plan process then underway.[14]

[18] The Environment Court then turned to the issues concerning the extent and boundaries of ONLs 78 and 85. The Court discussed an argument advanced by MOWS that in assessing whether a landscape was outstanding, for the purpose of s 6(b) of the Act, the threshold should be set "at the very highest level", the bar being set on the basis of a national scale.[15]

[19] In dealing with this submission, the Court observed:

> [67] It will be seen from analysis of the parties' cases that follows, that we struggle with the approach advocated by MOWS that identification of ONLs should be on a national rather than a regional scale. Two concerns arise. First, the task could become enormously complex — query impossible. Second, one might be forgiven for postulating that if pristine areas of New Zealand like parts of Fiordland, the Southern Alps and certain high country lakes, were to be regarded as the benchmark, nothing else might ever qualify to be mapped as Outstanding. These remarks should be seen as tentative at this stage because MOWS has [signalled] it wishes to maintain this line of submission. We simply signal our discomfort and leave the matter open for the present.

[20] We take it that the reference to MOWS signalling a desire to "maintain this line of submission" was a reference to the possibility that further submissions would be advanced on the issue in response to the *King Salmon* decision. In the event, that did not occur. It is clear from the judgment as a whole that the Environment Court proceeded on the basis that the quality of the relevant landscape for the purposes of s 6(b) of the Act was to be assessed on a regional scale.[16]

[21] The judgment contained a detailed discussion of the evidence called by the parties from landscape experts concerning ONL 78. It is unnecessary for us to give the detail of this part of the judgment. It is sufficient to note that MOWS contended that parts of ONL 78 and ONL 85 did not comprise coherent landscapes and were not appropriately characterised as outstanding. It was the case of MOWS that ONL

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[14] MOWS referred us to a statement of evidence given by a council planning officer, Mr McPhee, to the Auckland Unitary Plan Independent Hearings Panel suggesting various policy changes. We understand that decisions on content of the Unitary Plan have been made, but they cannot affect the outcome of this appeal.

[15] At [57].

[16] See at [83] where there was a further reference to adopting a "regional perspective".

78 comprised coastal and interior landscape character areas with only parts of the former being an ONL.[17] In addition, as noted above, the boundaries of the ONLs were disputed in respect of specific locations.[18]

[22] The Court prefaced its findings in relation to the disputed extent of ONL 78 by referring to an inspection that the Court itself had made. In the course of this it had viewed all parts of the land proposed to be included in the ONL from both land and sea viewpoints illustrated in photographic evidence given by the landscape witnesses.[19] It said:

> [128] During the visit it became obvious to us that the appellant's property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke Range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. This observation is consistent with the approach taken by Mr Brown and summarised earlier. In particular we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception near Cactus Bay that we will come to, we do not find it appropriate to separate coastal and inland landscape areas for individual assessment as recommended by Ms Gilbert … .

[23] The Court then discussed particular parts of the ONL largely expressing its agreement with conclusions reached by the Council's witness, Mr Brown, whose evidence was generally preferred to that of the MOWS landscape witnesses, Mr Mansergh and Ms Gilbert.

[24] The Court made orders that ONLs 78 and 85 be revised in accordance with its decision, "subject to possible further consideration of mapping should wording in the ARPS change after further agreement or input from parties".[20] We were not

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17 At [5(c)].
18 At [5(d)].
19 At [127].
20 At [152].

referred to any relevant further change to the wording of the ARPS, or agreement or input from the parties.[21]

[25] It is fair to say that nowhere in the Court's decision was there a comprehensive statement of why it considered ONLs 78 and 85 were outstanding. We infer the explanation for that is that there were concessions that substantial parts of them were properly so described,[22] perhaps subject to the qualification (the Court referred to a "degree of equivocation" on this, as noted above) that the bar should be set on a national scale rather than on a regional one. The Court clearly rejected the latter contention, and then dealt with particular issues that had been raised as to the extent and boundaries of the ONLs.

[26] While MOWS has argued strongly for a national comparator in this Court, there is no argument that, adopting a regional comparison, the Environment Court had no evidence on which it could confirm the ONLs. The merits of the Court's conclusions are not matters for this Court.

The High Court judgment

[27] The High Court judgment dealt with four alleged errors of law in the Environment Court decision. It was said that the Environment Court had erred in failing to:

(a) address the *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* (*WESI*) factors when determining whether the landscapes in question were ONLs;[23]

(b) undertake the assessment of whether areas of MOWS's property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

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21 The High Court judgment recorded that, although the Environment Court decision was called an "Interim Decision" and contemplated possible further consideration of mapping, MOWS in fact accepted that it was a final decision as to the mapping of the ONLs: *Man O'War v Auckland Council*, above n 2, at [4]–[5].

22 The maps attached to the evidence of Mr Mansergh, one of MOWS witnesses, showed substantial areas that he acknowledged should be classified as ONL.

23 *WESI*, above n 8.

(c) recognise that, as a result of clarification of the level of protection required for ONLs in the coastal environment in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under proposed change 8; and

(d) recognise that, given the implications of the judgment in *King Salmon*, it was required to determine which parts of MOWS's property fell within the coastal environment and which did not.

[28] The High Court rejected MOWS's case on each of the identified issues. It held that the Environment Court had undertaken an appropriate assessment of the disputed ONL areas noting that the Court had referred to the *WESI* factors and had analysed the relevant evidence on the issue without error. The conclusions as to which areas were ONLs were factual determinations unable to be appealed.

[29] On the question of whether the assessment should have been by reference to landscapes in New Zealand as a whole rather than by reference to landscapes in the Auckland region, the Environment Court rejected the proposition that a national comparator should be used. Andrews J thought that if s 6 had intended only nationally significant landscapes to be protected, the Act would have said so. She also expressed the view that it was unnecessary to have a comparator for the purpose of identifying an ONL.

[30] Further, the Court rejected MOWS's argument that as a consequence of the *King Salmon* judgment the identification of ONLs must necessarily be made more restrictive. The Court also held that it was unnecessary to determine which part of MOWS's land fell within the coastal environment and which part fell outside it.

The questions of law

[31] The High Court granted leave to appeal on the following questions:

(a) Is the identification (including mapping) of an ONL in a planning instrument prepared under the Act for the purpose of s 6(b) of the Act

informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

(b) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act changed (being elevated) as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the Supreme Court's decision in *King Salmon*?

(c) Where a landscape has been identified as an ONL under a policy framework and approach to ONL identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *King Salmon*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

(d) Is it relevant to the identification of an ONL (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an ONL should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

(e) Was the High Court correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

MOWS's principal argument

[32] Although five questions have been asked, Mr Casey submitted that the central issue is the proper interpretation and application of the word outstanding in s 6(b) of the Act, policies 13 and 15 of the NZCPS and the relevant provisions of the ARPS.

[33] MOWS's principal argument is that proposed change 8 was prepared prior to the Supreme Court's decision in *King Salmon*, and that both the policies it contains and the maps showing land identified as ONLs reflected the law as it was understood at that time. This involved a common understanding that the protection to be afforded to an ONL was one factor in the overall judgment called for by s 5 of the Act. Under that approach, consent might be granted for uses and developments in an ONL, including those adversely affecting the landscape, if considered appropriate by reference to other considerations based on achieving the Act's purpose of sustainable management. Since such an approach is no longer possible after the Supreme Court's judgment in *King Salmon*, Mr Casey submitted that the proper approach to identifying an ONL should be to apply the concept only to landscapes that are exceptional on a national scale or short of that, only to landscapes that are *clearly* outstanding, and not just "notable", "representative" or even "magnificent".

[34] Mr Casey pointed to various provisions in the proposed change that he claimed showed that the Council had based its approach on the law as understood prior to *King Salmon*. He submitted that, overall, the proposed change 8 policy framework is permissive and enabling of ongoing use and development of MOWS's land for rural production and tolerant of adverse effects, including potentially significant adverse effects that can be "managed" and need not be "avoided".

[35] Similarly as to the maps, MOWS argues that the extent of the ONLs reflects a pre-*King Salmon* origin in which, in accordance with the overall judgment approach, the use and further development of rural land for farming purposes could take place, subject to obtaining any necessary resource consent under the policy framework provided.

[36] The fundamental proposition advanced by Mr Casey is that the decision in *King Salmon* involves a significant change to the approach previously taken to the protection of ONLs in the coastal environment, so that all adverse effects within them will now have to be avoided. This is said to flow from the Supreme Court's interpretation of policy 15 of the NZCPS as creating an environmental bottom line, to be implemented by regional and district councils in formulating regional and district planning instruments.

[37] The argument makes it necessary to set out our understanding of what was established by the majority judgment in *King Salmon*.

King Salmon

[38] King Salmon had applied for changes to the Marlborough Sounds Resource Management Plan so as to change the status of salmon farming from prohibited to discretionary activity in eight locations. It also sought resource consents to enable it to undertake salmon farming at those locations and one other for terms of 35 years. A Board of Inquiry decided the plan should be changed and resource consents granted for salmon farming at four of the proposed locations. Opponents of the proposals appealed to the High Court but their appeals were dismissed.[24] Under s 149V(5) of the Act an appeal could not be filed in this Court, but s 149V(6) provided for applications for leave to appeal to the Supreme Court and that Court granted the Environmental Defence Society leave to appeal.

[39] The appeal by the Environmental Defence Society focused on only one of the plan changes, related to Papatua in Port Gore. The Board found that this was an area of outstanding natural character and an outstanding natural landscape. In considering whether to grant the plan change application, the Board was required to give effect to the NZCPS, but because of the findings about the natural character and landscape, policies 13(1)(a) and 15(a) of the NZCPS could not be complied with if consent were granted. The Board nevertheless granted the plan change. It took the view that although the relevant policies in the NZCPS had to be given considerable weight they were not determinative and it was required to give effect to the NZCPS as a whole. The Board considered that it was required to reach an overall judgment on King Salmon's application in light of the principles contained in pt 2 of the Act, and in particular s 5.

[40] The Supreme Court granted leave to appeal on two questions of law, but we need only discuss the judgment insofar as it relates to the first of those questions. That question asked whether the Board's approval of the Papatua plan change was

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[24] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371.

made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of policies 8, 13 and 15 of the NZCPS.[25]

[41] The Board had found that the area affected by the plan change was in a relatively remote bay and that all of the relevant landscape experts had identified part of the area adjoining the proposed farm as an ONL. The Board said:[26]

> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.

[42] The Board nevertheless stated that it had to balance the adverse effects against the benefits of economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources, purporting to apply to s 5 of the Act. Section 5 provides as follows:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[43] The Board concluded:

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[25] Policy 8 deals specifically with aquaculture and contemplates that regional policy statements and regional coastal plans would make provision for aquaculture activities in appropriate places in the coastal environment.

[26] Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents,* 22 February 2013 at [1236].

> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[44] The Supreme Court gave an overview of the structure of the Act, summarising the hierarchy of planning instruments provided for, addressing the provisions of pt 2 and referring to the "central role" played by the NZCPS in the statutory framework.[27] Importantly, the Court said that because no party had challenged the NZCPS it was proceeding on the basis that it conformed with the Act's requirements, and with pt 2 in particular.

[45] The Court noted that two different approaches to s 5 had been identified in early jurisprudence under the Act. The first was to hold that the section contemplated an environmental bottom line. This was to treat s 5(2) of the Act as requiring adverse effects to be avoided, remedied or mitigated, irrespective of benefits that may accrue from a particular proposal.

[46] The second approach was to hold that the section required an overall judgment to be made, which the Supreme Court identified as having its origins in the judgment of Greig J *New Zealand Rail Ltd v Marlborough District Council*.[28] The Supreme Court observed that in that case, the Judge had rejected a contention that the requirement of s 6(a) to preserve the natural character of a particular environment was absolute. Rather, he held that the preservation of the natural character was subordinate to s 5's primary purpose: to promote sustainable management. The protection of natural character was not an end or objective of itself, but an "accessory to the principal purpose" of sustainable management.[29]

[47] Similarly, in *North Shore City Council v Auckland Regional Council* the Environment Court held that:[30]

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27 *King Salmon*, above n 5, at [33].
28 At [39], citing *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
29 *New Zealand Rail Ltd v Marlborough District Council,* above n 28, at 85.
30 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94.

> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose … . Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

[48] The Supreme Court also noted that the Environment Court had held that the NZCPS is to be approached in the same way. Particular policies in the NZCPS may be irreconcilable in the context of a particular case[31] and the Court's role is to reach an overall judgment having considered all relevant factors.[32]

[49] The Court concluded that the directions in policies 13(1)(a) and (b) and 15(a) and (b) had as their overall purpose the preservation of the natural character of the coastal environment, protecting it and the natural features and landscapes from inappropriate subdivision, use and development. The Court observed:[33]

> Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects. In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of" … .

[50] The next important aspect of the decision for present purposes is the emphasis given to s 67(3) of the Act, which provides that a regional plan must "give effect to" any national policy statement, any NZCPS and any regional policy statement. The hierarchy established by the Act meant that the Board was required to give effect to the NZCPS in considering the plan change applications.[34] To give effect to is to implement, and was a matter of "firm obligation".[35]

[51] The Court interpreted the word avoid, used in s 5(2)(c) and policies 13(1)(a)–(b) and 15(a)–(b) of the NZCPS as meaning "not allow" or "prevent the occurrence of".[36] The Court observed that the scope of the word

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31 *King Salmon*, above n 5, at [42], citing *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 .
32 *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*, above n 31, at [258].
33 *King Salmon*, above n 5, at [62] (footnote omitted).
34 At [77].
35 At [77].
36 At [96].

inappropriate, used in s 6(a) and (b) of the Act, is heavily affected by context.[37] It said:

> [101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.

[52] Consequently, in the particular context of s 6(b) of the Act, a planning instrument that provided that *any* subdivision, use or development adversely affecting an area of outstanding natural attributes is inappropriate, would be consistent with the provision. Further:[38]

> … the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected … . The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning.

[53] And in the context of the NZCPS:[39]

> … the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

In the result, inappropriate is to be interpreted in s 6(a) and (b) against the "backdrop of what is sought to be protected or preserved".[40]

[54] The Court recognised, however, that the discussion of the meaning of both avoid and inappropriate did not resolve what it described as the fundamental issue in the case: whether the Board was correct to adopt the overall judgment approach.

[55] The Court held that the Board's approach was incorrect. Its reasoning turned on the following considerations:

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37 At [100].
38 At [102].
39 At [102].
40 At [105].

(a) Section 58(a) of the Act, prescribing the contents of New Zealand coastal policy statements, enabled the Minister for the Environment to set national priorities in relation to the preservation of the natural character of the coastal environment. The provision contemplated the possibility of objectives and policies that would provide absolute protection from the adverse effects of development in relation to particular areas. This was seen as inconsistent with the overall judgment approach: the Court thought it inconceivable that regional councils would be able to act in a manner inconsistent with the priorities set by the Minister on the basis that the priorities set by the Minister were only relevant considerations. Similar reasoning applied in respect of other subsections of s 58.

(b) Section 58A of the Act provides that a New Zealand coastal policy statement can incorporate material by reference under sch 1AA. Matters in cl 1 of the schedule include "standards, requirements, or recommended practices". The Court considered the language of the schedule envisaged matters that were prescriptive and expected to be followed, once again contemplating that a New Zealand coastal policy statement can be directive in nature.

(c) The language of the relevant policies in the NZCPS itself. Here the Court focused on the word avoid in policies 13(1)(a) and 15(a) contrasting it with words in other objectives and policies in the NZCPS containing more flexibility and being less prescriptive in nature. The Court observed that when dealing with a plan change application the decision-maker would first need to identify the policies that were relevant, paying careful attention to the way in which they were expressed. Acknowledging the possibility that particular policies in the NZCPS might be inconsistent, the Court recognised that it would only be where there was no proper basis for reading the provisions as not in conflict that there would be any

justification for reaching a determination that one policy should prevail over another. The Court said:[41]

> The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

This was to concede a limited role for s 5, that of assisting a "purposive interpretation" of the NZCPS.[42]

(d) The overall judgment approach in relation to the implementation of the NZCPS would be inconsistent with the process required before a national coastal policy statement can be issued. The statutory process would have been less elaborate if all that was intended was the creation of a list of relevant factors to guide decision-makers.

(e) The overall judgment approach would create uncertainty. Suggestions that the NZCPS could be applied in the round or as a whole were neither easy to understand or apply. This could result in protracted decision-making processes with uncertain outcomes.

(f) The overall judgment approach had the potential, at least in the case of plan change applications seeking zoning changes in particular coastal areas with outstanding natural attributes, to "undermine the strategic, region-wide approach" that the Court considered the NZCPS requires of regional councils.[43]

(g) While s 5 set out the Act's overall objective, Parliament had provided for a hierarchy of planning documents. The purpose of those documents was:[44]

> … to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content

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41 At [130].
42 At [88].
43 At [139].
44 At [151].

> and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.

(h) The NZCPS was an instrument "at the top of the hierarchy". Its objectives and policies reflected "considered choices" made on a variety of issues. The Court said: "As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice."[45] The Minister had been fully entitled to require that particular parts of the coastal environment be protected from the adverse effects of development, as had been done by adopting policies 13(1)(a) and 15(a) in relation to coastal areas with features designated as outstanding.

[56] Policies 13(1)(a) and 15(a) would not be given effect to if the plan change in question were to be granted because of the Board's finding that implementing the proposed change would result in significant adverse effects on areas with outstanding natural character and landscape. Those policies were strongly worded directives and the plan change did not comply with s 67(3)(b) of the Act because it did not give effect to those policies of the NZCPS.

[57] As we understand the decision, the overall judgment approach was rejected because of the prescriptive nature of the relevant provisions in policies 13 and 15 of the NZCPS. Because those policies were so specific and clear in what they prohibited, the overall judgment approach, by which a decision would be made balancing various considerations under s 5 of the Act with a view of achieving the Act's overall purpose, was not lawful. This case involves application of the same prescriptive provisions of the NZCPS that were engaged in *King Salmon.*

[58] The preceding discussion enables us to deal quite briefly with the questions of law we are asked to answer.

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[45] At [152].

First question

[59] This question asks whether the identification (including mapping) of an ONL for the purpose of s 6(b) is informed by, or dependent upon, the protection afforded to the landscape under the Act and/or the planning instrument. The suggestion is that whether or not land qualifies as an ONL and the extent of the land so described must be influenced by the consequences of according it that status in terms of what may take place on the land.

[60] We accept some of the propositions on which MOWS's argument that the level of protection should be taken into account is based. For example, it is clear that both the policies and the maps in proposed change 8 were developed prior to the Supreme Court's decision in *King Salmon* and that the Council would not have contemplated at the time that the land in the ONLs would be subject to the inevitably more restrictive regime flowing from the Supreme Court's decision. Mr Casey was right to characterise the overall effect of the policies in the proposed change as contemplating ongoing use of the land and a degree of development for rural production purposes.

[61] However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected. Although that was underlined in *King Salmon*, the Court was simply reflecting an important legislative requirement established when the Act was enacted. The same is true in respect of areas identified as having outstanding natural character in the coastal environment, in accordance with policies 13(1)(a) and 15(a)–(b) of the NZCPS.

[62] The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL

arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.

[63] The result of this approach may mean that, in some cases, restrictions of an onerous nature are imposed on the owners of the land affected. In a dissenting judgment in *King Salmon* William Young J drew attention to the potentially wide reach of the restrictions resulting from the decision having regard to the broad definition of effect in s 3 of the Act (the definition embraces, amongst other things, any positive or adverse effect, whether temporary or permanent).

[64] William Young J considered that the effect of the majority's judgment was that regional councils would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character".[46] He raised the possibility of significantly disproportionate outcomes as a result of the strict approach inherent in the majority judgment.

[65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.

[66] In the present case, as the Environment Court noted, it was agreed that the areas to which the ONLs were applied are sufficiently natural for the purposes of s 6(b) of the Act. It is also clear that there are a number of different elements currently forming part of the ONLs. Thus significant areas of native vegetation and pastoral land are both elements of ONL 78 together with buildings (albeit said to be subservient to other elements) and vineyard and olive grove activities. Although

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[46] *King Salmon*, above n 5, at [201].

natural, it is not pristine or remote. As Mr O'Callahan acknowledged on behalf of Auckland Council, it is in that setting the question of whether any new activity or development would amount to an adverse effect would need to be assessed.

[67] Mr Casey endeavoured to persuade us that a more restrictive regime will be in place under the new Auckland Unitary Plan. However, that is not an appropriate matter for us to assess in the context of a second appeal on questions of law arising from a decision on a different planning instrument, and we decline to do so. Relevantly, as Mr Casey's submissions tended to demonstrate, the policy content of the Hearings version of the ARPS provided a context that means the ONLs would not be inimical to the ongoing use of MOWS's land for its current uses.

[68] We should add that none of the questions raised for this Court was designed to test the lawfulness of the policies of the ARPS post *King Salmon*, and as has been seen, only a few of those provisions were apparently the subject of argument in the Environment Court.

[69] The first question must be answered no.

Second question

[70] This question asks whether the threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act has changed as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the decision in *King Salmon*.

[71] We do not consider that *King Salmon* is a judgment about the threshold to be applied in deciding whether a landscape is outstanding for the purposes of s 6(b) of the Act. The questions for the Board in that case, and for the Supreme Court on appeal, were whether a spot zoning should be allowed and a resource consent granted enabling salmon farming to proceed in an area already identified as of outstanding quality. The Supreme Court did not hear or deal with an argument that the area was not outstanding. Nor was there any dispute about the Board's finding that the proposed salmon farm would have significant adverse effects on the natural character and landscape of the area. The argument in the Supreme Court was, rather,

about whether the proposed plan change and resource consent could be granted on an overall judgment approach under s 5 notwithstanding the adverse effects on that environment.

[72] As a result there is nothing in the majority judgment of a definitional nature about ONLs. While the Court discussed the Marlborough Sounds Plan, it did so in terms that recorded that the Council, in developing the plan, had assessed the landscapes in the Sounds for the purpose of identifying those that could be described as outstanding, and noted that the plan described the criteria against which the Council made that assessment and contained maps identifying the areas of outstanding value. The Court observed that the exercise carried out was a "thoroughgoing one".[47] But nothing was said about the considerations taken into account by the Council in fixing on the outstanding areas.

[73] Overall, there is no language in the decision that suggests the Court was endeavouring to raise the test or threshold for deciding whether a landscape is outstanding. This question must also be answered no.

Third question

[74] The third question raised is whether a landscape identified as an ONL should be reassessed if the identification took place under a policy framework, and an approach to ONL identification, not now correct in law or needing to be changed by reason by *King Salmon*. Although couched in general terms, the obvious intent is to ask whether ONLs 78 and 85 should be reassessed by reason of *King Salmon*.

[75] The difficulty with this question is that it again attempts to link policies in the ARPS that apply to ONLs with the identification of ONLs. These are conceptually separate ideas. We see nothing in *King Salmon* that affects the identification of ONLs even if the policy framework might need adjusting as a result of the decision.

