Kāinga Ora – Homes and Communities

Western Bay of Plenty District Plan Change 92

Bundle of Relevant Cases and Consent Orders

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2336
[2017] NZHC 138

BETWEEN	ALBANY NORTH LANDOWNERS Plaintiff
AND	AUCKLAND COUNCIL Defendant

[Continued over page]

Hearing: 28 November - 2 December 2016

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

Judgment: 13 February 2017

JUDGMENT OF WHATA J

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

CIV-2016-404-2298

BETWEEN	AUCKLAND MEMORIAL PARK LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2323

BETWEEN	AUCKLAND UNIVERSITY OF TECHNOLOGY Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2333

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2335

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2351

BETWEEN	BUNNINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2326

BETWEEN	CHARACTER COALITION INC LTD & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2327

BETWEEN	CHARACTER COALITION INC LTD & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2322

BETWEEN	STEPHEN HOLLANDER Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2321

BETWEEN	HOWICK RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2320

BETWEEN	JPR ENTERPRISES & ORS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2324

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

CIV-2016-404-2325

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

CIV-2016-404-2349

BETWEEN	THE STRAITS PROTECTION SOCIETY INCORPORATED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2350

BETWEEN	STRAND HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2344

BETWEEN	SUMMERSET GROUP HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2305

BETWEEN	VALERIE CLOSE RESIDENTS GROUP Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2341

BETWEEN	VILLAGE NEW ZEALAND LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2316

BETWEEN	WALLACE GROUP LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2331

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

CIV-2016-404-2302

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

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Introduction

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

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

A guide

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

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

(b) Did the IHP have a duty to:

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

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

(c) Was it lawful for the IHP to:

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

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

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

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

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

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

(*The Preliminary Questions*)

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

PART A: THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Acknowledgement

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

PART B: BACKGROUND AND FRAME[1]

Establishment of Auckland Council, adoption of Auckland Plan

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

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

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

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

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

3 Resource Management Act 1991, s 59.

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

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

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

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

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

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

New legislation for development of the AUP

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

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

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

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

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

Notification of the draft PAUP

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

Section 32 Report

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

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

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

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

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

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13 Auckland Council *Section 32 Report – Part 1 for the Proposed Auckland Unitary Plan* (30 September 2013) at 15.
14 At 45-46.
15 Section 126.
16 Auckland Council *2.1 Urban form and land supply – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 4.
17 At 5.
18 At 4.
19 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) at 65.

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

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

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

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

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

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

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

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

21 At 34.

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

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

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

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

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

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

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

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

24 Auckland Council, above n 22, at 8.

25 At 8.

26 At 9.

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

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

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

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

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

The Report states:[32]

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

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

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

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

Notification of the PAUP

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

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

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

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

The IHP: Role, Function

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

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

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

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

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

The issue of scope emerges

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

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

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

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

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

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

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

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

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

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

47 At 47, 49 and 69.

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

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

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

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

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

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

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

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

50 Overview Report at 49–50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> or further submitter, and for whom the opportunity to participate in the process is restricted to Environment Court appeal.
>
> e) in the interests of upholding the principle of natural justice and procedural fairness, withdraw that part of its evidence relating to 'out of scope' zoning changes (other than minor changes correcting errors and anomalies).

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

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

The hearings on rezoning and precincts

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

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

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

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

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

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

IHP Recommendations

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

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

(a) Topic 013, Urban Growth;

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

(c) Topics 059 to 063, Residential Zones;

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

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

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

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

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

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

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

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

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

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

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

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

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

Topic 013 – Urban Growth

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

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

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

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

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

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

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

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

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

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

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64 At 6.
65 At 7.

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

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

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

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

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

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

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

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66 At 17.

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

68 At 8.

69 At 9.

70 At 13.

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

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

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

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

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

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

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

Topics 059-063 – Residential Zones

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

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

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

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

[74] The IHP notes that:[78]

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

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

[75] Further:[79]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal and review rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thresholds for appeal and review

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

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

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

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

PART C: THE PRELIMINARY QUESTIONS

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

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

The legislative frame

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

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

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

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

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

Recommendations must be provided in reports

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

(8) Each report must include—

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

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

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

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

(ii) the matters to which they relate.

(9) Each report may also include—

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

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

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

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

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

…

> (f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:
>
> (i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2), 165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:
>
> (ii) any other provision of the RMA, or another enactment, that applies to the Council's preparation of the plan.

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

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

The IHP approach to scope

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

(a) Consideration of:[95]

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

(ii) The submissions and further submissions;

(iii) Material lodged by the Council and submitters;

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

(v) The Auckland Plan; and

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

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

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

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

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

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

(i) Format/language changes;

(ii) Structural changes;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Argument (in brief)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assessment

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

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

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

(a) Addresses the relevant statutory criteria;

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

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

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

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

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

The statutory criteria

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Policy of public participation

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

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

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

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

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

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

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

The scheme of Part 4 and the RMA

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

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

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

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

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

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

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

Orthodoxy

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

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

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

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

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

The Clearwater two step test

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

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

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

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

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

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

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

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

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

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

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

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

a) The policy behind the variation;

b) The purpose of the variation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

151 Section 32A.

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

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

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

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

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

Summary

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

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

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

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

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

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

Did the IHP have a duty to:

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

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

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

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

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

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

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

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

Assessment

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

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

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

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

(a) Identification of out of scope recommendations;

(b) Grouping of submissions by topic; and

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

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

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

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

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

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

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

Was it lawful for the IHP to:

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

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

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

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

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

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

Assessment

[148] The answer to both questions is yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

161 At [151].

Palmerston North City Council v Motor Machinists Ltd

High Court Palmerston North CIV 2012-454-0764; [2013] NZHC 1290
13, 20 March; 31 May 2013
Kós J

Resource management — Appeals — Proposed district plan change — Whether submission "on" a plan change — Whether respondent's submission addressed to or on the proposed plan change — Procedural fairness — Potential prejudice to people potentially affected by additional changes — Whether respondent had other options — Resource Management Act 1991, ss 5, 32, 43AAC, 73, 74, 75 and 279 and sch 1; Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The Council notified a proposed district plan change (PPC1). It included the rezoning of land along a ring road. Four lots at the bottom of the respondent's street, which ran off the ring road, were among properties to be rezoned. The respondent's land was ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned. The Council said the submission was not "on" the plan change, because the plan change did not directly affect the respondent's land. The Environment Court did not agree. The Council appealed against that decision.

Held: (allowing the appeal)

The submission made by the respondent was not addressed to, or "on", PPC1. PPC1 proposed limited zoning changes. All but a handful were located on the ring road. The handful that were not on the ring road were to be found on main roads. In addition, PPC1 was the subject of an extensive s 32 report. The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would have reasonably required s 32 analysis to meet the expectations of s 5 of the Act. It involved more than an incidental extension of the proposed rezoning. In addition, if incidental extensions of this sort were permitted, there was a real risk that people directly or potentially directly affected by additional changes would be denied an effective opportunity to respond as part of a plan change process. There was no prejudice to the respondent because it had other options including submitting an application for a resource

consent, seeking a further public plan change, or seeking a private plan change under sch 1, pt 2 of the Act (see [47], [49]).

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

Other cases mentioned in judgment

Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145 (HC).

General Distributors Ltd v Waipa District Council (2008) 15 ELRNZ 59 (HC).

Halswater Holdings Ltd v Selwyn District Council (1999) 5 ELRNZ 192 (EnvC).

Naturally Best New Zealand Ltd v Queenstown Lakes District Council EnvC Christchurch C49/2004, 23 April 2004.

Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1 (HC).

Appeal

This was an appeal by the Palmerston North City Council against a decision of the Environment Court in favour of the respondent, Motor Machinists Ltd.

JW Maasen for the appellant.

B Ax in person for the respondent.

KÓS J. [1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between

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1 Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.
(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.
(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

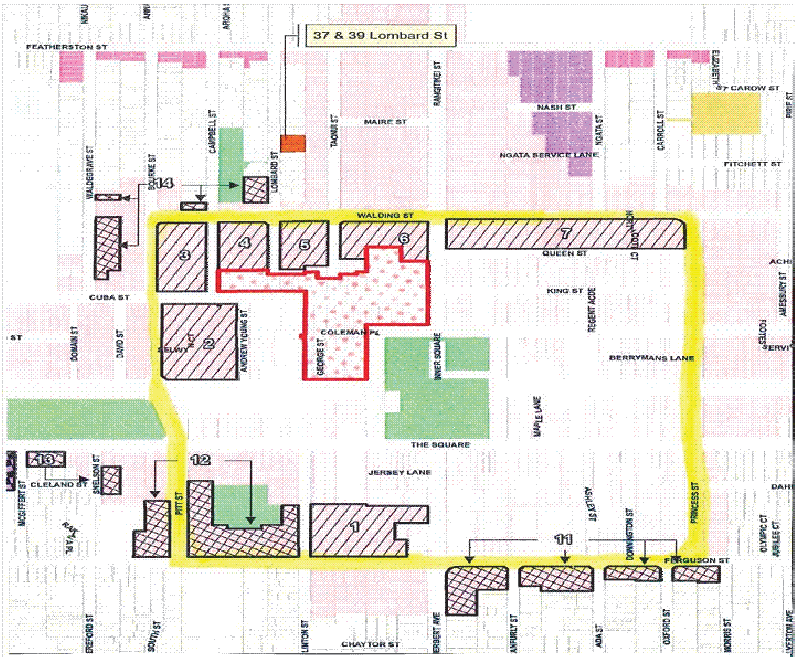
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but

does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 ha of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use

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2 In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by sch 1, cl 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council*.[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and
(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous

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

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619 m^2 to the 7.63 ha proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in sch 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did cl 7 of sch 1 require the local authority to notify persons who might be affected by submissions. Instead just a public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that sch 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater*.

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under sch 1, cl 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with sch 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Second, there is the consultation required by sch 1, cl 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Third, there is notification of the plan change. Here the council must comply with sch 1, cl 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either —
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.
6 Section 32(4).
7 Section 32(6).
8 Schedule 1, cl 3(2).

[37] Fourth, there is the right of submission. That is found in sch 1, cl 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

> **Making of submissions**(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
>
> (2) The local authority in its own area may make a submission.
>
> (3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).
>
> (4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include —*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**(1) A local authority must give public notice of —

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9 Schedule 1, cl 5(3)(b).
10 Section 43AAC(1)(a).

(a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
(b) where the summary of decisions and the submissions can be inspected; and
(c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
(d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
(e) the limitations on the content and form of a further submission.

(2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixth, there is a limited right (in cl 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

Certain persons may make further submissions(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
(a) any person representing a relevant aspect of the public interest; and
(b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
(c) the local authority itself.

(2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within cl 8(1)(a). For a person to fall within the qualifying class in cl 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what cl 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms cl 8. It is worth setting out the relevant part of that report in full:

Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.

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11 See at [25] above.

> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by cl 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of cl 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10-day timeframe provided for in cl 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a cl 5(1A) equivalent in cl 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, pt 2, cl 22, states:

> **Form of request**

(1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].
(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?
(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council*.[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater*. *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council*.[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater*. That gloss was disregarded in *Option 5*. I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
13 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";
(b) an approach in which "on" is treated as meaning "in connection with"; and
(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].
17 At [59].
18 At [65].

the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Second, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) to further lower the minimum sub-division lot size; and
(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26]–[44]. Much of what is said there remains relevant today. It noted among other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
22 At [38].

[61] The Court noted that the statutory scheme suggested that:[23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under cl 5 notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

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23 At [41].
24 At [42].
25 At [44].
26 At [51].

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42 was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*.[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another

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27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).
28 At [34].
29 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

High Court decision in *Countdown Properties Ltd v Dunedin City Council*.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within sch 1, cl 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).
34 Nolan (Ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under sch 1, pt 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the sch 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in cl 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the sch 1 plan change process beyond the original

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35 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

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

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under sch 1, cl 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as

the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
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> ...
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> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
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> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three

options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10-day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater.*

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under sch 1, cl 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council*.[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable

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

37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

39 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under sch 1, pt 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Reported by: Carolyn Heaton, *Barrister and Solicitor*

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 136

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to cl 14 of Schedule 1 to the Act
BETWEEN	CATHERINE MARY MACKENZIE
	(ENV-2017-WLG-000016)
	Appellant
AND	TASMAN DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer sitting alone under s 279(1)(e) of the Act
Hearing:	In Chambers at Wellington
Counsel:	P McMillan for the Appellant
	C P Thomsen for the Respondent
Date of Decision:	30 August 2017
Date of Issue:	30 August 2017

DECISION AS TO SCOPE

A: Appellant's submission held not to be "on" plan change

B: Appeal dismissed

C: No reservation of costs

REASONS

Introduction

[1] On 30 January 2016 Tasman District Council (the Council) notified –

Proposed Plan Change No 60.

Rural Land Use and Subdivision Policy Review (PC60).

PC60 proposed a series of changes to various aspects of the Tasman Resource

Management Plan (the District Plan) which were to apply in a number of rural zones contained in the District Plan. It is apparent from considering the documents forming part of PC 60 that the word "rural" is a generic reference to land contained in Rural, Rural Residential and Rural Residential Closed Zones of the District Plan.

[2] Catherine Mary Mackenzie (the Appellant) is the owner of land situated at Awaroa in the Tasman District. Her land is shown on Map 79 of the District Plan as being in the Rural Residential Closed Zone. The subdivision of land contained in the Rural Residential Closed Zone is subject to the provisions of Rule 16.3.8.7 of the District Plan which relevantly provides:

> Except as provided for in rule 16.3.8.6: (not relevant in this case)
>
> (a) Subdivision in the Rural Residential Closed Zone in ... Awaroa ... is a prohibited activity for which no resource consent will be granted.

PC60 did not propose any changes to Rule 16.3.8.7 (nor any other complementary provisions of the District Plan giving effect to that prohibition).

[3] The Appellant (in conjunction with a number of other property owners at Awaroa) filed a submission in respect of PC60. The heart of that submission is to be found in paragraph C which provides as follows:

> C. The submission is made with regard to section 79 of the Resource Management Act, and contests the Council's omission to propose alteration of that zoning, or the rules and restrictions defining and affecting the Residential Closed zone. The submitters believe that they do require alteration, involving consideration of the matters raised in this Review. The submitters note that some of the proposed changes go some way to acknowledge the widespread concern in Golden Bay that current restrictions on subdivision and occupancy are too inflexible, or too restrictive, and result in serious interference with proper development that could enhance the environment, including its social, cultural and amenity values.

[4] The submission went on to set out a number of grounds supporting the submitters' belief that either the zoning of the land at Awaroa or the relevant subdivision rules required change. It is not necessary to set them out in full here. It is apparent from paragraph J of the submission that the relief which the submitters sought was that "the land should be under rules which permit subdivision, and more dense settlement of the land". The submission went on to state:

> The submitters seek changes to achieve at least the flexibility that will apply to other

> rural residential areas. but reflecting the irrelevance of restrictions such as those designed to prevent loss of high value soils. They accept (and seek) conditions reflecting the unique character of the area. For example, that is why they do not necessarily expect conventional subdivision into equal rectangular blocks. They want criteria to limit the visual impact of multiple dwellings. They want consideration of offsets that will protect open space and provide for community uses.

In short, the Appellant sought the uplifting of the prohibition on subdivision applicable to her land contained in the Rural Residential Closed Zone. That could be achieved by either a change of zoning or change of rules.

[5] The Council refused to consider the Appellant's submission, determining that it was "out of scope". The Council Decisions version of PC60 did not make changes of the kind sought in the Appellant's submission either as to zoning or rules.

[6] The Appellant disputes the Council's determination that the submission which she filed was out of the scope of PC60. Additionally, she raises issues as to the merits of the submission and seeks that the Court makes amendments to PC60 of the kind sought in the submission.

[7] This preliminary decision deals solely with the legal issue of whether or not the submission was within scope.

Clause 14 – Schedule 1 RMA

[8] The starting point for considering issues of scope is cl 14 of Schedule 1, Resource Management Act 1991 (RMA). Clause 14 defines the circumstances in which persons may appeal to the Court from decisions on the preparation of district and regional plans and relevantly provides:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or
>
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.

(2) However, a person may appeal under subclause (1) only if—

(a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and

(b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

[9] Clause 14(2)(a) contains two joint requirements for there to be a valid appeal:

- An appellant must have made a submission on a proposed plan; and
- The appellant must have referred to the provision or matter under appeal in his/her/its submission.

There is no dispute that the Appellant referred in her submission to the current provisions of the District Plan as they relate to the prohibition of subdivision of land in the Rural Residential Closed Zone at Awaroa. The matter at issue is whether or not that submission was "on" PC60.

[10] Whether or not a submission is on a plan change has been the subject of a number of decisions of this and the higher Courts. It appeared to be common ground between the parties that the leading cases on this particular issue are the High Court decisions in *Clearwater Resort Ltd v Christchurch City Council*[1] (*Clearwater*) and *Palmerston North City Council v Motor Machinists Ltd*[2] (*Motor Machinists*).

[11] *Clearwater* set out a conjunctive two part test, identifying that a submission is only on a plan change if it:

- Addresses the extent to which a plan change or variation changes the pre-existing status quo; and
- Does not permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected.[3]

[12] In *Motor Machinists*, Kós J elaborated on the *Clearwater* approach in these terms:

[80] For a submission to be on a plan change, therefore, it must address the proposed

---

1 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

2 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

3 Appellant's legal submissions, para 29. Council's submissions, para 17.

> plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.
>
> [81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. ... Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. ...
>
> [82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. ... To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources.

[13] The first of the *Clearwater* tests requires that for a submission to be on a plan change, that submission must address the extent to which the plan change changes the pre-existing status quo. In considering the extent to which PC60 changes the status quo, I have had regard to the provisions of the s 32 evaluation forming part of the plan change documents. In *Motor Machinists* Kós J identified analysis of the s 32 evaluation as a means of determining whether or not a submission fell within the ambit of a plan change[4]. I recognize that it is not a test in its own right but rather a means of analyzing the status quo issue and that there may be other means in any given instance. In this instance consideration of the s 32 evaluation is of particular relevance in addressing the first test.

[4] Para [12] (above).

[14] An evaluation report under s 32 (s 32 evaluation) is a mandatory component of the plan change process. Section 32(1) provides as follows:

> 32 **Requirements for preparing and publishing evaluation reports**
>
> (1) An evaluation report required under this Act must—
>
> (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
>
> (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
>
> (i) identifying other reasonably practicable options for achieving the objectives; and
>
> (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
>
> (iii) summarising the reasons for deciding on the provisions; and
>
> (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

Section 32(1) requires an examination of the "objectives of the proposal being evaluated". What are the objectives of the proposal being evaluated in this case?

[15] It is apparent from consideration of the s 32 evaluation relating to PC60 that the plan change was the result of a review of effectiveness of the rural parts of the District Plan undertaken during 2012. The review identified "four key issues", namely:

- the management of the effects of subdivision and development, especially of small lots, on existing and potentially productive land and on rural character and amenity;
- the management of current rural living opportunities and provision for more diverse living opportunities in rural areas;
- the management of the effects of business activities in rural zones;
- fixing technical problems within the Plan that reduce its effectiveness and efficiency.[5]

Following completion of the review PC60 was notified by the Council. Its objective was to address the four key issues identified in the review.[6]

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5 Section 32 evaluation, para 1.1.

6 Section 32 evaluation, para 1.1.

[16] It is also apparent from consideration of the s 32 evaluation that PC60 was limited in scope. In particular, para 1.1 of the evaluation records:[7]

> The scope of the proposed Plan change does not include the rezoning of rural land. The zones, the pattern of zoning around the District and small rural settlements zoned Rural 1 were not reviewed in this process. A zoning location review is expected to follow this Plan change as a next phase of work.

One of the remedies sought by the Appellant in both her submission[8] on PC60 and notice of appeal[9] was a rezoning of her property. By definition that appears to be outside the scope of PC60 which does not propose any rezoning of rural land. Such rezoning is expected to be the subject of a further review and subsequent plan change.

[17] The limited scope of PC60 insofar as Rural Residential Zone locations are concerned is confirmed by the following statement contained in the s 32 evaluation under the heading **Providing for Rural Living Opportunities without diminishing the Productive Land Resource**[10]

> **Proposed Provisions**
>
> **Rural Residential Zone Locations**
>
> - A decrease in the activity status of below threshold subdivision from Discretionary to Restricted Discretionary; and
> - Policy discouragement for the use of high productive (Rural 1) land for rural residential (lifestyle) development.
>
> The proposed provisions above together with the complementary proposed provisions limiting small lot subdivision in the Rural 1 and 2 zones are expected to have some effect on directing demand for rural residential living away from the productive zones to the existing Rural 3, Rural Residential or urban Residential zones and encouraging take-up and the consolidation of development in these zones.
>
> - A new definition of 'rural residential character' (in addition to the current definition of rural character); and
> - New and amended zone performance standards appropriate to rural residential living (building setbacks from boundaries, building coverage).
>
> The proposed provisions above are expected to guide the definition and maintenance of an appropriate level of rural residential character and amenity within the zone locations

---

7 Section 32 evaluation, para 4.4 contains a similar statement as to scope of PC 60.

8 Para H submission ("the zone into which it falls").

9 Notice of Appeal, paras 8(c) and (d) – removal of Awaroa from the Rural Residential Closed Zone.

10 Section 32 evaluation, page 3.

as they consolidate.

[18] Paragraphs 15-27 of the Appellant's legal submissions identified a number of Objectives, Polices and Rules contained in PC60 which were to apply in Rural Residential Zones (inter alia) and which, it was contended, provided a linkage between PC60 and the issue of subdivision of land at Awaroa. Amongst the new Objectives which PC60 sought to add to the District Plan was :

> 7.2.2.2 Provision of opportunities for a range of residential living options within rural locations, including coastal and peri-urban areas, in the form of the Rural Residential Zone.

The Appellant submitted that the inclusion of this Objective in PC60 "as decided by the Council does extend the range of options within the closed overlay RRZ areas". I disagree with that submission for a number of reasons.

[19] I commence my observations in that regard by noting that it is apparent from consideration of the District Plan that the Rural Residential Closed Zone is a zone in its own right. The Rural Residential Closed Zone is shown as a "Zone" on the Zone Map key with its own identification (pink cross hatched). It appears from the definition of Rural Residential Zone which is stated as *including* Rural Residential Closed Zone that the "Closed" Zone is a zone which is subject to all of the various controls applicable to land in the Rural Residential Zone and then subject to further additional controls applying specifically to land in the Rural Residential Closed Zone.

[20] The proposed Objective 7.2.2.2:

- States an objective of providing opportunities for residential living options within rural locations, in the form of the Rural Residential Zone;
- Must be viewed in the context that PC60 does not propose re-zoning any further land to Rural Residential;
- Accordingly, applies to the areas of Rural Residential Zone land already existing in the District Plan. Those areas are shown in the map contained in Section 8 of the s 32 evaluation (the Map).[11] The identified areas do not include Rural Residential Closed Zone land at Awaroa or elsewhere;
- Makes no reference to the Rural Residential Closed Zone.

11 Section 32 evaluation, page 31.

[21] The Appellant's legal submissions identified a number of new Policies which flow from the Objective, being:

- **7.2.3.1A** To identify locations for residential living opportunities in rural, coastal and peri-urban areas (as the Rural Residential Zone) that are appropriate locations for their variety of qualities and features to allow for a rural lifestyle living choice.

This Policy provides the rationale for identification of areas for residential living being the Rural Residential Zone areas identified in the Map. No additional areas were zoned Rural residential by PC60.

- **7.2.3.1B** To encourage low impact design solutions for subdivision and building development in all rural zones.

This is a general encouragement applying in all rural zones seeking to achieve low impact design solutions.

- **7.2.3.1C** To enable further subdivision and residential development within any existing Rural Residential Zone location where the land:
  (a) is not affected by coastal, flood, stormwater, geotechnical or earthquake hazard; and
  (b) can accommodate the proposed development without adverse effects on landscape, rural, rural residential or coastal character and amenity values; and
  (c) can be adequately serviced for water, wastewater, stormwater and road access.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

- **7.2.3.1D** To enable further subdivision and residential development to urban densities within any existing Rural Residential Zone location where the land:
  (a) is in close proximity to an urban residential area and is appropriate to become part of the urban form of that settlement; and
  (b) is not affected by coastal, flood, stormwater or geotechnical hazards; and
  (c) can accommodate built development without adverse effects on character and amenity values; and
  (d) can be adequately serviced for water supply, wastewater, stormwater and transportation.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

[22] A number of Rule changes reflecting the proposed new relevant Objective and Policies follow in PC60. None of those rule changes relate to applicable subdivision rules in the Rural Residential Closed Zone. It is readily apparent from detailed examination of PC60, including the s 32 evaluation and all of the various amendments made, that there was no intention on the Council's part to change the status quo of subdivision rules in the Rural Residential Closed Zone land at Awaroa (or elsewhere in the district).