[76] Further, it must be noted that the Environment Court was well aware of the decision in *King Salmon* and plainly did not consider that it had any implications for

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47 At [73].

the extent of the ONLs identified in the ARPS. In fact, it recorded its agreement with a submission made to it by counsel for the Council that whether and to what extent land owned by MOWS is an ONL is a matter of fact, to be resolved on the basis of its view of the evidence called and an application of the relevant criteria in the proposed change. The "planning consequences" (that is, the impact of policies on the land) would flow from the fact the land was an ONL, and were not relevant to determining whether or not it was an ONL.[48]

[77] Finally, as we have already said, the policy framework contained in the ARPS as it stood in terms of the Hearings version did contemplate ongoing use of the land and a degree of development of it for rural production purposes.

[78] This question must also be answered no.

Fourth question

[79] The fourth question asks whether it is relevant to the identification as ONL of a landscape (particularly in the coastal environment) comprising a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming. The question goes on to refer to whether the identification of an ONL should take account of future changes over time by reason of that landscape's character as a working farm.

[80] This is a further question predicated on a link between identification of an ONL and the activities contemplated by the relevant planning instrument within that ONL. For reasons we have already explained, we are not persuaded that there is a logical link between the two. Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

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[48] *Man O'War v Auckland Council*, above n 1, at [38]–[39].

Fifth question

[81] The final question asked whether the High Court was correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator, that is, a basis of a comparison with other landscapes, nationally or in the relevant region.

[82] This question is again intended to accommodate MOWS's argument that as a consequence of the *King Salmon* decision a higher threshold should be applied to the identification of an ONL. It therefore covers some of the same ground as the second question.

[83] Here, however, Mr Casey made the explicit submission that the High Court had been wrong to determine that for the purpose of assessing whether a landscape is outstanding there is no need to have a point of reference against which to determine whether a landscape is outstanding. MOWS also submitted that the comparator should be landscapes acknowledged as being of national significance. Mr Casey argued that this follows from the use of the word outstanding in s 6(b), when other subsections in that section do not employ similar adjectives, and from the fact that the section itself is addressing matters said to be of national importance.

[84] In developing this aspect of the argument, Mr Casey referred to *WESI*, in which the Court referred to dictionary definitions of outstanding as "conspicuous, eminent, especially because of excellence; remarkable in" and definitions from other Environment Court decisions.[49] He submitted that an outstanding landscape is one that "stands out from the rest", which necessarily requires an assessment of what the rest is. He also noted the Court's observation that a landscape "may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes."[50]

[85] In the present case, the Environment Court proceeded on the basis that the identification of ONLs involved an assessment that took into account the landscapes

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[49] *WESI*, above n 8, at [82].

[50] At [82], citing *Munro v Waitaki District Council* Environment Court C98/97, 25 September 1997.

in the region rather than an assessment on a national basis. We have quoted what the Court said on this issue above.[51]

[86] We do not see any error in the Environment Court's approach. The question of whether or not a landscape may be described as outstanding necessarily involves a comparison with other landscapes. We also accept that the adjective is a strong one importing the concept that the landscape in question is of special quality. However, we suspect little is to be gained by applying a range of synonyms for what in the end involves a reasonably direct appeal to the judgment of the decision-maker. Whatever comparator is taken, the ultimate question is whether the landscape is indeed able to be described as outstanding.

[87] We do not accept Mr Casey's argument that a comparison is required with landscapes that may be described as outstanding on a national basis. The fact that the word outstanding has to be construed in a section dealing with matters of national importance does not support MOWS's submission. We see no reason why a landscape judged to be outstanding in regional terms should not be protected as a matter of national importance, the legislative policy being achieved by the protection of ONLs throughout the country on this basis.

[88] It is necessary to take into account that in developing a regional policy statement, the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region. The purpose of regional policy statements, set out in s 59 of the Act, is to achieve the purpose of the Act (that is, the sustainable management of natural and physical resources)[52] by:[53]

> … providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

[89] Further, the council must prepare and change the regional policy statement in accordance with its functions under s 30.[54] These specifically include "the

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51 Above at [19]–[20].
52 Resource Management Act 1991, s 5(1).
53 Section 59.
54 Section 61(1)(a).

preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance".[55]

[90] In addition, s 61(1)(b) requires the council to prepare its regional policy statement in accordance with the provisions of pt 2. That embraces the protection of outstanding natural features and landscapes from inappropriate development, in terms of s 6(b). Further, the regional policy statement must give effect to any national policy statement or New Zealand coastal policy statement.[56] In this respect, the position applicable to the regional policy statement is the same that applies to regional plans under s 67(3) of the Act, a provision prominent in the reasoning of the Supreme Court in *King Salmon*.

[91] It is appropriate also to underline that in *King Salmon* the Supreme Court emphasised in several places that a regional council has a responsibility to consider issues on a regional basis. For example, it observed:[57]

> It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[92] Further, although the context was slightly different, the Court noted:

> [171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. … Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application.

[93] These statements support our conclusion that the task of the regional council in formulating its regional policy statement is to assess the environment on a regional basis. That means ONLs should be those that are outstanding in terms of the region's natural environment. That is the approach the Environment Court took here.

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55 Section 30(1)(b).
56 Section 62(3).
57 *King Salmon*, above n 5, at [69].

Result

[94] For the reasons given the first four questions are answered no. Although these were posed as questions of law the underlying issue was essentially one of fact and judgment on the merits, not matters properly pursued in this Court.

[95] We answer the fifth question by stating that in assessing whether or not a landscape is an ONL a regional council should consider whether the landscape in question is outstanding in regional terms.

[96] The appeal is dismissed.

[97] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel. We did not find it necessary to call on the other parties and no costs orders are made in respect of them.

Solicitors:
Clendons North Shore, Auckland for Appellant
Kirkland Morrison O'Callahan & Ho, Auckland for Respondent

TAB 10

ORIGINAL

Decision No. W 83/94

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Change No. R9 to the Tasman District Council Transitional District Plan (Richmond Section)
AND	
IN THE MATTER	of a referral under First Schedule, Clause 14 to the Act
BETWEEN	GLADWEN FRANCES McINTYRE
	(Appeal: RMA 407/93)
	Appellant
AND	TASMAN DISTRICT COUNCIL
	Respondent

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge S E Kenderdine presiding
Mrs R Grigg
Mr F Easdale

HEARING at NELSON on the 19th and 20th days of May 1994

COUNSEL

Mr N A McFadden for the appellant
Mr W J Heal for the respondent

DECISION

This appeal, pursuant to the First Schedule Clause 14 of the Resource Management Act 1991 (the Act), is against the decision of the respondent council refusing the appellant's request to zone the lower five hectares of her land adjoining Hill Street South Richmond, to Residential, and the upper three hectares to Low Density Residential, rather than Low Density Residential (Sub-Area A) Restricted. Both

SEK

zones are contained in Proposed Change R9 to the Tasman District Council Transitional District Plan (change R9). The council's decision rezoned all of the appellant's land Low Density Residential (Sub-Area A) with the inclusion of a "*no buildings area*" over part of the site as shown on Proposed Planning Map No. 5. In addition to the rezoning issues, the appellant requires that the reference to "*no buildings*" on Planning Map 5 be deleted also. The appellant also appealed against the minimum area for subdivision in Sub-Area A being 2 hectares.

A copy of Planning Map No. 5 showing the relevant zoning and notations is attached to this decision marked Appendix A.

The council gave the following reasons for disallowing the referral :

1. The submitter's land is unsuitable for full residential development because it cannot be economically serviced.

2. Parts of the land are unstable and bisected by the concealed Waimea and Mount Heslington faults and are unsuitable for building on.

3. The subdivision minimum reduced to one hectare as a result of submissions is appropriate for maintaining and recognising the existing spacious character of the area and allowing a small amount of subdivision.

4. The zone boundary has been extended to facilitate such subdivision and in a manner that recognises that some land is unstable and should not be built on.

PROPOSED CHANGE R9

The Plan Change statement for Richmond indicates that the township has a rapidly growing residential population and it indicates that the council policy is to permit a variety of housing. The statement also recognises that Richmond no longer has an abundance of land for residential expansion and that while there are still opportunities for infill development on the large lots, these are becoming more limited and there is a need to provide further land for future development. The statement notes the rapid rate of residential expansion and the need to provide for at least 90 hectares of residential zoned land in the next 15 years. The statement indicates that there is also a demand for low density residential lots in the vicinity of Richmond and that it is council policy to make some provision for such lots on stable land which is not of high value for agriculture on the eastern side of Hill Street and on a strip on the southern side of Champion Road. The zone statement indicates it is land with a pleasant outlook and favourable aspect for such development.

Change R9 provides for a conventional medium density and some low density residential development, as well as a series of deferred zoning to enable an orderly release of land for residential purposes. The minimum area in the Low Density

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Residential as notified, was where two or more additional lots are created, an average area of 2500 square metres with a minium of 2,000 square metres for front lots, and a minimum of 3,000 square metres for rear lots. In the Sub-Area A Restricted zone the minimum area notified was to be two hectares. As a result of hearing submissions, the council amended these provisions for Low Density Residential to 2000 square metres minimum area for front and rear lots and 1 hectare to 6000 square metres in Sub-Area A Restricted.

The statement notes that some areas of Richmond are potentially unstable due to soil and geological conditions with a major risk being from shallow and minor earth movement or slumping after heavy or prolonged rain. Accordingly the council requires that all earthworks and buildings in these susceptible areas (shown on Planning Map 3) are designed to take account of the risks.

Planning Map No. 3 of the Plan which arose from Change 7 to the council's plan, identifies three risk areas:

1. Area A in which applications for building permits require a certificate of a registered engineer

2. Area A1 relating to subdivisions on hillsides and

3. Area B relating to floor level requirements.

Rule III Clause 6 of the plan requires that subdivision on potentially unstable land identified on Planning Map No. 3 must be accompanied by a report from a suitably qualified engineer or geologist certifying that the land together with any associated earthworks is suitable for residential subdivision having regard to potential instability. In addition, Rule III Clause 3.1.2.2 (iii)(a)(b)(c) in change R9 requires specific engineering requirements for the "*Sub-area A Restricted zone*".

Clause 4.8.1, the first objective in the proposed change for the Low Density Residential zone, reflects this theme as follows:

> "*To ensure that low density residential development occurs within a defined area, where land is generally stable and generally of limited value for food production, where development will not lead to conflict with adjoining land uses, where there is close proximity to urban facilities and where reticulated services can be economically provided. ...*"

It is also stated that in Sub-Area A Restricted on the east side of Hill Street, south of Lot 2 Deposited Plan 3146 (a specific reference to the McIntyre property), further reticulated services cannot be provided at this stage and as the land is less stable than the northern end of the zone, only limited subdivision will be permitted.

Clause 4.8.2 ensures that low density residential development can occur but that any adverse environmental effects and conflicts between incompatible activities are minimised.

Clause 4.8.3 recognises the need to create spacious residential sites close to Richmond.

Clause 4.8.4 seeks to identify and retain the major existing water courses in an open natural unpiped state wherever practicable and encourages public access to and along them.

The proposed policies for the new zone at Clause 4.9 Policies, recognise that only a limited range of activities compatible with both urban and rural areas are allowed: that there be restriction of the density of subdivision in order to avoid the need for large scale earthworks; that all new residential developments are to be connected to the reticulated water and sewerage system except for Sub-Area A Restricted where only reticulated water supply is required; to utilise as far as practicable, natural water courses in an unenclosed and natural state for stormwater disposal. The policies note that there are two areas, one at the south end of Hill Street where reticulated water cannot be supplied and/or which has a high risk of instability, and the other at the north end of Hill Street which has a high risk of instability and are identified on Planning Map No. 5 as "*unsuitable for building*".

THE SITE AND ITS ENVIRONS

The McIntyre land (the site) comprises an 8.0251 hectare L-shaped block of land being Part Lot 1 DP 5464 situated at 385 Hill Street, Richmond is outlined in the plan taken from the evidence of the planning witness for the council (see Appendix A). It is situated in the middle of the proposed Low Density Residential (Sub-Area A) Restricted zone on the eastern (upper) sides of Hill Street and it is the largest property in the proposed 25 hectare zone. Adjoining land includes a near mature eight hectare pine plantation forest on steep land zoned Rural above the appellant's upper boundary. The site extends south east from Hill Street onto the lower slopes of the Barnicoat Range and is bounded by Hart Creek in the south west. Slopes increase from gentle adjacent to Hill Street to very steep in the south east. A small spring developed into a well emerges on the lower slopes.

The site is presently grazed and contains one dwelling occupied by Mrs McIntyre.

There are two fault lines traversing the land, the concealed Waimea Fault and the Heslington Fault. The majority of the lower part of the appellant's land is classed as risk Category II, (low to moderate risk), and the upper part Category III (high risk) in the DSIR Study of risk relating to slope stability. The lower end of the property is shown as partly on very old slumped material on the DSIR 1991 Map of the Barnicoat Range. It has a well developed toe area.

Below the McIntyre property on the opposite side of Hill Street, a subdivision known as the Fawdan development is currently under development. There is currently no sewer in Hill Street. The nearest one extends from Chelsea Avenue up to within 250 metres of the northern corner of the McIntyre property to serve the Fawdan development. The water main in Hill Street extends only as far as the northern boundary of Lot 2 DP 3146, some distance from the subject site.

THE COUNCIL'S CASE

It was explained to us that the purpose of Proposed Change R9 (change R9) is twofold: to provide primarily for the future residential growth of Richmond and secondly to provide for some low density residential living opportunities near Richmond. Due to continuing pressure for land for residential subdivisions in Richmond and for lifestyle/low density residential subdivision on the elite soils of the Waimea Plains, the council made a commitment to investigate alternative growth sites when it withdrew the Richmond Borough's Proposed Changes 38, 39 and 40 in 1990 on the amalgamation of the Richmond and Motueka Boroughs and Waimea County Councils, and the amalgamation of Golden Bay County with Tasman District. In 1993 a Valuation New Zealand report indicated that up to one-third of the Waimea Plains Rural A zone was used for lifestyle purposes whilst an earlier report to council "*The Richmond Residential Growth Study*" identified the area as one of the fastest growing regions in New Zealand.

Change R9 was preceded by various analyses of options (including the above study) which considered a number of alternative growth sites for the township. Various combinations of nine alternative sites were discussed in terms of their advantages and disadvantages for future urban development. Hill Street South (which includes the appellant's land) was not considered as an alternative for ordinary residential development, because it was considered more costly to service and less accessible to community facilities (such as schools and shops) than most other areas. It was also considered less stable than the Hill Street North area and having what the council's planning witness described as a distinctive lifestyle character that would not be entirely lost if some large, low density residential development was permitted. The council was also of the opinion that the area in question will be the last to be serviced.

It is currently proposed that sewerage pipes will come up to Hill Street when the subdivision of residential land below Hill Street is complete and that the additional lots proposed by the appellant on her land, would just add to the sewerage capacity problems already existing in South Richmond. Hence the council's strategy in change R9 did not involve the provision of full services to the Hill Street South block.

An estimate of subdivision potential was made to assist with an assessment of the impact on services if the Sub-Area A zone was all Residential or Low Density Residential (permitted activities are the same in both zones). It was the council's planner's opinion that up to 100 new residential lots could be created within the

area presently shown as Low Density Residential (Sub-Area A) Restricted if it was all zoned Residential assuming eight lots per hectare and that high risk land was not included. Under the proposed rules as amended by the council's decision, approximately 20 new allotments could be created assuming a 1 hectare minimum of which Mr McIntyre's property would yield 7 - 8 allotments, and under the zoning rules agreed to by the other referrers, i.e. 6,000 square metres, there is a potential for 37 lots with about 10 lots available for Mr McIntyre's property. Ms Biss says that on the 6,000 square metres basis, 37 lots are potentially available and that these can be developed now on the basis of septic tank drainage. Whether this was practical or not, depended on the availability of stable building platforms and effluent areas; the availability to form roading and vehicle access to each lot without creating environmental problems such as construction scars; and the ability of downstream services to cope.

It was also the council's case that dense residential development on the appellant's land will irretrievably alter the landscape from a semi-rural open space to urban development, contrary to objective 4.8.3 for the zone and also policy 4.9.2 which is to restrict the density of the subdivision in order to avoid the need for large scale earthworks. It was the council's planning witness' opinion that the reduction in minimum area to 6,000 square metres would still leave very spacious sites as required by the zone objective to minimise earthworks. As the appellant's land is the largest single block within the subzone, it was felt that if the present appeal succeeds, the adverse effects would be to largely destroy one of the fundamental planning objectives of the change and largely compromise the coherence and viability of the subzone provision. It would take out a large area of the zone and make it difficult to resist other developers interested in promoting residential sites. The council would, in effect, have to look at servicing the whole of the area in the immediate future.

It was further considered that the roading in the Hill Street south area adjacent to the appellant's land, is inadequate to cope with the sudden emergence of a significant new residential development. The rezoning of other land will result in the addition of extra dwellings which itself places the roading system under strain. The respondent has recognised the existing problem by deciding to investigate the upgrading of the entire length of Hill Street of which the southern part would be last in the list of priorities and consequently is still some years away.

In essence it was the council's case that the considerable areas of land that have been rezoned, would require substantial financial commitment to cope with the capital costs of extending services to meet the demands of new subdivisions. The council held the view that the appellant is seeking to jump the gun at the expense of other property owners and ratepayers generally. It is part of its long-term council strategy to provide an adequate water and sewerage supply for the future but at the same time there are significant difficulties in retrieving costs from developers.

It was, in the council's opinion, this unique set of circumstances combined to make the relatively small Hill Street South area suitable for the development now proposed.

As part of the council's planning technique in change R9, it has adopted areas called *Deferred zones* which give notice of future zoning patterns and facilitate the preservation of land for public utilities and for provisions of services. In addition, the council explained it is also given discretion to refuse a subdivision consent if adequate provision is not made for the disposal of stormwater/and or slippage as provided for in s.406 of the Act. It was noted too that s.106 requires the council to refuse to grant subdivision consent if any land in respect of which consent is sought is likely to be subject to damage by subsidence, slippage or an inundation or where any subsequent use of the land is likely to accelerate such an event.

THE APPELLANT'S CASE

It was the appellant's contention that the requirements of s.7(b) of the Act require that land capable of urban development and capable of being serviced should be used to accommodate urban growth and avoid the adverse effects of uncontrolled urban growth onto the fertile lands of the plains. It was also the appellant's contention that her property is capable of being serviced with water and capable of being sewered from a property on the opposite side of Hill Street - at least if she undertook the works herself and before this hearing an agreement had been reached with the Fawdan developer for provision to connect into the sewer services being provided for that development. It was submitted that because the land adjoining the McIntyre property on the other side of the road is zoned Deferred Residential 1 January 2003, and Residential respectively, upgrading of the downstream sewerage system will need to take place at some point anyway. It was also the evidence that the council is coming to agreements with a number of private developers on the provision of services with the proviso that they will bear the costs.

It was the appellant's further contention that there was no evidence of instability adduced by the respondent at the hearing and therefore the council's case that her land was unstable and unsuitable for building on was without foundation. It was also contended that the reason given for the subdivision minimum is irrelevant as the objectives and policies of the proposed change do not seek to achieve such an outcome. Finally in this regard it was contended that the effect of the "*no buildings area*" on Planning Map No. 5 is effectively to prohibit building at all in that part of the Low Density Residential (Sub-Area A) Restricted zone contrary to the council's written decision which extended the zone. It was also counsel's submission in this regard that Planning Map No. 5 and its adverse notation was not served by the respondent as part of its decision and is invalid as it did not fall within the ambit of submissions.

Mr McFadden, counsel for Mrs McIntyre submitted that the transitional district plan already contained sufficient controls for development on land of uncertain

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stability through its rules and the engineering requirements in terms of certification. In addition the provisions of s.106 and s.406 of the Act give the respondent additional powers to refuse consent no matter how the land is zoned. It was also counsel's submission that if the land is not zoned in the way indicated by the appellant, the natural and physical resource it represents will not be used efficiently and is therefore not in accordance with principles of sustainable management in s.5 of the Act.

In support of her argument, the appellant called Mr F Bacon consultant planner, Mr Richard Wells a consulting engineer who dealt with matters of servicing and land stability, Dr N Johnston a geologist who dealt with issue of land stability and residential development and Mr Paul Russell also a consulting engineer who gave evidence on questions of geotechnical engineering, site stability and servicing options for sewage systems, stormwater water supply and site roading.

SUSTAINABLE MANAGEMENT AND THE PLAN STRATEGY: SECTION 5 OF THE ACT

The hearing of this appeal at the council level took place after the passing of the 1993 amendment to the Act, so the amended provisions of the Act apply. It is pertinent in this regard therefore to assess the relevant changes proposed by change R9 in a somewhat broader sense against the purpose of the Act before beginning to evaluate rezoning the appellant's site. We were not referred by counsel or the witnesses to any substantive s.32 matters in any depth. We therefore have dealt with the issues on their merits.

For the issues alive in this appeal, we place the emphasis in relation to the purpose of the Act as set out in s.5, on the promotion of sustainable *management* of both the area's natural and physical resources, by managing their use, development and protection *at a rate* which enables *the people* and *the communities* to provide for their social, economic well-being and their safety, whilst sustaining the potential of the resources to meet the reasonably foreseeable needs of future generations. This takes place whilst safeguarding the life supporting capacity of the soil ... and avoiding, remedying or mitigating any adverse effects of the activities on the environment.

For the appellant it was contended that because Richmond is such a residential growth area and because it is located on the edge of the Waimea Plains which is one of the most valuable primary producing soils in the country, the principles of sustainable management of resources point to the need to maintain the life supporting capacity of such soils. In this case it becomes important to direct growth onto areas where it is most appropriate and after back filling to Champion Road, the only option for further urban expansion in Richmond which does not involve encroaching onto lands of high quality for farming purposes, is onto the eastern foothills which include the McIntyre property. There was, it was alleged, a compelling argument for giving the land full Residential zoning in the ongoing

interests of protection of outstanding natural features such as the soils of the Waimea Plains represent.

The council carried out various analyses as options for permitting residential development around Richmond taking account of such issues as land suitability for agriculture, services and stability. Investigations alerted it to the fact that some of the areas of the district required special investigation before residential development took place. As a consequence it required Planning Map 3 in the Plan to identify the areas subject to risk and stated that all earthworks and buildings were to be designed accordingly. This was a restatement, we understand, of an existing provision in the district plan and, from the evidence before us, we believe properly brought through into the current proposal. In addition it stated that as an objective in relation to the Low Density Residential land in a small area it called (Sub-Area A) Restricted, it could not provide fully reticulated services for some considerable time, that the land is less stable and as a consequence only limited subdivision would be allowed. Planning Map No. 5 also gave a "*no buildings*" area on part of the McIntyre land. These provisions appear to relate to issues of safety and servicing priorities. As a consequence Sub-Area A which includes the McIntyre land is selected for unsewered large lot development.

To provide for a rapidly growing residential population, it was the council's policy to permit a variety of housing types; it recognised that for the next 15 years at least, 90 hectares more land needed to be zoned for residential purposes. It also acknowledged there was a demand as well for more spacious Low Density Residential lots to accommodate the community's needs. These are provided for on the eastern side of Hill Street at the south end as discussed above, as well as 70-80 hectares at the north end of Hill Street. In so doing, the council provided for a mix of zoning including Residential (which alone provides approximately 900 lots) as well as Deferred Residential (which provides prior warning of future developments) for those areas identified. In so planning the council appears to apply the principles of sustainable management for the community's overall social and economic well-being and its foreseeable needs. It has provided for a variety of housing on large and small sites needed by any community, by means of a veritable mix of zoning.

The council appears to have carefully considered the need to restrict any further expansion onto the elite soils of the area. It considered too the need to restrict subdivision on what it saw as land of some instability on the eastern side of Hill Street and it has indicated to the community at large, that any development may only proceed at a rate which can sustain the orderly provision of services in both its own interest as a consent authority (and by implication by the people as ratepayers) and by development agencies who will require the resources identified. In this regard we hold that it is relevant to consider that the provision of the physical resources, in this case a sewerage system, stormwater systems and roading, must be done at a rate that the council representing the community can physically and economically cope with. Otherwise change R9 does not fulfil the purpose of the Act.

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As for the appellant's proposal to zone some 4 hectares of the Low Density Residential (Sub-Area A) Restricted zone as Residential thus making available another 40 residential lots on top of those already provided for, it remains for us to now determine whether that action will be contrary to the overall principles of sustainable management in s.5. It is also pertinent to evaluate whether what the council has set out to do, will achieve an efficient use and development of the resources: s.7(b); will achieve the maintenance of amenity values: s.7(c); and will achieve the maintenance and enhancement of the quality of the environment: s.7(f) - all of which qualify the provisions of s.5 of the Act.

SLOPE STABILITY

It was the evidence that not all of the appellant's land falls into Category III land (most prone to high risk of instability) with much of it in Category II (of low to moderate risk) and a small portion in Category I (very low risk of slope failure). It was Mr Bacon's evidence that land with similar slope stability had been developed for residential purposes in Richmond along the eastern hills.

The evidence of Mr Wells generally supported the appellant's case that there is nothing to preclude an urban-type subdivision. A full and specific assessment of the particular property was carried out by Dr R M Johnston, author of a 1991 report to the council (*Richmond Growth Study: Slope Stability Assessment of the Barnicoat Range*) in which he had concluded that most of the respondent's land was Category III and therefore was unsuitable for intensive subdivision. However, at that time, Dr Johnston had qualified his conclusion by saying that detailed site investigations, including sub-surface investigations, might demonstrate that significant areas could be built on, although this would probably require intensive earthworks and drainage. His evidence to the Tribunal, based on a revision of his 1991 report effectively verified the fact that the McIntyre site was only partially unstable. He said this:

> *My investigation of the property, including the test pits which have been dug, leads me to the conclusion that the bulk of the Referrer's property is considered suitable for subdivision including residential subdivision on the gentle slopes adjoining Hill Street South and the alluvial deposits adjacent to Hart Creek, the scree and slope wash deposits adjacent to Hill Street South, the slump deposit and the lower part of the scree and slope wash deposits in the south east. The slump, slope wash and scree deposits, containing abundant rock debris and silty clay lacking swelling properties, would make ideal material for cutting and filling. The slump deposit could be modified by taking material from small knolls and placing it in gullies and at the toe of steeper faces.*

He concluded also that the activity on the two identified fault lines is not great enough to warrant formally establishing a building exclusion zone around them. He considered the faults to be significant only to the extent that if their location is readily identified, then buildings should not straddle them. He also concluded

that any slump material is probably more stable than other parts of the range and that because it has slumped in the past does not mean it will do so in the future.

In these circumstances, the respondent somewhat understandably, called no evidence as to instability but the council's planning witness remained convinced that Dr Johnston's evidence had not changed her mind that the majority of the land was Category II and therefore moderately unstable. (Dr Johnston's Table outlining geology and risk of slope failure, stated that for Category II land with gentle to very steep topography, development was feasible with specific site assessment but steepness of slopes is a limiting factor in many areas. There was a risk of superficial slipping but deep seated instability was unlikely). On questioning from counsel for the council about a plan he had produced showing the area he thought could be zoned Residential, Dr Johnston acknowledged that part of it fell within risk Category II. He acknowledged also he would prefer to see relatively few houses on the upper slopes and the whole development linked to a sewerage system. He considered that all large excavations should be adequately retained and placement of areas of fill should be under the supervision of a registered engineer. Where dwelling sites were sought in the upper part of the subdivision, he considered they should be sited a minimum of five metres from the toe or top of any very steep slopes, unless dwellings are designed to accommodate possible superficial slipping.

Under cross-examination the council's planning witness acknowledged that the notation "*no buildings area*" on Planning Map No. 5 had been added as an interpretation of the decision of the Hearings Committee after the proceedings. She now regretted it had appeared in that form. She also stated in questioning by the Tribunal that in reducing the minimum lot size to 6,000 square metres that everyone in the zone had wanted something different: that many had hoped to get 4,000 square metres minimum averaging 8,000 square metres and that 6,000 square metres was the absolute minimum as far as the council was concerned because of stability issues. She also stated that larger areas had been provided in the plan change to provide sufficient space to deal with site specific constraints including restricting the density of subdivision in order to avoid the need for large scale earthworks commensurate with Policy 4.9.2. Dr Robinson stated there was a risk with the steep slopes on the McIntyre property and the residents would need to take care in the upper part of the zone and he acknowledged that on Category III land the smaller the number of houses the less the risk from the slipping of land alone. He said:

> "*There is a risk of failure of the hillside on the very steep slope on the adjoining property with the deposits of failure moving downslope onto the Referrer's property. Thus the siting of a dwelling on those slopes in the southeast is not considered advisable unless detailed investigation shows that the risk is low or can be reduced to an acceptable level.*"

We consider that on the evidence as to instability now available, and as set out in the evidence of Dr Johnston, that objective 4.8.1 and policy 4.9.3 should be amended to take account of the new evidence and that Planning Map No. 5 should

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also be amended accordingly. The respondent, through counsel, acknowledged that the words on Planning Map No. 5 effectively constitute a prohibition on any subdivision and that the notation as to the potential for risk should be amended in accordance with a suggestion from Dr Johnston and the council's planner as follows:

> *"Generally unfavourable for development except where detailed site investigations show risk is either acceptable or can be minimised by substantial slope modification."*

It was Mr Bacon's evidence that there is another small portion of land next to the established Residential zoning in Richmond which on revised Planning Map 5 is identified with an asterisk.* This identifies that particular property as being one where subdivision will be permitted only if detailed information is provided. He did state that it is helpful to identify areas of risk on the Planning Maps. We make no decision either way on what method should be chosen to identify the potential for risk but agree it should be done in a way agreed to by the parties. We particularly noted the evidence of Dr Johnson when he acknowledged in reply to questioning from Mr Heal, that the area for proposed residential zoning he proposed on the plan marked Appendix B attached to this decision, was partly Category II land (of low to moderate risk).

We also acknowledge, for example, that provision has already been made within the Richmond Section of the plan, for the control of development on property identified in Planning Map No. 3, in Rule II Clause 2(I); Rule III Clause 6 and Rule 3.1.2.2 (iii)(a)(b)(c) of change R9 and that specific requirements in relation to subdivision on potentially unstable land require engineering certification. In addition ss.106 and 406 of the Act give the council further powers to refuse consent no matter how the land is zoned.

In conclusion on the matter of slope stability, we are of the opinion that subject to the foregoing, the front lower half of the subject site could be used for either residential development or low density residential and that the "*no building*" notation on the balance is not appropriate. Thus the notion of (Sub-Area A) Restricted is not soundly conceived. Subject to what we say below about servicing issues, we consider the restrictive naming does not reflect the area's true nature.

RETICULATED SEWERAGE, STORMWATER DISPOSAL AND WATER SUPPLY

It was the evidence that the southern end of Hill Street is relatively undeveloped compared to the land at the northern end towards Richmond. The area has been treated differently according to the engineering manager for the council, Mr J A L Robinson not only because of its stability, but because of servicing and locality factors.

It is a policy of the proposed change that all new residential developments are connected to a reticulated water and sewage system except for Sub-Area A Restricted, where only a reticulated water supply is required. Thus if we allow the appeal, any new residential subdivision on the McIntyre property should be connected to a sewerage system before the subdivision takes place. There was a major divergence between the parties as to whether this was possible given the council's resources and the placement, efficiency and age of the current sewer lines.

It was the appellant's case that the council's conclusion that the McIntyre land was unsuitable for residential development because it cannot be economically serviced, was contrary to the evidence at the council hearing, for while the council's evidence had revolved around instability issues the referrer's evidence had been to the fact that services could be provided. There was also an argument that because land elsewhere was zoned Deferred Residential or Residential, services had to be provided to those areas in any event and why should not the McIntyre property be part of those.

We had the benefit of evidence from Mr Russell, an engineering consultant called for the appellant whose opinion was that there is little difficulty with providing sewerage reticulation as the land in question rises gently to the east from Hill Street and a gravity system in accordance with the council's Engineering 1994 Standards is quite straightforward to achieve, provided a sewer pipe is laid approximately 3 metres deep along a limited length of Hill Street and connected to the nearest sewer servicing the Fawdan development approximately 250 metres from the northern corner of the property. It was his evidence that the council itself had conflicting views about the potential for adverse impact, either on the proposed subdivision downstream or on existing pipelines in the town. He had viewed a council advice which stated that an increased flow of 1.98 litres per second would have no adverse effect on the Fawdan development. It was his calculation that the peak wet weather flow from the McIntyre property would be 1.7 litres per second based on a 40 lot subdivision averaging 3.5 people per lot and 210 litres/capita per day which would be in accordance with the New Zealand Standard. With respect to stormwater, it was the evidence of Mr Russell that if an area of five hectares of pasture land suitable for residential development was assessed, the calculated flow for a five year return period storm is 420 litres per second. If residentially developed, the flow would be 520 litres a second. The difference of 100 litres a second increased discharge he considered to be very small. He estimated that the flow at the Hill Street culvert of Hart Creek is 6200 litres a second for the same return period. The change would represent 1.7% in Hart Creek. A development of 3.5 hectares would amount to a flow of 75 litres a second which would be even less. As a result he deposed that the small increase caused by any development of the McIntyre property would not cause stormwater drainage problems downstream and its effects could therefore only be minor.

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It was Dr Johnston's evidence regarding drainage that any subdivision should take note of

(a) No buildings or other obstructions should be placed in the floodway of Hart Creek:

(b) A culvert of adequate capacity should be placed on Hart Creek at Hill Street South:

(c) The swampy area in the vicinity of the well at the toe of the slump deposit should be adequately drained away and any water so collected would be best discharged into Hart Creek or elsewhere:

(d) All stormwater from roofs, paved areas and access roads should be disposed of off-site into Hart Creek:

(e) All sewerage be discharged into the Richmond sewerage system.

He was also of the opinion that because of stability considerations run-off should be carefully controlled.

These would be matters normally included in land development requirements.

It was the evidence of Mr Wells also that sewage reticulation could be provided from the McIntyre property into the former Richmond Borough Council system by way of the existing pipe system through the Fawdan subdivision on the opposite side of Hill Street. He had obtained a reticulation services agreement from a technical engineer for the council to that system and an agreement had also been entered into with the Fawdan developers to permit a sewer line to be taken through the property. It was Mr Wells' opinion that with a residential development and because effluent discharge would not be made to the ground, urban lot sizes could be contemplated on the easy to moderate slopes of the lower part of the site without risk of ground saturation and destabilisation of slope material. Mr Wells disputed the council's case that sewage could not be received downstream in the council's sewer mains because of their age and limited capacity. He stated that such situations are encountered all the time in urban development, and that as a result it is common for upstream developers to be levied to contribute to the upgrading costs. In any event sewage connections must be provided for the Low Density Residential areas throughout the change 9 area as the proposed zoning requires it. It was also his evidence that stormwater reticulation services can be provided to each lot and piped into Hart Creek which flows through the south west corner of the property. It was Mr Wells' understanding that in common with many old pipe systems, stormwater infiltration into the former Richmond Borough Council's sewerage reticulation has been a problem but the council is gradually upgrading existing systems and that the McIntyre development would make a worthwhile financial contribution to the upgrade.

SEK

It was Mr Robinson's evidence that the natural drainage flows from the site towards Gladstone Road, will be via Hart Creek. He warned too that Hart Creek is a sensitive area used for the rural water supply - that this was the upper reaches of catchments with considerable downstream influences. This creek has had substantial flooding problems in the past and has required substantial remedial works but these have been undertaken in the expectation that the locality served by the creek would remain rural. He acknowledged that a sewer connection could be made to the Fawdan development from the McIntyre property but once the pipe is put in, the council has to take over the costs of pumping, inferring that the initial development costs are one thing, but ongoing ones the council's concern only.

It was the council's evidence that the extra sewerage flow which would result from the extra residential development was an extra 3-4 litres a second if linked in to the Fawdan development which would result in serious overloading of the system in the vicinity of Cautley and Hunt Streets. Mr Robinson calculated that with additional houses coming into the area, the Cautley Street system showed a flow of an extra 21 litres per second with ponding of sewage in the manholes at times of high rainfall. Meanwhile stormwater discharge if the development proceeded would measure 400 litres a second over and above what was calculated by Mr Russell (820 litres in total) and the western section within the Sub-Area A Restricted zone would generate this volume alone if developed as Residential. He stated there are serious stormwater problems in the area, with the system in Richmond generally close to capacity now and that it needs a million dollar upgrade. Mr Robinson deposed any such discharge would require the upgrading of the Hart Creek flow path through to the rural section of the Wensley block and would decrease the capacity of the eastern hills drain which was not designed to cope with such flows. It was also his evidence that it was the Committee's verbal decision to take part of the stormwater flow directly down through the future residential land in the Wensley block and into the proposed Pouama Street system. Meanwhile where Hart Creek goes into the Wensley Block, the channel which goes to Hart Road floods in a number of ditches and needs upgrading in the future but currently has low priority. He was convinced that in view of the expected residential developments already proposed in the catchment, the council's priority is to address stormwater problems from Gladstone Road upwards and not to go to the top of the catchment first. Logically he saw the service as being provided at the McIntyre property by about the year 2005 with downstream capacity problems being addressed later than that. Meanwhile Ms Biss, planning witness for the council, explained that the council had recently put in a new trunk sewer on the north side of Richmond along the boundary of the Schools block and that the council had a programme to design a system which would eventually take care of the McIntyre property and the eastern side of Hill Street South. Mr Robinson confirmed such programming by stating monies the council receives from a proposed development levy will be put towards programmed or targetted projects because of development pressures.

SCH.

It was Mr Russell's view that should the McIntyre subdivision proceed without delay it would be unlikely that full design flows could be achieved within three years. By the time subdivision consent was approved, the subdivision developed and 40 houses constructed, it is likely to be between five to six years before full flows could be generated. This he felt tied in well with the council's proposal to upgrade by the year 2000. Mr Russell stated that the apparent constriction in the sewer system at Cautley and Hunt Streets is at least 1,200 metres from the appellant's site and that because of current development of residential land is going to require upgrading anyway, it would seem sensible to ensure the work catered for the largest number of residential properties possible in order to spread the cost. He considered it was also desirable to recover the capital expenditure as soon as possible.

Mr Wells acknowledged that reticulation through the Fawdan development has to look to be capable of coping with developments upstream. On being asked by Mr Heal whether the council should have priorities because the Fawdan development was beyond capacity anyway, Mr Wells acknowledged that the council must have priorities in respect of particular systems. He also acknowledged that it was wrong to start to develop a system starting with the remotest upstream point, because it put a disproportionate amount of cost on the developers (although he acknowledged also to Mr McFadden that that is the developer's problem). He further acknowledged that whilst the council has the power to recover development contributions that power was difficult to enforce. He further acknowledged that he had made no studies on the downstream effects of discharge on Hart Creek but then acknowledged to Mr McFadden that any increase in such discharge would be comparatively small from any rezoning as previously stated only an increase of 1.7% at the Hill Street culvert. In response to a question about whether 40-50 additional dwellings would cause problems for the low flow water pressures which currently exist on dwellings in the area he stated that the construction of a small reinforced concrete reservoir of say 50 square metres would assist low flow pressures.

The letter from the council technical engineer (who was not called to give evidence) attached to the evidence of Mr Wells, deals with the impacts of the proposed subdivision on the Fawdan development and downstream from there. Apart from the fact that we could give little weight to its contents as a result of the way in which the letter was introduced, Mr Robinson clearly indicated that the letter had been taken out of context. The difficulty lies not with the downstream effects of the McIntyre development on the Fawdan development and lower, but with the Hunt and Cautley Streets trunk connection. Mr Robinson stated that at the lower end of Hunt Street, the pipe is already at capacity and the sewerage from time to time spills out into the road. The council has completed a review of the sewage network up to the Fawdan development and had concluded that Hart Street will be over capacity very shortly. If the McIntyre subdivision as sought goes into that pipeline the problem could end up in Cautley Street and overflow into the manholes. The amount of upgrading required would be very extensive and would also need to deal with stormwater infiltration. He also stated that the council plans to service the Low Density Residential zone when Hill Street is

upgraded by carrying out the roadworks first and to put in the sewer lines at that time. The witness also stated that it is not practical to bring a water supply up from the Fawdan subdivision because the council had just built a new reservoir above Hill Street which is not yet connected to a high pressure pipe and as yet is 750 metres away from the McIntyre property. In reply to questioning from the Tribunal, he stated that if the McIntyre subdivision went ahead immediately with a lot size of 6,000 square metres, 10 lots would be provided serviced by septic tanks. But the council would signal that if a reticulation system was installed it would eventually be connected with the council's sewer.

Meanwhile the council's planning witness explained that the area zoned Deferred Residential opposite the McIntyre property, servicing could be provided for, but only from the bottom of the catchment up.

From Hill Street 700 metres of pipeline is required for sewerage to be taken down through the Deferred Residential 2003 and 2000 zoning to connect with the sewage continuation of the Homeblock from Gladstone Road. This is how council sees sewer and stormwater services being provided eventually to this deferred area, not from the Fawdan development. With regard to the land in the upper Hill Street area, Mr Robinson stated although the McIntyre property could physically be sewered through the Fawdan block, the council may elect to take this sewerage down through the deferred areas. No decision has yet been made. Mr Robinson also stated that it was council policy to provide a high pressure water supply to residentially zoned homes and they require a full fire fighting capacity at the same time which creates a need for significant design capacity. It has to be considered in conjunction with all the other systems provided. He concluded: "*Council will be able to provide services to the McIntyre block and adjacent land but not in the immediate future. Logically ... by 2005 ... possibly a few years sooner.*"

We agree with Mr Robinson that in this case the extension of services such as sewage system and roading should be carried out in a co-ordinated progression. We hold that if developments proceed on an ad hoc basis they cannot be sustainably managed by the council - an aspect which is not commensurate with s.5 of the Act. The provision for what would be effectively 30 extra residential sites if the Residential zoning proceeded, would have effects totally disproportionate, it seems, from any benefit we could perceive in view of the residential zoning already provided and its effect on the provisions of the district plan.

Mr Robinson stated that the area could not remain unsewered long term and that the council could undertake such works some time in the future. We are aware firstly, such work would be necessary sooner rather than later, and also this is a very expensive exercise to expect the community to bear. It thus becomes the second serious flaw in the concept of the Sub-Area A zoning. For these reasons we are not prepared to allow the Sub-Area A restricted notation to stand on the subject site.

A residential standard subdivision on the McIntyre property would create a pressure point in the council's servicing systems which at this time is clearly unacceptable.

ROADING MATTERS

Hill Street is extremely long, running the full length of the maps we had of the Barnicoat Range. The topography is also extremely hilly and sight distances difficult as Mr Russell stated, and as we saw for ourselves on our site visit.

It was Mr Wells' evidence that by best utilising the existing land contours, roading and normal access requirements for a residential development could be provided for the property without the need for mass earthworks or significant alteration to the existing ground contours. He deposed that Hill Street has a legal width of 20.12 metres and currently a formation of 6 metres across the frontage of the property. He considered that if we allow the zoning sought, the council would have little engineering difficulty in matching any subsequent upgrade of Hill Street. However, he acknowledged the council would want to upgrade Hill Street as the subdivision went ahead and when being questioned by Mr Heal as to whether it was not presently inadequate and that the council would be required to upgrade, he agreed the development should proceed in an orderly fashion. Mr Russell deposed that the sight lines at the proposed intersection with Hill Street just exceed 100 metres but with minor alteration to the vertical curve on the street could achieve over 500 metres to the south and 200 metres to the north. He stated that there are few positions along Hill Street where better sight lines can achieve so economically.

It was the respondent's case that the upgrading of Hill Street to accommodate the appellant's proposal, would mean council was put to considerable cost which it would be unable to recover. Mr Robinson deposed the road is substandard and that requires it to be upgraded as soon as possible. Meanwhile the council's priority is down the northern end of Hill Street because this is where there are high traffic flows (unlike near the McIntyre property). He deposed that Hill Street will need expensive upgrading in the form of road widening (to a minimum width of 8.5 metres wide which is a 2.5 metres extension on its current width) and smoothing of the vertical alignment in three stages. It is proposed that Stage 1 will comprise the upgrading of the Hill Street North area, Hill Street up to the boundary of Sub-Area A will be Stage 2 and the road adjacent to Sub-Area A will be Stage 3 which is scheduled for completion by the year 2003. If a block of 40 sections is provided now, the road would require immediate attention which he did not believe was practical. He stated categorically it is an expensive exercise.

Mr Heal on our invitation explained that the council's powers relating to its ability to seek roading contributions were originally contained in s.321A and s.322 of the Local Government Act 1974. These were repealed by the Resource Management Act 1991 although they remain intact under s.407 with respect to local authorities who have not included within their district plans conditions dealing with road

contributions on subdivisions. Section 407 applies to the respondent in this case. As a consequence and citing Fisher v Tauranga County (1983) 9 NZTPA 92 and Windsor Goodwin Limited v Tauranga City Council (1983) 9 NZTPA 120, Mr Heal submitted that the amount the council could possibly recover was limited to

"*(a) a maximum of one half of the 'formation cost' of the road adjacent to the subdivision (not including metalling and sealing) to such extent as the work is necessary to service the subdivision. This is likely to be minimal.*

(b) a maximum of one half of the cost of constructing footpaths and kerbing and channelling along the subdivision frontage 'to the extent the footpath services the subdivision'."

Thus, he submitted, the council would be unable to recover any other part of the construction cost of a roadway that is necessary to properly service a subdivision, even though the subdivision itself necessitated the upgrading. If the council was obliged to upgrade approximately 300 metres of road to provide appropriate and safe access to the McIntyre subdivision then it would have to do so, of its own cost given the present circumstances. Therefore counsel submitted, that taking account of the council's present priorities and pressures, it would be unreasonable for the council to upgrade the roadway out of sequence merely to serve the appellant's economic interests.