[23] Significantly for the purpose of these considerations, Chapter 16 of the District Plan contains a section giving the **"Principal Reasons for Rules"**.[12] It contains the following relevant provisions relating to subdivision rules in zones affected by PC 60:

> **Rural Zones**
>
> In order to maintain the productive values of land, controls are required on subdivision which allow for a range of soil-based production opportunities to be retained, despite shifts over time in the economic prospects for particular production activities;

In summary, subdivision rules in Rural Zones are for the purpose of maintaining the productive values of rural land.

> **Rural Residential Zones**
>
> The minimum net site area ensures a variety of allotment sizes to cater for different lifestyle needs in different parts of the District;

In summary, subdivision rules in Rural Residential Zones are for the purpose of ensuring there is a variety of allotment sizes catering for different lifestyle needs.

> **Rural Residential Closed Zone**
>
> Further subdivision is prevented at Awaroa ... because of proximity to the Coast and special landscape features;

In summary, further subdivision is prohibited in the Rural Residential Closed Zone at Awaroa because of the proximity of that zone to the Coast and special landscape features.

[24] The Rural Residential Closed Zone areas contained in the District Plan are areas where subdivision is prohibited for the specific purpose of protecting "the Coast and special landscape features". The issue of protection of the Coast and its special

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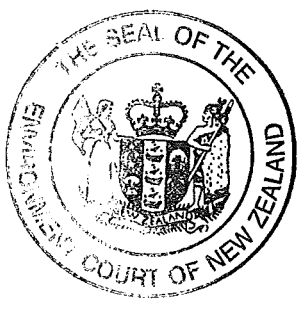
12 Chapter 16.3.20.

landscape features was not one of the "key issues"[13] which the Council's review considered, nor one which PC60 subsequently sought to address. Section 6(c) RMA identifies the..."preservation of the costal environment (including the coastal marine area)...and the protection of them from inappropriate subdivision..." as a matter of national importance. The s32 evaluation contains no analysis of the consequences of changing the status of subdivision in the Rural Residential Closed Zone at Awaroa when, as a matter of national importance, s6(c) would be at the forefront of consideration should there have been any intention of addressing that issue.

[25] PC60 does not alter the pre-existing status quo of subdivision of land in the Rural Residential Closed Zone at Awaroa because that matter was simply not the subject of the plan change which was addressed at the four key issues identified in para [15] (above). The submission does not address the extent to which PC60 alters the pre-existing status quo because the plan change does not seek to change the status quo, insofar as it relates to the prohibited status of subdivision of land in the Rural Residential Closed Zone at Awaroa, at all. I find that the submission does not meet the first of the *Clearwater* tests.

[26] Turning to the second of the *Clearwater* tests, I consider that it is not possible to discern from perusal of the plan change documents that a change to the provisions of the District Plan relating to the subdivision of land in the Rural Residential Closed Zone at Awaroa was contemplated by PC60 or might be the subject of submission on it. Nowhere in the s 32 evaluation is there any discussion as to what the consequences of any changes to the applicable subdivision Objectives, Policies or Rules at Awaroa might be, nor is there any analysis of the benefits and costs of such changes. That is because they were not contemplated by nor consistent with PC60.

[27] An interested person considering the provisions of PC60 would not reasonably anticipate than an outcome of the process might be changes to the District Plan of the sort requested by the Appellant. Such a person would accordingly not participate in the plan change process and would be denied the opportunity to be heard on the subject of subdivision at Awaroa.



[13] C.f para [15] (above).

[28] The Court is conscious of the possible consequences of rigid application of the tests in *Clearwater* and the measures identified in *Motor Machinists.* There is real potential for local authorities to stifle debate on matters which might be legitimately the subject of consideration by strategic drafting of plan change documents and s 32 evaluations. However, I do not consider that any such concern arises in this case.

[29] PC60 was the outcome of a plan review process which the Council initially commenced in 2004 and then recommenced in about 2012. The review was for a limited purpose, namely to more effectively achieve the current objectives of the District Plan as they provide for:

- protection of the productive capacity of land, especially land with high productive value;
- flexible use of land (for rural living and rural business opportunities) while retaining the productive capacity of land;
- maintaining rural character and amenity values while providing for resource use and development.[14]

[30] Neither the review nor PC60 which emerged from it, were undertaken for the purpose of considering subdivision opportunities in the Rural Residential Closed Zone at Awaroa. I consider that the Council was entitled to propose general changes to its District Plan seeking to protect productive land whilst providing flexibility in rural living and business opportunities, without opening debate on the appropriate zoning and subdivision provisions for a specific area of land which has been zoned to protect the Coast and its special landscape features.

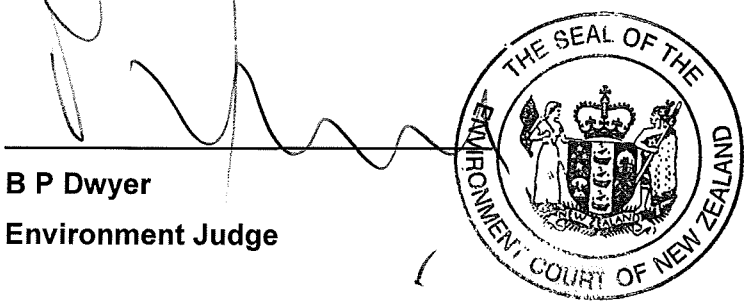
Outcome

[31] For all of the above reasons, I determine that the submission filed by the Appellant which seeks changes to either the zoning or the provisions of the District Plan which prohibit the subdivision of land at Awaroa Inlet was not "on" PC60. As it was not a valid submission, the Appellant has no right of appeal. To the extent necessary the appeal is dismissed.

[14] Section 32 evaluation, para 1.2.

Costs

[32] In accordance with para 6.6(b) of the Environment Court Practice Note 2014, I do not reserve costs.



B P Dwyer
Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2017-485-769
[2018] NZHC 2304

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court pursuant to s 299 of the Act
BETWEEN	CATHARINE MARY MACKENZIE Appellant
AND	TASMAN DISTRICT COUNCIL Respondent

Hearing: 27 February 2018

Counsel: S Franks and A Dartnell for Appellant
C P Thomsen for Respondent

Judgment: 3 September 2018

JUDGMENT OF GRICE J

Table of contents

Awaroa, Golden Bay

[1] Ms Mackenzie has owned land in the Golden Bay area of Awaroa since 1997. She and her family have their holiday home there. It is their tangata whenua.[1]

[2] The land is unique. It adjoins the Abel Tasman National Park and Marine Reserve. It has limited access – generally by boat or tramping in. Some landowners would like to see more flexible uses allowed for their land. For instance, to enable confined "hamlets" to be established on minimum sized land holdings in the area as well as common areas like "village greens" to be used by the public.

[3] The land is zoned Rural Residential Closed Zone (RRC), in which subdivision is prohibited.[2] Over the years Ms Mackenzie and other local landowners have spoken to the local authority, the Tasman District Council (the Council), about easing the restrictions on the use of the Awaroa RRC land. With that objective in mind,

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1 Oral submission of counsel for the appellant, Mr Franks.

2 Except in limited circumstances, such as boundary and similar adjustments: Tasman District Council *Tasman Resource Management Plan* (District and Regional Plan, 28 November 2015) at r 16.3.8.6.

Ms Mackenzie made a formal Submission[3] in response to a plan change proposed by the Council referred to as Plan Change 60 or PC60.[4]

[4] The Council rejected Ms Mackenzie's Submission on the basis it was outside the scope of PC60. Ms Mackenzie appealed this decision to the Environment Court (EC). The EC agreed. It was of the view that Ms Mackenzie's Submission was not on PC60, but rather was directed at the introduction of rules which would permit subdivision and denser settlement of the Awaroa RRC land. The Judge said as it was not "on" PC60,[5] it was not a valid Submission. He dismissed the appeal.[6]

[5] Ms Mackenzie appeals the decision of the EC.[7]

Background

[6] On 30 January 2016 the Council notified proposed changes in PC60 to aspects of its combined District and Regional Plan, the Tasman Resource Management Plan (the Plan). The changes related to the rural zones. The word "rural" in this context is a generic reference to land in Rural Zone, Rural Residential Zone and the RRC in the Plan. These are each separate zones.[8]

[7] The title of PC60 was: "Proposed Plan Change 60 Rural Land use and Subdivision Policy Review". A coloured brochure published by the Council invited submissions on PC60. It set out a summary of the background to and proposed changes in PC60. The proposed changes were described as changes to Rural One, Two and the Rural Residential Zones. The introduction in the brochure said:

> We are changing the rules about rural subdivision and land use to ensure greater protection of productive capacity, allow for flexibility of use and maintain rural character – while offering greater choices for landowners.

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3 For ease of reference I refer to the submission filed on behalf of five land owners in the Awaroa RCC (including Ms Mackenzie) as Ms Mackenzie's Submission.

4 Tasman District Council *Plan Change 60* (Proposed Plan Change Notified Version, 30 January 2016).

5 *Mackenzie v Tasman District Council* [2017] NZEnvC 136.

6 At [31]; the EC also dismissed the substantive appeal which sought amendments to PC60 to allow subdivision. That is not appealed here.

7 *Mackenzie v Tasman District Council,* above n 5.

8 That the RRC zone is a separate zone is now accepted by Ms Mackenzie. She initially argued the RRC zone was a part of the Rural Residential Zone, but abandoned that ground of appeal before this Court.

[8] The development and use of Ms Mackenzie's land in Awaroa is strictly controlled under the Plan. Under r 16.3.8.7(a) of the Plan, subdivision is prohibited as follows:[9]

> Subdivision in the Rural Residential Closed Zone in … Awaroa… is a prohibited activity for which no resource consent will be granted.

[9] PC60 did not propose any change to that rule nor to any other provision in the Plan that would affect r 16.3.8.7.

The Submission

[10] Ms Mackenzie's Submission was not made in the prescribed form.[10] It did not provide the details of the specific provisions of PC60 to which it applied. That information was extracted from the Submission by the EC.

[11] In the EC, the Judge noted that the heart of Ms Mackenzie's Submission was set out at C of her written Submission:[11]

> C. The submission is made with regard to section 79 of the Resource Management Act, and contests the Council's omission to propose alteration of that zoning, or the rules and restrictions defining and affecting the Residential Closed zone. The submitters believe that they do require alteration involving consideration of the matters raised in this Review. The submitters note that some of the proposed changes go some way to acknowledge the widespread concern in Golden Bay that current restrictions on subdivision and occupancy are too inflexible or too restrictive, and result in serious interference with proper development that could enhance the environment, including its social, cultural and amenity values.

[12] The Submission then set out a list of grounds in support of the failure to propose changes to ensure that the Plan "… will enable them to achieve the purposes of the Resource Management Act …".

[13] At the Submission's second paragraph marked J[12], the specific relief was sought was that "… the land should be under rules which permit subdivision, and more

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9 Tasman District Council *Tasman Resource Management Plan*, above n 2.
10 The requirements are set out at [36] below.
11 *Mackenzie v Tasman District Council,* above n 5, at [3].
12 Two sequential paragraphs are marked "J" in the Submission.

dense settlement of the land…". The Submission stated in its concluding substantive paragraph:

> The submitters seek changes to achieve at least the flexibility that will apply to other rural residential areas, but reflecting the irrelevance of restrictions such as those designed to prevent loss of high value soils. They accept (and seek) conditions reflecting the unique character of the area. For example, that is why they do not necessarily expect conventional subdivision into equal rectangular blocks. They want criteria to limit the visual impact of multiple dwellings. They want consideration of offsets that will protect open space and provide for community uses.

[14] Mr Franks, appearing for Ms Mackenzie, said that the owners of RRC land in Awaroa supported her Submission. He said that they had taken every opportunity to urge the Council to introduce provisions allowing more flexible use of their land. Mr Franks emphasised that "flexibility" was not limited to the ability to subdivide. Ms Mackenzie did not want the land rezoned to allow the standard types of "oblong box" subdivisions. Rather she wanted to be able to use the land for special types of developments such as cooperative living. This could better accommodate different interests and groupings of owners and occupiers. This was a vision, he said, driven by the Wellington architect the late Ian Athfield who, with a group of others, had owned land in the Awaroa RRC.

[15] In the Notice of Appeal to the EC dated 23 February 2017, Ms Mackenzie specified the part of the Council's decision that she was appealing as follows:

(a) The failure to remove Awaroa from r 16.3.8.7, which generally prohibits subdivision in the RRC;

(b) The failure to remove Awaroa from r 16.3.20, which covers the principle reasons for the prohibition of subdivision in the RRC areas (including Awaroa) because of proximity to the coast and other special landscape features;

(c) The failure of PC60 to extend the new r 16.3.8.4A, which made new restricted discretionary subdivision rules apply to all relevant properties in the Rural Residential Zone, to the RRC;

(d) The failure of PC60 to extend the proposed r 16.3.8.4B, which made changes to discretionary subdivision in the Rural Residential Zone for cooperative living, to the RRC.

[16] The relief sought in that Notice of Appeal included amendments to the rules removing the prohibition on subdivision in the RRC Awaroa area and allowing the rules for restricted discretionary subdivision in the Rural Residential Zone to operate in the RRC. The Notice further said:

> 8 The Appellant seeks the following relief:
>
> …
>
> (e) Directions to the Respondent to modify, delete or replace the Provisions to ensure the land in the Area is capable of reasonable use, or to remove the unreasonable burden of the prohibition on subdivision on the Appellant;

[17] No evaluation of the implications of these changes for the relevant RRC Awaroa area was provided with the Submission.

[18] The appeal was dismissed by the EC. This appeal arises from that dismissal.

Decision of the Environment Court

[19] The Judge began by noting that appeals from council decisions on the submissions made on the preparation of District and Regional plans are brought under cl 14 of sch 1 of the Resource Management Act 1991 (the Act). There are two requirements under cl 14(2). First the appellant must have made a submission "on" the proposed plan. Secondly, the appellant must have referred to the provision or matter under appeal in the Submission. The issue here, he said, was whether the Submission was "on" PC60.

[20] The Judge noted the leading authorities on that point are *Clearwater Resort Ltd v Christchurch City Council*,[13] and *Palmerston North City Council v Motor*

[13] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003.

Machinists Ltd.[14] From these decisions he determined he should address the question in two parts. Namely, a submission would be "on" a plan change if it:[15]

(a) Addressed the extent to which the plan change would alter the pre-existing status quo; and

(b) Did not permit an appreciable amendment to a planning instrument without real opportunity for participation by those potentially affected.

[21] Limb one has two aspects. First, what is the "…breadth of alteration to the status quo entailed in the proposed plan change…" and secondly whether the "…submission addresses that alteration...".[16]

[22] In addressing the extent to which PC60 changed the pre-existing status quo, the Judge had regard to the evaluation report on PC60 provided by the Council pursuant to s 32 of the Act. In *Motor Machinists* Kós J noted that an analysis of the s 32 evaluation report was of assistance in considering whether a submission was within the ambit of a plan change.[17] The EC Judge in this case noted that an analysis using the s 32 evaluation report did not act as a test in its own right – but it was a means of analysing the status quo.[18]

[23] The Judge concluded that the evaluation report indicated the four key issues for PC60 were:[19]

(a) The management of the effects of subdivision and development, especially on small lots, on existing and potentially productive land and on rural character and amenity;

(b) The management of current rural living opportunities and provision for more diverse living opportunities;

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14 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.
15 *Mackenzie v Tasman District Council,* above n 5 at [11]. I refer to the two limb test as the *Clearwater/Motor Machinists* test.
16 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [80].
17 At [12].
18 *Mackenzie v Tasman District Council,* above n 5 at [13].
19 At [15].

(c) The management of the effects of business activities in rural zones; and

(d) Fixing technical problems with the plan that reduces its effectiveness and efficiency.

[24] He said that the evaluation report recorded that PC60 was a "limited in scope" review.[20] The proposed plan change did not include the rezoning of rural land nor were the zones around the district reviewed. He noted that a zoning location review was expected to follow as the next phase of work.[21]

[25] The Judge noted it was apparent from his consideration of the Plan that the RRC was a zone in its own right, separate from the Rural Residential Zone. While the RRC is subject to all of the restrictions of the Rural Residential Zone, it is also subject to additional restrictions that apply only to it.[22]

[26] One of the new objectives sought to be added to the Plan in PC60 was:[23]

> 7.2.2.2 Provision of opportunities for a range of residential living options within rural locations, including coastal and peri-urban areas, in the form of the Rural Residential Zone.

[27] Ms Mackenzie submitted to the EC that this extended the range of options within the RRC. The Judge disagreed. The RRC was a separate zone to the Rural Residential Zone. He affirmed his view that PC60 did not include the RRC and said:[24]

> [21] The Appellant's legal submissions identified a number of new Policies which flow from the objective, being:
>
> - **7.2.3.1A** To identify locations for residential living opportunities in rural, coastal and peri-urban areas (as the Rural Residential Zone) that are appropriate locations for their variety of qualities and features to allow for a rural lifestyle living choice.
>
> This policy provides the rationale for identification of areas for residential living being the Rural Residential Zone areas identified in the Map. No additional areas were zoned Rural residential by PC60.

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20 At [17].
21 At [16].
22 At [19].
23 Tasman District Council *Plan Change 60*, above n 4, cl 3.3.4 sch 1.
24 *Mackenzie v Tasman District Council,* above n 5 at [21] – [22].

- **7.2.3.1B** To encourage low impact design solutions for subdivision and building development in all rural zones.

This is a general encouragement applying in all rural zones seeking to achieve low impact design solutions.

- **7.2.3.1C** To enable further subdivision and residential development within any existing Rural Residential Zone location where the land:

  (a) is not affected by coastal, flood, stormwater, geotechnical or earthquake hazard; and

  (b) can accommodate the proposed development without adverse effects on landscape, rural, rural residential or coastal character and amenity values; and

  (c) can be adequately serviced for water, wastewater, stormwater and road access.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

- **7.2.3.1D** To enable further subdivision and residential development to urban densities within any existing Rural Residential Zone location where the land:

  (i) is in close proximity to an urban residential area and is appropriate to become part of the urban form of that settlement; and

  (ii) is not affected by coastal, flood, stormwater or geotechnical hazards; and

  (iii) can accommodate built development without adverse effects on character and amenity values; and

  (iv) can be adequately serviced for water supply, wastewater, stormwater and transportation.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

[28] The Judge's comments above relating to policies 7.2.3.1C and 7.2.3.1D were incorrect. These rules apply to RRC as the definition of Rural Residential Zone in Chapter 2 of the Plan includes the RRC. These changes apply to the RRC because it shares the land use rules with the Rural Residential Zone. They do not affect prohibition on subdivision in RRC. In my view these are errors of detail which would not affect the Judge's conclusion. As the Judge said:

> [22] A number of Rule changes reflecting the proposed new relevant Objective and Policies follow in PC60. None of those rule changes relate to applicable subdivision rules in the Rural Residential Closed Zone. It is readily apparent from detailed examination of PC60, including the s 32 evaluation and all of the various amendments made, that there was no intention on the Council's part to change the status quo of subdivision rules in the Rural Residential Closed Zone land at Awaroa (or elsewhere in the district).

[29] The Judge also referred to the fact that under r 16.3.20 of the Plan, under which the purpose of subdivision prohibition in the RRC was explained as being for the protection of the "Coast and special landscape features". The Judge noted these protected features were not in the "four key issues" which the Council's review considered, nor was it something which PC60 sought to address.[25] These features were matters of national importance and should have been at the forefront of consideration and analysis had there been any intention of addressing issues relating to them.[26]

[30] The Judge concluded Ms Mackenzie's submission did not meet limb one of the *Clearwater/Motor Machinists* test. He said PC60 did not seek to change the status quo in relation to subdivision in the RRC. For that reason, Ms Mackenzie's Submission did not seek to address the extent to which PC60 altered the existing status quo.[27]

[31] As to the second limb, (b), of the *Clearwater/Motor Machinists* test the Judge noted that PC60 did not relate to changes in the subdivision rules in the RRC, and therefore it would not have been clear that this topic might have been the subject of submissions. He said that an interested person considering the provisions of PC60 would not reasonably anticipate that an outcome of the process might be changes to the Plan like those requested by Ms Mackenzie. They would not engage in the plan change process, and would be denied the opportunity to be heard on the subject of subdivision in Awaroa.[28] Therefore, Ms Mackenzie was also unable to satisfy the second limb of the *Clearwater/Motor Machinists* test.

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25 The four key issues identified by the Environment Court are set out above at [23].
26 *Mackenzie v Tasman District Council,* above n 5, at [24].
27 At [25].
28 At [27].

[32] The Judge found Ms Mackenzie had no right of appeal, as there had been no valid Submission. Therefore, her appeal which sought changes to the Plan by removing the prohibition on subdivision and related rules, was also dismissed.

Statutory framework for Plan Changes

[33] Plan changes are proposed amendments to the District Plan and are governed by s 73 of the Act. The process is governed by sch 1 of the Act.[29] In preparing a proposal for a District Plan change, s 74 of the Act provides matters to be considered by a territorial authority, which include:[30]

> …
>
> (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
>
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
>
> (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
>
> (f) any regulations.

[34] The s 32 evaluation report referred to at s 74(1)(d) deals with the extent to which the proposal will change the rules or method in a plan. The report must evaluate whether the proposal is the most appropriate way to achieve the objectives of the plan change.[31] This evaluation occurs through an examination of whether there are other reasonably practicable options for achieving the objectives, an assessment of the efficiency and effectiveness of the options in achieving the objectives, and a summary of the reasons.[32] The report must consider the benefits and costs of the options available, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[33] As Kós J said in *Motor Machinists*, this element "…introduces a precautionary approach to the analysis...".[34] The evaluation

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29 Resource Management Act 1991, s 73(1A).
30 Section 74(1).
31 Section 32(1)(a).
32 Section 32(1)(b).
33 Section 32(2).
34 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [34].

report is available for public inspection when the proposed plan change is publicly notified.[35]

[35] District Plan changes must be notified.[36] The notification process is intended to ensure that if there is to be any plan change that will directly affect a land owner they will be informed of these potential changes.

[36] Following this notification, any person[37] may make a submission on the proposed plan change under cl 6 of sch 1 of the Act. The submission *must* be made on the prescribed form.[38] The form provides:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include –*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> …
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish *or* do not wish to be heard in support of my submission.
>
> …
>
> (Emphasis added)

[37] In the words of Kós J in *Motor Machinists*: [39]

> [38] … It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[38] Following receipt of submissions prepared by the Council a summary of submissions is published. This is in far narrower terms than the notification of the plan change as to scope, content and timing. There is no requirement that the territorial

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35 Resource Management Act 1991, s 32(5).
36 Clause 5 of sch 1.
37 With some exceptions listed in cl 6 of sch 1.
38 Clause 6(5) of sch 1; Form 5 of sch 1 of the Resource Management (Forms, Fees and Procedure) Regulations 2003.
39 *Palmerston North City Council v Motor Machinists Ltd*, above n 14.

authority notify individual landowners directly affected by a change sought in a submission. Clause 7 of sch 1 provides:

> **7 Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.
>
> …

[39] The right to make further submissions is limited both as to who can make a submission and what that submission can address:[40]

> **8 Certain persons may make further submissions**
>
> (1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
>
> (a) any person representing a relevant aspect of the public interest; and
>
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
>
> (c) the local authority itself.

[40] Clause 8 of sch 1 was amended in 2009. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 restricted the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

…

(2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6.

[40] Kós J summarised the possible effect of a plan change brought about by a submission as follows:[41]

> [43] … what was intended by clause 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. … *Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10 day timeframe provided for in clause 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first.* ... The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.
>
> (Emphasis added)

[41] Clause 14 of Sch 1 of the Act provides for appeals from Council decisions on the preparation of district and regional plans to the EC as follows:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or
>
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if—

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41 *Palmerston North City Council v Motor Machinists Ltd,* above n 14.

(a) the person referred to the provision or the matter in the person's submission **on** the proposed policy statement or plan; and

(b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

…

(Emphasis added)

Appeals from the Environment Court to the High Court

[42] Section 299 of the Act provides that a party to a proceeding before the EC may appeal to the High Court on a question of law in any decision, report, or recommendation of the EC. Appellate intervention is, therefore, confined to a point of law and only justified if the EC can be shown to have:[42]

(a) applied a wrong legal test; or

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

(c) taken 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.