Mr McFadden submitted in reply that the council's ability to recover such costs would be viewed in the light of the overall change which allows for zoning substantial areas of land along Hill Street Low Density Residential and Low Density Residential (Sub-Area A) Restricted, and that contributions could be recovered to contribute to its cost from all of the developers, not just Mrs McIntyre. Therefore it was inappropriate to isolate her proposal and to say as a consequence that any upgrading was unjustified.

It was Mr Robinson's evidence that the council is on the point of implementing Development Impact Levy provisions into the district plan which will anticipate taking levies for essential services at the subdivision approval stage. It is also council's intent to set up a rolling ten year programme to meet servicing requirements. Whilst he agreed with the appellant's witnesses that forward planning is essential, we ascertained that it is going to be some time before adequate funding provisions are going to be in place. Mr Robinson acknowledged to Mr McFadden that the council will consider servicing deals on their merits but they would be "*logical developments in good circumstances*" - unlike this proposal.

It is our conclusion that currently Hill Street South as a carriageway is unable to cope with significant new residential development. We agree Hill Street needs extensive upgrading and see no reason why the McIntyre property should have any priority. We had no other developers along Hill Street before us to indicate they were happy to share roading costs, so the appellant's approach to shared costs is untenable in this regard. Meanwhile we accept Mr Heal's submission about the legal difficulties of recovering extensive roading costs. The rezoning of the land

residential will result in the addition of approximately 30 extra dwellings (i.e. over and above a Low Density Residential zoning) which would take the single largest block out of the zone and put pressures on the other land owners to seek rezoning also. We agree it would be difficult to resist such pressure. It was the council's evidence that once the land was zoned Residential a council has to have very good reasons to turn down a subdivision application. Once an indication is given, the developers of such sites expect to develop immediately and to obtain a building permit. The evidence was that the upgrading of Hill Street is still at the investigative stage with its southern end at the end of priorities and although the consequences of rezoning have a "*neatness*", they create expectations which do not allow for managing the use "*at a rate*" which enable people and their communities to provide for their social and economic well-being. It would put economic pressure on the council to provide resources which are currently deployed elsewhere. This is an adverse effect we consider unacceptable and offends the purpose of the Act.

EFFECTS ON AMENITY VALUES AND QUALITY OF ENVIRONMENT

We were given very little evidence on amenity values as they affected the McIntyre block.

Mr Russell described the site as follows:

> "*The property is in pasture and rises gently at first (average 11°) from Hill Street becomes steep at the rear of the property. The slopes on the adjacent property at the rear boundary continue to rise steeply and are vegetated in a mature radiata pine plantation. The transition from the lower gentle slopes to steep upper slopes is punctuated by several mounds. ... As a result the topography is an interesting variation with several vantage points providing panoramic views across Richmond and the plains.*"

It was the council's case that closer subdivision on the slopes of Mrs McIntyre's property would reduce the amenity provided by the area. The council's planning witness stated that it has a different character from that to the north which is zoned Residential and that any such a provision would reduce its open space character which was the fundamental difference between the dense residential development proposed and the low density provisions.

It was Mr McFadden's submission that the efficient use and development of the McIntyre land and the natural and physical resource it represents must outweigh any amenity impact upon which the council did not give specific evidence. It was Mr Bacon's evidence that whilst he acknowledged there is a strong demand for Low Density Residential allotments in and around Richmond, there is an even greater demand and consumption of average size residential allotments in the range of 500 to 600 square metres in size. He also deposed that in Richmond residents will pay $100,000 for a 2,000 square metres elevated section. It was also his evidence that elevated sections in Richmond are keenly sought after, fetching a

premium price, because they mostly offer spectacular views across the Waimea Plains to the Mount Arthur Range, the Abel Tasman Park and Tasman Bay. He stated also, that as a planner, he believed there is merit in providing for a wide variety of residential sections, to avoid incursion onto the soils of high productivity. He saw the eastern foothills as the only option for expansion. Some people want relatively small sites with good views which he believed the McIntyre site could provide, in contrast to the northern end of Hill Street, where the principal landowners have chosen to create an environment of Low Density Residential sections larger than average and much more expensive.

The council has provided elsewhere in the change for large land areas to be zoned Residential or Deferred Residential. Apart from either side of the northern end of Hill Street, at the time of hearing, there was no other Low Density Residential land available. Mr Bacon admitted there was "*strong demand*" to use his words for Low Density Residential land. Change R9 already provides for a good number of residential lots and given the interesting topography of the site we consider it has the potential (given the various constraints imposed by the geography) to provide the community with more spacious sites commensurate with the zone's objective of providing spacious residential sites with pleasant outlook close to Richmond.

RESIDENTIAL AS OPPOSED TO LOW DENSITY RESIDENTIAL?

We return now to the applicant's proposal to zone some four hectares as Residential. In terms of stability we have determined there is not a constraint. In terms of servicing we have found this is only a matter of timing as it will be for much of the remainder of change 9 (albeit as a low priority for the southern end of Hill Street) and the same can be said for the upgrading of Hill Street.

In terms of clauses 4.1.1 and 4.1.6 of the plan statement, we agree council is correct to relieve pressure on adjoining high quality soils by making provision for low density residential development in Richmond and in terms of clause 4.7 to maximise this use of land which has a pleasant outlook and favourable aspect. For these reasons we believe council is correct in identifying the subject site for Low Density Residential use.

As to the relevance of the plan provisions to the Low Density zone and the provision of larger lot sizes, we consider these are implicit in Section A - the Plan Statement to change R9 at Clause 4.1.6 which records there is a demand for Low Density Residential lots close to Richmond on the eastern side of Hill Street on stable land which is not of high value for agriculture. The evidence established the McIntyre land is of low agricultural value and now that questions of instability have been resolved we consider it is suitable for Low Density Residential zoning. As to the site's amenity, the Zone Statement at Clause 4.7 records it has a "*pleasant outlook and favourable aspect for residential development*". It is also the zone's intent to create spacious sites close to Richmond.

Mr Bacon did persuade us that it should not be a split zoning and that elsewhere the council was persuaded to give consistent zoning to a number of properties. We consider this should be the case here. We consider that the whole of the McIntyre property should be zoned Low Density Residential with any appropriate notations as regard to matters of stability. As such, and in common with the remaining Low Density Residential areas, it will have to await or negotiate the availability of a reticulated sewage system before subdivision.

COSTS

Mr McFadden sought costs for his client although a quantum was not specified. We were urged to accept that there was a lack of substantiation by evidence of the council's decision and that as a consequence there should be a substantial award.

We consider there is some merit in what has been submitted. This case may be considered as a very difficult jigsaw puzzle which had to be carefully pieced together to achieve the full picture of how the south end of Hill Street with the McIntyre property came to be singled out in change R9 from all the others. The planning provisions were not clearly set out in the planning evidence; consent orders to which we were not a party (and have even yet not sighted) have amended the lot size for the Low Density Residential zone down to 6,000 square metres which somewhat altered the case we consider for Mrs McIntyre immediately prior to this hearing. Crucial engineering and planning evidence was not given as evidence-in-chief but as points of clarification put by counsel. We consider the question of costs should be reserved.

CONCLUSION

For the reasons previously stated we believe the objects of change 9 are better served by the use of this land for Low Density Residential rather than Residential zone density. Therefore the outcome of the referral is that the land remains zoned Low Density Residential without the Sub-Area notation and without the "*no building*" area notation.

We also hold that the present proposal does not generally fulfill the statutory purpose of the Act and nor does it meet the requirements of s.7(b), s.7(c) and s.7(f).

Accordingly and for the aforegoing reasons we hold as follows:

1. The appeal is allowed to the extent that the site is renamed Low Density Residential with the notations on Planning Map No. 5 amended accordingly and the relevant plan provisions also amended accordingly.

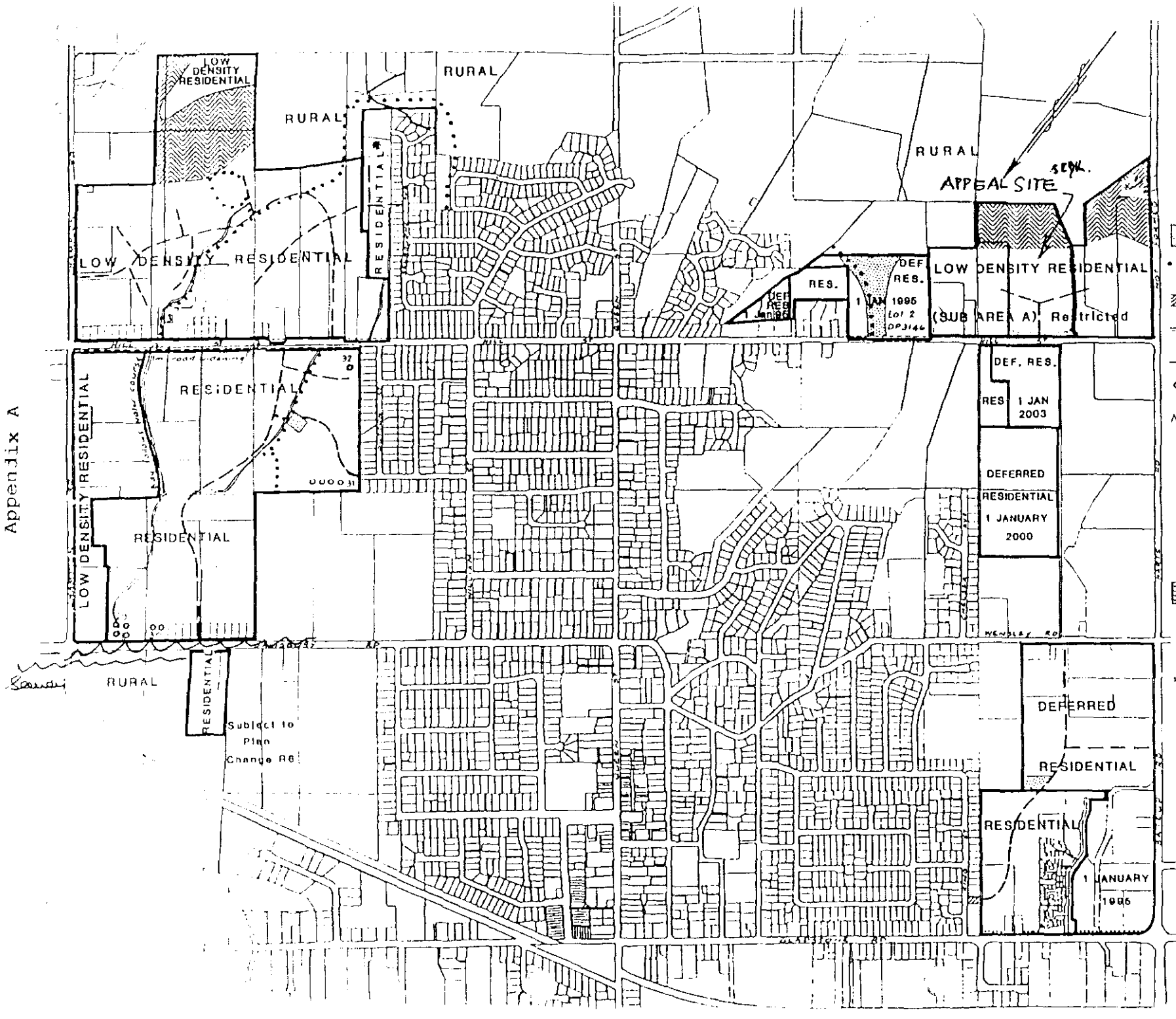
2. Costs are reserved. The appellant's memorandum to be filed within a month of receiving this decision and the council's reply one week after that.

DATED at WELLINGTON this 2nd day of September 1994

S E Kenderdine
Planning Judge

rm407-93.doc (mo)

Appendix A



PROPOSED PLAN CHANGE R9

AS AMENDED BY COUNCIL DECISION

- Indicative Reserve
- Proposed Walkway/ Bridleway
- Proposed Road
- Proposed Road Widening
- Indicative Roading
- Trees to be protected (See Appendix D)

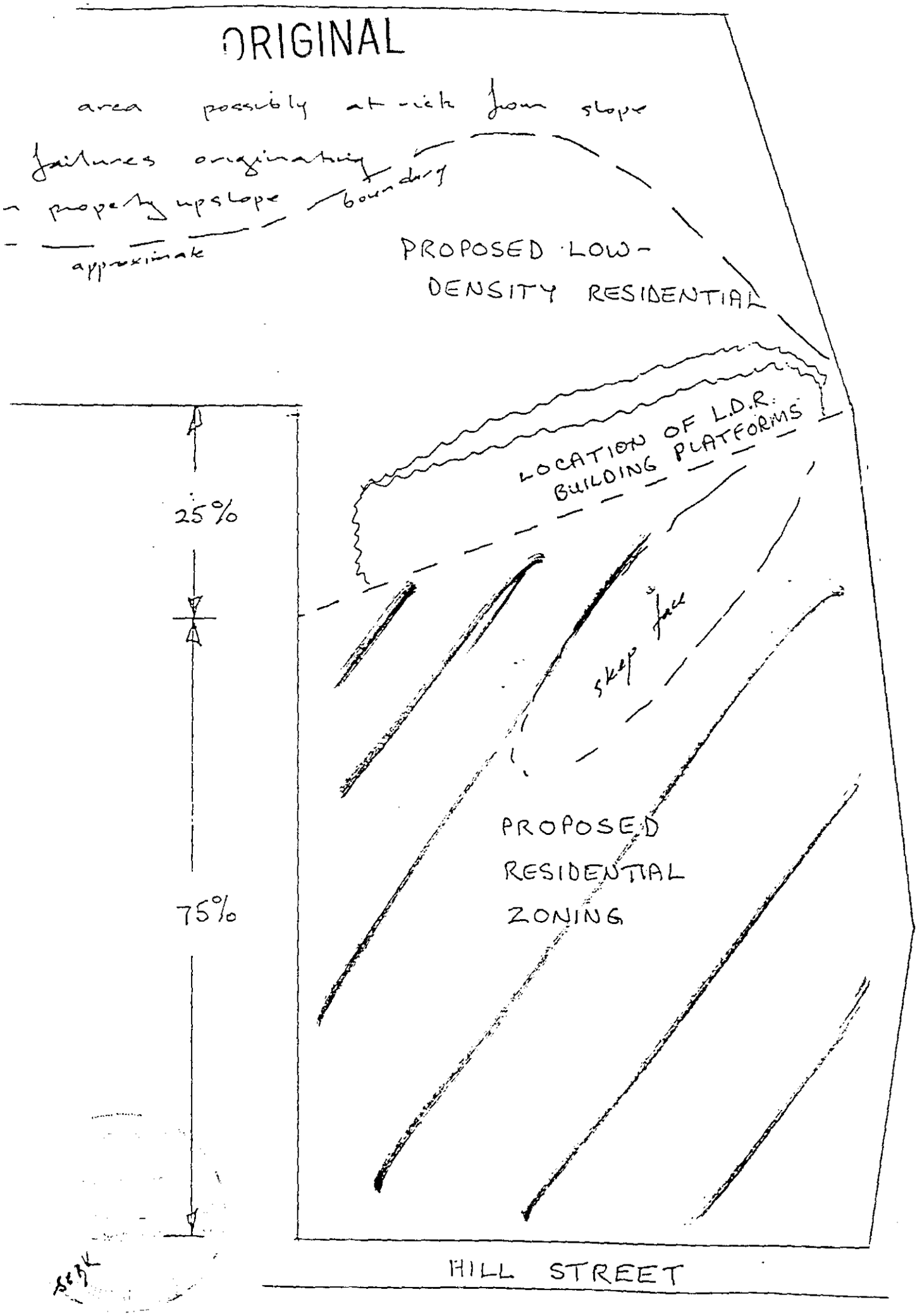
Note: All other zoning remains as indicated on the Richmond Section of the Tasman District Transitional Plan

- [3] Building of Historic Interest
- "No Buildings" area
- Subject to special engineering requirements
- No direct vehicle access to S# 6 and access roads at least 100 m from 3 Brothers corner
- Major Streams (see Policy 4.9.7)

Publicly Notified 19 Dec 92

PLANNING MAP No. 5

Scale 1: 4000 (approx)


ORIGINAL
area possibly at risk from slope failures originating upslope of property boundary
approximate
PROPOSED LOW-DENSITY RESIDENTIAL
LOCATION OF L.D.R. BUILDING PLATFORMS
25%
75%
PROPOSED RESIDENTIAL ZONING
HILL STREET

TAB 11

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-008098
[2013] NZHC 1172

BETWEEN	NEWBURY HOLDINGS LIMITED & T R GROUP LIMITED Appellants
AND	AUCKLAND COUNCIL Respondent

CIV 2012-404-001403

AND BETWEEN	AUCKLAND COUNCIL Appellant
AND	NEWBURY HOLDINGS LIMITED & T R GROUP LIMITED Respondents

Hearing: 5 and 6 September 2012

Counsel: D Kirkpatrick and K Littlejohn for Newbury Holdings Ltd & T R Group Limited
W Loutit and K Reid for Auckland Council

Judgment: 22 May 2013

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Wednesday, 22 May 2013 at 12:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:

Simpson Grierson (B Loutit & K Reid) Barristers & Solicitors Auckland for Auckland Council
D A Kirpatrick, Barrister, Auckland for Newbury Holdings Ltd & T R Group
Glaister Ennor (T N Arieli) Solicitors, Auckland for Newbury Holdings Ltd & T R Group

Contents

Introduction

[1] These two appeals arise out of a substantive decision of the Environment Court (the Court) dated 16 November 2011,[1] and a subsequent decision on costs dated 22 February 2012.[2] The substantive decision determined five separate proceedings before the Court involving two plan change appeals, two appeals in relation to consents sought by T R Group Limited (T R Group) and/or its subsidiary, Newbury Holdings Limited (Newbury), and an application seeking a change to the provision of the regional plan that T R Group contended rendered the land at issue incapable of reasonable use. The subsequent decision on costs awarded T R Group and Newbury 60 per cent of their costs, or $136,800.00 if their costs exceeded $228,000.00.

[2] The land at issue is situated at 791-793 Great South Road, Penrose, Auckland, and has a total area of 6.61 hectares. It is known as Anns Creek because two tributaries of Anns Creek enter the site through culverts under Great South Road and flow through the site to the Manukau Harbour. T R Group owns neighbouring land at 781 Great South Road, which it uses as part of its nationwide truck and trailer leasing operation. T R Group acquired Anns Creek in 2004 with the intention of developing the land to accommodate its expanding operations.

[3] There are, however, a myriad of constraints on the land's development. It has significant indigenous biodiversity values. It also has a complex planning history, including two substantive Court decisions in 2000[3] and 2001.[4]

[4] The land was originally an arm on the Manukau Harbour but became enclosed following the construction of a railway embankment along the foreshore to the west of the site. It is, however, still subject to tidal influence via a series of culverts running underneath the embankment. It is undeveloped and relatively flat with areas of low-lying mangroves and more elevated basalt lava flow. There is a

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1 *Newbury Holdings Ltd & Anor v Auckland Council* [2011] NZEnvC 364.
2 *Newbury Holdings Ltd & Anor v Auckland Council* [2012] NZEnvC 32.
3 *Auckland Regional Council v Hastings* ENC Auckland A130/2000, 6 November 2000.
4 *Hastings v Auckland City Council* ENC Auckland A068/01, 6 August 2001.

sequence of wetlands forming an ecotone along a gradient from salt to freshwater, from mangroves to raupo. The basalt lava flow supports one of the last remaining unmodified shrublands in the Tamaki ecological district. Schools of mature inanga are found in both tributaries of Anns Creek. The site also has value as an avian habitat with evidence of banded rail and bittern.

[5] The land was owned by the Crown for many years and was identified as being held for railway purposes. It was sold by the Crown in 1989 to T R Group's predecessor in title as surplus to railway requirements. It is, however, still designated for railway purposes in the District Plan. The land is subject to various easements in favour of utility companies enabling them to install, maintain and use various railway, water supply, telecommunications, gas supply and power facilities through and over the property. In particular, there is an easement for railway purposes registered across the site and over a portion of its southern most corner. There was also a notation placed on the title when the land was sold by the Crown identifying that it is subject to Part IVA of Conservation Act 1987. This reserves to the Crown a marginal strip of 20 metres width extending landward from the line of mean high water springs. The marginal strip was not able to be fixed by survey and was the subject of the first decision of the Court in 2000.[5]

[6] Most of the land is zoned "Business 6" being the heavy industrial zone on the Auckland isthmus, consistent with the zoning of neighbouring land which has been developed for a wide range of industry. The zoning of the land was a result of the second decision of the Court in 2001.[6] The appropriate approach to sustainable development, use and protection of the land was the subject of substantial debate between various regulatory authorities and T R Group's predecessor in title.

[7] T R Group originally applied to develop approximately 60 per cent of the land (generally its northern and eastern areas) by filling it in, and to retain and enhance the balance in the south and west as open space. The enhancement involved implementation of a lava shrubland management plan to protect and enhance the rare lava shrubland vegetation and features of the site, and a wetland enhancement plan

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5 *Auckland Regional Council v Hastings*, above n 3, at [37].
6 *Hastings v Auckland City Council*, above n 4, at [183].

focused on wetland species enhancement and public access to the marginal strip and through the site. During the course of the hearing the Court directed the parties to meet. Subsequently, the extent of the footprint sought for development was reduced further by T R Group, to comprise approximately 50 per cent of the land with the balance retained for conservation purposes. In the Court's substantive decision of 16 November 2011, consent was granted for development of approximately 30 per cent of the land. T R Group/Newbury now appeal against the Court's substantive decision. The Auckland Council (Council) appeals against the Court's subsequent decision on costs. I will refer to T R Group and/or Newbury just as T R Group.

Questions of Law

[8] Section 299 of the Resource Management Act 1991 (the Act) enables any party to a proceeding before the Court to appeal on a question of law against any decision of the Court made in the proceeding. It applies to both the substantive decision dated 16 November 2011 and the costs decision dated 22 February 2012.

[9] As to the appeal against the substantive decision, the notice of appeal dated 13 December 2011 filed by T R Group, lists the questions of law to be resolved on the appeal as:

(a) Did the Court wrongly disregard the position of the Council in relation to the extent to which the site could be filled?

(b) Did the Court wrongly determine the proceedings in a manner that went beyond the scope of the proceedings before it?

(c) Did the Court wrongly fail to give the parties an opportunity to be heard on its new proposal as to the extent of the resource consent?

(d) Did the Court wrongly fail to determine the application by T R Group under section 85 of the Act?

(e) Did the Court wrongly take into account the issue of need on the part of T R Group for use of the land as a depot and fail to have particular regard for the efficient use and development of its natural and physical resources?

(f) Did the Court properly determine the activity status of the activities which were the subject of the resource consent appeals?

(g) Did the Court wrongly limit the scope of the resource consents or impose conditions on the consents in a manner which rendered the consents nugatory?

[10] The notice of appeal dated 13 March 2012 filed by the Council against the costs decision lists the questions of law to be resolved on the appeal as:

(a) Did the Court take into account irrelevant considerations in determining that the Council's conduct was blameworthy and thereby justifying departure from the starting point that costs are not normally awarded against a council?

(b) Did the Court wrongly apply the principles set out in *DFC NZ Limited v Bielby*[7] to justify a higher than normal award of costs?

(c) Did the Court wrongly conclude that the Council had failed to explore the possibility of settlement either because the conclusion was made without evidence or was not reasonably available given the evidence presented to the Court?

(d) Did the Court fail to consider the unique position in which the Council found itself, having succeeded to the differing positions of both the Auckland City Council and the Auckland Regional Council?

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7 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 (HC).

(e) Did the Court fail to consider and determine whether the claimed actual costs were reasonable costs in fixing costs as a proportion of (estimated) actual costs?

(f) Did the Court wrongly include costs in relation to purchase negotiations or settlement or mediation relating to the appeal as costs which could be recovered from the Council?

(g) Did the Court fail to consider whether the higher award was appropriate given the funding and statutory responsibility of the Council?

(h) Did the Court fail to assess costs on a principled legal basis in accordance with the settled approach of the Court?

(i) Was the award of costs by the Court excessive in this case?

[11] It is important to note at the outset the limited scope of appeals under s 299 of the Act. It is not a general right of appeal against the merits of the Court's decision. For example, the ninth and final question of law set out in the Council's notice of appeal against the costs decision is "Was the award of costs by the Court excessive in this case?" That is, however, directed at the merits of the Court's decision and is, in my view, not a question of law. In its written submissions, the Council did not advance the eighth and ninth questions listed in its notice of appeal and recast some of the other questions.

[12] The relevant principles that apply were summarised in *General Distributors Limited v Waipa District Council*[8]

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

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8 *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 (HC).

> [30] The applicable principles were summarised in *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145 at pp 157-158, p 153. In that case the full Court – Barker, Williamson and Fraser JJ – noted as follows:
>
> > … this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal -
> >
> > (a) Applied a wrong legal test; or
> >
> > (b) Came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come; or
> >
> > (c) Took into account matters which it should not have taken into account; or
> >
> > (d) Failed to take into account matters which it should have taken into account.
> >
> > See *Manukau City v Trustees Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
> >
> > Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise. See *Environmental Defence Society Inc v Mangonui County Council* (1988) 12 NZTPA 349, 353.
> >
> > Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest & Bird Protection Society Inc v W A Habgood Limited* (1987) 12 NZTPA 76, 81-2.

[13] I adopt these principles for the purposes of this appeal.

APPEAL AGAINST SUBSTANTIVE DECISION

Question One - Did the Court wrongly disregard the position of the Council in relation to the extent to which the site could be filled?

[14] This question presupposes that the Council took a position in relation to the extent to which the land could be developed. T R Group clearly had a position but did the Council?

[15] T R Group notes that the Council advised the Court in a pre-hearing memorandum dated 25 January 2011 that it would abide the decision of the Court. As a result, the Council did not open its case with the presentation of a position on

the appropriate extent of development of the land. Its witnesses referred to the issue of reasonable use but did not reach any conclusion as to what the extent of such use might be. T R Group notes that the Court was sharply critical of this approach by both the Council and by its witnesses.

[16] T R Group submits that by the end of the hearing, however, the Council had identified a position in relation to the extent to which the land could be developed. It points to Exhibit H. Exhibit H was produced by consent when the Court hearing resumed on 2 August 2011, after it had been adjourned part-heard on 28 June 2011. It is entitled "Environment Court "Option 2" – Auckland Council's Preferred Layout".

[17] Exhibit H was produced following a minute of Judge Smith dated 28 June 2011, in which he required the planners, including those retained by the Council, "to respond to the core issue in this case which is what is the reasonable balance to be achieved". Exhibit H was accompanied by a handwritten statement "AGREED DESIGN PRINCIPLES (without prejudice)". Although it sets out six principles, these were not all finalised. For example, number two was "Area of spawning habitat above NIMT [North Island Main Trunk] culverts retained and enhanced (subject to final agreement)". Number six was "Design of new stream meander to be resolved". It also noted three unresolved issues including whether the resultant Business 6 land was reasonable for T R Group (including development costs) and whether the retained area for reserve was adequate for the Council.

[18] Importantly, Exhibit H was also produced prior to the evidence given by four terrestrial ecologists. One of the three unresolved issues noted in the agreed design principles was mitigation and offsets. The terrestrial ecologists all agreed that the amount of mitigation proposed was not sufficient to offset the adverse effects of the proposal. They agreed it was not possible to fully mitigate the adverse effects of the proposed development on the land itself. They further agreed that the proposed development had severe effects on the wetland aquifer and upper reaches of the wetland complex. Consequently, the amount of offsite mitigation required to offset these effects would involve a relatively large commitment of financial resources and effort.

[19] The Court explained the hearing process in its decision as follows:

> [66] Having heard the aquatic ecological experts first, we were minded to have their joint concerns addressed in the design. That and our overall concern that the proposal could not mitigate the adverse effects which had been identified thus far, lead us to record a minute at this point in the part heard matter. This opportunity arose because the hearing was split into two time periods due to circumstances beyond our control...
>
> ...
>
> [68] Thus the Court offered and it was accepted, that a facilitated meeting with a suitably qualified Commissioner would be held between the parties. This was to assist in advancing the reasonable balance matter if the question of acquisition could not be resolved. As it turned out, upon reconvening the hearing the Council confirmed that it had no intention of purchasing the land. However, a plan was advanced by the Appellant (attached as "**E**") and we were provided with further evidence of a document of *Agreed Design Principles* which represented a common position of the parties as a result of the mediation. This is attached as "**F**".
>
> [69] As we have noted, at this point we had not heard from the terrestrial ecologists. However, on the basis of the evidence from the aquatic ecologists the Agreed Design Principles are set out below: ...
>
> ...
>
> [73] These documents presented the first move from the Council towards a possible agreed position. However, while the Council accepted the general stream design and the operational efficiency of the proposed new layout as it related to the eastern tributary and the stormwater pond, it did not agree with the road alignment presented by T R Group in its amended plan and nor did it accept the extent of the encroachment of fill over an area which we will refer to as raupo wetland at the western edge of the works.
>
> [74] The reason for this position became apparent as we heard from the terrestrial ecologists. The Council put forward Exhibit H (attached as "**H**") entitled *Environment Court "Option 2" – Auckland Council's Preferred Layout*. But it transpired that although the title reads as if it might represent *a line in the sand* on the Council's behalf, the evidence went on to contradict that view.

[20] During questioning from the Court, one of the terrestrial ecologists, Dr Julian, provided the following explanation regarding the position reached on 2 August 2011, when the hearing was resumed and Exhibit H was produced:[9]

> ... my understanding with the bookend approach is that those bookends were arrived at in mediation with stormwater experts and freshwater ecologists. Terrestrial ecologists were not included as part of that so they weren't generated in terms of looking at the terrestrial ecology so I understood that

[9] Notes of evidence, page 128 line 30 – page 129 line 2.

> those were the bookends in terms of the stormwater approach and the maintenance of freshwater ecology values...

[21] Furthermore, when questioned by the Court at the end of the hearing, the Council's lawyer clearly indicated that he had no instructions to assist the Court regarding the relative priorities of the raupo wetland, the lava shrubland and the inanga habitat.

[22] The Court concluded:

> [51] We would normally provide the Parties positions relative to the key issues ... but ... only the position of the Appellant was made clear to us. The Council remained steadfast in opposition but accepted that some reasonable use was appropriate.

[23] Having carefully reviewed the transcript of the Court hearing and the decision under appeal as well considering counsel's submissions, I am of the view that the Council did not take a definite position in relation to the extent to which the land could be developed. In that regard, I agree with the Court. Exhibit H, on which T R Group relies, was accompanied by "Agreed Design Principles" which left a number of matters unresolved. It was also produced before the terrestrial ecologists had given evidence. The Council did not give assistance to the Court in determining the relative priorities of the raupo wetland, the lava shrubland and the inanga habitat, leaving it to the Court to prioritise the different landforms and to determine what area of each should be retained to preserve it in some form.

[24] The answer to question one is therefore no, on the basis that the Council did not take a position in relation to the extent to which the site could be filled.

Question Two – Did the Court wrongly determine the proceedings in a manner that went beyond the scope of the proceedings before it?

[25] Having answered no to question one, it follows that the answer to question two is also in the negative, on the basis that the Court did not go beyond the scope of the proceedings before it. However, despite it being unnecessary for me to comment further, I do not necessarily accept the underlying premise of question two, that the Court cannot determine proceedings in a manner that goes beyond the positions

adopted by the parties to the proceedings. I do not agree with T R Group's submission that the Court effectively granted consent to an application that was not before it. T R Group sought permission to fill a substantial portion of the site. Its application was granted, except not to the extent it proposed.

[26] Furthermore, the purpose of the Act is to promote the sustainable management of natural and physical resources.[10] In achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are required to recognise and provide for what are said to be matters of national importance, such as the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.[11] The Court is therefore entitled, in fact is obliged, to reach its own conclusion on such matters irrespective of the position adopted by the parties to proceedings before it.

[27] The answer to question two is therefore no, on the basis that the Court did not go beyond the scope of the proceedings before it.

Question Three – Did the Court wrongly fail to give the parties an opportunity to be heard on its new proposal as to the extent of the resource consent?

[28] T R Group submits that if the Court was entitled to consider and determine the appeals beyond the positions adopted by the parties, it should in any event have given the parties the opportunity to be heard in relation to such a possible outcome. They submit the Court should have given them the opportunity to be heard on the scope of the court's jurisdiction to introduce an alternative position beyond the positions adopted by the parties and the merits of that alternative position in light of the evidence before the court. At worst, T R Group submits that it should have been given an opportunity to amend its application in light of some indication of the Court's position.

[29] In essence, T R Group submits that it was taken by surprise by the Court's ruling. The question therefore is – should T R Group have been advised by the Court

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10 Resource Management Act 1991, s 5(1).
11 Resource Management Act, s 6.

that it may take a position for which the parties did not advocate? T R Group accepts that it was theoretically possible that the Court might not grant any consent but notes that the hearing had proceeded throughout on the basis that some of the land must be able to be developed by T R Group.

[30] The key issue at the hearing was always how much and what parts of the site could be filled. T R Group's initial proposal involved using 3.29 hectares of the 6.61 hectare site (approximately 50 per cent). Its proposal presented to the Court in August 2011 involved using 3.05 hectares of the 6.61 hectare site (approximately 46 per cent).

[31] T R Group submits that the Court based its decision, that approximately 30 per cent of the site could be filled, on the evidence of Dr Julian, a terrestrial ecologist called by the Council. This evidence emerged after cross-examination and in answer to questions from the Court when all four terrestrial ecologists had given evidence together.

[32] The Court asked the terrestrial ecologists where they would draw the lines if they were being asked to provide the same amount of land as T R Group were proposing. After hearing from Dr Flynn, a terrestrial ecologist called by T R Group, the Court turned to Dr Julian and asked "Dr Julian, have you got a better plan for us?"[12] Dr Julian did not initially answer the question. He suggested that the railway easement was not usable land under the Business 6 zoning given it was a railway easement. He stated that the land "orphaned" to the southwest of the easement was also not usable because it had no guaranteed access across the railway line which may eventually be built. Dr Julian then described how the lines might be drawn if 50 per cent of the land east and north of the railway easement was to be developed.

[33] Dr Bishop, another terrestrial ecologist called by the Council, then told the Court that his approach would be similar to Dr Julian's. Finally, Dr Lovegrove, who was also called by the Council, stated that he had similar comments. He then stated that the question they obviously needed to ask themselves was whether in view of the natural values of the land, 50 per cent was a reasonable compromise or should

[12] Notes of Evidence, page 146 line 20.

they be looking at a figure lower than 50 per cent for development. The Court responded that that was not a question for the ecologists.

[34] The Court then offered counsel the opportunity to ask further questions of the terrestrial ecologists. Counsel for T R Group states that because of the Court's response to the question posed by Dr Lovegrove, it was not considered necessary to question Dr Julian on her suggested approach. T R Group submits that had it been apparent, preferably by the Court informing counsel, that Dr Julian's personal opinion about the reduction of the area of land under consideration might be determinative, then the flaws in Dr Julian's approach would have been drawn to the Court's attention. T R Group submits that Dr Julian's opinion was flawed as she went beyond the scope of her expertise and failed to take into account a number of relevant matters.

[35] However, T R Group must have known that the Court was considering a proportion less than 46 per cent of the land as available for development. On the last day of the hearing the following exchange took place between the Court and counsel for T R Group:[13]

> The Court: I think in the circumstances that although we would have preferred to see ie the site as a whole acquired, that was our, we sent the parties away to try and achieve that. Secondly, if there was a way in which we could accommodate both, that doesn't seem to be realistic without – and even to accommodate the sequence will involve a significant amount of land that can't be compensated elsewhere on the site. Now, of course that doesn't answer the question as to whether or not if we were prepared to look at you only being able to utilise 30% of the site, or something, that might be feasible, but that's the sort of percentage we would be left with.
>
> Mr Kirkpatrick: Well, in my respectful submission, Sir, that would not provide for reasonable use in the circumstances.
>
> The Court: Well, that's the question. So that is, so I don't think any of those questions the planner can help us with. There is nothing in the plan that says this is more important than that –
>
> Mr Kirkpatrick: No, not on the ecological side, Sir.

[13] Notes of evidence, page 30 line 27 – page 31 line 26.

The Court:	No. So given that it doesn't rate groundwater wetlands against inanga habitat, then we're not going to get any planning assistance I can see. And the question of reasonable use is really a question of law, in the end. Well, it's a value judgment, but it's based on law.
Mr Kirkpatrick:	With respect, Sir, it is a matter of judgment within the discretion of the Court in light of all of the evidence. But I respectfully agree, Sir, that it boils down to the ecological evidence, rather than a planning argument.

In this passage, the Court clearly refers to the possibility of T R Group "only being able to utilise 30% of the site".

[36] In my view, the Court was not required to formally give parties a further opportunity to be heard on what would be, in effect, the draft decision. The Court had the jurisdiction to make the decision that it did and the parties did have sufficient notice that such a decision was available to the Court. The primary issue in dispute before the Court was always quite clear. A joint memorandum of counsel filed with the Court prior to the hearing described it as "To what extent development of the land at Anns Creek should be allowed to enable its business use taking into account a number of specified factors". The use of the word extent connotes a range of possibilities, one of which was eventually adopted by the Court. The opportunity was also given to T R Group to ask questions of Dr Julian and to make submissions about flaws in her approach but counsel chose not to do so.

[37] The answer to question three is therefore no, on the basis that T R Group did have a sufficient opportunity to be heard on the proposal that eventually found favour with the Court.

Question Four – Did the Court wrongly fail to determine the application by T R Group under s 85 of the Act?

[38] By notice of motion dated 13 August 2010, T R Group applied under s 85(2) of the Act to change the proposed Auckland Regional Plan: Air, Land and Water so that specified objectives, policies and rules in the plan did not apply to the land. This was on the basis that the identified provisions rendered the land incapable of

reasonable use and placed an unfair burden on T R Group as a person having an interest in the land.

[39] Section 85 was, in fact, considered in the second of the two earlier decisions of the Court in relation to the land - *Hastings & Anor v Auckland City Council*.[14] Mr Hastings was T R Group's predecessor in title. He referred provisions of the proposed Auckland City District Plan (Isthmus Section) about the zoning of the land, to the Court. By the proposed plan, two pieces of the land were to be zoned Special Purpose 3 (Transport Corridor), while the rest of the land was to be zoned Open Space 1 (Conservation). The Open Space 1 zoning would have considerably restricted the use and development of the land. The Court found, in terms of s 85 of the Act, that Open Space 1 zoning would render the land incapable of reasonable use and would place an unfair burden on the owners. The Court accordingly directed the Auckland City Council to zone as Business 6 all the land outside of the areas required for railway links and proposed railway reclamation work.

[40] The Court noted, however, that the opportunity granted to Mr Hastings to use and develop the land by the Business 6 zoning would be subject to the constraints of the existing infrastructure and designation on the land, and the coastal management area and earthworks controls. At [168] the Court stated:

> [168] In this case, the conflict between enabling economic use of the land and precluding all economic use to protect the undoubted natural values of the land is not quite as stark as that. Leaving aside the prospect of protection by the proposed designation for nature reserve, and eventual public acquisition, even Business 6 zoning would not allow unrestrained development of the remainder of the northern piece after excluding the marginal strips, the railway link easement, the other infrastructure elements, and the building line restriction. Although they would not be as fully effective to protect the features of natural value as Open Space 1 zoning, the coastal management area control and the earthworks control have the potential to provide considerable protection.

[41] It is clear that in the present case, the Court did not determine the s 85 application by T R Group, notwithstanding the submission by the Council that the Court did address s 85 in its decision because the issue of reasonable use was at the forefront of its decision. The Council submits that the Court therefore implicitly

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[14] *Hastings v Auckland City Council* above n 4, at [167].

decided the s 85 application. I am, however, of the view that the Court chose not to determine the s 85 application because it did not think it was necessary to do so. On page 2 and 3 of it's judgment, the Court inserted a table which sets out each application made by the parties and the outcome. Under the s 85 application, the Court has stated "Decision not required". This is reflected in the judgment itself when the Court states:[15]

> We also consider that having made this decision we have reached a reasonable balance of the objectives and policies of the relevant planning instruments which apply to this site and having done so...Section 85 of the Act need not be invoked.

[42] I am of the view that the Court should have made a decision on the s 85 application although there is no express requirement in the Act that the Court must make a decision on such an application. Section 85(3) gives a discretion to the Court to direct a Council to modify, delete or replace a provision of a plan as it relates to a particular piece of land but it does not suggest that the Court has a discretion whether or not to determine the application.

[43] Case law suggests that consideration of whether a council plan renders land incapable of reasonable use should be confined to s 85 and is not a matter that should be considered under other sections of the Act. In *Robert John Buckley v South Wairarapa District Council* the Court stated:[16]

> Finally if, as the appellant has suggested, to refuse this application would deny him reasonable use of his land then we agree with the submissions of counsel for the Regional Council who submit that this is not a relevant matter under s 104 RMA. Mr Buckley's remedy, if his assertion is correct, lies in an application under s 85 of the Act.

[44] Similarly, the Court in *Gebbie v Banks Peninsula District Council* noted[17] that Mr Gebbie could not rely on s 85 "indirectly". If Mr Gebbie thought he had a claim under s 85 "then he should apply directly under s 85." In *Steven, Application by* the Court set out a clear procedure for the determination of an application under

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15 At [163].

16 *Buckley v South Wairarapa District Council* ENC Wellington W004/08, 4 February 2008 at [209].

17 *Gebbie v Banks Peninsula District Council* (1999) 5 ELRNZ 362 (ENC) at [24].

s 85(3). This procedure does not leave room for the Court to decide not to determine the application. It stated:[18]

> After the hearing the Court may
>
> (i) refuse the request; or
>
> (ii) grant the request; or
>
> (iii) if it considers
>
> (a) that a reasonable case has been presented for changing or revoking any provision of a plan; and
>
> (b) that some opportunity should be given to interested parties to consider the matter
>
> then the Court may adjourn the hearing until such time as interested parties can be heard and follow the section 293 procedure as to notification by the Council.

None of the three options set out by the Court allows the court to make a decision not to determine the application.

[45] The key question, however, is whether the Court's decision not to determine the s 85 application is material and warrants a remedy on appeal. In the table on page 2 and 3 of its judgment, the Court stated next to the notation "Decision not required" that "The resource consents now granted will allow for reasonable development". I take it from this statement and from comments in the judgment itself, that if the Court was required to determine the s 85 application it would have dismissed it. In those circumstances, the Court's failure to determine the s 85 application may be seen as a matter of form rather than a matter of substance.

[46] Furthermore, in its earlier decision the Court directed the Council, under s 85 of the Act, to zone as Business 6 all the land outside of the areas required for railway links and proposed railway reclamation work on the basis that the change would enable T R Group's predecessor in title to make reasonable use of the land.

[47] The answer to question four is therefore yes, but the Court's failure to formally determine the application is not material.

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[18] *Steven, Application by* (1997) 4 ELRNZ 64 (EWC) at 17.

Question Five – Did the Court wrongly take into account the issue of need on the part of T R Group for use of the land as a depot and fail to have particular regard for the efficient use and development of natural and physical resources?

[48] This question of law arises out of a comment made by the Court that it was not provided with any evidence on the actual size of the additional land required for T R Group's use as a depot for its truck and trailer leasing operation. The Court stated:

> [114] This background assists in understanding the balancing of the objectives and policies required. There is clearly a restorative and enhancement aspect to the proposal which is entirely consistent with the ARP:ALW [Auckland Regional Plan:Air, Land and Water]. Given that the Council has indicated it will not buy the land, the option of development to protect and enhance at least part of this resource is in our view a positive move in the direction of the outcome sought by the Plan. This positive aspect comes with a cost. It will require human intervention and financial investment to secure. In the absence of public funding the arrangement proposed by T R Group would seem to be a good one. We therefore agree with Mr Hay in terms of the balance of assessment of these objectives and policies. We do note though, that we were not provided any evidence on the actual size of additional land required for T R Group's use for its depot. It appeared that the evidence focused on the cost of reclamation rather than the actual need for the land to be reclaimed.

[49] The reference to the lack of evidence of T R Group's need for additional land is criticised by T R Group on the basis that such a comment must in some way have influenced the Court in reaching its determination that only approximately 30 per cent of the land was able to be developed. T R Group submits that an applicant's needs should not be a factor which determines the Court's decision on what is a reasonable use of the land. The predominant factor should be the efficient use and development of the natural and physical resources of the land, which is quite separate from the needs of any particular applicant.

[50] I am of the view, however, that the Court's comment in [114] did not have a conclusive impact on the Court's decision. The Court's decision needs to be read as a whole. When read as a whole, it is evident that the efficient use and development of the natural and physical resources of the land, was the primary consideration of the Court when making its decision. The Court's primary consideration was not T R Group's needs or rather lack of evidence as to T R Group's needs.

[51] For example, the Court made specific reference to balancing protection, enhancement and (unspecified) business use in [135] and finding a reasonable balance between (unspecified) development and conservation of important natural features in [195].

[52] The Court concluded:[19]

> We are satisfied that the development of the area we have identified for business activities, can be undertaken with appropriate mitigation to ensure the natural environment is protected and in a manner that logically connects and encourages sustainable use of this land as an industrial/business land resource.

[53] These passages illustrate that the predominant feature in the Court's decision making was indeed what T R Group submits it should be, the efficient use and development of the natural and physical resources of the land.