[43] How much weight the EC chooses to give relevant policy or evidential considerations is a matter solely for the EC. This cannot be reconsidered as a question of law.[43] Similarly, the merits of the case dressed up as an error of law will not be considered.[44] Planning and resource management policy are, for obvious reasons, matters that will not be considered by this Court.[45]

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42 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735 at [34], citing *Countdown Properties (Northlands) Ltd* v *Dunedin City Council* [1994] NZRMA 145 (HC).

43 *Stark v Auckland City Council* [1994] 3 NZLR 614 (HC); *Mariarty v North Shore City Council* [1994] NZRMA 433 (HC).

44 *Young v Queenstown Lakes District Council* [2014] NZHC 414 at [19] citing *Sean Investments Pty Ltd v MacKeller* (1981) 38 ALR 363 (FCA).

45 *Russell v Manukau City Council* [1996] NZRMA 35 (HC).

[44] It is insufficient for an error of law simply to be identified, the error must be a material one, impacting the final result reached by the EC.[46]

[45] Finally, in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court recognised the deference to be shown to the EC as an expert tribunal when determining planning questions:[47]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

Grounds of appeal

No Separate Zone ground abandoned

[46] Mr Franks, for Ms Mackenzie, abandoned the ground that the EC Judge had wrongly treated the Awaroa RRC zone as a separate zone. That issue, therefore, was not before me.

Relief sought in Environment Court appeal

[47] The relief sought by Ms Mackenzie in the EC Notice of Appeal is specific. It seeks the easing of the subdivision prohibition in Awaroa RRC by various means.[48] The Council says that the relief sought was the lens through which the EC viewed the appeal. It further says the specified relief must assist to confirm the ambit of the Submission. In addition, the Council says, no useful purpose would be achieved by allowing the appeal as the relief in the Notice of Appeal to the EC seeks changes to the subdivision rules in Awaroa RRC which was not raised in PC60.

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46 *Countdown Properties (Northlands) Ltd* v *Dunedin City Council* [1994] NZRMA 145 (HC).

47 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC).

48 Ms Mackenzie sought an amendment of rr 16.3.8.4A, 16.3.8.4B, 16.3.8.7, 16.3.20 to the end that the prohibition on subdivision over RRC Awaroa land be removed. Ms Mackenzie also sought the Council be directed to alter provisions within the Plan to "…ensure the land in [Awaroa] is capable of reasonable use, or to remove the unreasonable burden of the prohibition on subdivision on [Ms Mackenzie]."

[48] In my view the relief sought in the appeal does provide some confirmation that the Judge was correct in his view that the Submission was about the prohibition of the subdivision in Awaroa RRC. The Judge did not rely on this to shortcut his decision. He considered the points raised by Ms Mackenzie which suggested the Submission was wider. I do the same and for that purpose put in the relief sought in the Notice of Appeal to one side.

Reframed appeal

[49] At the outset of the hearing, Mr Franks indicated he did not intend to follow the Notice of Appeal nor his filed written submissions. Mr Franks' oral submissions were wide ranging and presented a smorgasbord of issues most of which related to the proposition that the Council should allow to landowners more flexible and denser use of their Awaroa RRC land.[49] While his submissions did cover a lot of ground they were largely elaborations on the matters set out in Ms Mackenzie's written submissions before the EC and this Court.

[50] In the written Submissions, Ms Mackenzie noted the basis on which an appellate court will interfere with decisions on questions of law as set out in *Countdown Properties*, which I have set out above at [42].[50] Ms Mackenzie claimed the EC Judge made all of those errors and that they materially affected the outcome of the decision.

Issues

[51] To bring some order to the wide-ranging submissions made of behalf of Ms Mackenzie, I propose dealing first with the issues advanced by her which underpin the argument that her Submission was "on" PC60. These are:

(a) The Judge erred by failing to take into account relevant considerations causing him to misconstrue the content of either PC60 or Ms Mackenzie's Submission. Specifically, he failed to consider:

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[49] He also noted his personal interest in the proceedings as the husband of Ms Mackenzie and a regular visitor to the family holiday home there.

[50] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 1345 at 153.

(i) That Submission was not only about the "subdivision" rules or rezoning (including rule changes) in the RRC as the Submission was much wider. It was also about better use and intensification of the use of the Awaroa RRC land.

(b) The judge erred by misapplying or misinterpreting both limb one and limb two of the test assessing whether a submission was "on" a plan change as set out in in *Clearwater* and *Motor Machinists*.[51] Specifically:

(i) The EC misapplied the legal tests on whether or not a submission is "on" a plan change; and

(ii) The EC misapplied the legal tests which consider the effect on the persons potentially affected if the Submission had been accepted as within scope by the Council.

The Judge erred by failing to take into account relevant considerations causing him to misconstrue the content of either Plan Change 60 or Ms Mackenzie's submission

How did the Environment Court Judge approach Ms Mackenzie's Submission?

[52] Ms Mackenzie's Submission was not in the prescribed form as required under cl 6.[52] Therefore examining the specific provisions of PC60 to which the Submission related, ascertaining what it supported and opposed and what decision was required (with precise details) fell to the EC Judge. He concluded that the heart of the Submission was at [C]. That paragraph contests the Council's omission to propose alteration of RRC zoning or the rules and restrictions defining and affecting the RRC. It also seeks alteration to those rules and restrictions. Finally, it notes that current restrictions on subdivision and occupancy are too inflexible, or to restrictive and result in serious interference with proper development.[53]

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51 *Clearwater Resort Ltd v Christchurch City Council*, above n 13; *Palmerston North City Council v Motor Machinists Ltd*, above n 14.

52 Resource Management Act 1991, cl 6 of sch 1.

53 The full text of "C" of the submission is set out at [11] above. *Palmerston North City Council v Motor Machinists Ltd,* above n 14, at [3].

[53] The EC Judge also referred to [J] of the Submission, which sought that the Awaroa land be under the rules which permit subdivision and more dense settlement of the land. The Judge said:[54]

> [4] The submission went on to set out a number of grounds supporting the submitters' belief that either the zoning of the land at Awaroa or the relevant subdivision rules required change. It is not necessary to set them out in full here. It is apparent from paragraph J of the submission that the relief which the submitters sought was that "the land should be under rules which permit subdivision, and more dense settlement of the land". The submission went on to state:
>
> > The submitters seek changes to achieve at least the flexibility that will apply to other rural residential areas, but reflecting the irrelevance of restrictions such as those designed to prevent loss of high value soils. They accept (and seek) conditions reflecting the unique character of the area. For example, that is why they do not necessarily expect conventional subdivision into equal rectangular blocks. They want criteria to limit the visual impact of multiple dwellings. They want consideration of offsets that will protect open space and provide for community uses.
>
> In short, the Appellant sought the uplifting of the prohibition on subdivision applicable to her land contained in the Rural Residential Closed Zone. That could be achieved by either a change of zoning or change of rules.

[54] The Judge had the District Plan and PC60 in front of him.[55] He specifically referred to relevant parts of the PC60 and the plans including the maps.[56]

The Submission

[55] Ms Mackenzie said she was urging the Council to consider more flexible methods enabling the Awaroa landowners to use their land better. This was described as advancing "… the intensification objectives with permission for more dwellings which PC60 proposed by alternative rule changes". Ms Mackenzie argues the Submission was wide enough to encompass a call to explore innovative methods which would allow better use of the Awaroa RRC land.

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54 *Mackenzie v Tasman District Council,* above n 5, at [4].

55 The Judge did not have the decision version of PC60 before him and it was not in the bundle before me. It is publicly available, however, on the Tasman District Council's website. For the purposes of citation and establishing what was in the decision versus notified version I have cited decision reports throughout this judgment. The decision reports incorporate the proposed changes following the consideration of submissions. At this hearing, Ms Mackenzie argued that the decision to include a definition of "cooperative living" and related changes to the Rural Residential zone discretionary activity rules supported the appeal grounds. I refer to that argument below.

56 *Mackenzie v Tasman District Council,* above n 5, at [2], [18], [19] and [23].

[56] Mr Franks, for Ms Mackenzie, said that the Submission only mentioned "zone" three times and "subdivision" six times. In comparison, it mentioned other rule changes to the zone 10 times including referring to intensification, low impact design, sharing and visual impact. Mr Franks pointed to these comparisons as a crude way of supporting his argument that Ms Mackenzie's Submission was not seeking a zoning alteration or a variation of the subdivision rules in the RRC Awaroa area but was rather looking to obtain the introduction of a higher level of rules and objectives which would allow for a greater flexibility and intensification of Awaroa RRC land use.

[57] The Submission pointed to the attractiveness of Awaroa and the need to allow greater appreciation and public use of the land as well as innovative ways to intensify use of the land by landowners. He said from this would be followed later by detailed rules to amend what was permitted in the zone including a re-examination of the virtual blanket prohibition on subdivision.

[58] Ms Mackenzie says that the Judge wrongly took a "precautionary approach … to … submissions proposing more than an incidental or consequential further changes to a notified proposed plan change."

What was Plan Change 60 about?

[59] Mr Franks said that PC60 indeed did cover the wider issues of intensification of land use. This was illustrated specifically by a number of matters which were dealt with in PC60. Two particular illustrations were elaborated on in submissions. The first was that the notified decision version of PC60 introduced the concept of "cooperative living" to the Rural Residential Zone.[57] Secondly that some incidental changes to rules, including provisions related to sleepouts made changes which applied to the RRC.[58]

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57 Tasman District Council *Decision Report 604 – Change 60: Co-operative Living* (9 December 2016), r 16.3.8.4B.

58 Tasman District Council *Plan Change 60*, above n 4, rr 17.8.3.1 and 17.8.3.1A.

Cooperative living

[60] "Cooperative living" is the use of land and buildings where a legal arrangement exist for collective ownership or use of the land or buildings.[59] PC60 introduced this definition into the Plan. It contemplates both land use and subdivision. PC60 as notified did not include cooperative living rules for the Rural Residential Zone.[60] It only included those rules for Rural One and Two zones.[61]

[61] Counsel for the Council said that the *decision* version of PC60 provided for a new land use rule and subdivision rule as a discretionary activity in the Rural Residential Zone.[62] The land use allows the activity.[63] The subdivision rules permit an application for consent to subdivide the relevantly zoned land for that purpose. The council can grant or decline that consent.

[62] The "cooperative living" provisions had no practical effect on the Awaroa RRC land. It did not change the prohibited status of subdivision in the RRC nor did it permit more dwellings on the Awaroa RRC land as was suggested by Ms Mackenzie in her written submissions. There were no changes to rr 16.3.8.6 and 16.3.8.7 of the Plan, which prohibits subdivision in the RRC. Those rules are not reproduced in PC60. Instead there is a blank space where the rule would be found on the Plan, and in that space the following words appear:

[unchanged text omitted]

Other dwellings

[63] The second main point in support of Mr Franks' submission on the ambit of PC60 was that it proposed changes to the rules and policies for certain structures allowed on properties throughout the Rural Zones, including RRC Awaroa land.

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59 At "Cooperative living" in ch 2.2.

60 These were introduced later: Tasman District Council *Decision Report 604 – Change 60: Co-operative Living*, above n 57, r 16.3.8.4B.

61 Tasman District Council *Plan Change 60*, above n 4, rr 16.3.5.4A and 16.3.6.4A.

62 The Decision Version of PC60 included the Council's recommended changes to the Plan following submissions: Tasman District Council *Decision Report 604 – Change 60: Co-operative Living*, above n 57, rr 16.3.8.4B and 17.8.2.6A.

63 Resource Management Act 1991, s 9.

[64] PC60 did propose some amendments relating to the rules headed "Build Construction or Alterations Rules in Rural Zones" as they relate to the maximum area of attached housekeeping units and the number of "sleepouts" permitted.[64] Sleepouts are detached buildings without facilities, limited to 36 m^2 and not located more than 20 metres from the dwelling.[65] PC60 proposed that the number of sleepouts be limited to two per dwelling.[66]

[65] These changes are minor adjustments to existing provisions and subject to land use conditions. These changes do not support the argument for the appellant.

Subdivision prohibition

[66] Mr Franks also said there was at least one type of subdivision already allowed on RRC land. He said subdivision was permitted to facilitate boundary adjustments.[67] This advanced a proposition that subdivision was a live issue in the RRC. This also supported his submission that it was incorrect to characterise subdivision as "prohibited" in that zone.

[67] In my view it does not lend support to Ms Mackenzie's arguments. Merely because realignments of boundaries requiring consequential lot adjustments are allowed in the RRC does not alter the fact that subdivision proper is prohibited in the RRC and that a review of rules on subdivision in the RRC was outside the ambit of PC60.[68]

Linkages between Plan Change 60 and the Submission

[68] I have dealt with the main specific examples that Mr Franks put forward at the hearing to show linkages between PC60 and the Submission.

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64 Tasman District Council *Plan Change 60*, above n 4, rr 17.8.3.1 and 17.8.3.1A.
65 At rr 17.8.3.1(c) and 17.8.3.1(d).
66 At rr 17.8.3.1(ba).
67 Tasman District Council *Tasman Resource Management Plan*, above n 2, r 16.3.8.6.
68 Rule 16.3.8.6 contemplates boundary adjustments which do not create additional lots upon which dwellings can be built and other restrictions as well as the requirement for resource consent. This was not the subject of proposed changes in PC60.

[69] Mr Franks in his oral submissions succinctly summed up what Ms Mackenzie was seeking in her Submission in relation to the Awaroa RRC land was: "the ability for the Council to broker and manage a more comprehensive change which would allow subdivision subject to detailed rules that would follow". He said this did not necessarily mean an immediate change to the prohibition on subdivision in the Awaroa RRC area, but the Council needed to hear alternative viewpoints on land use rather than being limited to the Council proposals. He said the exclusion of the Submission as it related to these viewpoints was wrong.

[70] Most of Mr Franks oral submissions went to showing how the Submissions "touched" PC60. He said PC60 was very wide and had ramifications for specific sites so why could it not apply to Awaroa RRC. This was a submission in response to the EC Judge's reasoning that PC60 was "limited in scope". Mr Franks gave an example of a site-specific change relating to the Richmond East Development Area. The Council had control over whether to grant a resource consent for subdivision in that area because of "… the potential effects on the landscape values of the hill/backdrop to Richmond".[69] Mr Franks said if PC60 could put in site specific provisions for that land why not have the same controls for Awaroa RRC rather than a prohibition on subdivision.

[71] However, as the Council pointed out, that the provision relating to Richmond East Development Area was already in the existing plan and was not subject to any change proposed in PC60.[70] In addition, the Plan controlled the use of that area of land in a way which might be less restrictive than a prohibition on subdivision, but that was not a reason to review the prohibition on subdivision in RRC Awaroa land under the umbrella of PC60.

[72] In this vein Mr Franks also pointed to the change proposed for restricted discretionary subdivision in the Rural Residential Zone.[71] This proposed allowing the Council to refuse consent or impose conditions on consents given for restrictive

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69 Tasman District Council *Tasman Resource Management Plan*, above n 2, r 16.3.8.1(10).

70 This can be established by looking at Tasman District Council *Tasman Resource Management Plan*, above n 2. There is no information surrounding the rule that indicates it was proposed in PC60.

71 Tasman District Council *Plan Change 60*, above n 4, r 16.3.8.4A.

discretionary subdivision. Matters for which consent could be refused or conditions imposed included the effect of development on "… rural, landscape or coastal amenity values …".[72]

[73] This was said to illustrate the point that the Council was already dealing with coastal amenity in PC60 and changing subdivision rules, therefore, there was no reason why the Awaroa RRC land could not be dealt with in the same way. However, this point does not support an argument that the submission was "on PC60". It merely shows rather that the Council has different ways of managing different areas of land in the district. This is a matter of policy.

[74] The fact that the provision mentions "coastal amenity values" does not provide a material linkage between the Awaroa RRC land – merely because that land is also coastal.

[75] Mr Franks says that these illustrations show that the EC Judge took a "shortcut" through PC60. However, the examples given relate to the approach of the Council to different areas of land are matters of policy and are not required to be considered by the EC.

[76] Nor do references in the Submission to concepts such as "intensification", "low impact design", "sharing" and "visual impact" provide a sufficient connection between the Submission and PC60 to establish that it is "on" the Plan Change. They are merely a collection of words and concepts relevant to planning when divorced from the Submission. When in the context of the Submission those words all relate to the change being sought to the Awaroa RRC land to allow "… subdivision … and more dense settlement of the land".

[77] The Judge carefully reviewed the Submission. He referred to those parts of the Submission which related to the submitters' belief that the current restrictions on subdivision and occupancy are too inflexible and resulted in serious interference with

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[72] Rule 16.3.8.4A.

the proper development of the RRC Awaroa land.[73] He also specifically referred to the Submission seeking more dense settlement of the land.[74]

[78] Finally, in respect of the oral arguments as to the scope of PC60 I also note that, the Submission neither referred to nor sought specific relief in respect of the "cooperative living" provisions, nor the sleepout provisions which were dealt with in PC60.

[79] Ms Mackenzie has misunderstood the *Clearwater/Motor Machinists* first limb test. That a rule "touches" on a particular area of land is not enough.[75] It is about understanding the alteration to the status quo effected by the plan change.

[80] This general call for discussion of intensification of land use in the RRC Zone and consideration of innovative approaches to that does not provide the necessary linkages to make the submission "on" PC60. There are other steps Ms Mackenzie can take to precipitate the discussions she seeks which I refer to later in my judgment at [112].

Did the Judge err by misapplying or misinterpreting both limb one and limb two of the *Clearwater*/*Motor Machinists* test?

[81] The *Clearwater/Motor Machinist* test is in two parts that help to identify whether a submission is "on" a plan change in terms of cl 14(2)(a).[76] It is "on" a variation if it satisfies two limbs:[77]

(a) it addresses the extent to which the plan change will alter the status quo; and

(b) it would not cause the District Plan to be appreciably amended "…without the real opportunity for participation by those potentially affected…".[78]

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73 *Mackenzie v Tasman District Council,* above n 3, at [3] and [4].
74 At [4].
75 *Bluehaven Management Ltd v Rotorua District Council* [2016] NZEnvC 191 at [79].
76 Resource Management Act 1991, sch 1.
77 *Clearwater Resort Ltd v Christchurch City Council*, above n 13, at [66].
78 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [55].

[82] Ms Mackenzie says the EC incorrectly applied limb one of the *Clearwater/Motor Machinists* test:

(a) Firstly, because the Judge applied limb one of the test too narrowly, and

(b) Secondly, as the Judge relied upon the s 32 evaluation report as the test.

[83] Ms Mackenzie also says the EC incorrectly applied limb two of the *Clearwater/Motor Machinists* test:

(a) Firstly, because the Judge applied limb two of the test too narrowly, and

(b) Secondly, the limb is "superfluous".

[84] I will address the arguments directed at each limb of the test in turn.

Limb one of the Clearwater/Motor Machinists test

[85] Kós J characterised the first limb of the *Clearwater* test as a "filter" which helped ensure there was a direct connection between the submission and the degree of alteration proposed in the notified plan change.[79] There are two parts to this first limb; first what is the breadth of the alteration to the status quo envisioned by the notified plan change, and secondly whether the submission addresses those alterations.[80]

[86] Kós J summarised the three possible approaches discussed by William Young J in *Clearwater*, as follows:[81]

> [49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".16 He identified three possible general approaches:
>
> (a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";

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79 At [80] – [82].
80 At [80].
81 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [49] and [50].

> (b) an approach in which "on" is treated as meaning "in connection with"; and
>
> (c) an approach "which focuses on the extent to which the variation alters the proposed plan".
>
> [50] William Young J rejected the first two alternatives, and adopted the third.
>
> (Footnotes omitted)

Was the first limb applied too narrowly?

[87] Mr Franks accepted that the *Clearwater/Motor Machinists* test was applicable to this case. However, he submitted it should have been more liberally interpreted in keeping with the EC decision in *Bluehaven Management Ltd v Rotorua District Council*.[82] In that case the EC adopted both limbs of the test but noted that other cases also assisted in the consideration of the scope. It said:[83]

> [27] Kós J then expanded on the *Clearwater* test by posing questions that may be asked to determine whether a submission can reasonably be said to fall within the ambit of a plan change:
>
> In terms of the first limb of the test:
>
> (i) Whether the submission raises matters that should have been addressed in the s 32 evaluation report? If so, the submission is unlikely to be within the ambit of the plan change.
>
> (ii) Whether the management regime in a plan for a particular resource is altered by the plan change? If not, then a submission seeking a new management regime for that resource is unlikely to be on the plan change.
>
> In terms of the second limb:
>
> (i) Whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been denied an effective response to those in the plan change process? If so, then the process for further submissions under clause 8 of the Schedule 1 to the Act does not avert that risk.
>
> [28] All parties before us presented their cases based on this approach to the *Clearwater* test and we respectfully adopt it as the basis for this decision. However, we also note, in light of the submissions of Mr Muldowney for RDC and by reference to the survey in *Environmental Defence Society Inc & Ors v Otorohanga District Council*, that there are *other High Court authorities*

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82 *Bluehaven Management Ltd v Rotorua District Council,* above n 75.
83 At [27] – [28].

> *which are also pertinent to the question of scope which we consider must also be referred to.*
>
> (Emphasis added)

[88] The other authorities the Judge in *Bluehaven* referred to warned against an unduly narrow approach,[84] observing:[85]

> [32] In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression.

[89] In *Bluehaven* the EC Judge concluded:[86]

> [37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the *Clearwater* test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court *discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal*, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.
>
> (Emphasis added)

[90] The Judge said this might include an assessment of whether the evaluation report should have covered the issues raised in a submission.[87] He also noted that assessment should involve considerations of whether "there are statutory obligations national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission".[88]

[91] I now consider whether the EC incorrectly applied limb one of the test, when the Judge said:[89]

> …the submission does not address the extent to which PC60 alters the pre-existing status quo because the plan change does not seek to change the status quo, insofar as it relates to the prohibited status of subdivision of land in the RRC at Awaroa, at all …

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84 At [29] citing *Power v Whakatane District Council* CIV-2008-470-456, 30 October 2009.
85 At [32]
86 *Bluehaven Management Ltd v Rotorua District Council,* above n 75, at [37].
87 At [38].
88 At [38].
89 *Mackenzie v Tasman District Council*, above n 5, at [25].

[92] Mr Franks submitted Ms Mackenzie was seeking higher level changes rather than direct or zoning changes to the subdivision rules. However, that does not alter the fact that for all practical purposes those matters were what Ms Mackenzie's submission was on. What Mr Franks now says it sought is a review of the rules which would apply to the RRC. However this would ultimately lead to a relaxation of the rules on subdivision without proper consideration, evaluation or notification of the high level changes.

[93] Land subdivision is one of the most important tools a planner can use because it controls the division of ownership access rights and movement. It is the tool used to limit development in the RRC.[90] To change any high-level rules which would later flow into the detail of the subdivision rules would, in my view, require a clear proposal that was not contained in PC60.

[94] As the EC Judge noted, the uplifting of the subdivision prohibition could be done by a change of zoning or a change of rules relating to the RRC Awaroa land.[91] He noted that the merits of the Submission and the amendments it seeks to the subdivision rules in the RRC were not relevant to the legal issue of whether or not the Submission was within scope.[92]

[95] The EC's analysis and conclusion that the Submission was focussed on the prohibited status of subdivision in the RRC and the changes to the zone or zone rules is justified. That conclusion was reached following a reasoned consideration of the Submission and PC60. That conclusion will always be a question of degree and impression. The Judge applied his specialist expertise and experience to reach that conclusion on the evidence.

[96] Taking into account the additional considerations suggested in *Bluehaven*, the changes sought in the Submission:

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90 Subdivision is not limited to division of fee simple title but includes allocation of ownership and rights by way of modern forms of title which include unit title, cross lease, and company lease; See generally Caroline Miller and Lee Beattie *Planning Practice in New Zealand* (LexisNexis, Wellington, 2017) at ch 18.

91 *Mackenzie v Tasman District* Council, above n 5 at [4].

92 At [6].

(a) Were major alterations to the objectives of the proposed plan change. Consideration of the unique features of the area and the Awaroa RRC land did not feature in the objectives of PC60.

(b) Engaged other policy considerations relevant to the interpretation of land use and the relaxation of the prohibition on subdivision in the Awaroa RRC. These were not evaluated. The considerations included coastal environment and protection from inappropriate subdivision. Development of that land is a matter of national importance.[93]

[97] The EC Judge was well placed to undertake the *Clearwater*/*Motor Machinists* first limb assessment. The conclusion the Environment Court Judge reached that the Submission was not "on" PC60 was correct.

Section 32 Evaluation Report

[98] The other matter referred to in the Notice of Appeal under this ground relates to the s 32 evaluation report. Kós J in *Motor Machinists* suggested it is useful to analyse the contents of the s 32 evaluation report and compare the contents of the submission to the contents of the report.[94] The second method was to:[95]

> … ask whether the management regime in a district plan for a particular resource… is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change.