[54] In any event, reference to T R Group's needs does not invalidate the Court's decision as an applicant's needs may be a relevant consideration in a number of different ways. For example, the Court itself referred to the criteria which apply to an application for discretionary earthworks, which includes:[20]

> The applicant's need to obtain a practicable building site, access, a parking area, or install engineering services to the land.

The Court noted that while the activity is fully discretionary, the criteria helpfully assisted in defining the concerns which needed to be addressed in this case. In its decision, the Court directed that an agreed (and consolidated) amended staging plan(s) and earthworks plan(s) to describe works in accordance with the decision, were to be provided to the Court for attachment to the final decision.

[55] More generally, T R Group's particular needs were relevant issues for the Court as part of the balancing exercise to be undertaken. The fact that T R Group already operated from the adjoining site was relevant because the land at issue would provide a superior and safer roading link for T R Group's existing operations. Benefits would also accrue to T R Group from boundary straightening, for instance.

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19 At [200].
20 At [131].

These factors were identified in the evidence of Mr Andrew Carpenter, the managing director and an owner of T R Group.

[56] The answer to question five is therefore no, on the basis that the Court did not fail to have particular regard for the efficient use and development of the land's natural and physical resources.

Question Six – Did the Court properly determine the activity status of the activities which were the subject of the resource consent appeals?

[57] T R Group submits that the primary issue raised by this question is whether it was appropriate for the Court to bundle applications in terms of both district and regional plans. The bundling of these plans meant that the activity status under the district plan changed from discretionary to non-complying as a result of the regional plan activity status being non-complying. T R Group also submits that the Court's failure to resolve the s 85 application is closely linked to this question. Instead of working through the planning proceedings before it, in particular the s 85 application, all of which affected the planning and statutory provisions against which the development proposal had to be considered, the Court made its decision on the basis that the whole proposal was non-complying and sought an overall outcome that it considered reasonable. Had it worked through the issues which affected the particular consents that were required under the district and regional plans, the latter being the purpose of the s 85 application, the Court might have been faced with a proposal that was wholly discretionary under both plans.

[58] However, having carefully considered the matter, I am of the view that the Court did not fall into error when it determined that overall, T R Group's proposal was non-complying. The Court held it to be non-complying due to reclamation sought of the 515 m length of both tributaries of Anns Creek and two 2500 mm culverts and the consequential disturbance of the stream banks.

[59] There is well established precedent for bundling together different activity consents. This is acknowledged in the submissions of both T R Group and the Council. This occurs where there is such an overlap of the consents that, for the sake

of efficiency, it makes sense to bundle the overlapping consents and then apply the most restrictive status to all of them. This principle can be found in the decisions of *Locke v Avon Motor Lodge*,[21] *Southpark Corporation Limited v Auckland City Council*,[22] and *Aley v North Shore District Council*[23] to name a few. I consider the cases of *Body Corporate 97010 v Auckland City Council*[24] in the Court of Appeal and *Southpark Corporation Ltd v Auckland City Council* in the Environment Court to be of assistance. In *Body Corporate 97010 v Auckland City Council* the Court of Appeal stated that bundling was not appropriate where there was no overlap in the claims.[25] In *Southpark Corporation Limited v Auckland City Council* the Court stated that it would be appropriate to bundle where consents overlap and have consequential and flow on effects for one another.[26] The High Court in *Tairua Marine Limited v Waikato Regional Council* confirmed that:[27]

> It is a longstanding principle that where there is an overlap between two consents so that consideration of one will affect the outcome of the other it will generally be appropriate to treat the application as one requiring overall assessment on the basis of the most restrictive activity...

[60] I see no reason why this principle, which has been consistently applied to bundle together different activity consents, cannot apply to bundle together activity consents from different council plans, as long as there is the requisite overlap between the plans. Furthermore, there is also some precedent for the bundling together of not only different activity consents, but consents from different plans. The Environment Court in *Living Earth v Auckland Regional Council*[28] bundled together consents contained in both the Auckland Regional Plan and the Manukau City District Plan. The Court in that case held that because the plans overlapped they would bundle together the plans on the basis of the most restrictive activity.

[61] In the present case, there is significant overlap in the district and regional plans and in the individual activity consents within those plans. Both plans deal with

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21 *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17 (NZSC).
22 *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350 (ENC).
23 *Aley v North Shore City Council* [1999] 1 NZLR 365(HC).
24 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).
25 At [22].
26 At [15].
27 *Tairua Marine Limited v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [30].
28 *Living Earth Limited v Auckland Regional Council* ENC A126/06, 4 October 2006.

the appropriate development of the site, the filling of the northern and eastern areas and the maintenance of areas in the south and west as open space. The plans also both deal with the enhancement of the wetlands and lava shrubland. What is decided under one plan will inevitably impact upon the other, as evidenced by the fact these proceedings having occurred because T R Group received consent under one plan but not the other. Therefore it makes sense both for the different activity consents to be bundled together (as is the norm when they overlap) and also for the activity consents in two different plans to be bundled together when they also overlap.

[62] The answer to question six is therefore yes. It was not inappropriate for the Court to bundle together activity consents from different council plans because of the overlap of such activities.

Question Seven – Did the Court wrongly limit the scope of the resource consents or impose conditions on the consents in a manner which rendered the consents nugatory?

[63] T R Group submits that the imposition of conditions which render a resource consent nugatory is beyond the lawful scope of the Court's power to impose conditions. While as a general proposition this may well be the case, T R Group submits that, in the present case, the restrictions on development of the site make the consent nugatory. This is because it would be uneconomic for them to proceed with development of the land. T R Group submits that the costs of doing so, well outweigh the benefit in having only 30 per cent of it available for use. Therefore it submits that the Court has effectively declined T R Group's application.

[64] T R Group points to the evidence of Mr Carpenter who stated:

> 25. Our financial analysis and valuation advice is that the resulting value of the usable Business 6 land from this proposal will be unlikely to cover the cost of the land to us, including ongoing holding / interest costs..., the estimated cost of consenting ... and the projected cost of construction and rehabilitation and enhancement works...
>
> 26. On the basis of that analysis it is not economically viable to develop any less of the site than currently proposed. Reductions in development footprint would have marginal cost savings in terms of development costs; and any savings would likely be offset by

> increased enhancement and rehabilitation costs with respect to the balance area.
>
> 27. If we could have devised a scheme that viably developed less of the site then that would be the scheme under consideration. But with the passing of such considerable time (seven years now) spent in the process of seeking consents, there is now no more that we can give away and ensure the project remains financially viable.

T R Group notes that Mr Carpenter's evidence was not challenged in cross-examination or in questions from the Court.

[65] I do have some sympathy for T R Group because of the long drawn out process of obtaining consent for development of the land. However, the myriad of restrictions on the land's development were obvious from the Court's decision in 2001, when it directed the Council to apply a Business 6 zoning to much of the land. Mr Carpenter stated that with their knowledge of the land and advice obtained through the due diligence process, T R Group was satisfied that the planning provisions for the land enabled development of a good portion of it for Business 6 purposes. There did, however, have to be real uncertainty about what "a good portion of it" amounted to, at the time T R Group bought the land.

[66] A similar argument was advanced in *Kiwi Property Management Ltd v Hamilton City Council.* The Court stated:[29]

> It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
>
> It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an applicant has to pay for implementing a resource consent in certain circumstances.

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[29] *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (ENC) at [64]-[65].

[67] The answer to question seven is therefore no. The consents are not rendered nugatory simply because of the costs involved in developing the land.

[68] Having determined the questions of law as indicated above, the appeal against the substantive decision dated 16 November 2011 is dismissed.

APPEAL AGAINST COSTS DECISION

[69] In a subsequent decision dated 22 February 2012, the Court directed the Council to pay T R Group 60 per cent of its costs, up to a maximum of $136,800. The Council appeals against the award of costs to T R Group on the basis that the Court erred in relation to both the Council's liability to pay any costs at all, as well as the quantum of costs awarded if this Court determined that the Council should pay a part of T R Group's costs.

[70] As noted above, under s 299 of the Act, a decision of the Court can only be appealed to the High Court on a question of law. The Council accepts that, even if a question of law arises in an appeal, an appellate court should be reluctant to interfere with the discretionary exercise by a court at first instance, of the power to award costs. It responsibly refers to the comments of the Court of Appeal in *Commerce Commission v Southern Cross Medical Care Society*:[30]

> ...reasons must be shown for interfering with the exercise of a discretion as to costs. As this Court has repeatedly said, costs decisions are influenced by a myriad of details that are difficult to replicate on appeal. The award of costs is quintessentially discretionary. Review and appeal courts are correspondingly reluctant to interfere: *Lewis v Cotton* [2001] 2 NZLR 21 (CA) at p 35. That is not to say that an appellate court should decline to intervene if it can be shown that there was an error of principle or that the award was plainly wrong.

[71] In its decision in the present case, the Court referred to the following considerations which it said generally guided the Court on the exercise of its discretion as to costs:[31]

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30 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) at [12].

31 At [6].

(a) the degree of success or failure including at first instance;

(b) the nature and complexity of the case and the issues;

(c) the length of the hearing;

(d) the conduct of the parties; and

(e) the costs actually and reasonably incurred.

[72] The Court then referred to *DFC NZ Limited v Bielby*[32] and the circumstances to be taken into account when making a significant award of costs:[33]

(a) Were arguments advanced without substance?

(b) Were the processes of the Court abused?

(c) Were the cases poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing?

(d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have reasonably been expected; and

(e) Where a party takes a technical or unmeritorious point of defence.

[73] The Environment Court accepted that the Court will not normally impose costs against a council when it is undertaking its statutory functions. The exception is where the actions of the council can be considered blameworthy. In the present case, the Court considered that the Council was blameworthy in two major respects. Firstly, it was unwilling to purchase the land to preserve the values of the site and secondly, it had been less than helpful in providing guidance for development of the land.

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32 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587 (HC).
33 At [7].

[74] As to possible purchase of the land by the Council, the Court commented:[34]

> ... it is important to note that at the time of adjournment during the hearing the Court did encourage the Council to purchase the property, and subsequently commented on its failure to do so. In particular, it appeared to the Court that the Council was reluctant to meet the costs of preserving the values of this site and wished instead for the applicant to bear these.

[75] Commenting on the helpfulness of the Council, the Court stated:[35]

> The essence of the concern in this case is that there were originally two bodies [Auckland City Council and Auckland Regional Council] whose staff took conflicting positions. Rather than seeking to resolve that conflict, the councils continued to argue the matter, essentially at the expense of the appellants [T R Group]. In those circumstances the actions of both councils, and their witnesses, were blameworthy by failing to address the appropriate balance to be achieved between Business 6 zoning and natural use. Put in another way, we conclude that the actions of the former Auckland Regional Council in relation to plans was to undermine the Environment Court decision as to zoning.

The Court was of the view that if the witnesses had given evidence about where the reasonable balance lay between Business 6 zoning and natural use, this would have enabled a far more focussed approach by the Court.

[76] As noted above, the Council has identified a number of different questions of law which arise. However, it is my view that it is unnecessary to separately consider each question as the conclusion I have reached is that the Court's costs decision is fundamentally flawed in its reliance on the Council's failure to purchase the land and the Council's failure to draw the development "line in the sand". In doing so, it took into account matters which it should not have taken into account in terms of the test set out in *General Distributors Limited v Waipa District Council*.

[77] In my view, it was wrong of the Court to consider that the failure of the Council to purchase the land from T R Group was a factor that could be taken into account by it in deciding whether to award costs against it. When reference is made to the conduct of the parties in case law on costs, that means the conduct of the parties in the proceedings themselves. I agree with the Council that the decision whether or not to expend public money to purchase the land was a discretionary

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34 At [8].
35 At [11].

decision for the Council to make. A decision which took into account competing demands for the expenditure of Council funds and the public interest. A Court should not interfere in a decision by the Council as to the setting of expenditure priorities.

[78] In that regard, I am of the view that the Court had no basis for suggesting that "the Council was reluctant to meet the costs of preserving the values of this site, and wished instead for the applicant to bear those". There does not appear to have been any evidential foundation for such a comment. With respect, this attitude seems to have coloured the Court's approach to costs.

[79] A similar attitude seems to have been taken by the Court to the issue of the stance taken by the Council in the proceedings. The Court commented in its substantive decision[36] that the addition of a reference to Anns Creek in Policy 7.4.25(c)(i) was evidence of continuing attempts to subvert the Court's 2001 decision and prejudice T R Group's development of the site. This comment is repeated in the costs decision.[37] Again, the attribution of such an improper motive to the Council and its officers does not appear to have any evidential foundation.

[80] The Council has produced evidence to assist the Court and abided its decision in relation to the balance to be struck between the ecological value of the land and the ability of T R Group to reasonably use the site. This stance is not, in my view, blameworthy. The Court's role is to hold a de novo hearing and it is required to form its own view on the merits. It is certainly not a rubber stamping exercise, nor even an exercise in choosing the position of one party or the other or somewhere in between. The Court is required to reach its own independent decision which may be quite different from the positions adopted by the parties.

[81] Prior to the reorganisation of the former Auckland territorial authorities on 1 November 2010, proceedings relating to the land had been on-going for over six years. There had been clear differences between the former Auckland City Council and Auckland Regional Council as to the development which should be permitted on

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36 At [106].
37 At [11].

the land, so the new Council's approach was understandable in the circumstances. It had recognised the need to achieve finality and so it brought all outstanding matters to the Court within a year in order for them to be resolved. That approach is in my view constructive, not obstructive.

[82] A joint memorandum of counsel, which set out a synopsis of the relevant issues, was prepared and filed with the Court prior to the hearing. A number of other joint statements were prepared and filed. These included a joint statement of the stormwater management experts, a joint statement of the aquatic ecological experts, a joint statement of the ecological experts (vegetation and avifanna) and a joint statement of the planning experts. This was commendable and reduced the amount of hearing time required and enabled the Court to reach a prompt decision.

[83] In those circumstances, the costs decision dated 22 February 2012 is quashed. The conduct of the Council in the proceedings before the Court was not demonstrably blameworthy. This is therefore not one of those rare cases where costs should be awarded against the Council. In that regard, I note the Court's comments (when refusing full reimbursement of costs) that:

(a) T R Group was only partly successful. The Court did recognise the natural values of the land in that more land was preserved than that proposed by T R Group.

(b) It could not be said that the Council's case was advanced inefficiently or with any desire to extend the hearing before the Court once it had reached that stage.

(c) The land is clearly of some considerable complexity which would have been clear to T R Group at the time they purchased the property from the previous owner.

Costs

[84] Finally, although the Council has been successful in this Court on both appeals and would normally be entitled to costs, I invite the Council to consider whether or not it should make an application for costs. This is because of the complex and lengthy nature of the proceedings caused, in part, by the differences between the former Auckland City Council and Auckland Regional Council, and the costs to be borne by T R Group in preserving the natural values of the land should they now proceed with the consent.

…….

Woolford J

TAB 12

Ngati Maru Ki Hauraki Inc v Kruithof

High Court Hamilton CIV-2004-485-330
11 June; 30 July 2004
Baragwanath J

Resource consents — Application for resource consent — Site on historic pa — Resource consent proceeded on notified basis — No objections — — Council granted resource consent — Commenced earthworks — Subsequent complaint by local Maori tribe to lack of consultation with tribe — Historic Places Trust granted authority to proceed with development — Appeal of that decision dismissed — Consents lapsed — New consents issued without notice — Application to Environment Court for enforcement orders and declarations dismissed — Settlement discussions unsuccessful — Application for leave to appeal out of time — Resource Management Act 1991, ss 6(e), 6(f), 8, 11, 87(b), 94, 310, 311, 314, 316, 319; Historic Places Act 1993, ss 10, 11; Treaty of Waitangi Act 1975; Maori Language Act 1987.

Mr Kruithof owned land that was on a historic pa site and near a sacred stream. Ngati Maru Ki Hauraki Inc ("Ngati Maru") was one of the tribes of Hauraki. The historic pa was of special significance to Ngati Maru as it was adjacent to a sacred waterway where sacred rites had been performed.

Mr Kruithof applied for a resource consent for a proposed development on the land. Notice of the application was published in the newspaper and a sign was posted on the site. Ngati Maru did not object to the application. The Thames-Coromandel District Council ("the council") approved the application. After Mr Kruithof commenced excavating the site, Ngati Maru complained to the council about the lack of consultation with Ngati Maru.

After archaeological assessments and a report from Ngati Maru, the New Zealand Historic Places Trust granted authority to destroy part of the midden lying within the subject site. The Environment Court dismissed Ngati Maru's appeal of that decision.

However, Mr Kruithof was unable to take advantage of the resource consent and the Historic Places Trust consent during their life and they lapsed. Mr Kruithof lodged a fresh application for resource consent for a revised and more modest development. The council decided to waive public notification under s 94 of the Resource Management Act 1991 ("the

Act") and granted resource consent. The Historic Places Trust accepted that there was no longer any material of relevance on the site and therefore no authority from it was required.

Ngati Maru applied to the Environment Court seeking an enforcement order under s 314 of the Act that Mr Kruithof immediately cease all earthworks and construction and restore the natural and physical resources of the property. Ngati Maru also applied for declarations under s 310 of the Act that to undertake earthworks on the property required a resource consent and the earthworks undertaken before the date of Ngati Maru's application contravened s 9(1) of the Act.

The Environment Court refused both the declarations and the enforcement orders sought and found that the earthworks undertaken did not require resource consent under the proposed Thames-Coromandel district plan.

After the decision of the Environment Court was released, the parties commenced settlement discussions. Ngati Maru sought instructions from the parties in respect of extending the time to lodge any appeal. The council consented to the late filing of the appeal and Mr Kruithof did not respond to the request.

Ngati Maru has applied for leave to appeal out of time against the decision of the Environment Court.

Held (dismissing the application for leave to appeal out of time):

(1) The Treaty of Waitangi ("the Treaty") did not contemplate a society divided on race lines between two groups of ordinary citizens, Maori and non-Maori. The Treaty contemplated that the British Crown and the Maori signatories would create a new community of both Maori and immigrants, and both groups were to have the rights of British subjects in the new community. The protection promised by the second article of the Treaty was not contemplated to give rise to social division between races. Because the Treaty recognised the need to apply British justice in New Zealand, it followed that any construction of the Act that would work injustice to non-Maori was as likely to infringe the principles of the Treaty as injustice to Maori. Since each of the competing interests was recognised by the Treaty, it was not enough simply to assert as a generality either "Maori Treaty claim to taonga" or "British subject's claim to justice". Where Treaty interests were in issue, a Court would examine closely the justice of the case, which might include the efforts made to secure a fair result that was proportionate to the competing interests. It was the responsibility of successors to the Crown, which in the context of local government included the council, to accept responsibility for delivering on the second article promise (see paras [48], [50], [51], [52], [56], [57]).

(2) It was simply inconceivable that the Environment Court could be persuaded on the facts to order Mr Kruithof to pull down the three units at the front of his property, and Ngati Maru's proposed contention on appeal was by no means clear-cut. In all the circumstances, the Court was satisfied that it would be disproportionate for a New Zealand Court to order Mr Kruithof to pull down the buildings and return the site to its prior

state. Accordingly, the application for leave to appeal out of time was dismissed (see paras [82], [83], [84]).

Cases referred to in judgment
Campbell v MGN Ltd [2004] 2 WLR 1232
Douglas v Hello! Ltd [2001] QB 967
Langridge v Wilson (1989) 3 PRNZ 341 (CA)
Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546
Minhinnick v Watercare Services Ltd [1997] NZRMA 289
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA)
Taipari v Pouhere Tangoa (New Zealand Historic Places Trust) (Environment Court, Auckland A107/97)
Thompson v Turbott [1963] NZLR 71 (CA)
Weldon v de Vathe (1877) 3 TLR 445

Application
This was an application by Ngati Maru Ki Hauraki Inc, the appellant, for leave to appeal out of time against the decision of the Environment Court of 20 January 2004 refusing the declarations and enforcement orders sought by the appellant in relation to earthworks and developments being undertaken by Cornelis Johanas Kruithof, the first respondent, after being granted a resource consent by the Thames-Coromandel District Council, the second respondent. The High Court delivered an interim judgment on 11 June 2004 and its final judgment on 30 July 2004.

P F Majurey (3 June and 29 July hearings) and *T L Hovell* (29 July hearing) for Ngati Maru Ki Hauraki Inc
R A Houston QC for Cornelis Johanas Kruithof
S McAuley (3 June hearing) and *R E Bartlett* and *N D Wright* (29 July hearing) for the Thames-Coromandel District Council

BARAGWANATH J. [1] Ngati Maru Ki Hauraki Inc ("Ngati Maru") apply for leave to appeal 13 days out of time against a decision of the Environment Court delivered on 20 January 2004. It found in favour of the first respondent, Mr Kruithof, on Ngati Maru's application to declare unlawful certain earthworks approved by the second respondent, the Thames-Coromandel District Council ("the council") , and to stop the work. It was preceded by an application to this Court by Ngati Maru for judicial review, filed on 19 September 2003, challenging the council's failure to notify Mr Kruithof's application for planning consent, which is to be heard on 4 August 2004.

[2] The proper exercise of the Court's discretion requires appraisal of the respective merits and the consequences to Ngati Maru and to Mr Kruithof of granting or declining leave. Each of the competing interests, considered in general terms and in isolation from the other, is powerful.

[3] For Mr Kruithof, Mr Houston QC urges refusal of leave on the grounds that his client has suffered grievously through no fault of his own as a result of being caught between the urbanisation of Thames, that led

him to buy in good faith two eighth-acre blocks of residentially zoned land which he reasonably expected to be able to develop in a manner generally in keeping with the environment. For Ngati Maru, Mr Majurey expressed their desire to secure recognition of ancestral lands with particular historic significance in accordance with the principles of s 6(e) and (f) of the Resource Management Act 1991 ("the RMA"):

> **6. Matters of national importance —**
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> . . .
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.

They have, he submitted, suffered grievously for generations because of failure of public authorities to recognise such taonga and heritage.

The background

Ngati Maru

[4] Ngati Maru are one of the tribes of Hauraki. Mr Wiremu Nicholls, a senior kaumatua, has described the Hape Stream as a sacred waterway. Parts of its margin were areas of sacred rites including water births, burying of the afterbirth and umbilical cord, burying of hair and nail clippings, bathing and care of the sick and wounded, healing rituals and washing and burial of the dead.

[5] He deposed that Mr Kruithof's land is located within an area of the former Pukerahui Pa which is of special significance by reason of its being adjacent to the sacred waterway.

[6] Mr David Taipari deposed that the site was part of land originally sold to meet unlawful rates demands by the predecessor of the council, a matter currently awaiting a report by the Waitangi Tribunal.

[7] Mr Pani Gage, kaumatua of Hauraki and Maori warden, recounted a history of events nearly 40 years ago and then about six years ago, what he described as "strange noises", and on the latter occasion lights flicking on and off and water running without explanation. Each appears to have been suggestive to him of breach of tapu that required karakia to achieve good wairua. He described the subject site as tapu with which the process of excavating earthworks was inconsistent.