[99] Mr Franks says the evaluation report should not govern the ambit of submissions on the plan change and the EC was in error in using the s 32 evaluation report to define the ambit of PC60 for the purposes of deciding whether the submission was "on" it.

[100] In applying the *Clearwater* test, the Judge expressly recognised that the s 32 evaluation was not a test in its own right, but rather a means of analysing the status quo at issue. He noted there may be other means, but found s 32 evaluation report of

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93 Resource Management Act 1991, s 6(a).
94 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [12].
95 At [81].

particular relevance in addressing the first limb of the *Clearwater/Motor Machinists* test.[96] The Judge was alive to and expressly noted the concern that a rigid application of the legal tests might give local authorities the opportunity to stifle debate through a narrow s 32 report.[97]

[101] While the Judge did consider the evaluation report it is apparent he did so in conjunction with consideration of the Plan and PC60.[98] The Judge nevertheless concluded that the submission was not "on" PC60 because the plan changes were not directly applicable to the RRC Awaroa land. He said:[99]

> [29] PC60 was the outcome of a plan review process which the Council initially commenced in 2004 and then recommenced in about 2012. The review was for a limited purpose, namely to more effectively achieve the current objectives of the District Plan as they provide for:
>
> - protection of the productive capacity of land, especially land with high productive value;
>
> - flexible use of land (for rural living and rural business opportunities) while retaining the productive capacity of land;
>
> - maintaining rural character and amenity values while providing for resource use and development.
>
> [30] Neither the review nor PC60 which emerged from it, were undertaken for the purpose of considering subdivision opportunities in the Rural Residential Closed Zone at Awaroa. I consider that the Council was entitled to propose general changes to its District Plan seeking to protect productive land whilst providing flexibility in rural living and business opportunities, without opening debate on the appropriate zoning and subdivision provisions for a specific area of land which has been zoned to protect the Coast and its special landscape features.
>
> (Footnotes omitted)

[102] The s 32 evaluation report was an accurate evaluation of the proposed changes in PC60. Mr Franks takes issue with the fact it excluded options for the intensification or better use of RRC Awaroa land. However, as PC60 was not dealing with the RRC Awaroa land in any specific sense the evaluation report did not need to canvas the

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96 *Mackenzie v Tasman District Council*, above n 5, at [13].
97 At [56].
98 At [19], [21] and [22].
99 At [29] and [30].

alternatives relating to that resource which was in a separate zone than the zones targeted by PC60. That the RRC is a separate zone is not now contested.

[103] In essence, the Environment Court Judge concluded that the management regime for Awaroa RRC land was not altered by the proposals in PC60 and that Ms Mackenzie's Submission was seeking a new management regime for that resource. This consideration is the second method suggested by Kós J to assist the analysis.

[104] I am of the view that the Judge correctly applied the *Clearwater*[100] test as formulated in *Motor Machinists*.[101] Ms Mackenzie is essentially arguing that the Judge did not apply her preferred legal test, rather than alleging the Judge made an error of law. It is perhaps obvious that I believe no error of law was made in this regard.

The second limb of the Clearwater/Motor Machinists test

[105] The second limb of the test is focussed on fairness of process and ensuring those potentially affected are both notified and have the opportunity to have their say. It would be a powerful consideration against finding that the Submission was truly "on" the variation if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected.[102]

[106] The Council indicated it would be looking at some zoning changes at a later date. If there were to be relevant changes proposed to the Awaroa RRC zone, they would be dealt with squarely at that time. Through that process, all landowners and other interested parties would be alerted to the proposals and have the opportunity to make submissions. This is in line with the progressive and orderly resolution of issues associated with the development of proposed plans contemplated by the Act. If the changes sought in the Submission were effected in PC60, it would be out of left field to those who read PC60.

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100 *Clearwater Resort Ltd v Christchurch City Council,* above n 13.
101 *Palmerston North City Council v Motor Machinists Ltd,* above n 14.
102 At [55].

[107] It is not only landowners who would likely be interested in putting in a submission on changes to the RRC Awaroa land. Given its special characteristics appropriate consultation would be necessary with other parties, and proper consideration and evaluation of the proposals undertaken. In *Clearwater* William Young J said that "…a submission proposing something completely novel…" was a strong factor against finding the submission to be on the variation.[103] This would be the case when dealing with proposals for intensification of Awaroa RRC land use. Such changes must be notified clearly. Kós J said covering proposals for significant changes to the management regime of a resource:[104]

> [79] … That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the Clearwater test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in clause 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[108] The proposals made in Ms Mackenzie's Submission were unlikely to attract a response via submissions from landowners and other interested parties who had alternate views on the matters raised. This was recognised within Ms Mackenzie's Submission, which noted:

> G … Indeed in the absence of considered change the natural response to increased visitor pressure could be a more intrusive emphasis on the private nature of current land occupancy. Sensible changes would enable the Council to work with owners on mutually satisfactory changes to manage and respond to that access need. *Changes in the Plan could be important to reducing the cost of withstanding possible challenges from the kind of objectors who tend to resist automatically any changes to any status quo.*
>
> (Emphasis added)

[109] Ms Mackenzie said that most of the people who would be affected landowners were aware of the submission and longstanding desire of Ms Mackenzie to obtain an easing of the restrictions on the development of their land. Mr Franks said that as most

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103 *Clearwater Resort Ltd v Christchurch City Council,* above n 13, at [89].
104 *Palmerston North City Council v Motor Machinists Ltd,* above n 14 at [79].

of the landowners would have supported the Council allowing increased density and flexibility in the land use as sought, the second limb of *Clearwater* was not relevant.

[110] In making his argument that Ms Mackenzie's Submission was known to all relevant land owners, Mr Franks said:

> 57. The Decision erred in failing to recognise that persons who might be affected by the Submission's purposes were likely to be aware of them and had a chance to submit on the issues.

[111] There was no evidence in support of this point. Nor would it have been appropriate for me to allow new evidence on this point. In any event the evidence relates to matters of fact and it is not for determination here. In addition, Ms Mackenzie's Submission itself suggests at [G] that there are landowners who may not be aware of the Submission or who would not agree with the views and proposals made in it.

[112] Ms Mackenzie is not precluded from adopting one of three options to pursue the changes and discussions that she is seeking concerning subdivision and a change of rules in the Awaroa RRC. Kós J set those options out in *Motor Machinists* as follows:[105]

> [78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under Schedule 1, Part 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[113] I conclude that the EC Judge was correct in his finding that the Submission did not meet the requirements of limb 2 of the *Clearwater/Motor Machinists* test.

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[105] *Palmerston North City Council v Motor Machinists Ltd,* above n 14, at [78].

Policy issues

[114] Ms Mackenzie's Submissions on the appeal were largely concerned with issues of policy. The specific matters raised by Mr Franks as providing linkages to PC60 overlooked by the Judge, do not in my view advance his argument that the Submission was on PC60. The Submitters disagree as a matter of policy on the approach of the Council to the use of the Awaroa RRC land, and seek the ability to use the land more flexibly and intensively. PC60 was not the vehicle for enabling those policy issues to be advanced.

[115] I have not addressed in detail every illustration raised in Mr Franks oral argument. Many were directed toward the policy of the Council in the manner it has restricted development of the RRC Awaroa land and comparison with the use of other land in the area. For instance, Mr Franks said there is already residential zoned land in Awaroa and this land his similar attributes to the Awaroa RRC land. However, this does not open the gate to consideration of the limitations and subdivision prohibition on Awaroa RRC land in PC60.

[116] As I noted above, the Judge made some minor errors of detail. These were largely due to the way the draftsman of the Plan created the RRC with reference to the definition of the Rural Residential Zone in chapter 2 of the Plan.[106] These minor errors do not detract from the fact that the Submission was not on PC60.[107] The errors are immaterial.

[117] The Judge made no material errors in his judgment. He was very well placed by virtue of his special expertise and experience to make his assessment. His judgment is to be given deference in that regard. He was entitled to conclude Ms Mackenzie's submission was not "on" PC60.

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[106] Tasman District Council *Tasman Resource Management Plan* (2 December 2016), above n 2, at ch 2.

[107] See above at [28]. There also appears to have been some confusion about the maps the Judge was referring to – see *Mackenzie v Tasman District Council,* above n 5, at [19] – [21].

Further evidence

[118] Mr Franks sought to introduce further evidence in support of Ms Mackenzie's appeal. The evidence largely related to the history of the discussions between some of the landowners and the Council concerning the use of the Awaroa RRC land. These were matters not appropriate to be dealt with here. Further evidence in an appeal is rarely admitted. As Doogue J said in *Television New Zealand Limited v Southland Fuel Injection Limited,* the Court on appeal should only consider the matter on the evidence which was before the lower court.[108] This was adopted in *Zimmerman v Director of Proceedings*.[109] Therefore, the application to admit further evidence is denied.

Conclusion

[119] The questions of law as posed in the Notice of Appeal are answered as follows:

(a) **Question (1)**: Did the EC misdirect itself in its interpretation and application of cl 14 of Sch 1 of the Act? In particular, did it apply legal tests from case law additional to, or in elaboration of, the requirements of cl 14 so as to contradict the express provisions for rights of appeal?

Answer: No.

(b) **Question (2)**: Did the Judge err by misapplying or misinterpreting both limb 1 and limb 2 of the tests set out in in *Clearwater* and *Motor Machinists* in assessing whether a submission was "on" a plan change.

Answer: The Judge did not err as described.

(c) **Question (3):** Did the EC misdirect itself in treating the land area in the Rural Residential Zone under the "Closed" overlay as a separate zone, and in effect treating it as if it was deemed to be excluded from the Rural Residential Zone in relation to relevant proposals of PC60?

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[108] *Television New Zealand Limited v Southland Fuel Injection Limited* AP298/94, 16 March 1998 at 6.

[109] *Zimmerman v Director of Proceedings* HC WN CIV-2006-485-761, 29 May 2007.

Answer: This question was abandoned at the hearing.

[120] The appeal is dismissed.

Costs

[121] There appears to be no reason that costs should not follow the event in the usual manner. If the parties are unable to reach agreement on this issue they should file submissions on costs as follows:

(a) The Council will file submissions on or before seven days from the date of the delivery of this judgment.

(b) Ms Mackenzie will file submissions in reply on or before seven days from the date of the respondent's submissions.

(c) The Council will file submissions in response (if any) on or before a further three days.

Grice J

Solicitors:
Franks Ogilvie, Wellington
Fletcher Vautier Moore, Lawyers, Nelson

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 191

IN THE MATTER	of the Resource Management Act 1991 ("the Act")
AND	of proposed Plan Change 72 (Rangiuru Business Park) to the Western Bay of Plenty District Plan
AND	of two appeals pursuant to Clause 14(1) of Schedule 1 to the Act
BETWEEN	BLUEHAVEN MANAGEMENT LIMITED (ENV-2016-AKL-000153)
	ROTORUA DISTRICT COUNCIL (ENV-2016-AKL-000154)
	Appellants
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL
	Respondent

Court:	Environment Judge JA Smith Environment Judge DA Kirkpatrick sitting together for the purposes of s 279(1)(e) of the Act
Hearing:	at Tauranga on 12 September 2016
Appearances:	K Barry-Piceno for Bluehaven Management Limited L Muldowney and S Thomas for Rotorua District Council M Hill for Western Bay of Plenty District Council V Hamm and K Jordan for Quayside Properties Limited
Date of Decision:	30 September 2016
Date of Issue:	30 SEP 2016

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY ISSUES AS TO SCOPE OF APPEALS

A: The appeals by Bluehaven Management Limited (ENV-2016-AKL-000153) and Rotorua District Council (ENV-2016-AKL-000154) are within the scope of Plan Change 72 to the Western Bay of Plenty District Plan and may proceed to be heard on their merits.

REASONS

Introduction

[1] This decision deals with the preliminary issue as to whether two appeals are within the scope of a plan change.

Background

[2] Plan Change 72 ("**PC72**") to the operative Western Bay of Plenty District Plan relates to the Rangiuru Business Park. The Business Park contains approximately 150 hectares of land and is located to the east of Te Puke and the Kaituna River on Young Road, generally bounded by Pah Road to the west, the East Coast Main Trunk Railway and Te Puke Highway to the south, and the Tauranga Eastern Link (State Highway 2) to the northeast.

[3] The appellants, Bluehaven Management Limited ("**Bluehaven**") and Rotorua District Council ("**RDC**"), both seek to challenge the decisions on their submissions relating to the proposed plan provisions for one or more Community Service Areas ("**CSA**s") in the Business Park.

[4] In response, the Western Bay of Plenty District Council ("**WBoPDC**") and Quayside Properties Limited (the owner of most of the land which is subject to the plan change and a wholly owned subsidiary of Quayside Holdings Limited which is a Council-controlled organisation of the Bay of Plenty Regional Council) ("**Quayside**")

challenged both appeals as being outside the scope of the Court's jurisdiction on the basis, broadly, that the relief sought in the appeals is not within the scope of the submissions made by the appellants and that the submissions made by the appellants are not on the plan change as required under clause 6 of Schedule 1 to the RMA.

[5] More particularly,[1] Quayside and WBoPDC object to the following aspects of the relief sought:

(i) The relief sought in paragraph 12 of RDC's Notice of Appeal which seeks to:

(a) Include a new rule imposing a maximum cumulative gross floor area for all office and retail activities allowed in the CSAs to a total of 1,000m^2 for each CSA, with an associated note explaining that this rule is to ensure the CSA continues to provide a service function principally to the local business community; and

(b) Include a new general subdivision and development rule requiring the location, layout and design of a CSA proposed to be included as part of a subdivision application to be shown in order to demonstrate how it will meet the primary local business community service function.

(ii) The relief sought in paragraph 7 of Bluehaven's Notice of Appeal which seeks to:

(a) Include appropriate objectives and policies that identify the purpose and nature of local commercial activities and CSAs;

(b) Impose rules and locational restrictions to ensure the CSAs are of a small scale and type that will provide only the required convenience services for the RBP workforce; and

(c) Include a specific rule to limit GFA of each individual activity and require a cap for convenience retail and office activities to a maximum of 500m2 for each CSA.

[1] Agreed statement of facts and Issues at paras 4 – 10.

[6] All parties have agreed that these issues should be considered and determined on a preliminary basis ahead of any hearing of the substantive merits of the appeals. This preliminary hearing has proceeded on the basis of an Agreed Statement of Facts and Issues dated 8 September 2016 and with an Agreed Bundle of Documents.

[7] Although not framed as an application to strike out the appeals under s 279(4) of the Act, the issues are essentially the same as they would be in relation to such an application. For that reason we have approached this as if it were an application to strike out the appeals. On that basis we have focussed our attention on the relevant primary documents, being mainly relevant parts of the operative Western Bay of Plenty District Plan (first review 2009),[2] PC 72 to that Plan[3] and the s 32 evaluation report prepared by WBoPDC in respect of it,[4] the submissions of Bluehaven and RDC and the further submission of RDC,[5] and WBoPDC's decisions on those submissions.[6] We have not based our decision on any evidential matters that might be contested at a hearing of these appeals on their substantive merits.

Rangiuru Business Park

[8] The history of PC72 goes back to 2005, when Quayside requested a plan change to establish an industrial business park at Rangiuru. The Council accepted that request and notified Plan Change 33 (Rangiuru Business Park zone) ("**PC33**") as a private plan change on 10 December 2005. The Council's decisions on PC33 were made on or about 10 January 2007,[7] with the only appeal being by Transit NZ in relation to roading matters that are not relevant for present purposes.[8]

[9] PC33 incorporated structure plan provisions and maps. Relevantly, the maps showed a single rectangular CSA in the middle of the main business park, with a frontage of approximately 260m to Young Road and a depth of approximately 100m. One of the objectives for the Business Park zone was to maintain and enhance the viability of the established retail centres elsewhere and those proposed in the adopted

2 Agreed bundle of documents, tabs 4 – 6.
3 Agreed bundle of documents, tabs 10 (as notified) and 13 (decisions version).
4 Agreed bundle of documents, tab 11.
5 Agreed bundle of documents, tabs 14 – 16.
6 Agreed bundle of documents, tab 13.
7 Agreed bundle of documents, tab 2.
8 Agreed statement of facts and issues at paras 11.1 – 11.5.

Smart Growth Strategy.[9] In support of that objective, there was a policy to avoid the establishment of large format retail or large office developments, whether standalone or in conjunction with industry, storage and warehousing. Consequent on these provisions, the permitted activities in the zone restricted offices and retailing to those which would be accessory to permitted industry, storage, warehousing, cool stores and pack houses, except in the CSA, where offices, retailing involving a maximum floor area of $100m^2$ and places of assembly were also permitted. Permitted activities not complying with one or more of the permitted activity performance standards could be considered as limited discretionary activities. Retailing and office activities not covered by the activity rules were specifically identified as non-complying activities.[10]

[10] The first review of the District Plan under the Act was notified on 7 February 2009 and the provisions of (now operative) PC33 relating to the CSA and to commercial activities generally were carried over into the proposed review of the Plan. This review was made operative on 16 June 2012. There were no appeals in relation to it other than by the NZ Transport Agency in relation to roading matters and the inclusion of an existing pack house within the business park area, neither of which are relevant for present purposes.[11]

[11] It appears to be generally agreed that anticipated development within the Business Park did not occur as a result of the supervening events of the global financial crisis in 2008. As well, development was delayed pending construction of the Tauranga Eastern Link which has now been completed.[12] A further consequence of the latter development is that changes to the environment made the operative Rangiuru Structure Plan maps out of date, including a number of infrastructure arrangements in relation to the location of culverts constructed under the Tauranga Eastern Link, and the final design of that road's proposed interchange with a road into the business park area have.

Ambit of PC72

[12] In 2015, Quayside made a further request to the Council for a plan change to amend the operative provisions of the District Plan relating to the Business Park. The

9 Agreed bundle of documents, Tab 30 (2013 version). The Smart Growth Strategy, released in different forms since 2004, is a non-statutory joint planning document of the Tauranga City Council, the Bay of Plenty Regional Council and the WBoPDC.
10 Agreed statement of facts and issues at para 11.3.
11 Agreed statement of facts and issues at paras 11.6 – 11.7.
12 Agreed statement of facts and issues, para 11.8.

Council accepted that request on 9 October 2015, and on 7 November 2015 notified PC72 – Rangiuru Business Park.[13] For present purposes, PC72 relevantly proposes the following amendments to the operative plan provisions for the Business Park in relation to the Community Services Area:[14]

(a) Divide the CSA into two distinct parts;

(b) Enable one part of the CSA to be included within a new Stage 1 and one part within Stage 2 (as opposed to the operative provisions which provide for the entire single CSA area within Stage 2);

(c) Locate each CSA at intersection points at either end of Young Road (as opposed to the operative provisions which provide for the single CSA at a central point on Young Road);

(d) Add one new permitted activity within the CSAs, specifically educational facilities (limited to childcare/daycare/preschool facilities);

(e) Specify in the wording of the permitted activity rule that the total net land area for the CSAs is 2.6ha (as opposed to the operative provisions which show a single CSA in the relevant district plan maps and structure plan, which covers an area of 2.6 ha according to the scale shown on those maps);

(f) Specify the requirement for a single contiguous development within each CSA of not less than 6000m2 and not greater than 20,000m2 net land area.

[13] Other changes proposed in PC72 but not related to the CSAs include:

(a) amending the staging regime;

(b) amending the road infrastructure provisions;

(c) amending the stormwater provisions and providing alternative options for water supply and wastewater treatment and disposal;

(d) amending the financial contribution provisions to reflect the revised staging and infrastructure provisions and to update construction cost estimates; and

[13] Agreed statement of facts and issues at paras 11.9 – 11.10.
[14] Agreed statement of facts and issues at para 11.11.

(e) making various amendments to the permitted and discretionary land use activities.

The content of the submissions

[14] In its submission, Bluehaven submitted:

> *...the proposed community service area rules will enable ad hoc commercial office and retails development that is not appropriate at this location.*
>
> *The industrial zone has no objectives and policies that support the proposed amendment. The s 32 report contains insufficient assessment and evaluation of this issue.*
>
> *The proposal is inconsistent with the sub-regional commercial strategy, which promotes a hierarchy of identifiable centres with clearly defined functions as set out in the WBoP District Pan commercial chapter issues, objective and policies.*
>
> *The existing plan provisions have poor alignment with district plan objectives and policies, which needs to be rectified. Any plan changes should await the outcome of the Smart Growth Eastern Corridor study to ensure an integrated approach is taken. This study is likely to lead to changes being made to the plan provisions for commercial activities for both Tauranga and Western Bays.*[15]

[15] Bluehaven sought rejection of the proposed amendments, or the inclusion of appropriate objectives and policies to identify the purpose and nature of local commercial centres at the Business Park and to provide for two identified local centres of a location, scale and type to provide required convenience services to the local work force with a maximum gross floor for convenience retail and office activities not to exceed 500m^2 for each local centre.

[16] RDC's submission was a substantially longer document than Bluehaven's, which we will not set out in full. It opposed PC72 in its entirety on the bases that:

15 Agreed bundle of documents, Tab 14.

(a) it would have an adverse effect on the sustainability, vitality and viability of the industrial and commercial land resources in the Rotorua district and the wider region;

(b) it would lead to transport inefficiencies and adverse effects on the transportation network;

(c) it was inconsistent with the higher order planning instruments, including the purpose of the Act.

[17] In particular, RDC focussed its opposition on:

(a) the inclusion of additional non-industrial land use activities in the industrial rules applying to the Business Park;

(b) the changes to the provision of roading infrastructure and the expansion of stage 1 development from 25 to 45 hectares of gross land area; and

(c) the rule which proposed to enable further development outside stage 1 once a development threshold of 50 per cent within stage 1 had been achieved.

[18] A clear theme running through the whole of this submission is that PC72 would deviate from the original intended purpose of Rangiuru, which was intended to be protected for near-exclusive industrial activity.[16]

The Council's decisions on submissions

[19] In the Agreed Statement of Facts And Issues, the parties set out the following as the relevant reasons for the Council's decisions on the submissions by Bluehaven and RDC, which we have reviewed against the actual decisions and accept as a fair summary:

> *Plan Change 72 is not seeking to increase the developable area but to retain what is in the Operative Plan and to give effect to any minor locational change that may be required. The Operative CSA is in the new stage 2, so the proposal to split the CSA into two is to enable activities that would be established in a CSA to be available to the first stage of development.*

[16] Agreed bundle of documents, Tab 15.

Plan Change 72 seeks to modify the location of the CSA, change the area from gross to nett, and add a new permitted activity for childcare.

The Committee's consideration is limited to these particular amendments. The first two would not have any material effect on the purpose and function of the Business Park. The inclusion of childcare facilities is considered to provide a clear benefit.

Rule 21.3.2 provides that there can only be one development per site, and its size has to be between 6,000m^2 and 2ha. This is to ensure a comprehensive development, rather than piecemeal small ones that may or may not join up.

The location restrictions of 250m is important to ensure that the CSAs and their activities are internal to Rangiuru Business Park, rather than on the edge in order to attract passing traffic.

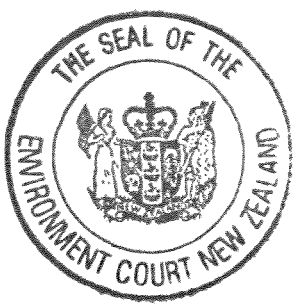
Submissions for a cap on the gross floor area for offices and retail are considered to be outside the scope of what is a very limited plan change. This plan change is not an opportunity to re-visit such matters, as these would have to be addressed by way of a further plan change,

Notwithstanding that this was considered outside the scope of the plan change, there was no evidence (such as economic analysis) other than theoretical planning scenarios given to justify a cap of any size. Nor was there any evidence provided to support submissions claiming the potential for negative effects of the CSAs on nearby town centres such as Rotorua, Te Puke and Wairake. On the contrary, submissions from the Te Puke community were in full support of all aspects of the plan change.[17]

The scope for a submission

[20] A survey of the relevant legislation and case law is set out in *Environmental Defence Society Inc & Ors v Otorohanga District Council.*[18]

[21] For present purposes, the most relevant statutory provisions are:



17 Agreed statement of facts and issues, para 13.
18 [2014] NZEnvC 070 at [7]-[22].

(a) clause 6 of Schedule 1 to the Act, which allows any person to make a submission on a publicly notified proposed plan or plan change in the prescribed form;

(b) clause 14(1) of Schedule 1 to the Act, which sets out the scope of a submitter's appeal rights;

(c) clause 14(2)(a), which limits the right of appeal to provisions that were referred to in the appellant's submission; and

(d) the text of Form 5 in Schedule 1 to the Resource Management Act (Forms, Fees, and Procedure) Regulations 2003, which requires a submitter to give details of the specific provisions of the proposed plan or plan change that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority.

[22] In this case essentially the same issue arises under clause 14(1) as under clause 6: whether the submission (on which the appeal must be based) is "on" the plan change. No residual issues appear to arise in relation to the requirements of clause 14(1)(a) – (d) relating to the extent of the Council's decisions which are appealed from, as the Council included the proposed plan change provisions which were the subject of the submissions.

[23] In relation to whether the Bluehaven and RDC submissions were "on" PC72, the argument before us was focussed on the analysis undertaken by Kós J in the High Court in *Palmerston North City Council v Motor Machinists Limited*[19] based on the approach set out by William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[20]

[24] The approach in *Clearwater* focuses on the extent to which a plan change or variation alters the relevant parts of the operative or proposed plan, rather than the broader alternative approaches of allowing submissions in terms of either anything which is expressed in the plan change or variation, or anything which is in connection with the contents of the plan change or variation. In pursuit of the adopted approach, *Clearwater* establishes a bipartite test:

19 [2014] NZRMA 519 at [74]-[83].
20 Christchurch AP34/02, 14 March 2003, William Young J at [56]-[69].

(i) a submission can only fairly be regarded as being "on" a plan change or variation if it is addressed to the extent to which the plan change or variation changes the pre-existing status quo; and

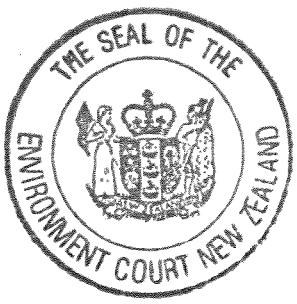
(ii) if the effect of regarding a submission as being "on" a plan change or variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be "on" the change.

[25] The *Clearwater* test was adopted in *Motor Machinists* and explained with additional analysis. Starting with the purpose of the Act in s 5 and describing the Act as an attempt to provide an integrated system of environmental legislation, Kós J identified two fundamentals inherent in that purpose:

(i) An appropriately thorough analysis of the effects of a proposed plan by means of the s 32 evaluation report which should adequately assess all feasible alternatives or further variations by a comparative evaluation of the efficiency, effectiveness and appropriateness of options.[21]

(ii) Robust, notified and informed public participation in the evaluative and determinative process to ensure that those potentially affected are adequately informed of what is proposed, citing with approval the observation that "*[u]ltimately plans express community consensus about land use planning and development in any given area.*"[22] Kós J added the view that "*[i]t would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage … might then find themselves directly affected but speechless at a later stage by dint of a third party submission …*"[23]

[26] Noting that the Schedule 1 submission process lacks the procedural and substantial safeguards which exist when promulgating a plan change, Kós J held that the standard submission form (Form 5 in Schedule 1 to the 2003 Regulations) is not designed as a vehicle to make significant changes to the management regime in a plan where those are not already addressed by the plan change. Consequently, permitting



21 Above at fn 19 at [76].
22 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC at [54].
23 Above at fn 19 at [77].

the public to enlarge the subject matter of a plan change significantly beyond the ambit of a plan change is not efficient because it transfers the cost of assessing the merits back to the community.[24]

[27] Kós J then expanded on the *Clearwater* test by posing questions that may be asked to determine whether a submission can reasonably be said to fall within the ambit of a plan change:

> In terms of the first limb of the test:
>
> (i) Whether the submission raises matters that should have been addressed in the s 32 evaluation report? If so, the submission is unlikely to be within the ambit of the plan change.
>
> (ii) Whether the management regime in a plan for a particular resource is altered by the plan change? If not, then a submission seeking a new management regime for that resource is unlikely to be on the plan change.[25]
>
> In terms of the second limb:
>
> (iii) Whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been denied an effective response to those in the plan change process? If so, then the process for further submissions under clause 8 of Schedule 1 to the Act does not avert that risk.[26]

[28] All parties before us presented their cases based on this approach to the *Clearwater* test and we respectfully adopt it as the basis for this decision. However, we also note, in light of the submissions of Mr Muldowney for RDC and by reference to the survey in *Environmental Defence Society Inc & Ors v Otorohanga District Council*,[27] that there are other High Court authorities which are also pertinent to the question of scope which we consider must also be referred to.

24 Above at fn 19 at [79].
25 Above at fn 19 at [81].
26 Above at fn 19 at [82].
27 Above at fn 18.

[29] In *Power v Whakatane District Council & Ors*[28] the High Court noted that:

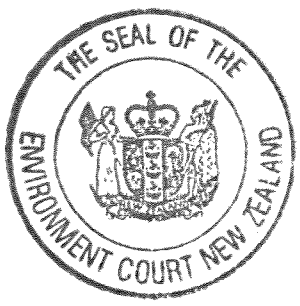
> *Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the reference are not subverted by an unduly narrow approach.*

[30] Allan J went on in that decision to quote with approval the decision in *Westfield (NZ) Limited v Hamilton City Council*[29] where Fisher J said:

> *[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.*
>
> *[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in sections 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would <u>not</u> have been within the reasonable contemplation of those who saw the scope of the original reference.*
>
> (emphasis in original text)

[31] The same approach was expressed by Wylie J in *General Distributors Limited v Waipa District Council*:[30]

> *[55] One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness.*
>
> *[56] There is of course a practical difficulty. As was noted in* Countdown Properties[31] *at [165], councils customarily face multiple submissions, often*



28 HC Tauranga, CIV-2008-470-456, 30 October 2009, Allan J, at [30].
29 [2004] NZRMA 556, at [574]-[575].
30 (2008) 15ELRNZ 59 (HC)

conflicting, and often prepared by persons without professional help. Both councils and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

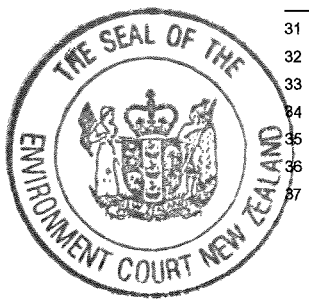
[32] As Allan J observed:[32]

In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression.

[33] The issue of consequential changes is also addressed in the *Motor Machinists*[33] decision, where Kós J noted that the *Clearwater*[34] approach does not exclude altogether zoning extension by submission, saying:

Incidental or consequential extensions of zoning changes proposed in a plan change are permissible provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change.[35]

[34] While accepting the usefulness of an approach which includes an analysis of the relevant resource management issues in the form the Council is required to undertake pursuant to s 32 to comply with clause 5(1)(a) of Schedule 1 to the Act, we respectfully consider that some care needs to be taken in assessing the validity of a submission in those terms. As Kós J expressly recognises,[36] there is no requirement in the legislation for a submitter to undertake any analysis or prepare an evaluation report in terms of s 32 when making a submission. The extent and quality of an evaluation report under s 32 of the Act depends very much on the approach taken by the relevant regional or district council in preparing it. As provided in s 32A, a submission made under clause 6 of Schedule 1 may be based on the ground that no evaluation report has been prepared or regarded or that s 32 or 32AA[37] has not been complied with.



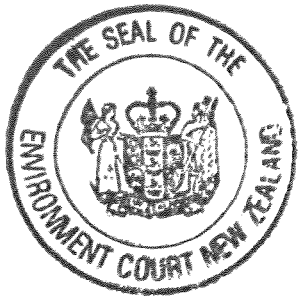
31 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC)
32 Above at fn 28 at [43].
33 Above at fn 19 at [81].
34 Above at fn 20.
35 Above at fn 19 at [81].
36 Above at fn 19 at [79].
37 Since the coming into force of the Resource Management Amendment Act 2013 on 4 September 2013, a further evaluation in accordance with the requirements of s 32 may be required pursuant to s 32AA of the Act for any changes made since the first evaluation report was completed.

[35] As held in *Leith v Auckland City Council*,[38] there is no presumption in favour of a planning authority's policies or the planning details of the instrument challenged, or the authority's decisions on submissions. An appeal before the Environment Court is more in the nature of an inquiry into the merits when tested by submissions and the challenge of alternatives or modification.

[36] In that sense, we respectfully understand the questions posed in *Motor Machinists*[39] as needing to be answered in a way that is not unduly narrow, as cautioned in *Power*.[40] In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the *Clearwater* test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.

[37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the *Clearwater* test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.

[38] It may be that this issue can be encapsulated by regarding the first test as including an assessment of whether the s 32 evaluation report should have covered the issue raised in the submission. This follows Kós J's wording[41] closely and involves an evaluation of the submission in terms of the issue as it is (or is not) addressed by the proposed plan change and the context in which it arises. In particular, such contextual evaluation should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on



38 [1995] NZRMA 400 at 408-9.
39 Above at fn 19 and set out above in [26].
40 Above at fn 28 and set out above at [30].
41 Above at fn 19 at [81].

the issue raised in the submission. A failure to address the context expressly in the s 32 report may well indicate a failure to consider a relevant matter.

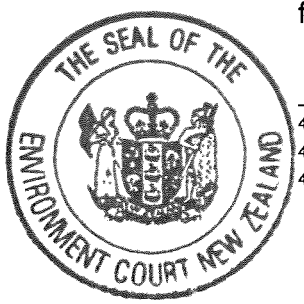
[39] Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

[40] We also respectfully note that the discussion in *Motor Machinists*, as in most of the cases on the issue of the scope for submissions made under clause 6 of Schedule 1 to the Act, arises in the context of a proposed change to an operative plan. The context of a review of an entire planning instrument is likely to mean that not only the methods but even the objectives could be open to challenge by way of submissions, because the review would not be considered within any existing framework of operative plan provisions.[42] This aspect is discussed in more detail in our decision in *Motihi Rohe Moana Trust v Bay of Plenty Regional Council*.[43]

The arguments presented

[41] For Quayside, Ms Hamm emphasised the history and nature of the Industrial Park, noting the issues it had faced in relation to staging, infrastructure and take-up. Within that context she submitted that the CSAs were of much lesser significance, amounting to less than 2% of the total area covered by PC72. She noted that no changes were proposed to the objectives and policies that relate to the Business Park. She referred us to the s 42A report of the WBoPDC planning officer, Mr Martelli, and the manner in which he addressed the issues relating to the CSAs.[44]

[42] In relation to the submission by RDC, she noted it sought rejection of the entire plan change but only made express reference to the proposed addition of daycare facilities.



42 In terms of the principles set out in *Leith v Auckland CC* referred to above at [31].
43 ENV-2015-AKL-134, [2016] NZEnvC 190, which is delivered contemporaneously with this decision.
44 Agreed bundle of documents at Tab 12, esp. pp 14-18.

[43] In relation to the submission by Bluehaven, she acknowledged that it was more specific but noted that it only sought rules requiring an overall cap on retail and office gross floor area within the CSAs, so was not a sufficient for the relief which seeks specific limits for each activity.

[44] On the basis that neither RDC nor Bluehaven had made any specific reference to the matters identified as the changes proposed to the CSAs, she submitted that neither submission address the degree to which PC72 changes the status quo, in terms of the first limb of the *Clearwater* test. She did not accept the argument that, taken overall, the proposed changes could be described as sweeping and submitted that essentially the submitters were advancing cases based on their submissions being "in connection with" PC72, which both *Clearwater* and *Motor Machinists* have held is not a sufficient basis to be "on" a plan change.

[45] For WBoPDC, Ms Hill noted that the Council, in the s 42A report, had identified scope as being an issue from the outset. She emphasised that PC72 was limited in its scope, with no changes proposed to the objectives and policies and clear identification of the land use activities in the s 32 evaluation report.

[46] She described the scheme of PC72 as being enabling, so as to get a stalled business park going within appropriate limits so that the CSAs would have no distributional impact.

[47] In relation to the deletion of a single mapped CSA and the change to a net area which was connected to two intersections, she submitted that this was not intended to enable the area to increase but to better provide for the establishment of a commercial area to support the industrial activities. She described this as an updating exercise.

[48] For RDC, Mr Muldowney presented his argument in five main points:

(i) As to context, he submitted that there was little controversy about the intended limited function of the CSA to support an industrial park rather than create a new centre. He referred to the centres approach in the Smart Growth Strategy, to Policy UG10B in the Regional Policy Statement relating to the sustainability of rezoning and development of urban land and to District Plan Objective 21.2.1.4 requiring commercial activities that do not have a functional need to locate in an industrial area be consolidated.

(ii) As to the scope of PC72, he argued that it was not so limited as contended and that the issues identified in the s 32 evaluation report showed an over-specified structure plan that required various changes, of which the potential increase in size and range of activities unrelated to industrial uses was an issue that was open to submission.

(iii) He developed the submission that in the context of PC72 and the broad submission that it be declined in its entirety, it was open to RDC to advance submissions which challenged the greater permissiveness of PC72 and to seek amendments which would maintain the status quo, while enabling updating to meet the requirements for infrastructure, including adjustments to the financial contribution rules.

(iv) He argued that within RDC's broad relief was scope to seek to manage the effects of commercial activity in the CSAs by such means as a cap on gross floor areas, referring to the scope for such detail to be considered within the ambit of a plan change and submissions on it as identified in a number of cases referred to above in our discussion of the relevant case law. He was, however, careful to add that RDC's further submission to Bluehaven's submission ought not to be regarded as a limit on RDC's primary submission.

(v) He submitted that RDC's submission was a direct response to a change in the management regime for Rangiuru as proposed in PC72, and that it did not seek to expand either the area involved or the range of activities.

[49] For Bluehaven, Ms Barry-Piceno emphasised that the operative objectives and policies relating to the Business Park do not support non-industrial uses. She submitted that the s 32 evaluation report was insufficient in its consideration of potential effects and its limited identification and assessment of alternative options. She confirmed that Bluehaven had no opposition to the updating of the District Plan to deal with infrastructure and funding issues.

[50] In reply, Ms Hamm reminded us that Quayside is not the only affected landowner and that others may be affected by the changes sought by the submitters. She repeated that the area of the CSAs would not increase so there was no basis for introducing caps on gross floor area. Ms Hill identified support for PC72 from the Bay of Plenty Regional Council and the Smart Growth alliance. She repeated that PC72

should be characterised as "minor tweaks" to the management regime, with no scope for caps on gross floor area.

Are the submissions "on" the plan change?

[51] As the parties all agree,[45] PC72 as notified proposed to alter the status quo in relation to the CSA at Rangiuru Business Park in a number of different ways. In our view, it is feasible (without determining the likelihood of any possible outcome) that the changes proposed could have some degree of effect on the nature and scale of non-industrial development at Rangiuru, including:

(a) by dividing it to create two such areas rather than limiting it to a single area;

(b) by enabling it to extend along road frontages at the two main intersections within the Business Park, rather than being concentrated in a single area;

(c) by potentially expanding its footprint from an identified 2.6ha rectangle shown on the structure planning maps to an undefined footprint, the area of which may be assessed net of roads and other public places; and

(d) by increasing the range of non-industrial activities permitted in the area.

[52] In terms of the status quo, these changes should be considered in light of the existing planning regime. This is based on the approach taken by the Council in PC33, and in particular the issue statement, objective and policy which highlighted the potential adverse distributional effects on existing and proposed retail centres of locating non-accessory retail and office activities in the Business Park.[46] In the operative District Plan these matters remain important, as evidenced by both the commercial provisions (Issue 19.1.2, objective 19.2.1.1 and policy 19.2.2.3)[47] and the industrial provisions (Issue 21.1.5, objective 21.2.1.4 and policy 21.2.2.6).[48] None of these provisions are proposed to be deleted or amended by PC72.

[53] The s 32 evaluation report for PC72[49] addresses this issue in section 4.0 - Issues and Options Review and in particular in section 4.4 - Issue 4 - Land Use Activities. This section identifies the status quo and the proposed amendments as the

45 Agreed statement of facts and issues at 11.11.
46 Agreed Statement of facts and issues at 11.3.
47 Agreed bundle of documents, Tab 5.
48 Agreed bundle of documents, Tab 6.
49 Agreed bundle of documents, Tab 11.

two options. There is no identification or analysis of any possible variations of or alternatives to the proposed changes. The commentary identifies Objective 21.2.1.4 and Policy 21.2.2.6 as being relevant. The discussion there appears to emphasise a balance between "efficient and optimum use and development of industrial resources" and limiting non-industrial activities. The most appropriate option is identified as being to seek minor changes to the permitted activities while replicating the overall size of the CSA and relocating it to "more logical and central locations." The discussion concludes with the statement that none of the changes generate redistribution effects as there is no increase in size or significant change in land uses. Our reading of these portions of the document leads us to a preliminary view (without determining any of the issues that may be raised on appeal) that the evaluation of the proposed changes to the CSAs is underlain by a number of unstated assumptions about the reasons for making these changes and the likely effects of them which may or may not be valid in this particular case.

[54] The submissions of Bluehaven and RDC substantively challenge the proposed changes in relation to the CSAs and seek approaches which are different, but (on a preliminary basis) not radically so in the context of the operative provisions.

[55] RDC's primary submission sought that the plan change be declined in its entirety. Even if that were the result of the appeal, that would leave the status quo in place. The relief now sought by RDC in its notice of appeal, as summarised in the Agreed Statement of Facts and Issues, is less than such complete rejection of the CSAs. While not specifically identified in RDC's original submission, it appears to us that the amendments sought to the rules to impose a cap on retail and office gross floor area and to require evidence of some functioning demonstrably in support of the industrial park do arise out of the specific references in the submission to RDC's concerns about the sustainability of other industrial and commercial resources including existing centres, the greater scope for non-industrial activities at Rangiuru and the tension with existing objectives and policies.

[56] Bluehaven's relief is both briefer and more specific than RDC's, to the extent of seeking:

(a) appropriate objectives and policies to identify the purpose of the CSAs;

(b) imposing rules and locational restrictions to ensure that the CSAs were of a small scale and of a type to provide only required convenience services; and

(c) a rule to limit the gross floor area of each individual activity and require a cap for both convenience retail and office activities.

[57] That relief appears to us to be within the scope of Bluehaven's original submission which clearly referred to these elements, even if in slightly different terms. This relief is therefore is also within the scope of RDC's further submission in support of the Bluehaven submission.

[58] We note that counsel for Quayside laid great stress on the extent to which both RDC and Bluehaven had raised concerns about matters that were not proposed to be changed by PC72, being the permitted activity status of non-accessory offices and retailing as permitted activities within the CSAs. She submitted that these matters should not be allowed to be re-opened for debate when they had been settled in the PC 33 process and then in the first review of the District Plan. Had PC72 left the provisions relating to the CSA completely unchanged and dealt only with the provisions for infrastructure and financial contributions, that argument would have great force in terms of the test in *Clearwater*. But that is not what happened in PC72. The Council has changed a number of aspects relating to the CSAs (as acknowledged by all parties) at least to the extent that we do not think that RDC and Bluehaven can be prohibited from raising issues that should form part of an integrated regime for the CSAs.

[59] Various submissions were made to us in argument at the hearing in relation to the relative size and significance of aspects of the plan change, the areas of land involved and the extent to which activities might be enabled. We do not consider it appropriate to venture into any consideration of those arguments, which plainly enter into the merits of the plan change and can only be considered and assessed after relevant evidence is presented and tested.

[60] Leaving to one side the extent to which the content of the s 32 evaluation report might be contested on its merits, there can be no real doubt that it addresses matters that are the concern of the submissions lodged by Bluehaven and RDC. On that basis and in terms of the first limb of the *Clearwater* test (whether the submission is addressed to the extent to which the proposal changes the pre-existing status quo) and the first question posed in *Motor Machinists*, the submissions raise matters that should

have been (and, at least to some extent, were) addressed in the s 32 evaluation report. In terms of the second question posed in *Motor Machinists*, it appears at least arguable that PC 72 did involve changes to the management regime for commercial activity which is not accessory to permitted industrial uses in the Business Park, so that it is open to Bluehaven and RDC to lodge submissions seeking a new management regime.

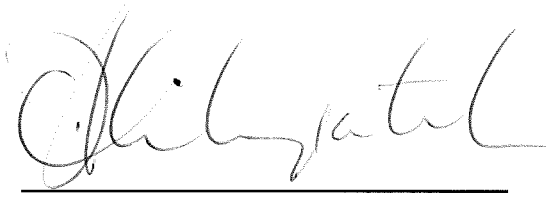
[61] In terms of the second limb of the *Clearwater* test (whether the submission would permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected), it seems clear that there is little risk where, as here, the submitters seek relief which would restrict the extent of the change rather than increase it. The issue of potential distributional effects having been raised in the s 32 evaluation report, any potentially interested persons (including all landowners at Rangiuru) were effectively on notice that the location and extent of the CSA, and the range of activities that might occur within it, might be the subject of submissions. They could therefore make their own decisions about whether to become involved in the process by lodging submissions, or by reviewing the notified summary of submissions and then deciding whether to join the process by lodging further submissions.

Conclusion

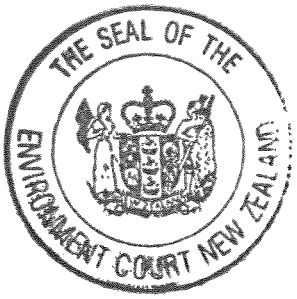
[62] For the foregoing reasons we determine that both these appeals are within the scope of PC72 and direct that they may proceed to hearings on their merits.

[63] Costs are reserved. If any party considers there is reason to depart from the usual practice set out in clause 6.6(b) of the Practice Note 2014 and cannot reach agreement about that with the other parties, then any application must be made within 20 working days of the date of this decision.

For the Court:



DA Kirkpatrick
Environment Judge



BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC051

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under clause 14 of Schedule 1 to the Act
BETWEEN	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	(ENV-2016-AKL-000014)
	Appellant
AND	WHAKATĀNE DISTRICT COUNCIL
	Respondent

Court:	Environment Judge DA Kirkpatrick Environment Commissioner RM Dunlop Environment Commissioner WR Howie
Hearing:	At Whakatāne on 9 March 2017 Respondent's submissions in reply filed on 24 March 2017
Appearances:	S Gepp for Royal Forest & Bird Protection Society Inc D Riley for Whakatāne District Council
Date of Decision:	6 April 2017
Date of Issue:	6 April 2017

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused.

B: The provisions of the proposed Whakatāne District Plan are amended in the terms set out in **Attachments A and B** to this decision.

C: There is no order as to costs.

REASONS

Introduction

[1] The review of the Whakatāne District Plan, notified on 28 June 2013, has now progressed to the point where the only remaining issue to be resolved is the status or classification of the activity of harvesting of mānuka and kānuka in Significant Indigenous Biodiversity Sites (**SIBS**) listed in the schedules to Chapter 15 – Indigenous Biodiversity.

[2] The relevant decisions of the Whakatāne District Council (**the Council**) on submissions were that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.1 Schedule A (Coastal and Wetland Sites) and a permitted activity in SIBS listed in Rule 15.7.3 Schedule C (Te Urewera-Whirinaki Sites).

[3] The appellant, Royal Forest & Bird Protection Society Inc (**the Society**) seeks in its appeal that such harvesting be a non-complying activity in SIBS in Schedule A and a restricted discretionary activity in SIBS in Schedule C.

[4] The parties agree that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.2 Schedule B (Foothills).

Background

[5] As notified, the proposed Whakatāne District Plan included Rule 15.2.1.1(9) stating the activity status for the following activity:

	Activity Status	**Schedule A**	**Schedule B**	**Schedule C**
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal Zone, for commercial use provided that; a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; b. that no more that 10% of the **Significant Indigenous Biodiversity Site** is harvested in any one year; and c. that a sustainable management plan verifying the above is submitted to **Council**.	RD	C	P

[6] The Society, in its submissions on the proposed District Plan in relation to this

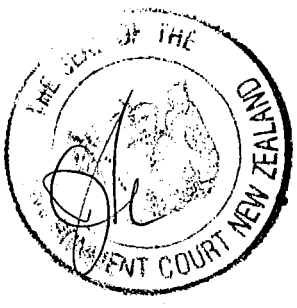
activity, submitted that there should be no permitted or controlled harvesting of mānuka and kānuka within scheduled SIBS, that the replanting conditions were not enforceable and that the ten per cent per year threshold was unsustainable. It sought to change the activity status or classifications in this part of the activity table to non-complying for SIBS in Schedule A and to discretionary for SIBS in Schedules B and C.