[8] Ngati Maru argue with force that the resource consent obtained by Mr Kruithof for the proposed development was granted without notification to them in circumstances where the council well knew or ought certainly to have known that their interests were engaged, hence the proceedings for judicial review.

The effects on Ngati Maru

[9] The Environment Court in its decision of 27 August 1997 stated:

> [Ngati Maru] assert that the historical and cultural values of the site to which the application relates are such that they should be preserved. They maintain that the whole of the midden and the wider area where the Pa was located is waahi tapu, and that Ngati Maru are responsible for maintaining and upholding the deep and significant values that flow from that. To summarise, it is their case that the portion of the midden which is affected by Mr Kruithof s application under the Act cannot be dealt with as a separate entity, restricted to the boundaries of No 506, but must be seen as part of the whole area. This is said to be so because the historical and cultural value of the midden is as part of the former Pa; and it is the relationship with the Pa which gives the context to the portion of the midden which is located on the subject property. Put another way, the relationship is said to be symbiotic between the whole and each part, and the spiritual value (the wairua) is regarded as belonging to the entirety. It is claimed that granting the application would entail the permanent desecration of a waahi tapu and the irreversible loss of mana to the appellants. The evidence of the appellants and their witnesses was not challenged on any of these matters, and we respect the sincerity of their views.

[10] Ngati Maru have seen the urbanisation of Thames encroach on the ancestral land so that the need for the opportunities afforded them by the RMA, to be consulted and to secure such protection as is practicable for their rights, is the more powerful by reason of the insignificant areas of undeveloped land and opportunities for protection and recognition of their culture and identity.

Mr Kruithof

[11] Mr Kruithof too has every reason to feel aggrieved. Whereas it became clear in argument that the principal objection of Ngati Maru is to the fact of excavation, the transitional district plan and proposed district plan of the council permit as of right substantial earthworks of unlimited depth. There is no hint in those documents, prepared through the exacting procedures of the RMA, that a developer may encounter objections resulting from the character of proposed earthworks. Before buying the land Mr Kruithof consulted the council and obtained a land information memorandum which contained no suggestion of trouble. To the extent that the land was on a well-known historic pa site and near a sacred stream it was the responsibility of the council, funded by public resources, to identify significant s 6 factors and incorporate them in the planning documents on which the public should be able to rely.

[12] Inevitably there will arise unforeseeable discoveries of unknown archaeological sites. That eventuality is provided for by ss 10-11 and other provisions of the Historic Places Act 1993. Since it cannot be predicted, it is a risk that any developer must accept. But that regime cannot and should not bear the full weight of dealing with well-known areas of former Maori habitation, which should be dealt with under the RMA so that the public are alerted to problems. Otherwise, as has happened here, individuals will sustain loss and uncertainty as a result of public sector shortcomings.

[13] Mr Kruithof bought the land in 1994 from private individuals. Earlier owners included the Crown which in 1994 sold the land to private

owners with two former state houses erected on it, surrounded by urban development. Since neither the planning documents nor a land information memorandum which Mr Kruithof prudently obtained from the council contained any suggestion of Ngati Maru interest, he had very reason to think he was safe. In 1995 he made an initial application for resource consent for a relatively intensive development of the site. It proposed four units suitable for disabled persons' accommodation and one house for the use of himself and his wife. The application sought relaxation of the site area density standard and standards for outside living and service court areas. Expecting consent, Mr Kruithof erected a sign advertising for removal of the houses and placed in a local newspaper an advertisement to the same effect. On the council's advice he sought the approval of neighbouring owners. One, concerned about possible loss of morning sun, withheld approval. Mr Taipari, who lived about 90 m away from the site, was not consulted about the development proposal although he was aware that the houses had been advertised for removal.

[14] The council required the application to be notified as of a non-complying activity. Notice was published in the *Hauraki Herald* and a sign was posted on the site giving details of the application. No objection was made by Ngati Maru. Following a hearing on 23 November 1995 the council approved the application. There was no appeal against the council's decision.

[15] Following removal of the houses Mr Kruithof embarked on an excavation which was more than half complete by the time Mr Taipari contacted the council to gain information and to complain about there having been no prior consultation with Ngati Maru.

Notification of the presence of archaeological material on the site

[16] It was not until 2 May 1996 that Mr Kruithof was contacted by a council planner and told of an issue about the presence of archaeological material on the site. The same day an officer of the New Zealand Historic Places Trust, who is of Ngati Maru descent, told Mr Kruithof that no further work should be undertaken pending an examination of the site. The reason was the presence of a shell midden on the property and adjoining sections.

Authority to destroy part of the midden

[17] Following two archaeological assessments and a report from Ngati Maru of 14 October 1996 on the significance of the area, on 8 November 1996 the Historic Places Trust granted authority to destroy the part of the midden lying within the subject site. Ngati Maru appealed to the Environment Court which, following a four-day hearing in June – July 1997, accepted the evidence of two archaeologists that the subject site is of low archaeological value and that by granting authority to destroy it the archaeological value of the wider midden area of which it forms part would not be compromised or diminished to any significant degree. It recorded hearing extensive evidence relating to the overall area of the pa and a homestead building formerly located on a site now later owned by Toyota New Zealand Ltd and occupied by staff accommodation units.

The effects on Mr Kruithof

[18] Having appraised the interests of Ngati Maru as tangata whenua the Court turned to the effect of the course of events on Mr Kruithof and his wife and found that:

> . . . considerable stress, financial and otherwise, has been placed upon them. This includes servicing with a mortgage for the property, lost income from the dwellings, and lost income caused by forgoing other building work in order to concentrate on the project at 506 Rolleston Street– which project has been held in abeyance, firstly, while the applicant is waiting for authority under the Historic Places Act, and then again while these appeal proceedings have ensued. It is noteworthy that all along [Mr Kruithof] has acted in good faith, immediately ceasing work on the site and awaiting the outcome of the legal processes. He and his wife are in the unfortunate position they are through no fault of their own.

Dismissal of Ngati Maru's appeal

[19] The Environment Court found:

> We do not overlook that in the context of the resource consent process the tangata whenua were not consulted when they should have been in accordance with s 8 of the RMA. Nevertheless, we consider that when Mr David Taipiri knew via the applicant's sign on the property that the two houses were to be removed well before they were actually removed, an enquiry could well have been made of the Council by or on behalf of [Ngati Maru] so that Mr Kruithof, in turn, could have been alerted to Ngati Maru's interest before incurring the considerable expense of having the houses removed and the excavation works carried out.

[20] Ngati Maru's appeal was dismissed but, in accordance with the parties' agreement, without costs.

Lapse of the consents

[21] Mr Kruithof was however unable during the life of the resource consent and the Historic Places Trust consent to take advantage of them and they ultimately lapsed. Mr Kruithof claimed that this was because of the effect upon him and his wife of the earlier litigation on their resources.

The fresh application and the decision to waive notification

[22] On 27 May 2003 Mr Kruithof lodged an application with the council for a revised and more modest development. On 29 July 2003 the council decided to waive public notification under s 94 of the RMA and granted subdivision consent and land use consent for the construction of three units on the new front lot. It is his intention to develop the new rear lot at a later stage. On 15 August 2003 Mr Kruithof lodged an objection to certain conditions.

[23] The Historic Places Trust has accepted that there is no longer any material of relevance on site and accordingly no authority from it is required unless further archaeological material was found during further excavations.

Ngati Maru's application to the Environment Court

[24] In September 2003 Ngati Maru representatives observed trucks and diggers in operation on the site. The council did not intervene but

Mr Kruithof stopped work at that point. There followed Ngati Maru's applications both to this Court on 19 September 2003 challenging the non-notified consent and to the Environment Court for a declaration that the excavation was unlawful and for an order stopping work. Following a two-day hearing in November 2003, on 20 January 2004 the Environment Court dismissed the application.

The events between decision and application for leave to appeal

[25] Following notification of the decision to Ngati Maru on 23 January 2004, and with its time for appealing expiring on 13 February 2004, on 11 February 2004 the parties to the application for review took part in a telephone conference before Randerson J on 11 February 2004. The Judge's note records:

1. Settlement prospect.
2. Conference adjourned to 3 March 2004 at 9 am.
3. Memoranda to be filed prior to that date as to timetable if not resolved by then.

[26] Ms Broughton, who took part in the judicial telephone conference, recorded Mr Majurey's reference to timetable orders made on 5 November 2003 in the application for review proceeding and to the appeal period for the Environment Court decision expiring "this Friday" being 13 February 2004.

[27] The Judge referred to the prospect of settlement and said that the timetable would be in effect after the stated period. Mr Houston advised that the matter was "so likely to settle" he did not agree to timetabling for the judicial review.

[28] Mr Wright for the council referred to the topic of prejudice by reason of late service and appeal. While saying that his comments were subject to instructions he expressed his own view that no one would be prejudiced by a delayed period of one fortnight. Mr Houston did not address the issue of prejudice. The matter was adjourned to 3 March 2004; a memorandum addressing timetable orders was to be filed before that date if it had not settled.

[29] An affidavit by Meredith Stephens for the council recorded that following delivery of the decision the parties commenced settlement discussions. Later on 11 February following the judicial telephone conference Mr Majurey wrote to Mr Houston and counsel for the council stating:

> In order to avoid unnecessary appeal documentation (given the potential for settlement) please confirm whether or not your clients would agree to an extension of the lodging of an appeal against the Environment Court decision until Wednesday 25 February 2004.

Four days later Mr Houston responded, stating:

> Your point made that Mr Kruithof might have to remove his building should Ngati Maru succeed against the Council did not exactly pour oil upon troubled waters.

In a response of 23 February 2004 Mr Majurey stated:

> . . . our point was simply made to confirm the legal position . . . that there is a risk in Mr Kruithof proceeding in advance of the High Court proceedings and in advance of the decision of the Environment Court being appealed . . .

[30] Ngati Maru instructed Russell McVeagh to seek instructions from the parties in respect of extending the time to lodge any appeal against the decision until 25 February 2004. The deponent said that "no opposition was received from Mr Kruithof". It is not however suggested that he agreed. The affidavit, sworn on 25 February 2004, concluded:

> Settlement discussions between the parties have not been successful and, therefore, Ngati Maru instructed Russell McVeagh to lodge an appeal against the decision, together with the application for extension of time within which to appeal.

[31] On 4 March 2004 counsel for the council consented to late filing of the appeal "recognising that the delay was occasioned by the Council's need to consider further possibility of settlement".

[32] Work resumed on 20 February 2004. There are currently two house "shells" constructed on the site.

The arguments

[33] In support of the application Mr Majeury submitted that the time delay was short and the reason for the failure to file the appeal in time was due to bona fide attempts to reach settlement with Mr Kruithof, those attempts being mentioned before Randerson J in this Court on 11 February 2004. He submitted that Mr Kruithof could be under no misapprehension that he could without objection pursue his development. He submitted that in the context of the pending application for review there could be no legitimate concern that Mr Kruithof was disadvantaged by the short delay in the light of the negotiations and the fact that the underlying challenge to the legitimacy of his resource consent was plainly being pursued.

[34] Mr Houston for Mr Kruithof submitted that the time for appeal as of right having expired the Court must examine the merits and, so far as lies within its power, act to bring an end to the process of attrition in which his client has found himself embroiled.

[35] Mr McAuley for the council confirmed that the council offers no objection to Ngati Maru's application and elects to abide the Court's decision.

Discussion

[36] The principles were stated by the Court of Appeal in *Langridge v Wilson* (1989) 3 PRNZ 341 at p 343:

> The judgments of this Court on such applications always stress the wide nature of the discretion conferred upon the Court. In *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at p 91 Richmond J said:
>
> > When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court

> that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

[37] In *Thompson v Turbott* [1963] NZLR 71 at p 81 the Court of Appeal observed that:

> The justice of the case which may require leave to be given must, in our opinion, relate directly to the result of the appeal . . .

And at p 82:

> There must admittedly be situations in which a party, being led to believe that certain consequences will follow if he allows the time for appealing to go by, is disconcerted when other different, and damaging, consequences follow his inaction; but not in all cases will leave be granted on this account. It may be granted when the inaction of the would-be appellant has been due to a justifiable mistake, and especially where there has been a misconception which has been brought about or contributed to by the conduct of the successful party.

[38] The fact that Mr Houston advised that the matter was "so likely to settle" that he did not agree to the timetable for the judicial review proceeding is a point of obvious significance. It bears on his reliance on the passage from p 82 of *Thompson v Turbott*:

> Nearly all of the cases in which leave has been granted can be related to something that happened before the time expired, because of which the applicant was induced to allow the time to go by . . .

[39] On the other side is the following observation that:

> . . . where an unsuccessful party, with full knowledge of the facts as they are, deliberately, and with his eyes open, allows the time for appeal to expire, must be but rarely that he will later be allowed to revive his rights of appeal because of subsequent occurrences.

[40] Ultimately however the principle is that stated at p 80:

> The discretion given by the Rule as it now stands is in the widest terms. Where such a discretion is given, it is not desirable for the Court to attempt to lay down any general rules which will tend to fetter the discretion in other cases . . .

As was said by Bowen LJ in *Weldon v de Vathe* (1877) 3 TLR 445 at p 446:

> The Court ought not to fetter its discretion . . . but would always exercise its discretion for the purpose of doing justice.

[41] It follows that it is the responsibility of this Court to exercise its discretion according to such appraisal of the merits as is practicable with the information at present available. That includes the affidavits filed upon the application for review, the two decisions of the Environment Court and the submissions for counsel.

[42] In the course of argument an attempt was made to identify the true nature of the dispute between the parties. Expressed generally,

Mr Kruithof as the holder of fee simple title to land long used for housing and with urban zoning seeks simply to exercise the rights that he acquired at purchase without knowledge or reason to suspect the existence of any adverse claim by Ngati Maru. Whatever wrong they may have sustained by the urbanisation of their ancestral land should be the responsibility of the community as a whole and not visited upon an unfortunate single individual who happens to have acquired for legitimate purposes one of the numerous subdivided blocks within an old established urban area of Thames.

[43] Ngati Maru's argument has failed twice before the Environment Court. The evidence for the Historic Places Trust's absence of basis for requirement for further consent under the Historic Places Act appears from the report by Dr Rachel Darmody, regional archaeologist New Zealand Historic Places Trust, of 7 October 2003 recording:

> Archaeological deposits were located during the inspection of the works being undertaken by the excavator was not modifying or damaging the archaeological site. Case Kruithof explained that no new areas of land were being excavated, only the exposed area that was visible. An authority was therefore not required and work was not stopped. However, the cultural layer of midden material recorded in 1996 along with the southern portion of the property was not found when I visited the site and appears to have been destroyed at some stage by earthworks.

[44] Mr Kruithof's site is separated by a sealed driveway and an expanse of grass from the stream that is the focus of Ngati Maru's argument. I have noted that extensive excavation is permitted as of right. Ngati Maru did not claim that the site could be sterilised in his hands by a requirement to fill the area of excavation and create a de facto public reserve at his own expense.

[45] While I do not propose to anticipate the adjudication on the lawfulness of the non-notification of Mr Kruithof's application, which is to be considered at substantive trial in August, there may well be force in Ngati Maru's argument that they have reason to feel aggrieved at the non-notification. It is true that no objection was filed by Ngati Maru to the original resource consent application. But their evidence is that they were unaware of it and certainly they were not individually notified. They contend that the finding adverse to Ngati Maru in the Environment Court's decision of 27 August 1997 did not justify the council to fail to notify them of any subsequent resource consent application in the event – that manifested itself – that the first consent lapsed. Rather, they say, the interest demonstrated by Ngati Maru provided the clearest evidential basis for the council to appreciate that standard notification procedures should be gone through. It is impossible for the purpose of the present application to do more than mention Mr Houston's response which is that Ngati Maru were aware of the second application but elected to do nothing about it. Such a position would be difficult to reconcile with the considerable effort made by Ngati Maru at the two Environment Court hearings, one before and one after that stage.

[46] It is apparent that there are legal points to be run on both sides. But since Ngati Maru must face the presence of a substantial development on the site in any event it seems highly desirable that they should do so now. Section 8 of the RMA provides:

> **8. Treaty of Waitangi** — In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[47] It is sometimes overlooked that the Treaty had purposes other than those stated in the second article which have received much attention in recent times. Also of importance was the contemplation in the preamble stating, in Professor Sir Hugh Kawharu's version of the Maori text:

> . . . there are many of [Queen's] subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness. [See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at p 662.]

In the English language version the equivalent passage refers to:

> . . . the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress . . .

And to Her Majesty:

> . . . being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the Native population and to Her subjects . . .

the rights and privileges of which were extended by the third article to Maori. (See Treaty of Waitangi Act 1975, First Schedule.)

[48] It is time to recognise that the Treaty did not contemplate a society divided on race lines between two groups of ordinary citizens - Maori and non-Maori – set against one another in opposing camps.

[49] When Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at p 664 said that the Treaty "signified a partnership between races", his focus was on the treaty between two high authorities – the Maori chiefs who were signatories on behalf of their tribes and Captain Hobson who signed as representative of Queen Victoria on behalf of "the Crown", who were together creating a new society. He did not suggest that the new society of New Zealanders created by the Treaty would be a divided one with Maori on one side and non-Maori on the other side of a gap. Read fairly in context Cooke P's concept has precisely the opposite sense. So does the language of the Treaty.

[50] It contemplated that the British Crown and the Maori signatories would create a new community of both Maori and immigrants. Both Maori and non-Maori citizens were to have the rights as British subjects in the new community. The need for its "Laws and Institutions

was alike to the native population and to Her subjects". Both Hobson and the signatory chiefs agreed to what Sir Hugh translated as "the Queen's Government being established over all parts of this land . . .". That Government, of an age before universal franchise, has evolved into the present democratic New Zealand government that represents and is answerable to all New Zealanders. Hence Cooke P's description at p 664 of the New Zealand Government as "in effect one of the Treaty partners". Its obligation to give due effect to the Treaty is a continuing one.

[51] Nor was the protection promised by the second article contemplated to give rise to social division between races. While its scope has been debated, its function, in Sir Hugh's version, was to safeguard "their lands, villages and all their treasures". Since 1987 it has become natural to speak simply of "their taonga" which, as the preamble to the Maori Language Act 1987 recognises, is not confined to tangibles.

[52] Because the Treaty itself picked up the need to apply British justice in New Zealand it follows that any construction of the RMA that will work injustice to non-Maori is as likely to infringe the principles of the Treaty as injustice to Maori. Here we are faced with a collision between long-term injury to the historic interests of Ngati Maru and the immediate personal interests of Mr Kruithof who has been subjected to obviously heavy expense and distress for an unconscionable time.

[53] There is nothing unusual about a conflict between two important public interests – that of Ngati Maru to recognition of their relationship and their culture and traditions with their ancestral lands, recognised by s 6(e) and other provisions of the RMA; and that of Mr Kruithof in simple and timely justice which no less fundamental principle requires shall be neither "denied or deferred" (that is delayed): see ch 29 of Magna Carta 1297 (UK) reproduced in the *Reprinted Statutes of New Zealand* vol 30 at p 26.

[54] In *Douglas v Hello! Ltd* [2001] QB 967 at 1005 para 137 Sedley LJ was required to deal with another deep-seated conflict; the means of resolution is of present relevance. There the first interest was the powerful prima facie claim of Mr Douglas and Ms Zeta-Jones to redress for invasion of their privacy. The second was that of the defendant magazine in freedom of expression. Viewed at a general level each was inconsistent with the other. Sedley LJ held that each value was important; neither could be permitted to trump the other. Rather, he said, it was necessary to focus on the precise circumstances:

> The outcome . . . is determined primarily by considerations of proportionality.

[55] That judgment has been endorsed by the House of Lords in the case of another celebrity — *Campbell v MGN Ltd* [2004] 2 WLR 1232, where a famous fashion model's claim to respect for her private life had to be weighed against a newspaper's right to freedom of expression.

[56] Here, since each of the competing interests is recognised by the Treaty, it is not enough simply to assert as a generality either "Maori Treaty claim to taonga" or "British subject's (now New Zealand citizen's) claim to justice". Where Treaty interests are in issue a Court will examine

closely the justice of the case, which may include the efforts made to secure a fair result that is proportionate to the competing interests.

[57] It is the responsibility of successors to the Crown, which in the context of local government includes the council, to accept responsibility for delivering on the second article promise. Nowadays the Crown is a metaphor for the Government of New Zealand, here delegated by Parliament to the council, which is answerable to the whole community for giving effect to the Treaty vision in the manner expressed in the RMA. The due application of that statute will assist to "avert the evil consequences which must result from the absence of the necessary Laws and Institutions" needed to secure justice to all New Zealanders.

[58] The focus of the present dispute has narrowed to the precise nature of the substantial building to be erected on Mr Kruithof's land. The relationship between Mr Kruithof and Ngati Maru may well be long term and it may be desirable, with the issues clarified, for there to be more specific settlement discussions to bring this long-running and expensive litigation to an end. I have therefore decided before delivering final judgment to give the parties the opportunity to meet.

[59] A significant contributor to the problem has been past failures within the public sector of the need to recognise Ngati Maru's interests in the manner now required by the RMA. In its decision *Taipari v Pouhere Tangoa (New Zealand Historic Places Trust)* (Environment Court, Auckland A 107/97) the Environment Court recorded in relation to the subject site:

> For Ngati Maru it was indicated that the applicant's land was a small part of a much larger area of much significance to tangata whenua. It was also indicated that the midden remains were representative of the waahi tapu values of the larger site. Concern was expressed over the lack of consultation aspect. That concern was predictable, given the Council's extensive involvement with local iwi and the commissioning of a report "Nga Taonga o Te Kaueranga" in 1993 ("the 1993 report") which indicated the importance of the Pukerahui Pa and Taipari Homestead (to which we later refer). In the circumstances the Council should have realised that the site was of significance and concern to tangata whenua. Ngati Maru should thus have been notified of Mr Kruithof's plans prior to the hearing for resource consent with consultation occurring pursuant to s 8 of the Resource Management Act 1991 ("the RMA"). Although we record that the Council's omission was most unfortunate and without any satisfactory explanation (at least to us), we also note that the resource consent proceedings were separately brought and dealt with, and that the appropriateness of the authority granted by the Trust under the legislation applicable to the Trust is the focus of the present appeal.

The 1993 report referred to records at p 9 in relation to Thames that:

> Many of the obvious Maori heritage features had disappeared or had been forgotten over the passage of time . . . burial grounds and wahi tapu sites that were supposed to be reserved and protected were not. Buildings were constructed upon them or roads put through them.

[60] A notable increase in sensitivity has however emerged in the present generation. An amendment to the council's proposed district plan

made by the Environment Court on 30 March 2004 with the consent of Ngati Maru created in the Totara Valley a "Maori policy area" identifying sites of special significance that require particularly careful planning treatment. Contributions by both Maori and councils are required to achieve results that conform with s 8 of the RMA, to ensure a proper balance among the competing interests which it is the task of councils and the Environment Court to balance.