[7] The Council's decisions on submissions and further submissions on the plan in relation to Chapter 15 – Indigenous Biodiversity said this at paragraph 13.2.9 in relation to activity 9 in Rule 15.2.1:

> The committee heard evidence from several submitters including Mr Brosnahan about the status and threshold level for sustainable harvesting of mānuka and kānuka. Forest & Bird and P Fergusson asked for a more restrictive status for commercial harvesting of kānuka and mānuka within SIBS, while DoC requested clarification that the reference to ten per cent in the Rule applied to mānuka and kānuka rather than all indigenous vegetation. Federated Farmers and John Fairbrother for Nikau Farms sought provisions that allow the harvesting in a sustainable way as either a permitted or controlled activity in all SIBS.
>
> The committee notes that the rule is intended to provide for sustainable harvesting of mānuka and kānuka, recognising that in some SIB regenerating mānuka and kānuka can be managed sustainably to enable the economic benefits to be gained from the activity. However, the committee takes particular note that the rule does not apply to vulnerable coastal mānuka and kānuka in the Rural Coastal zone.
>
> The committee notes that commercial extraction of mānuka and kānuka have been managed sustainably for many years as mānuka and kānuka grows relatively fast and can be sustainably harvested while retaining significant values.
>
> The committee agrees with the submission by DoC that clearance of ten per cent of the total area of a SIB could amount to a large amount of clearance in any one year, particularly in the SIB extended over multiple titles and included other vegetation types. To address this issue the amended wording is accepted to clarify that the clearance relates to ten per cent of the total area of mānuka and kānuka as follows:
>
> > *"Harvesting of mānuka and kānuka excluding any kānuka in the rural coastal zone, for commercial use provided that:*
> >
> > *(a) an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate;*
> >
> > *(b) that no more than ten per cent of the total area of kānuka and mānuka in a scheduled feature* ~~***Significant Indigenous Biodiversity Site***~~ *on any site is harvested in any one year; and*
> >
> > *(c) that a sustainable management plan verifying the above is submitted to* ***Council.***"

[8] The decision made no change to the activity status in any of the Schedules.

[9] The Society's appeal against this decision is on the grounds that allowing commercial harvesting of mānuka and kānuka on a concessionary basis does not protect the habitat values of this vegetation type which may contain threatened species, and does not recognise the successional aspect of forest ecology, and that the



conditions are unenforceable. The relief sought in the appeal on this matter was the same as the submission, namely that the activity should be non-complying in Schedule A sites and discretionary in Schedules B and C sites.

[10] The Council and the Society, with other interested parties, participated in mediation of this and many other matters in the Indigenous Biodiversity chapter. The relevant outcomes for the purposes of this appeal were that the description of Activity 9 in (now) Rule 15.2.1.2 (including its requirements, conditions, and permissions) was reworded but the activity status for areas listed in Schedules A and C was not agreed, as follows:

	Activity Status	**Schedule A** **Coastal and Wetlands**	**Schedule B** **Foothills**	**Schedule C** **Te Urewera - Whirinaki**
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; and ~~b~~c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; ~~and~~ d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover; and ~~c.~~ ~~a sustainable management plan verifying the above is submitted to **Council.**~~	~~RD~~ D **or** NC	~~C~~ RD	P **or** RD

[11] The deletion of condition (c) (as notified) was addressed through mediation by the insertion of a new rule 15.2.6 – *Harvesting of kānuka and mānuka (Rule 15.2.1.2(9))*, which provides:

> *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements (in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[12] Also agreed through this mediation process was that the activity status for classification of such harvesting in SIBS listed in Schedule B should be restricted

discretionary.

[13] The remaining issues for the Society and the focus of the hearing of this appeal are the appropriate activity statuses or classifications for such harvesting as described in Activity 9 in SIBS listed in Schedules A and C.

Relevant planning provisions

[14] It was common ground between the Society and the Council that the following provisions of the operative Bay of Plenty Regional Policy Statement (**RPS**) concerning matters of national importance are relevant to this appeal:

> **Policy MN 1B: Recognise and provide for matters of national importance**
>
> *(a) Identify which natural and physical resources warrant recognition and provision for as matters of national importance under section 6 of the Act using criteria consistent with those contained in Appendix F of this Statement;*
>
> *...*
>
> *(c) Recognise and provide for the protection of areas of significant indigenous vegetation and habitats of indigenous fauna identified in accordance with (a); ...*
>
> **Policy MN 2B: Giving particular consideration to protecting significant indigenous habitats and ecosystems**
>
> *Based on the identification of significant indigenous habitats and ecosystems in accordance with Policy MN 1B:*
>
> *(a) Recognise and promote awareness of the life-supporting capacity and the intrinsic values of ecosystems and the importance of protecting significant indigenous biodiversity;*
>
> *(b) Ensure that intrinsic values of ecosystems are given particular regards to in resource management decisions and operations;*
>
> *(c) Protect the diversity of the region's significant indigenous ecosystems, habitats and species including both representative and unique elements;*
>
> *(d) Manage resources in a manner that will ensure recognition of, and provision for, significant indigenous habitats and ecosystems; and*
>
> *(e) Recognise indigenous marine, lowland forest, freshwater, wetland and geothermal habitats and ecosystems, in particular, as being underrepresented in the reserves network of the Bay of Plenty.*
>
> **Policy MN 3B: Using criteria to assess values and relationships in regard to section 6 of the Act**
>
> *Include in any assessment required under Policy MN 1B, an assessment of: ...*
>
> *(c) Whether areas of indigenous vegetation and habitats of indigenous fauna are significant, in relation to section 6(c) of the Act, on the extent to which criteria consistent with those in Appendix F set 3: Indigenous vegetation and habitats of indigenous fauna are met;*
>
> **Policy MN 7B: Using criteria to assist in assessing inappropriate development**
>
> *Assess, whether subdivision, use and development is inappropriate using criteria consistent with those in Appendix G, for areas considered to warrant protection under section 6 of the Act due to:*
>
> *(a) Natural character;*

(b) Outstanding natural features and landscapes;

(c) Significant indigenous vegetation and habitats of indigenous fauna;

(d) Public access;

(e) Māori culture and traditions; and

(f) Historic heritage.

Appendix G – Criteria applicable to Policy MN 7B

Policy MN 7B

Methods 1, 2, 3 and 11

1 Character and degree of modification, damage, loss or destruction;

2 Duration and frequency of effect (for example long-term or recurring effects);

3 Magnitude or scale of effect (for example number of sites affected, spatial distribution, landscape context);

4 Irreversibility of effect (for example loss of unique or rare features, limited opportunity for remediation, the costs and technical feasibility of remediation or mitigation);

5 Resilience of heritage value or place to change (for example ability of feature to assimilate change, vulnerability of feature to external effects);

6 Opportunities to remedy or mitigate pre-existing or potential adverse effects (for example restoration, enhancement), where avoidance is not practicable;

7 Probability of effect (for example likelihood of unforeseen effects, ability to take precautionary approach);

8 Cumulative effects (for example loss of multiple locally significant features).

Policy MN 8B: Managing effects of subdivision, use and development

Avoid and, where avoidance is not practicable, remedy or mitigate any adverse effects of subdivision, use and development on matters of national importance assessed in accordance with Policy MN 1B as warranting protection under section 6 of the Act.

[15] The proposed District Plan, as amended by decisions on submissions, is now past the point where any of its provisions (other than those which are the subject of this appeal) can be changed. We therefore treat the proposed provisions as having greater weight than any provisions in the operative District Plan.

[16] The following strategic provisions of the proposed District Plan were agreed to be relevant:

Strategic objective 7 (Our special places – Māori and iwi):

Subdivision, use and development are managed so that tāngata whenua, including kaitiaki maintain and enhance their culture, traditions, economy and society.

Strategic objective 8 (Our special places):

The natural, cultural and heritage resources that contribute to the character of the district are identified, retained and protected from inappropriate subdivision, use and development.

Policy 2 *To recognise the contribution that natural character, landscapes, biodiversity and heritage resources make to the social, cultural and economic wellbeing of people; and to provide for the* ***maintenance***

and enhancement of those resources in resource management decisions.

[17] The following objectives and policies of chapter 15 of the proposed District Plan on Indigenous Biodiversity[1] were agreed to be relevant:

Objective IB1: *Maintenance of the full range of the district's indigenous habitats and ecosystems, including through restoration and enhancement.*

Policy 2 *To recognise sustainable land management practices and cooperative industry arrangements that reflect the principles of stewardship and kaitiākitanga, and to take into account the range of alternative methods in the maintenance and protection of indigenous biodiversity, including Tasman Forest Accord, NZFOA Forest Accord, Iwi Management Plans, Bay of Plenty Regional Council biodiversity management plans and protective covenants with the QEII Trust and Nga Whenua Rāhui.*

Objective IB2: *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

Policy 1(b): *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*

(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.

Policy 5: *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[18] Section 15.4 of the proposed District Plan sets out the assessment criteria for restricted discretionary activities and Rule 15.4.4 provides:

15.4.4 ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***

15.4.4.1 *Council shall restrict its discretion to:*

a. *Timing to enhance the regeneration or establishment of mānuka and kānuka;*
b. *Stock type;*
c. *Grazing intensity;*
d. *Stock containment methods; and*
e. *Potential adverse effects on water bodies within the property.*

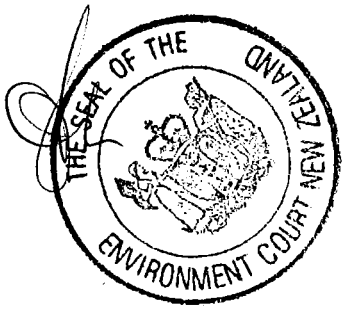
[19] In relation to activities which are classified as discretionary or non-complying, the relevant assessment criteria are set out in section 3.7 in Chapter 3 of the proposed District Plan. The introductory paragraph of this section states that the criteria are a guide to the matters that the Council can have regard to when assessing an application, but that they do not restrict the Council's discretionary powers under s 104(1)(a) of the Act to consider any actual or potential effects on the environment of allowing the

[1] As amended by a consent order dated 5 October 2016 in this proceeding and other related appeals.

activity.

[20] Section 3.7.13 sets out the criteria in respect of indigenous biodiversity effects as follows:

> *3.7.13.1* ***Council*** *shall have regard to;*
>
> *a. any adverse effect on* ***ecosystems*** *including;*
>
> *i. coastal* ***ecosystems****;*
>
> *ii. estuarine margins;*
>
> *iii. rivers and streams, wetlands and their margins;*
>
> *iv. habitats of* ***indigenous fauna*** *or flora;*
>
> *v. the cumulative effects of the activity on habitat of* ***indigenous vegetation*** *and fauna;*
>
> *vi. the degree to which the activity will result in the fragmentation of indigenous habitat and adversely impact on the sustainability of remaining vegetation;*
>
> *vii. the impact on ecological linkages and connectivity between significant natural areas;*
>
> *viii. the degree to which the effects are reversible and the resilience of the feature to change;*
>
> *ix. the long-term sustainability of an affected coastal* ***ecosystem****, waterway, estuarine margin, wetlands and their margins, indigenous vegetation or habitat;*
>
> *x. the indigenous vegetation to be retained and the degree to which the proposal will protect, restore or enhance indigenous vegetation and the net ecological gain as a consequence of the activity; and*
>
> *xi. the means to protect fish habitats by maintaining riparian vegetation;*
>
> *b. the effect on Significant Biodiversity areas identified in Appendix 15.7.1, 15.7.2 and 15.7.3, or other sites considered significant according to criteria in the Bay of Plenty Regional Policy Statement;*
>
> *c. the location of* ***buildings****, structures and services (such as* ***accessways****) in relation to how that may adversely affect ecological features;*
>
> *d. specifically, the management of existing kānuka stands in the Rural Coastal Zone, and means of restoring or rehabilitating this regionally significant feature;*
>
> *e. whether there is a reasonable alternative siting for the proposed activity or any alternative subdivision layout that will avoid, remedy or mitigate a significant adverse effect on the environment;*
>
> *f. location of the activity relative to any indigenous area and its vulnerability to the pest species; method of containing the pest plant or animal; other barriers to the spread of the plant or animal pest; method of identifying animals (for example, branding); method of dealing with escapes;*
>
> *g. plant and animal pest management;*
>
> *h. the means to manage the adverse effects of pets, for example, cats, dogs, ferrets and rabbits on wildlife and vegetation;*
>
> *i. whether there will be adverse effects on* ***ecosystems****, including effects that;*



i. may deplete the abundance, diversity or distribution of native species; or

ii. disrupt natural successional processes; or

iii. disrupt the long term ecological sustainability of Significant Biodiversity sites, including through increased fragmentation and vulnerability to pests; or

iv. obstruct the recovery of native species and the reversal of extinction trends, or the restoration of representative native biodiversity within an ecological district, ecological region, or nationally, or

v. reduce representative biological values within an ecological district, ecological region, or nationally, or

vi. reduce the area, or degrade the habitat value of an area set aside by statute or covenant for the protection and preservation of native species and their habitat, or

vii. degrade landscape values provided by native vegetation, or

viii. degrade soil or water values protected by native vegetation, or

ix. degrade a freshwater fishery, or

x. degrade aquatic ***ecosystems****.*

j. the degree of clearance in relation to the area retained or protected property.

The evidence

[21] Mr Shaw, an expert ecologist called by the Council, has extensive knowledge of the natural environment in the district. He gave essentially unchallenged evidence of primary facts about the circumstances in which mānuka and kānuka are present in the district as follows:

(a) The three types of scheduled SIBS in Chapter 15 of the proposed Plan and the table in Rule 15.2.1.2 have been identified based on Land Environment New Zealand Classifications.

(b) There are six sites listed in Schedule A containing kānuka forest (that is, where more than 80 per cent of the cover consists of kānuka) and one further site of mixed kānuka-kamahi forest that could potentially contain more than 80 per cent cover in kānuka. They are located in the Te Teko, Taneātua and Ōtānewainuku Ecological Districts. They are smaller in size than the sites in Schedules B and C and are located in much modified environments.

(c) The sites listed in Schedule C are much larger and fall largely within the Whirinaki, Ikawhenua and Waimana Ecological Districts with some also present in the Taneātua and Waioeka Ecological Districts. Large

proportions of these districts, other than Taneātua, have a cover of indigenous vegetation: from Waimana at 98 per cent to Whirinaki at 78 per cent. Most of these districts also have very high levels of formal protection as reserves under the Reserves Act or by way of covenants, of the order of 76-89 per cent.

(d) Commercial harvesting of kānuka for firewood is a longstanding (over many decades) activity in various parts of Whakatāne district. Typically, trees are harvested and the areas are left to regenerate naturally, often in the presence of grazing. Currently, most of this activity occurs on sites listed in Schedule B, with little or none presently occurring on sites listed in Schedules A and C.

(e) The areas in Schedule C with significant extensive kānuka dominant forest which are unprotected either as reserves or by way of covenants are all physically inaccessible and therefore are not subject to harvesting.

(f) The value of mānuka as firewood appears to be diminishing, with much higher values being placed on it for the harvesting of foliage for use in skin and hair care products and as a resource for bee keeping and honey production.

[22] Against this factual background, Mr Shaw expressed the following principal opinions:

(a) The small size and limited number of the sites listed in Schedule A means that assessment of the effects of harvesting in these areas can be done effectively.

(b) An activity status of discretionary is sufficient in the Schedule A areas, given the clear requirements in the objectives, policies and assessment criteria for promoting sustainable management in terms of the conditions on the activity for regeneration and the scope of the general discretion to decline consent.

(c) While the sites listed in Schedule C are substantially larger, other methods of protection and limited accessibility means that including rules in the plan to require resource consents to be obtained for harvesting in these areas would be of little benefit.

[23] The Council also called Mr McGhie, its principal planner, to outline the Council's planning approach. Mr McGhie relied on the evidence of Mr Shaw as the basis for his planning assessment. Mr McGhie also outlined the views that had been expressed to the Council by Māori, who own much of the land in the areas where the Schedule C sites are located, during consultation and the submission process.

[24] Mr McGhie characterized the issue before the Court as one of balancing the protection of indigenous biodiversity with management responses that would be appropriate to each type of SIBS. In that regard, he observed that the Council had originally proposed only two types of SIBS, but had created Schedule C for two main reasons:

(i) Māori had objected to large tracts of land being controlled in ways that would unnecessarily restrict their development opportunities; and

(ii) the list in Schedule B would otherwise have consisted of sites varying significantly in size.

[25] Mr McGhie set out in his statement of evidence numerous amendments that had been made to Rule 15.2.1.2(9) and in other plan provisions through the process of mediation as summarised above. As well as the Rules referred to earlier in this decision, he also explained that a new definition of "naturally regenerate" had been inserted in chapter 21 of the proposed Plan and that the definition of "indigenous vegetation" had been amended to ensure that regenerated kānuka or mānuka was not covered by the exclusion for vegetation established for commercial purposes. These amendments were not in issue before us.

[26] Mr McGhie also set out his analysis of the activity rule in terms of s 32 of the Act and in the context of the relevant objectives and policies of the Regional Policy Statement and the proposed District Plan. In his opinion, a non-complying activity status for harvesting in Schedule A sites would be out of proportion with those objectives and policies given the degree of protection that the rule has been drafted to provide and the extent to which the process of considering an application for resource consent should include an assessment of sustainable practice to address the relevant assessment criteria in section 3.7.13 of the proposed District Plan. Given those considerations, he opined that a discretionary status was more appropriate.

[27] In relation to a permitted activity status for the Schedule C sites, he also expressed the opinion that this would be consistent with the relevant objectives and

policies and would better address landowner concerns, subject to a restricted discretionary activity status applying where grazing is proposed during the natural regeneration phase.

[28] The Society called Ms Myers as an expert ecologist. In her evidence, Ms Myers set out the ecological context for the harvesting of mānuka and kānuka. She noted the extent of ongoing loss of indigenous biodiversity nationally and emphasised the ecological values of kānuka and mānuka forest in Whakatāne District and, especially, the national importance of Te Urewera for its range of ecological diversity. She stressed the successional role of kānuka and mānuka and the benefits that these species provide in the form of buffers for other forest species and corridor functions between stands of bush and forest. She noted that there was a lack of specific survey information to enable the extent of harvesting and regeneration to be quantified.

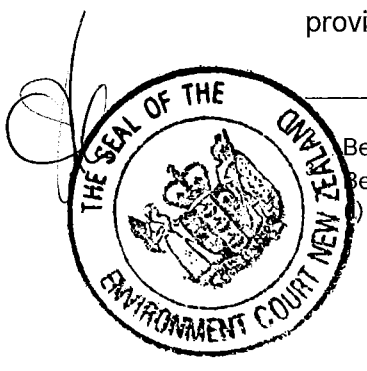
[29] In her opinion, rules for vegetation clearance should be based on the ecological values of that vegetation, as the degree of threat to an ecosystem may be unknown or can change over time. On that basis, she expressed the opinion that harvesting in areas listed in Schedule A should be non-complying because those areas are small and vulnerable and that resource consent as a restricted discretionary activity should be required for harvesting in sites in Schedule C in order to provide a basis for understanding the extent of that activity and its effects.

[30] Ms Myers agreed with the changes to these plan provisions that had been achieved through mediation.

Relevant considerations for a district plan

[31] Under s 290 of the Act, the Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. We must accordingly proceed to consider the issues on appeal on the same statutory basis as they were considered by the Council.

[32] The Council was required to prepare its the proposed District Plan in accordance with ss 74 and 75 of the Act,[2] and the Court must now consider the provisions still in issue in this appeal under those sections.[3] Those sections now



[2] Being s 74 in the form it was when the proposed District Plan was notified on 28 June 2013.
[3] Being s 74 in the form inserted by s 78 Resource Management Amendment Act 2013, given:
(a) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013; and

relevantly provide:

> ***74 Matters to be considered by territorial authority***
>
> *(1) A territorial authority must prepare and change its district plan in accordance with—*
>
> *(a) its functions under section 31; and*
>
> *(b) the provisions of Part 2; and ...*
>
> *(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and*
>
> *(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; ...*
>
> *(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to— ...*
>
> *(b) any—*
>
> *(i) management plans and strategies prepared under other Acts; ...*
>
> *(2A)A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district. ...*
>
> ***75 Contents of district plans***
>
> *(3) A district plan must give effect to— ...*
>
> *(c) any regional policy statement.*

[33] The Council plainly has a function of the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity under s 31(1)(b)(iii).

[34] In relation to the consideration of Part 2 of the Act, counsel for the Council referred us to the Court's decision in *Appealing Wanaka Inc v Queenstown-Lakes District Council*[4] and submitted that because the relevant objectives and policies of the proposed Plan for indigenous biodiversity are beyond challenge, there is no need to look past them to Part 2 of the Act.

[35] That decision is based on the reasoning of the Supreme Court in *Environmental Defence Society v NZ King Salmon*.[5] The Supreme Court held that there is a hierarchy of statutory planning instruments under the Act in order to achieve the purpose of the Act. The purpose of these instruments is to give substance to the principles in Part 2 of the Act. Where an instrument has been prepared to give effect to a higher instrument,

(ii) there appears to be no transitional provision in the Amendment Act which would require the application of s 74 of the Act as it stood when the proposed District Plan was notified.

4 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

5 *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

there is no need to refer back to that higher instrument, or to Part 2 of the Act, to interpret and apply the lower instrument unless there was a challenge based on invalidity, incompleteness or uncertainty in relation to the lower instrument.[6]

[36] In the present case, there is no issue before us of invalidity, incompleteness or uncertainty in the relevant objectives and policies of the proposed District Plan. Accordingly, our consideration of the most appropriate activity status for the harvesting or mānuka and kānuka in SIBS listed in Schedules A and C to the District Plan should be in terms of those relevant objectives and policies.

[37] We address matters concerning the obligation to prepare and have particular regard to an evaluation report in accordance with s 32 of the Act under a separate heading below.

[38] In relation to management plans and strategies prepared under other Acts, Counsel for the Council referred us to Te Urewera Act 2014. The purpose of that Act is:[7]

> *... to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—*
>
> *(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and*
>
> *(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and*
>
> *(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.*

[39] The principles for achieving that purpose are:[8]

> *(1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—*
>
> *(a) Te Urewera is preserved in its natural state:*
>
> *(b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:*
>
> *(c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:*
>
> *(d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:*
>
> *(e) the historical and cultural heritage of Te Urewera is preserved:*
>
> *(f) the value of Te Urewera for soil, water, and forest conservation is*

6 Ibid at [85] and [88].
7 Te Urewera Act 2014, s 4.
8 Te Urewera Act 2014, s 5.

maintained:

(g) the contribution that Te Urewera can make to conservation nationally is recognised.

(2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

[40] This Act declares Te Urewera to be a legal entity and establishes a board for its governance and management. That board is under an obligation to prepare a management plan to identify how the purpose of the Act is to be achieved and to set objectives and policies for Te Urewera, but we understand that such a plan has not yet been prepared.

[41] We were also referred to an integrated planning protocol between Tuhoe Te Uru Taumatua, the Council and other local authorities in which Te Urewera is situated, but that is not a statutory document and did not appear to contain any objectives or policies.

[42] We have set out above the policies of the RPS of most relevance to this appeal.

Evaluation under section 32 of the Act

[43] The necessary evaluation of a proposed rule under s 32 of the Act[9] involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:

(a) identifying other reasonably practicable options for achieving those objectives;

(b) assessing the efficiency and effectiveness of the rule in achieving those objectives, including:

i) identifying, assessing and, if practicable, quantifying the benefits and

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[9] Being s 32 in the form inserted by s 70 Resource Management Amendment Act 2013, given:
(i) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013;
(ii) the transitional provision in cl 2 of Schedule 2 to the Amendment Act (inserting a new Schedule 12 in the principal Act) which requires the further evaluation under s 32 to be undertaken as if s 70 of the Amendment Act had not come into force only if it came into force on or after the last day for making further submissions on the proposed District Plan; and
(iii) the last day for making further submissions on the proposed District Plan being 19 December 2013.

costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and

ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and

(c) summarising the reasons for deciding on that rule.

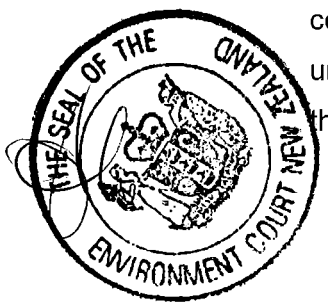
[44] Section 32 of the Act has been through several amendments since the Act first came into force. It is not necessary to rehearse the whole evolution of the section for the purposes of this case, but in light of the focus of this appeal and the wording of the relevant objectives and policies of the proposed District Plan it is appropriate to address one particular aspect of s 32 which has recently been inserted.

[45] The requirement to identify other means or options for achieving the purpose of the Act and the objectives of the plan which is being evaluated has been a central element of s 32 of the Act in all its versions. The current version appears to be the first time that the options have been qualified by the words *reasonably practicable*. The potential importance of this qualification is emphasised in this case given the centrality of Policy MN 8B in the RPS and Policy IB2(1)(b) in the proposed District Plan in argument before us and their wording which calls for consideration of whether avoiding adverse effects on significant indigenous vegetation and SIBS is or is not "practicable."