[61] For the future, it may be appropriate to record in planning documents the significance of the stream and whatever provision is needed to provide sensitively and sensibly in respect of development affecting its immediate surrounds. Given the past failings of the public sector, and since the council alone has access to public funding, it may consider assisting resolution by both its planning skills and experience and also a contribution to the costs of the other parties.

[62] I will defer delivering final judgment for 14 days.

Final judgment

[63] This judgment is conveniently treated as supplementary to the interim judgment of 11 June 2004, of which original paras [57] and [59] were amended following oral argument on 29 July. The numbering of that judgment is continued.

[64] In the interim judgment I outlined the background to Ngati Maru's application for leave to appeal out of time against the decision of the Environment Court which found in favour of Mr Kruithof on Ngati Maru's application to declare unlawful certain earthworks approved by the council and to stop the work. I concluded that the parties should have the opportunity to see whether their differences could be resolved by agreement. At the parties' request I extended time for negotiations. They have not resolved the dispute and, following further argument, I now give final judgment. For the reasons that follow I have concluded that Ngati Maru's application fails.

[65] In order not to prejudice the settlement negotiations in the interim judgment I did not deal with the detail of the competing submissions. It is now necessary to do so. It is to be emphasised that this case concerns only the three-unit first-stage development on the front lot of Mr Kruithof's ultimate proposal; nothing in this judgment deals with a proposed second stage.

[66] I record that the Council maintained the position of abiding this Court's decision on the application for leave to appeal out of time. But at my request Mr Bartlett outlined its argument if leave were given for a substantive appeal. I have taken this, as well as the submissions of other counsel, into account in preparing the present judgment.

Ngati Maru's application to the Environment Court

[67] Ngati Maru's unsuccessful application to the Environment Court, against whose decision it wishes to appeal, was under ss 316 and 311 of the RMA seeking an enforcement order under s 314 and declarations under s 310. The orders sought were that Mr Kruithof should:

(a) Immediately cease all earthworks/construction works at 506 Rolleston Street, Thames ("site")
(b) Restore the natural and physical resources of 506 Rolleston Street, Thames by undertaking all necessary site works, for example soil/material placement and compacting/buttressing etc to return the site to the state it was in before the works undertaken on or about 8–10 September 2003 by or on behalf of Mr Kruithof in order to:

(i) Achieve compliance with s 9(1) of the Act, especially in relation to r [432.4.6] of the proposed Thames-Coromandel District Plan
(ii) Remedy the adverse effects caused on the environment by or on behalf of Mr Kruithof (which occurred as a result of removing large quantities of soil from a wahi tapu site and which contained an archaeological site without the necessary approvals under the Resource Management Act and Historic Places Act 1993.

[68] The declarations sought were that:

(a) To undertake earthworks at 506 Rolleston Street requires a resource consent pursuant to r 432.4.6 of the proposed Thames-Coromandel District Plan.
(b) The earthworks undertaken by or on behalf of Mr Kruithof at 506 Rolleston Street, Thames prior to the date of this application contravenes s 9(1) of the Resource Management Act 1991.

The decision of the Environment Court

[69] The Environment Court, in a careful decision, refused both the declarations and the enforcement orders sought. It found the earthworks undertaken did not require resource consent under the district plan and it applied the holding in *Minhinnick v Watercare Services Ltd* [1997] NZRMA 289 at p 293:

> The Environment Court . . . has no authority to make an enforcement order where something is done or is to be done which contravenes the Historic Places Act.

The ground of appeal: lack of proper reasons

[70] The ground of appeal in this Court did not challenge these decisions. The error of law alleged is that the Environment Court failed to give proper reasons for rejecting the application for enforcement orders, especially in relation to s 319.

Section 319

[71] The application was made before buildings had been erected, at a stage when the council had granted non-notified consent to Mr Kruithof to rearrange the boundaries between 506 and 508 Rolleston Street with the new common boundary running crosswise and parallel to Rolleston Street rather than at the original right angles. By ss 11 and 87(b) resource consent was required for that purpose. It was required also to allow three units on the new front lot. I was informed from the Bar that since the development included disabled access Mr Kruithof was entitled as of right to building coverage of 40 per cent of each of the original lots.

Further, the volume of soil required to be removed from the development was in accordance with the council's rules.

[72] So only the number of units and the boundary alteration required Council consent. In terms of the interference with the earth, which was the basis of Ngati Maru's pleaded complaint, Mr Kruithof has done nothing more than is the presumptive right of any other person within the area. The three units of the first stage of the development have now been completed. That has entailed no greater interference with the earth than the permitted volume of earthwork.

[73] Mr Bartlett, whose submissions were adopted by Mr Houston, submits that it is not arguable that the case falls outside s 319(2) of the RMA and so no enforcement order can be made. Mr Majurey submits to the contrary.

[74] Section 319 of the RMA provides:

> **319. Decision on application** —
>
> . . .
>
> (2) Except as provided in subsection (3), the Environment Court must not make an enforcement order [sought] against a person if —
>
> (a) that person is acting in accordance with —
>
> (i) a rule in a plan; . . . and
>
> (b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, . . . at the time of the approval . . .

It was not submitted that subs (3) was of present significance.

[75] Mr Bartlett argues that Ngati Maru did not plead in its applications to the Environment Court that the Court had power under s 319(2) of the RMA to issue enforcement orders even where the activity complained of was permitted under the plan. Mr Majurey responded that the point was the subject of argument and one with which the Court was bound to deal.

[76] I accept Ngati Maru's argument that the point was of such importance as to engage the principles stated in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, paras [79] – [82]. The Environment Court did not deal directly with the point, to which the following part of the judgment is relevant:

> [27] Finally, rule 432.4.6 is pointed to for Ngati Maru. That provision lists the following as a discretionary activity:
>
> > Earthworks within the vicinity of an archaeological site, waahi tapu or waahi tapu area listed in a Heritage Register.
>
> [28] As to this last-mentioned provision, the plan incorporates two heritage registers – one for the Thames part of the district and the other for the general area of the Coromandel – hence the reference to "a Heritage Register". We accept Mr Wright's submission for the Council that at the time the earthworks were undertaken in September the allotment comprising 506 Rolleston Street was not referred to in a heritage register under the plan as having located on it an archaeological site, waahi tapu or waahi tapu area. Neither was there any other form of record prepared by the Council outside the plan that one could describe as a "heritage register". A Council-generated

> GIS plan was produced in evidence purporting to show the location of the site labelled T12/962 on a property other than 506 Rolleston Street. However, that document was not publicly available in September last and cannot, in our view, be relied on for the purpose of invoking rule 432.4.6 in reference to 506 Rolleston Street.
>
> [29] However, the question arises whether the identification with the number allocated by the New Zealand Archaeological Association is sufficient to bring the rule into play. In our view it is not. The Association mentioned is not within the Council's jurisdiction or authority, and its records are open to compilation and modification without a landowner having any opportunity to make a submission to the Council as to whether his or her property should, through the action of the Association outside the planning process, be caught by rule 432.4.6. It would, indeed, be unfair to a landowner seeking to develop a residentially-zoned site if his or her site were liable in terms of the rule to fall under some additional "register" outside the plan, on the basis of assumed accuracy of detail and location, and over and above the plan's specific register provisions.

[77] The question is what this Court should now do. Mr Bartlett submitted that "the adverse effects [of interference with the earth] were expressly recognised by the [council when it] approved the plan . . . at the time of the approval [by enacting rule 432.4.6]", and so the case falls within the s 319(2) prohibition against making an enforcement order. Mr Majurey argued that there can be no "express recogni[tion] . . . at the time of the approval" unless there is a site-specific list of properties affected and so the prohibition does not apply.

[78] I do not propose on a leave application to determine a point of construction of s 319(2) where that is not essential to my decision to decline leave. Certainly there is a high level of specificity in the reference by rule 432.4.6 to whatever earthworks are listed in a heritage register. But because of my conclusion on the next issue I leave the point undetermined.

Does Ngati Maru have an arguable case for the orders sought?

[79] The fact that Ngati Maru, which has exhibited energy and ability in other spheres, did not secure the making of such entry as would give notice to Mr Kruithof of risk in acquiring the property, is however a factor relevant to a decision whether it has an arguable case for the orders sought, which is the pivotal issue.

[80] Given Mr Houston's advice that the matter was "'so likely to settle' that he did not agree to the timetable for the judicial review proceeding" (para [38]) I would not have regarded the 13-day delay in appealing as justifying refusal of leave had I considered Ngati Maru's proposed contention on appeal to be arguable. But I am satisfied that it is not.

[81] Ngati Maru's submission is that facts deposed to by Mr Nicholls and summarised in para [4] of the interim judgment provided such basis for a contention that the Environment Court had erred as to justify a grant of leave to be argued in accordance with the principles stated at paras [36]–[40]. It submits that the combination of its s 319(2) argument and the fact that Mr Kruithof has long been aware of its position

and of the prospect of appeal meant that he courted risk by electing to complete the building and should not be permitted to take advantage of that. Moreover, I add, it is for the Environment Court, not this Court, ultimately to make any determination under ss 314 and 310. Viewed apart from the actual facts of this case there is intellectual force in the argument.

[82] But whatever the true construction of s 319(2) I am satisfied that it is simply inconceivable that in the end the Environment Court could be persuaded on the present facts to order Mr Kruithof to pull down the three units at the front of his property.

[83] The reasons are:

- The recent history of this matter until the challenged decision of the Environment Court as recounted in paras [11]–[24] and [42]–[44].
- The property is in the heart of the town of Thames. It comprises two small residential sections which, subject to s 319(2), Mr Kruithof is entitled to develop as of right.
- Mr Kruithof purchased the property in good faith and proceeded to remove the existing state houses and made a successful planning application for its development without objection.
- He succeeded after a heavily defended hearing before the Environment Court on the Historic Places Act appeal.
- The challenge to the earthworks was in respect of removal of earth to a degree that was authorised by the council's plan.
- He has had to undergo another full hearing before the Environment Court, which has pronounced in his favour.
- The proposed contention on appeal under s 319(2), while arguable, is by no means clear-cut.
- While I attempted in the interim judgment to articulate Ngati Maru's grounds of concern, it is to be borne in mind that, despite their importance, the ss 8 and 6(e) provisions, among others in the RMA which provide for recognition of Maori values, do not give them the status of trumps. They are to be evaluated by the decision maker, whether counsel or Environment Court. While this Court on appeal will correct error, like any judicial tribunal, it will strive to maintain a sense of proportion. Mr Majurey did not submit that the evidence of Mr Gage summarised at para [7] or any other evidence could justify the sterilisation of Mr Kruithof's land and prevent continued residential development.
- I gave the parties the opportunity to consult in case some redesign of the development might meet Ngati Maru's concerns and be acceptable to Mr Kruithof. Mr Majurey argued, and I accept, that Mr Nicholls' evidence about the significance of land adjoining the Hape Stream extended in a general way to the subject site. But he was unable to articulate exactly what relief short of demolition might realistically be contended for on a reference back to the Environment Court. Whether or not a major redevelopment would warrant reappraisal of how the vicinity of the stream should be handled, he failed to satisfy me that there is arguably such nexus between the facts deposed to by Mr Nicholls and the removal from

the subject site of the volume of earth permitted under the council's plan as to warrant demolition.

- In all these circumstances I am satisfied that it would be disproportionate for a New Zealand Court to order him to pull down the buildings and return the site to the state it was in prior to 8–10 September 2003. No alternative remedy was proposed.
- Reverting to s 8, for Mr Kruithof to be exposed further to the cost, uncertainty and delay of this litigation would deprive him of the important right of a British subject to be left alone in the peaceful possession of his property where there is no sufficient countervailing interest.

[84] For these reasons the application for leave to appeal out of time is dismissed.

[85] I will receive memoranda as to costs filed within 14 days.

TAB 13

ORIGINAL

Decision No: C 74 /97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 358 of the Act

BETWEEN **PROSPECTUS NOMINEES**

RMA: 463/97

Appellant

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson - (Sitting alone pursuant to section 279 of the Act)

HEARING at **CHRISTCHURCH** on the 11th day of July 1997

COUNSEL

Mr A More for the applicant (appellant)
Mr N S Marquet for the respondent

DETERMINATION AS TO COMMENCEMENT OF RESOURCE CONSENT

Introduction

The appellant, Prospectus Nominees ("the applicant") obtained a subdivision consent from the Queenstown Lakes District Council ("the Council") in relation to the applicant's land known as Penrith Park on the shores of Lake Wanaka. The applicant was unhappy about two of the conditions of consent and after objecting

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

(unsuccessfully) to the Council under section 357 of the Resource Management Act 1991 ("the Act") about the conditions has appealed to this Court under section 358 of the Act (although the appeal is headed as being under section 121). The only issues for the Court to decide in the substantive appeal are:

(a) whether the assessed contribution of $136,300 to the sewerage system is fair and reasonable;
(b) whether the reserve fund contribution should be by way of land or a sum of money.

At first sight the effect of the narrow limits to the appeal is that a consent cannot now be refused. The subdivision consent is given - the only issues are the terms on which it goes ahead.

The appellant has now applied to the Court under section 116(1) of the Act for a determination that the resource consent should commence immediately despite the appeal having not yet been heard. The Council opposes that course. This decision relates only to that issue, not the substantive appeal.

Background

There is an uncontested affidavit by one of the Council's officers, Mr D G Richardson, which gives the history of the site and the subdivision consent. The applicant's land is at the northern tip of Beacon Point, a peninsula jutting out into the lake north of Wanaka township. The land was zoned under the district plan for rural purposes until recently. In February 1995 a plan change came into effect which created two zones known as Penrith Park 1 and 2: these are residential zones allowing average lot sizes of 1,000m^2 and 3,000m^2 respectively. In September 1996 the applicant applied for consent to subdivide 58 allotments in the two zones with proposals:

(a) that the allotments be serviced by a private sewerage scheme which connects to a public scheme at the Bremner Bay pump station; and

(b) that lower lying land by the lake be taken as reserve, rather than that a cash reserve fund contribution be paid by the applicant under section 358 of the Act.

As stated earlier, the Council granted subdivision consent subject to conditions, two of which have been appealed against by the applicant.

For the specific application under section 116(1) with which I am concerned, there are two relevant preliminary points: first the application for subdivision consent was for a non-notified controlled activity so there are no other parties who need to be heard. Secondly the applicant has volunteered a bond for the full amount sought by the Council for contribution to sewerage and the reserve fund contribution. Thus the (undecided) question in ***Watts and Hughes Projects v Auckland City Council*** (A84/96) as to whether the Court has authority to impose a condition requiring a bond on a determination under section 116(1) is not an issue here.

Mr Richardson stated in his affidavit that if the financial contribution as assessed by the Council is not paid in full the Council would have to withhold connection to the public system

> *"as the effect of a requirement to upgrade caused by the subdivision would be an adverse effect on the general rate fund to an extent that it would not be in the public interest."*

Thus the main issue in this case is whether the Council is prejudiced by the applicant commencing its resource consent before determination of the appeal on the two conditions in issue. The applicant's position is, in effect, not that there is

no prejudice to the Council but that the Council has already accepted the risk of that "prejudice".

The applicant also stated through its counsel that there was a need for urgency thus, in effect, claiming it is more prejudiced than the Council if the consent cannot commence [see ***Ngati Rauhoto Land Rights Committee v Waikato Regional Council*** (A7/97]. If the applicant had relied on commercial demands (even the urge to profit as soon as possible) as creating the need for urgency that would be proper (as in ***Ngati Rauhoto***). Rather surprisingly, Mr More said from the bar that the urgency was elsewhere: the applicant had already carried out earthworks and wishes to carry out further work to remedy a dust nuisance. Jumping the gun like that is not a factor designed to make the Court exercise a discretion in the applicant's favour. And if there is a real dust nuisance then there are other remedies. For the Council, Mr Marquet stated that the Council would not stand in the way of any necessary remedial work.

The Statutory Provisions

The Council's power to impose a condition as to financial contribution towards sewerage costs is contained in section 407(1) of the Act. This states:

> *"(1) Where an application for a subdivision consent is made in respect of land...where the district plan does not include relevant provisions of the kind contemplated by section 108(1)(a) or 220(1)(a) the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under section 208(3)...of the Local Government Act 1974 as if those sections had not been repealed by this Act."*

My understanding is that the transitional plan does not contain provisions of the kind referred to in sections 108 and 220 of the Act - it refers to section 283(1) of the Local Government Act 1974 (called "the LGA"): see ***Willowridge Developments Ltd v Queenstown-Lakes District Council*** [1996] NZRMA 488. Therefore section 283 LGA applies. It states:

> *"(1) In any case where the council is of the opinion that all or any part of the land in respect of which a scheme plan is submitted to it for approval is intended to be used solely or principally for...residential purposes...the Council may, as a condition of its approval of the scheme plan, require the owner -*
>
> *(a) where an existing public...drainage system...is available to service the subdivision (being a system within or contiguous to the land in the subdivision), -*
>
> *(i) to pay, or enter into a bond to pay, to the Council such amount as the Council considers fair and reasonable for or towards the cost of upgrading the said system:*
>
> *(ii) to supply and lay within the subdivision necessary pipes and ancillary equipment for...drains...and ancillary equipment...as the case may be to the satisfaction of the Council:*
>
> ...
>
> *(c) where any such system is not available, but is likely to be available within a period of five years, to pay, or to enter into a bond to pay, to the Council such amount as the Council considers fair and reasonable for or towards the cost of providing such a system to*

serve the subdivision, and of providing water, drainage, electricity or gas connections from that system to the subdivision or to any allotments in the subdivision.

(2) The liability of the owner under sub-section (1) of this section shall be limited to the extent to which the works in respect of which he is so liable serve or are intended to serve the land in the subdivision."

(Section 283(7) of the LGA states that for the purposes of the section *"drainage"* includes sewerage drainage.)

Evaluation

A first reading of section 283 of the LGA suggests that the real issues on the substantive appeal (as it relates to sewerage) are whether the amount assessed by the Council is *"fair and reasonable"*, and possibly whether there is jurisdiction to impose a contribution upon the applicant in the particular facts of this situation, where a private sewerage scheme is also involved. However Mr Marquet's submission was, as I understood it, that if the Council does not receive the full amount of $136,300 then it may refuse to connect the property to the public system at all. And, he continued, such a power would be prejudiced if the applicant had started (or, rather, continued) work on the subdivision because the consent had started under a section 116 determination.

I accept that there are at least two stages at which a Council may refuse to promote a private person's wishes on grounds of expense to the public purse and the ratepayers in particular. First it would have been open to the Council to have refused the **plan change** promoted by the applicant on the grounds that it would cause unnecessary expense to the ratepayers: ***Bell v Central Otago District Council*** (Decision C/4/97).

In this case the Council did not do so. Instead it allowed the plan change whereby residential development became a non-notifiable controlled activity.

Secondly, since the plan, even as amended by the plan changes creating the Penrith Park zones, is still a transitional district plan under the Act, section 406 of the Act applies. That means that on any subdivision application - even for a subdivision consent as a controlled activity - the Council still had power to refuse consent on public interest grounds such as the cost to ratepayers of supplying necessary services. This point has been recently confirmed by the High Court in its decision ***HM Murray and Others v Whakatane District Council*** (High Court, Rotorua CP20/96, Elias J, 2/7/97).

The Council should have been aware of its problems with sewage disposal in Wanaka at least since 31 May 1996 - the date of the *Willowridge* decision. There the Planning Tribunal stated:

> *"It is plain to us that the sewerage and water services at Wanaka need upgrading and that they have been in this state for some time. It is unfortunate therefore that the appellant's land was zoned residential...The reality is that without the upgradings, future development such as those proposed by the appellants will not be adequately serviced."* ([1996] NZRMA 488 at 496).

So in this case the Council had both knowledge of the problem and a second chance to prevent the subdivision because of the expense of connecting to the sewerage system. It chose not to refuse consent to the applicant and instead granted consent subject to conditions (including the two appealed against). Despite that Mr Marquet suggested, if I understand him correctly, that the Council could even at this late stage, and despite the wording of section 283 LGA, insist that the sewerage

contribution is so fundamental it cannot be changed and that without its consent must be refused. He could give no authority for that except for one interlocutory decision in ***Willowridge.***

Willowridge is remarkably similar to the present case: it also concerned a subdivision at Wanaka which had been granted consent by the same Council; again the appellant had appealed only against conditions, and had also applied under section 116 of the Act for early commencement of the consent.

In his interlocutory decision (C54/95) on the section 116 application Judge Skelton stated:

> *"In a minute to parties...I suggested that this appeal might raise the whole question as to whether the subdivision consents should have been granted in the first place. I asked counsel to consider that matter. For this reason I was not prepared to make an order under section 116 of the Act at the time the application was filed.*
>
> *At the resumption of the substantive hearing on 16 August 1995 counsel for the appellant, Mr Butler, renewed this application and after some discussion counsel for the respondent, Mr Marquet, confirmed his consent. It is apparent now that the fundamental question raised in my minute will not have to be considered".*

The difference in the present case is that the Council does not consent, consequently the *"fundamental question"* does have to be considered.

Judge Skelton has kindly drawn my attention to an earlier decision of his - ***Sydenham Holdings Ltd v Christchurch City Council*** (1981) 8 NZTPA 8 - on this

point. There the Planning Tribunal held a condition of consent was unreasonable. The Court was then asked to sever the condition. It held:

> *"In this case it [i.e. the condition] is so clearly an integral part of the consent given that if it is to go, then, in the absence of anything more, the whole consent should go."* (ibid p.12).

A similar approach in this case raises a number of questions which have not been argued:

- whether in respect of an appeal under section 358 (or 120) of the Act, the resource consent can be set aside notwithstanding that the appeal is about conditions only?
- whether there is a difference between *"essential"* (or *"integral")* and *"ancillary"* conditions?
- whether a condition which relates to contributions under section 283 LGA is essential?
- whether it makes a difference if the condition under section 283 LGA is challenged in full (for example as being ultra vires) or merely as to whether it is *"fair and reasonable"?*

Determination

In summary, I am left in the rather unsatisfactory position that

(a) the applicant says there is urgency - but this is caused by its own, apparently illegal, actions in starting site work;

(b) the Council (in reality the ratepayers) is facing real prejudice in the form of a bigger bill for sewerage works then anticipated (not for the first time in Wanaka as *Willowridge* shows).

(c) it is arguable (but unlikely) that the Council now has power to refuse to connect the applicant to the public sewerage scheme, and/or that the Court at the substantive hearing has jurisdiction to refuse consent altogether.

In the circumstances I am (just) not prepared to determine that the resource consent should start now. Prospectus Nominees' application is dismissed. However this is without prejudice to the applicant's right to reapply under s.116(1) if it does not wish to wait for the substantive hearing and believes it has answers to the questions I asked on the previous page of this decision.

Costs are reserved.

DATED at **CHRISTCHURCH** this 17th day of **July** 1997.

J R Jackson
Environment Judge