[46] Neither the word "practicable" nor the phrase "reasonably practicable" is defined in the Act. There is a definition of "best practicable option" in s 2 where it is defined to mean, unless the context otherwise requires:

> *in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—*
>
> *(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the financial implications, and the effects on the environment, of that option when compared with other options; and*
>
> *(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.*

[47] While acknowledging that this case is not concerned with the discharge of a contaminant or the emission of noise, we consider that this definition is helpful in understanding what the word "practicable" may mean in the context of the Act and how the practicability of an option should be analysed.



[48] The word "reasonably" is often used to qualify other words both in legislation and in case law. It has been held in relation to the predecessor provision to s 6(a) of the Act that it may be an implied qualification of the word "necessary."[10] Similarly in relation to s 341(2)(a) of the Act, the same qualification has been implied on the basis that it is unlikely that the legislature envisaged the unreasonable.[11] In the context of an earlier version of s 171(1)(c) of the Act, it has been held to allow some tolerance to the meaning of "necessary" as falling between expedient or desirable on the one hand and essential on the other.[12] There does not appear to be any reason why it should be interpreted differently when used (whether expressly or by implication) in the phrase "reasonably practicable."

[49] Examining other legislation which may be of assistance in this context, we also note that there is a definition of "reasonably practicable" in the Health and Safety at Work Act 2015, as follows:

> *In this Act, unless the context otherwise requires,* reasonably practicable, *in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
>
> *(b) the degree of harm that might result from the hazard or risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

[50] Similar definitions are to be found in other legislation concerned with matters of health and safety and the protection of property, including in s 2 Electricity Act 1992, s 2 Gas Act 1992, s 69H Health Act 1956 and s 5 Railways Act 2005. The phrase is also used in many statutes without definition.

[51] These legislative examples are, perhaps unsurprisingly, consistent with well-established case law interpreting the meaning of "reasonably practicable." It has been

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[10] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 260; (1989) 13 NZTPA 197 at 203 (CA) per Cooke P in relation to s 3(c) of the Town and Country Planning Act 1977, citing *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423, 430; and *Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25, 54.

[11] *Hugle v Cowie* [1998] 1 NZLR 104 at 109-110; [1997] NZRMA 395 at 400-401; (1997) 3 ELRNZ 261 at 268 (HC).

[12] *Bungalo Holdings Ltd v North Shore City Council* A137/2002 at [94].

held that the phrase is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk.[13] Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable, but if the risk is a very rare one and the trouble and expense involved in precautions against it would be considerable but would not afford anything like complete protection, then adoption of such precautions could have the disadvantage of giving a false sense of security.[14] "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[15] Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighing exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.[16]

[52] While acknowledging that this case is not governed by any of those other Acts referred to and that the case law summarised above was decided under other legislation, nonetheless we consider the approach consistently taken in other legislation and by other Courts to the assessment of the correct approach to or the boundaries of what is "practicable" in relation to a duty to ensure the health and safety of people and the protection of property could be analogous to the approach which may be taken to protecting, or otherwise dealing with adverse effects on, the environment under the Resource Management Act 1991.

[53] We consider that these statutory provisions and cases together illustrate a consistent approach to the meaning of "reasonably practicable" which we respectfully adopt in this case in considering the options before us. We accordingly proceed to consider RPS Policy MN 8B and District Plan Policy IB2(1)(b) and identify reasonably practicable options for achieving the objectives of the proposed District Plan by examining the options having regard to, among other things:

[13] *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743 (EWCA).
[14] *Marshall v Gotham Co Ltd* [1954] AC 360; [1954] 1 All ER 937 (UKHL).
[15] *Union Steam Ship Co of NZ Ltd v Wenlock* [1959] 1 NZLR 173 (CA).
[16] *Auckland City Council v NZ Fire Service & anor* [1996] 1 NZLR 330 (HC).

i) The nature of the activity and its effects;

ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;

iii) The likelihood of adverse effects occurring;

iv) The financial implications and other effects on the environment of the option compared to other options;

v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;

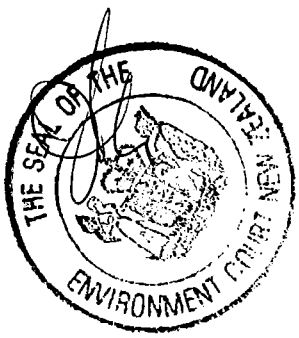
vi) The likelihood of success of the option; and

vii) An allowance of some tolerance in such considerations.

The extent to which adverse effects must be avoided

[54] A further consideration arising from the centrality of RPS Policy MN 8B and District Plan Policy IB2(1)(b) in the argument is the need expressed in those policies to avoid adverse effects on significant indigenous vegetation and scheduled SIBS or, where avoidance is not practicable, to remedy or mitigate adverse effects.

[55] The most obvious meaning of "avoid" in the context of the Act and in policy statements under it, as held by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[17] is "not allow" or "prevent the occurrence of." The Supreme Court then goes on to explore the contexts in which the word is used and, in particular, the importance of its meaning when used with the word "inappropriate" in relation to subdivision, use and development. That exploration is principally in the context of s 6(a) and (b) of the Act and against the framework of the New Zealand Coastal Policy Statement. It is clear, however, that the approach of the Supreme Court is equally applicable in other contexts where the extent of avoidance called for by a policy is to be considered.[18]



[17] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [92]-[97].

[18] See for example *R J Davidson Family Trust v Marlborough DC* [2017] NZHC 52 at [61]-[93] where the Supreme Court's approach in relation to a proposed plan change was held to be a lawful consideration in relation to an application for resource consents.

[56] Certainly, in relation to this case which involves a plan review and proposed provisions intended to recognise and provide for the protection of areas of significant indigenous vegetation as required by s 6(c) of that Act, it was common ground that the approach of the Supreme Court was applicable.

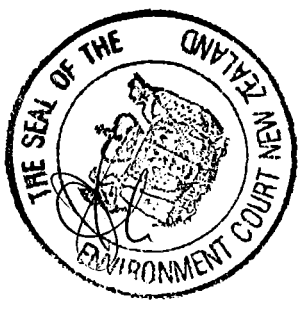
[57] The consideration of context is, as it usually is,[19] an essential part of the interpretation and application of policy provisions. It is generally insufficient to refer to the presence of the word "avoid" as a conclusion in itself: a policy to avoid adverse effects of activities on the environment, without any greater particularity, could be said to be a basis for not allowing any activity at all. As the Court of Appeal recently observed in *Man o'War Station Ltd v Auckland Council,*[20] much turns on what is sought to be protected.

[58] We bear this guidance respectfully in mind in considering not just whether the SIBS listed in Schedules A and C to Chapter 15 of the proposed District Plan should be protected, but the extent of such protection and the manner in which such protection is intended to be achieved.

[59] In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*:[21] that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

Classes, categories or status of activities

[60] The power to categorise activities into one of six classes and to make rules and specify conditions for each class is conferred by s 77A of the Act. The six classes of



[19] *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (UKHL), 1636 per Lord Steyn; referred to in *McGuire v Hastings DC* [2001] NZRMA 557 (PC) at [9] per Lord Cooke.

[20] *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [65] as part of discussion in [59]-[66] and [70]-[73].

[21] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

activities are listed in s 77A(2) and described in s 87A. The class of an activity is often referred to as its "activity status."[22]

[61] The six classes may be seen as a spectrum of control from *permitted* through to *prohibited* in a progression of increasing levels of constraint:

(i) a permitted activity requires no resource consent and may be undertaken as of right if it complies with the requirements, conditions and permissions, if any, specified in the Act, regulations or relevant plan;

(ii) a controlled activity requires a resource consent but that consent must (with limited exceptions) be granted and may be subject to conditions within the scope of control specified in the relevant plan or national environmental standard;

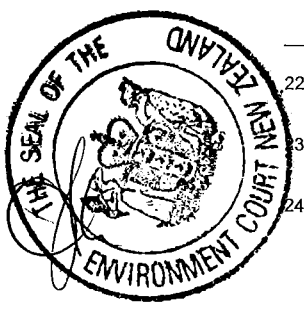
(iii) a restricted discretionary activity requires a resource consent but the consent authority's power to decline an application for such an activity or to grant consent and impose conditions is restricted to the matters specified for that purpose in the plan or national environmental standard;

(iv) a discretionary activity requires a resource consent and the consent authority's discretion to decline consent or to grant consent with or without conditions is, within the scope of the Act itself, unlimited;

(v) a non-complying activity must be assessed against the threshold tests in s 104D of the Act and may be granted only if it passes one of those threshold tests; and

(vi) a prohibited activity is one for which no application for resource consent may be made.

[62] Counsel for the Council referred us to well-known decisions in *New Zealand Mineral Industry Association v Thames-Coromandel District Council*[23] and *Mighty River Power Limited v Porirua District Council*[24] in support of her argument that the harvesting of trees from sites listed in Schedule A should be discretionary rather than non-



[22] The phrase "activity status" appears only in s 149G of the Act, inserted on 1 October 2009, but the usage among practitioners is considerably older than that.

[23] *New Zealand Mineral Industry Association v Thames-Coromandel District Council* (2005) 11 ELRNZ 105.

[24] *Mighty River Power Limited v Porirua District Council* [2012] NZEnvC 213.

complying. She did acknowledge, however, in response to a question from the Court that the statements in those decisions on which she relied were conditioned by the factual circumstances before the Court in those two cases. We consider that acknowledgement to be properly made and, with respect to those decisions and others of a similar nature,[25] we think that caution must be exercised in applying the reasoning in those decisions to other cases. Without doubting the correctness of the statements in the context of the cases in which they were made, the complexity of plan making means that the classification of activities in other circumstances is likely to require specific analysis of the effects of the activity against the particular objectives and policies which relate to the activity being assessed.

[63] It is important to note that the statutory framework for the classification of activities contains no provisions which address the application of these categories or classes to any particular activities or in terms of the nature of the effects of any activity. Instead, the scheme of the Act is that the categorization or classification of an activity is to be done by rules under s 77A. Such rules, like all others in a district plan, must be examined and assessed in accordance with the requirements of s 32 of the Act and consistent with the requirement under s 76(3) of the Act to have regard to the actual or potential effect on the environment of the activity under consideration including, in particular, any adverse effect.

Evaluating the most appropriate activity status

[64] In terms of achieving the objectives of the proposed District Plan, both parties pointed to Objective IB2 as being the most relevant:

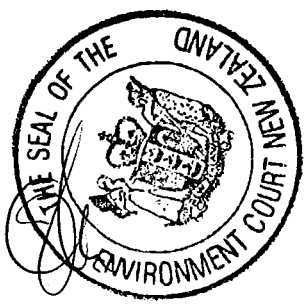
> ***Objective IB2:*** *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

The focus of the argument was then on the issue of the most relevant policy, with the focus of the case being on policies IB2(1)(b) and IB2(5).

[65] Counsel for the Council, in addressing the extent of protection that is appropriate in the circumstances, placed the most weight on Policy IB2(5):

> ***Policy 5:*** *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[66] She submitted, based on Mr Shaw's evidence, that classifying harvesting in



[25] In relation to permitted activities, see *Twisted World Limited v Wellington City Council* W024/2002 at [62]-[64]; in relation to restricted discretionary activities see *Auckland City Council v John Woolley Trust* (2007) 14 ELRNZ 106 at [49] (HC); and in relation to discretionary activities, see *Lakes District Rural Landowners Society Inc v Wakatipu Environmental Society Inc* C75/2001 at [43]-[44].

Schedule A sites as non-complying would go too far, given the extent to which the plan provided for the assessment of effects in terms of specific criteria and the status of discretionary left open the ability of the Council to decline an application.

[67] In relation to classifying harvesting in Schedule C sites as permitted, she submitted, on the basis of Mr Shaw's evidence that the effects would be no more than minor, that it was unnecessary to impose the costs of the consenting process on landowners except where grazing was proposed during the regeneration phase.

[68] It was common ground that grazing generally slows the regeneration of indigenous species, but that as kānuka and mānuka are relatively unpalatable to stock they are able to regenerate in the presence of managed grazing. On that basis, the parties were agreed that the activity status in Schedule C sites should be restricted discretionary where grazing is proposed during the regeneration phase, which amounts to a partial allowance of the Society's appeal.

[69] The Council proposed that, should the Court confirm the status of Activity 9 in Schedule C sites as otherwise permitted, this outcome could be provided for in the rules by inserting a footnote to that activity status stating that restricted discretionary status applies where grazing is proposed during the natural regeneration phase. The assessment of an application for consent for that activity would not be against the assessment criteria for clearance of indigenous vegetation and so the heading of Rule 15.4.1 would explicitly exclude Activity 9. Instead, such assessment was proposed to be dealt with by a new rule 15.4.4 setting out the restrictions on the Council's discretion, as follows:

> ***15.4.4*** ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.4.4.1* *Council shall restrict its discretion to:*
>
> *a. Timing to enhance the regeneration or establishment of mānuka and kānuka;*
> *b. Stock type;*
> *c. Grazing intensity;*
> *d. Stock containment methods; and*
> *e. Potential adverse effects on water bodies within the property.*

[70] Counsel for the Council also addressed the relocation and expansion of condition (c) in Activity 15.2.1.2(9) (as notified) to become a new rule 15.2.6, in the following terms:

> ***15.2.6*** ***Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.2.6.1* *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is*

> *submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[71] Counsel submitted that this rule would apply to Activity 15.2.1.2(9) regardless of its activity status because it forms part of the rules for indigenous biodiversity generally. We note the statement at the beginning of section 15.2 of the District Plan:

> The following standards and terms apply to Permitted, Controlled, and Restricted Discretionary activities and will be used as a guide for Discretionary and Non-Complying activities.

[72] Should any harvesting of kānuka and mānuka not meet the standards and terms[26] of Rule 15.2.1.2(9) or Rule 15.2.6, counsel noted that then it would be subject to Rule 15.2.1.2(14), the catch-all activity rule which makes activities involving indigenous vegetation clearance or modification or habitat disturbance not otherwise provided for in the activity table a non-complying activity in sites listed in Schedule A and a discretionary activity in sites listed in Schedules B and C.

[73] The Court expressed a doubt about the likelihood of compliance with Rule 15.2.6.1, particularly at years five and 15 and especially where the subject property may have been transferred. In reply, counsel for the Council submitted that much of the land listed in Schedule C is Māori land and unlikely to be transferred to third parties. She said that monitoring of sites that had been subject to harvesting would occur whether the activity was the subject of a consent or not and whether the costs of monitoring were the subject of an administrative charge under s 36(1)(c) or not.

[74] In response, counsel for the Society placed the most weight on Policy IB2(1)(b):

> ***Policy 1(b):*** *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*
>
> *(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.*

[75] Counsel for the Society approached the issue of the appropriate activity status for harvesting kānuka and mānuka by referring us to the decision in *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council*.[27] There the Court was concerned with the level of protection of significant natural areas required in terms

[26] Being the "requirements, conditions, and permissions" referred to in s 87A of the Act.

[27] *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council* [2015] NZEnvC 219.

of s 6(c) of the Act. By analogy with the consideration of the requirements of s 6(a) and (b) of the Act taken by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[28] the Environment Court held that there was a requirement to implement the protective element of sustainable management in those circumstances.

[76] While recognising that counsel for the Society referred to the *New Plymouth* case for its clarification of the meaning of the word "protection" which is not defined in the Act, we note that the case concerned an application for declarations and enforcement orders based on claims that the Council had not appropriately recognised and provided for protection of areas of significant indigenous vegetation, among other things. Those circumstances clearly come within the exception of incompleteness to the hierarchical approach as explained by the Supreme Court.

[77] In the present case there is a clear relationship between Policy IB2(1)(b) in the District Plan and Policy MN 8B in the RPS where the former gives effect to the latter, providing local and regional substance in terms of the principles in s 6(c) of the Act. On that basis, and consistent with the approach described in the *Appealing Wanaka* decision[29] discussed above, we should not go back to Part 2 of the Act in a more general assessment of what is appropriate.

[78] Counsel for the Society stressed the character of the adverse effects of the harvesting activity and relied on the evidence of Ms Myers in relation to the disruption of forest succession, loss of habitat, hedge effects and the particular threat to Schedule A sites given their small size. She also submitted that the evidence that little or no harvesting was presently occurring in the Schedule A and C sites meant that there was no economic incentive to undertake harvesting and therefore it would be unnecessary to provide for that activity so as to enable reasonable use of the land. With respect, we think that latter submission is not supported by the scheme of the Act or other authority. In our view, the Act is not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary.

[79] Another point raised in the argument before us was the notion that the classification of an activity as non-complying tended to indicate that it ought not to occur, while the classification as discretionary usually means that the activity will be

[28] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [24]-[28].

[29] *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

acceptable if it is made subject to appropriate conditions.

[80] With respect, cognisant of the degree to which some earlier decisions of the Court noted above[30] may give that impression, we consider it better to approach these two classifications in their statutory context. In particular, they share the same consenting provision in s 104B of the Act, which is expressed simply as a general discretion. While a non-complying activity must first pass one of the thresholds set out in s 104D, if it does so then in terms of s 104B it is to be considered on the same statutory basis as a discretionary activity. At that stage, both types of activities must be considered in terms of the matters set out in s 104 of the Act, including having regard to any effects on the environment of allowing that activity and any relevant provisions of any of the planning documents listed in s 104(1)(b). Typically, the most relevant provisions will be the objectives and policies which bear most directly on the activity or others of like nature and on the environmental context in which the activity is proposed to be established.

[81] In relation to the Schedule A sites, we conclude that a discretionary activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka. We consider that this activity status responds to the policy framework in the District Plan by providing suitable protection of SIBS through an assessment and consenting process for sustainable use of the resource. The detailed assessment criteria for this activity should ensure a thorough analysis of all likely effects, including effects on wider ecosystems. Given those provisions in the District Plan, we do not see any reason to require a prior threshold assessment under s 104D of the Act: that would amount to a further restriction which would add little if anything to the assessment under s 104.

[82] In relation to the Schedule C sites, we conclude that a permitted activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka where grazing will not occur during the regeneration phase. We consider that the requirements, conditions, and permissions for this activity appropriately delimit the extent to which it could occur without a resource consent being required and provide a reasonably clear boundary to the activity for the purposes of monitoring and enforcement. We also have regard to the fact that harvesting of mānuka and kānuka has been occurring in the district for a long time without evidence of more than minor adverse effects on the environment. We also note the fact that currently little or no such

[30] At fn 23 and fn 24.

harvesting activity is occurring in the Schedule C sites and see no evidence that a requirement to obtain resource consent should be imposed on any sort of pre-emptive basis. We acknowledge the relationship of the Māori owners with much of the land listed in Schedule C and take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi and the purpose and principles of Te Urewera Act 2014 in reaching our conclusion.

[83] We are grateful to the parties for the constructive way in which they have worked together to improve the related provisions of the District Plan, including since mediation. In particular:

(a) We endorse the suggested amendment of the activity description to replace the words "in the same year" with "within one year." This amendment effectively addresses the potential problem of treating the activity as occurring within a calendar year when it is much more likely to be seasonal.

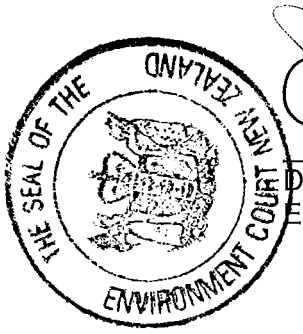
(b) We endorse the agreed position that if harvesting in the Schedule C sites is to be generally a permitted activity, nonetheless it should be a restricted discretionary activity if grazing is proposed in the harvested area during the regeneration phase, given the effect of grazing to delay such regeneration.

(c) As a consequence of that adjustment to the activity status in the Schedule C sites, we also confirm the appropriateness of the amendments to the headings of Rules 15.2.6, 15.4.1 and 15.4.4 to make that distinction clear.

[84] We attach to this decision as **Attachment A** the relevant provisions of the District Plan, amended in accordance with our decision. We attach as **Attachment B** the same provisions with those amendments shown with deletions struck through and additions underlined.

[85] In accordance with the Court's usual practice on appeals under clause 14 of Schedule 1 to the Act, there is no order as to costs.

For the Court:



D A Kirkpatrick
Environment Judge

Attachment A

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover.	D	RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

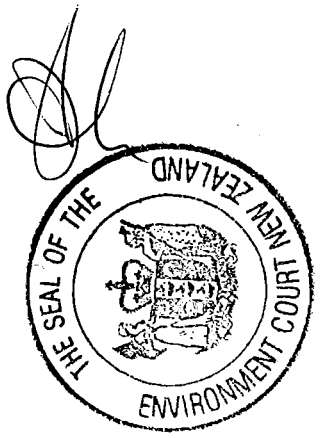
a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

Where indigenous vegetation naturally regenerates or is replanted within a SIB in accordance with Rule 15.2.1.2(9), it is not a "plantation or vegetation established for commercial purposes" as described in the definition of indigenous vegetation.

Naturally regenerate means the harvested area is retired from other active land uses (including grazing) and indigenous vegetation is allowed to regenerate through natural processes. For kānuka and mānuka dominant stands this will typically take ten to twenty years.



Attachment B

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

Amendments are shown with deletions ~~struck through~~ and additions underlined

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted ~~in the same~~ within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; ~~b~~c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover. ~~c. a sustainable management plan verifying the above is submitted to Council.~~	~~RD~~ D	~~C~~ RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9)) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

3. Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
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e. Potential adverse effects on water bodies within the property.

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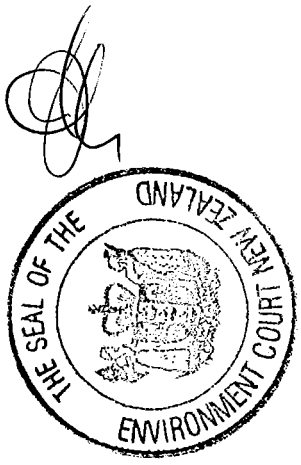


IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14 of the First Schedule of the Act
BETWEEN	KIWI RAIL HOLDINGS LIMITED
	(ENV-2020-AKL-000131)
	Appellant
AND	WHANGĀREI DISTRICT COUNCIL
	Respondent

Court: Environment Judge J A Smith sitting alone under section 279 of the Act

Date of Order: 01 APR 2021

Date of Issue: 01 APR 2021

CONSENT ORDER

A: Under section 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

(1) Plan Changes 88 and 109 to the Operative Whangārei District Plan are amended in accordance with **Annexure 1**;

(2) The Planning Maps be amended to show the new Strategic Railway Line Protection Area in accordance with **Annexure 2**;

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(3) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Transport topic are resolved;

(4) The District Wide – Transport topic remains extant;

(5) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Noise topic remain extant.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

[1] This consent order relates to the appeal by KiwiRail Holdings Limited (**KiwiRail**) against the decision of the Whangārei District Council on Plan Changes 88A to 88I, 109 and 115 to the Operative Whangārei District Plan (**the Plan**), and specifically to that part of KiwiRail's appeal dealing with setbacks from the railway corridor boundary allocated to the District Wide Transport topic.

[2] Under the Plan the only specific setbacks from railway corridor boundaries are within the Rural Village Residential Zone and Rural Village Centre Zone, where residential units are required to be setback 4.5m and 2m respectively from the railway line designation boundary.

[3] The notified plan changes did not introduce any additional railway corridor setbacks.

[4] KiwiRail made a submission on the Plan Changes (**the submission**) seeking the inclusion of a new rule within the district wide Transport (**TRA**) Chapter, applying to all zones, requiring consent as a restricted discretionary activity for buildings not set back at least 5 metres from a railway corridor boundary. As an alternative to the requested TRA rule, the submission sought the inclusion of the same setback rule

within 15 specified zone chapters. The submission also sought a district wide rule to require forestry replanting to be set back 10m from the railway corridor boundary.

[5] The Council's Decisions on the Plan Changes did not introduce the amendments requested in the submission.

[6] The appeal seeks relief consistent with the submission.

[7] The parties listed below have given notice of intention to become a party to KiwiRail's appeal with respect to building setbacks from the railway corridor under section 274 of the Act and have signed the joint memorandum in support of the consent order:

(a) Foodstuffs North Island Limited
(b) Heron Construction Holdings Limited
(c) Kāinga Ora – Homes and Communities
(d) Port Nikau Joint Venture
(e) Southpark Corporation Limited
(f) Udy Investments Limited
(g) The University of Auckland

[8] There are no section 274 parties with respect to forestry setbacks from the railway corridor.

Agreement reached

[9] Following mediation and subsequent direct discussion, the parties have reached agreement on a proposal to resolve the aspects of the appeal within the District Wide – Transport topic.

[10] KiwiRail is no longer pursuing relief relating to forestry setbacks.

[11] The parties have agreed that the Planning Maps, interpretation rule HPW-R6 and policy TRA-P16 are to be amended, and a new TRA rule is to be inserted, to better protect the safe, efficient and effective operation of the rail corridor.

Section 32AA Analysis

[12] Section 32AA of the Act requires a further evaluation for any changes to a proposal since the initial section 32 evaluation report. In this instance the changes are the introduction of specific provisions for managing buildings in proximity to the railway corridor.

Mapping of Strategic Railway Line Protection Areas

[13] The appeal sought provisions requiring building setbacks from the "railway corridor boundary". The two approaches identified in the appeal were either a blanket district wide rule in the TRA Chapter, or zone-specific rules in 15 specified zones.

[14] The agreed provisions take an alternative approach of creating a new mapped layer in the Planning Maps which identifies where the new setback rules apply. This approach is consistent with similar provisions in the TRA Chapter (strategic road protection areas and indicative roads).

[15] Mapping the locations where the setback rule applies avoids having to define the "railway corridor boundary", and allows for an approach better tailored to specific instances in Whangārei where a setback is considered appropriate.

[16] For example, the "Kamo Shared Path" has recently been constructed throughout portions of Whangārei within the railway corridor designation, between the physical rail tracks and the adjoining property boundaries. There are also locations where the railway designation is significantly wider than the physical tracks, and any adjoining property boundaries are at least 100m from the tracks. The parties agree that requiring additional setbacks in either of these locations would not improve the safety or efficiency of rail operations, as a sufficient physical setback is already provided.

[17] The areas where a setback is considered appropriate traverse multiple zones and the parties agree that the most efficient method of targeting the setback is by introducing the new mapping.

[18] The appeal relief refers to setbacks in 15 specified Residential, Business and Open Space zones. The spatial analysis undertaken to generate the mapped setbacks refined this to only Residential and Business zones.

Amendments to policy TRA-P16

[19] The appeal did not specifically seek any amendments to the objectives or policies.

[20] The agreed provisions however consequentially introduce a new subclause to policy TRA-P16 to provide policy direction that providing sufficient building setbacks from identified strategic railway line protection areas is for the purpose of ensuring that buildings can be safely accessed and maintained.

[21] Introducing a policy framework provides more clarity and certainty for applicants, and for the Council when assessing resource consent applications.

New TRA Rule

[22] The agreed provisions introduce a new rule to the TRA Chapter which refers to the mapped strategic railway line protection areas. Locating the rule in the TRA Chapter is efficient as it avoids duplicating the rule in each relevant zone, and better relates the rule to the new policy which is also located in the TRA Chapter.

[23] The rule requires a 2m setback in the Residential Zones and a 2.5m setback in Business Zones.

[24] The setback distances have been reduced from the 5m setback sought in the appeal to respond to Whangārei's specific built environment and Plan-enabled development. This reduces the overall costs of the new provisions (compared to a 5m setback) while still ensuring that safe access to buildings adjacent to the railway corridor can be achieved.

[25] The larger setback in the Business Zones is based on the rationale that larger scale (smaller setbacks and greater height) buildings are enabled in the Business Zones and a larger setback provides for improved accessibility, such as use of scaffolding.

[26] The agreed rule exempts "minor buildings" (e.g. garden shed, water tanks, etc.) and "major structures" (e.g. fences, swimming pools, flag poles, etc.). Based on the Plan definitions the parties agree that these generally do not require setbacks for access or maintenance purposes, and that requiring setbacks could lead to inefficient use of space on smaller residential sites.

[27] The agreed matters of discretion have been refined from the relief sought in the appeal to focus on the location, size and design of the building as it relates to the ability to safely use, access and maintain buildings without requiring access on, above or over the rail corridor.

[28] The agreed rule includes a notification rule precluding public notification, and identifying KiwiRail as the only potentially affected person under the limited notification provisions of the Act.

Amendments to HPW-R6

[29] Interpretation rule HPW-R6 is a Plan-wide rule regarding the zoning of roads, railways and rivers:

> *All public roads (including state highways), railways and rivers are zoned, although they are not coloured on the planning maps to avoid confusion. Roads, railways and rivers are zoned the same as the zoning of adjoining sites. Where a different zone applies on either side of the road, railway or river then the zoning will apply to the centreline of the road, railway or river.*

[30] The parties identified that some railway sites are specifically zoned on the Planning Maps. This results in internal conflict within the Plan as, in some instances, the mapped zoning would result in a different zoning outcome than if HPW-R6 were applied.

[31] To provide more clarity and to address this conflict the parties have agreed to consequentially amend HPW-R6 to record that some railway sites are zoned on the Planning Maps.

Assessment of reasonably practicable options

[32] The proposed amendment does not result in any changes to the zoning of the railway corridor but does resolve the current inconsistency in the Plan.

[33] The railway corridor is identified as Regionally Significant Infrastructure under the Decisions and the Regional Policy Statement for Northland 2016.[1] As such it is important to ensure that rail infrastructure can continue to operate in a safe, efficient and effective manner. In considering the most appropriate method of achieving this, the parties identified three options:

(a) Option 1 (status quo) – No specified building setbacks from railway corridor boundaries. Any setbacks would be dependent on the underlying zone setback rules.

(b) Option 2 (KiwiRail appeal relief sought) – A district wide "blanket" 5m building setback from the railway corridor boundary.

(c) Option 3 (the agreed provisions) – A 2m – 2.5m building setback from specifically mapped parts of the railway corridor.

[34] The parties agree that the most *efficient and effective* option in the context of Whangārei's specific built environment and Plan-enabled development is Option 3 because:

(a) Providing for a railway corridor setback better protects the safe, efficient and effective operation of rail infrastructure than the status quo.

(b) Reducing the setback distance from 5m to 2m – 2.5m reduces the costs on landowners while still providing for safe access and maintenance (including space for ladders and scaffolding).

(c) Identifying specific areas where the railway corridor setback applies (and conversely does not apply) tailors the provisions to areas within Whangārei where an additional setback is appropriate.

[35] The agreed new rule and mapping together with the amendments to TRA-P16 and HPW-R6 provide a clear and consistent framework for protecting the safe, efficient and effective operation of rail infrastructure in Whangārei. Option 3 will

[1] Appendix 3 of the Regional Policy Statement for Northland 2016.

effectively limit instances where private property owners may need to access the railway corridor in order to maintain or access their buildings. The agreed provisions are efficient in that they are less onerous than KiwiRail's relief sought, and there are notification exemptions where property owners apply for resource consent if they wish to infringe the setbacks.

[36] The parties agree that this is not a situation where there is uncertain or insufficient information such that the risk of acting or not acting needs to be evaluated, as the location of and safety requirements for the railway corridor are well understood.

Consideration

[37] In making this order the Court has read and considered the appeals and the joint memoranda of the parties dated 26 March 2021.

[38] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

(a) all parties to the proceedings have executed the memorandum requesting this order;

(b) all parties agree that the agreed amendments to the Plan Change resolve the KiwiRail appeal in relation to the District Wide – Transport topic in full; and

(c) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

[39] I am satisfied that an appropriate outcome has resulted. Overall, I consider the sustainable management purpose and the other relevant requirements of the Act are broadly met.

Order

[40] Therefore the Court orders, by consent, that:

(a) Plan Changes 88 and 109 to the Operative Whangārei District Plan are amended in accordance with **Annexure 1** (insertions marked as underlined, deletions as ~~strikethrough~~);

(b) The Planning Maps are amended to show the new Strategic Railway Line Protection Area in accordance with **Annexure 2**;

(c) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Transport topic are resolved;

(d) The District Wide – Transport topic remains extant;

(e) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Noise topic remain extant; and

(f) There is no order as to costs.

J A Smith
Environment Judge

Annexure 1

(insertions marked as underlined, deletions as ~~strikethrough~~)

(insertions marked as underlined, deletions as ~~strikethrough~~)

A. Transport Chapter (TRA)

TRA-P16 – Rail ~~Level Crossings~~ Infrastructure

To support the safe, effective and efficient operation of the transport network by:

1. *~~d~~Discouraging new vehicle and new pedestrian rail level crossings.*
2. *Providing sufficient building setbacks from identified strategic railway line protection areas to ensure that buildings can be safely accessed and maintained.*

TRA-R9A	***New Buildings, Excluding Minor Buildings***	
Residential Zones	*Activity Status: Permitted* *Where:* 1. *All new buildings, excluding minor buildings, are set back at least 2m from the strategic railway line protection areas as shown on the Planning Maps.*	*Activity Status when compliance not achieved: Restricted Discretionary* *Matters of discretion:* 1. *The location, size and design of the building as it relates to the ability to safely use, access and maintain buildings without requiring access on, above or over the rail corridor.*
All Zones Except Residential Zones	2. *All new buildings, excluding minor buildings, are set back at least 2.5m from the strategic railway line protection areas as shown on the Planning Maps.*	*Notification:* *Any restricted discretionary activity under TRA-R9A shall not be notified or limited-notified unless KiwiRail is determined to be an affected person in accordance with section 95B of the Resource Management Act 1991 or Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991.*

B. How the Plan Works Chapter (HPW)

HPW-R6 – Zoning of Roads, Railways and Rivers

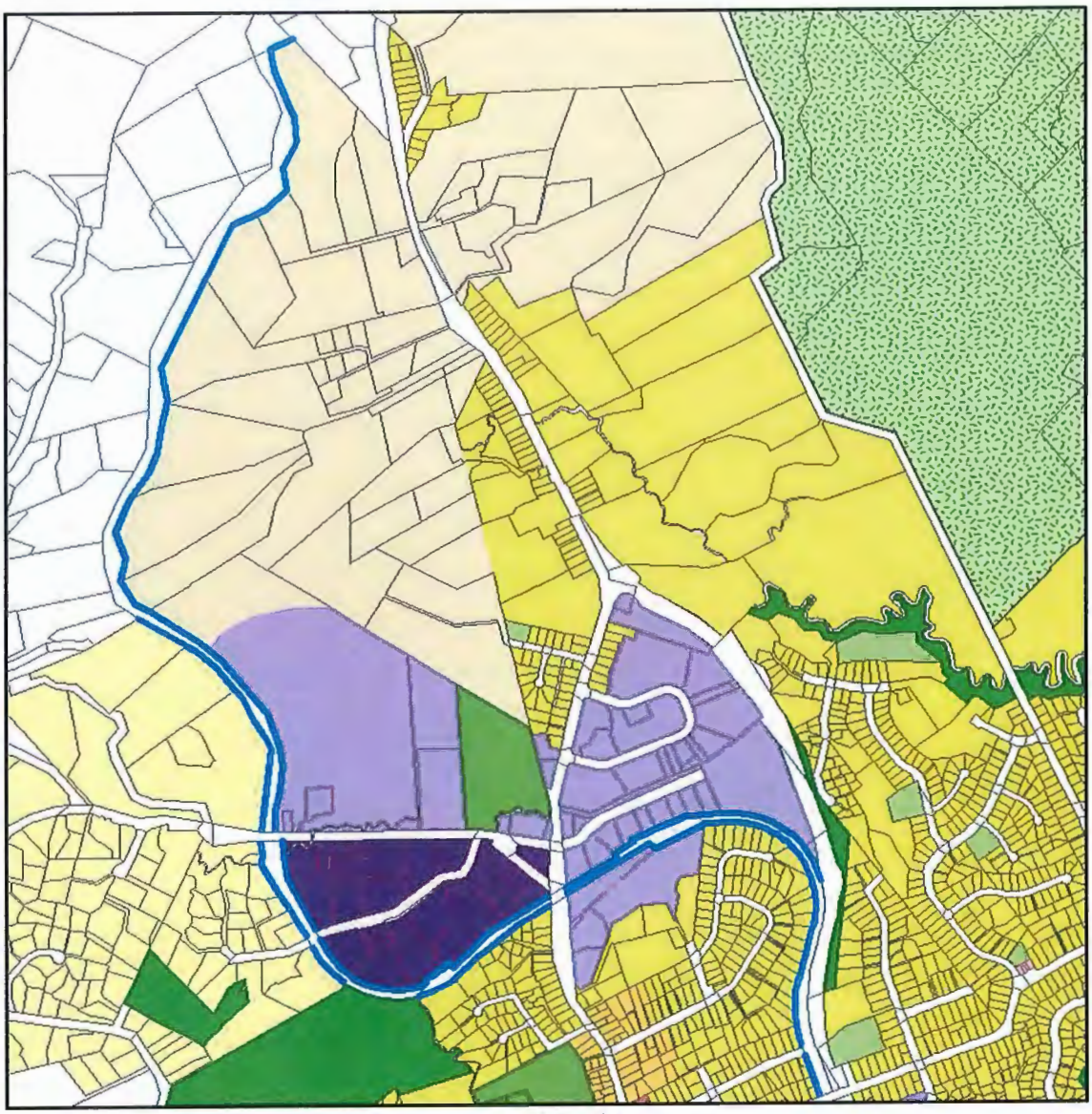
All public roads (including state highways), railways and rivers are zoned, although they are generally not coloured on the planning maps to avoid confusion.

Where ~~R~~roads, railways and rivers are coloured white on the planning maps they are zoned the same as the zoning of adjoining sites. Where a different zone applies on either side of the road, railway or river then the zoning will apply to the centreline of the road, railway or river.

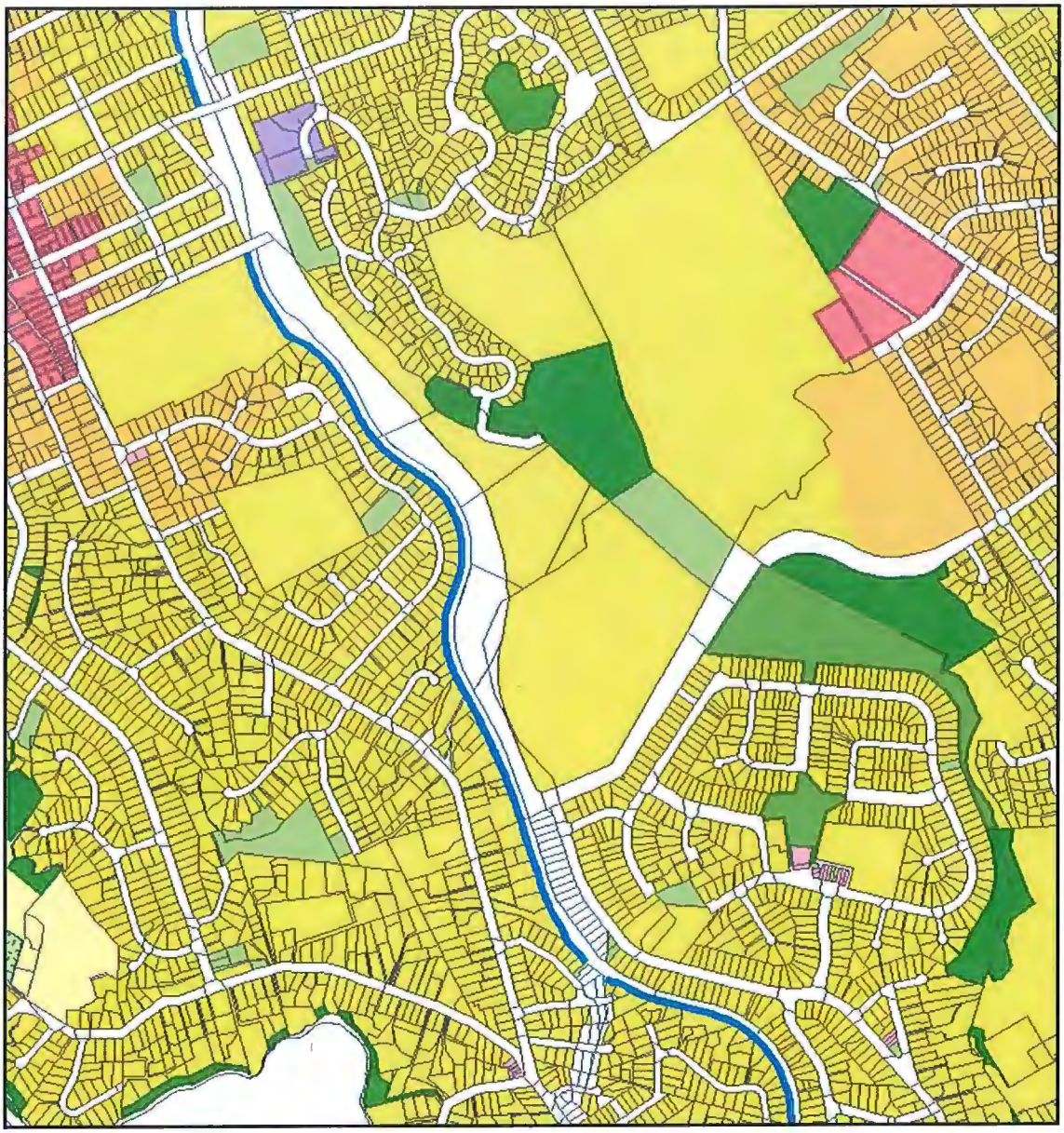
Where a specific zoning that is not coloured white is shown on the planning maps within a railway then that zoning applies.

Annexure 2

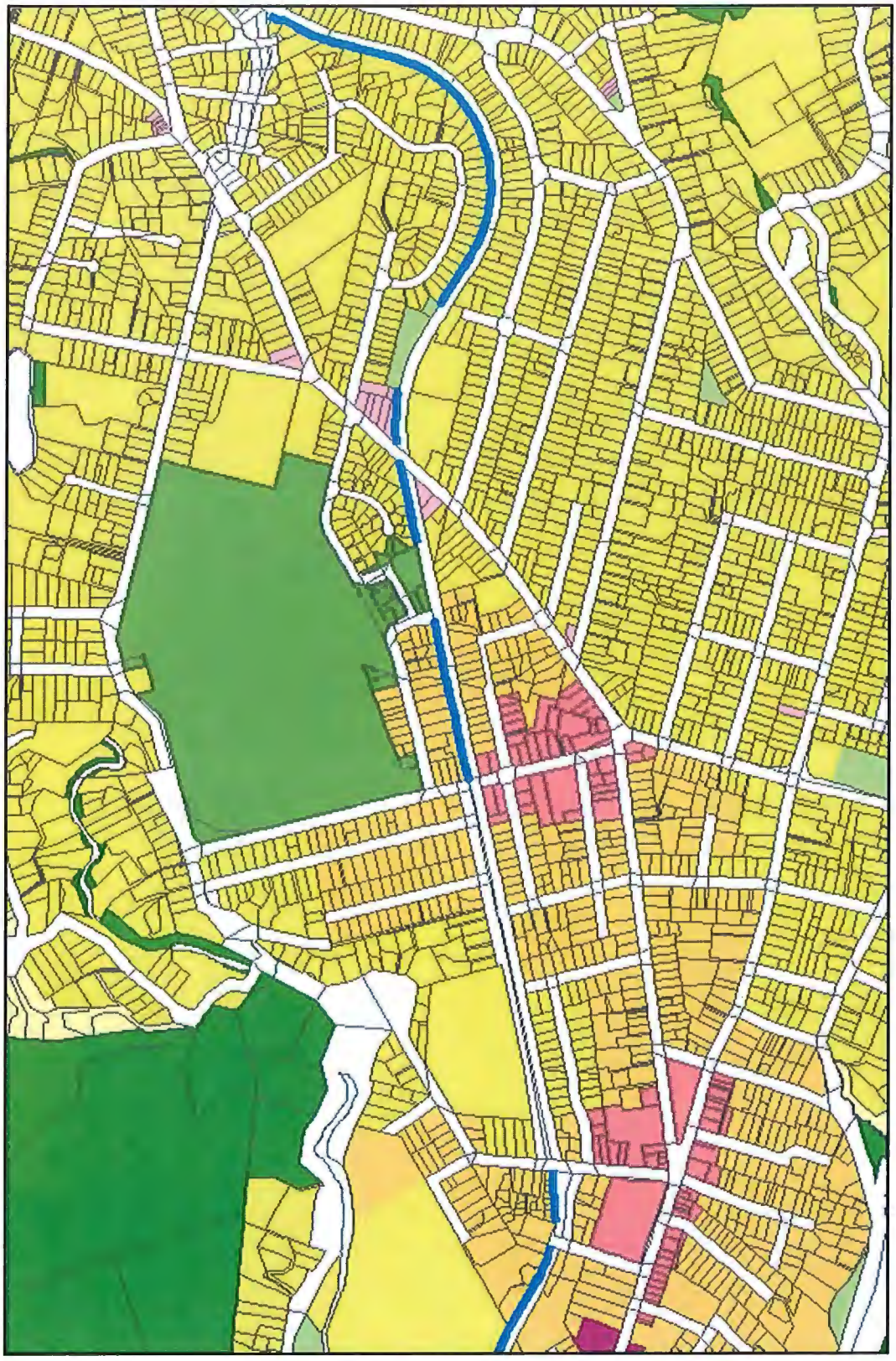
Location of new Strategic Railway Line Protection Areas



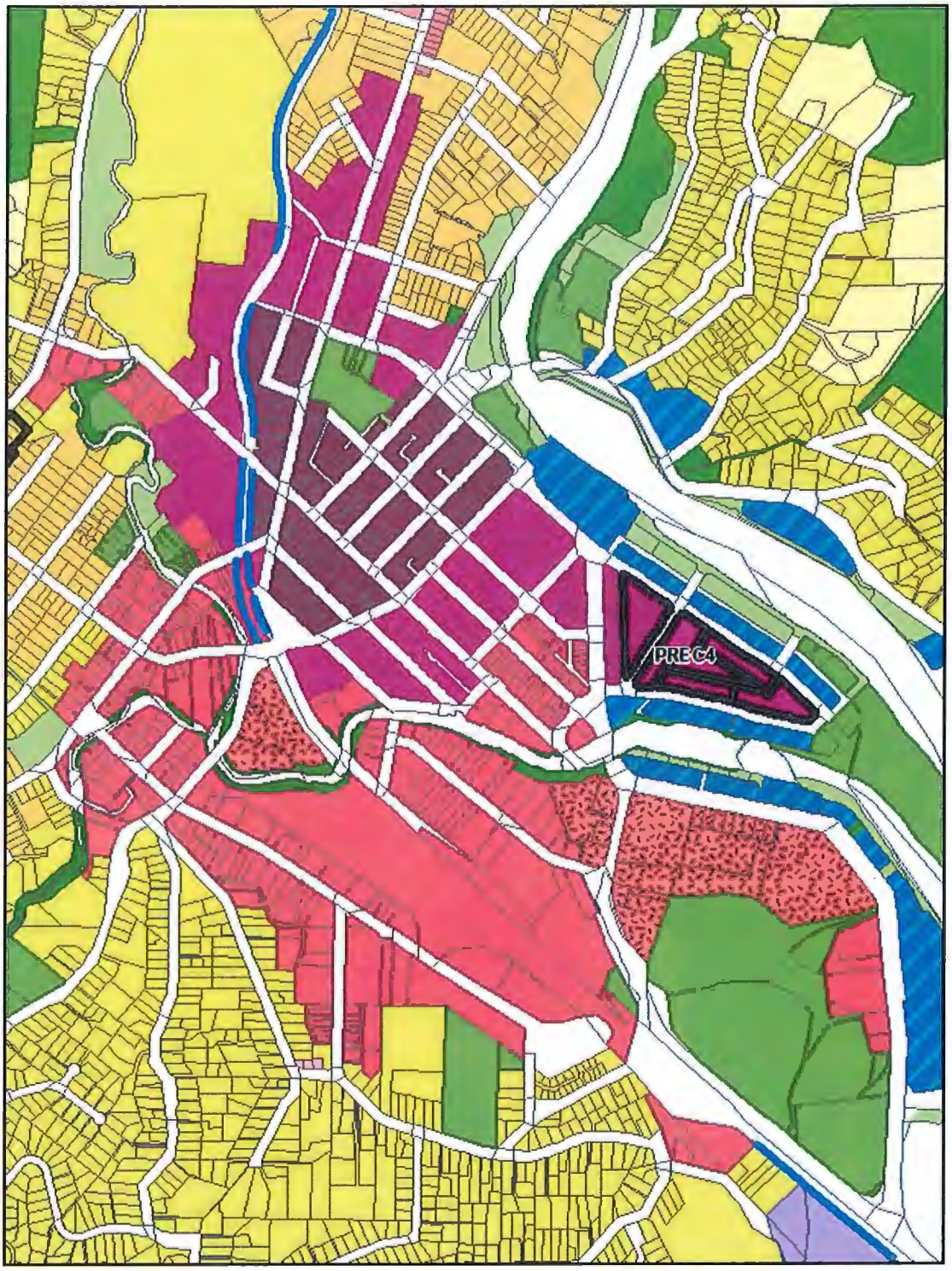
Springs Flat and Northern Kamo



Kamo and Otangarei

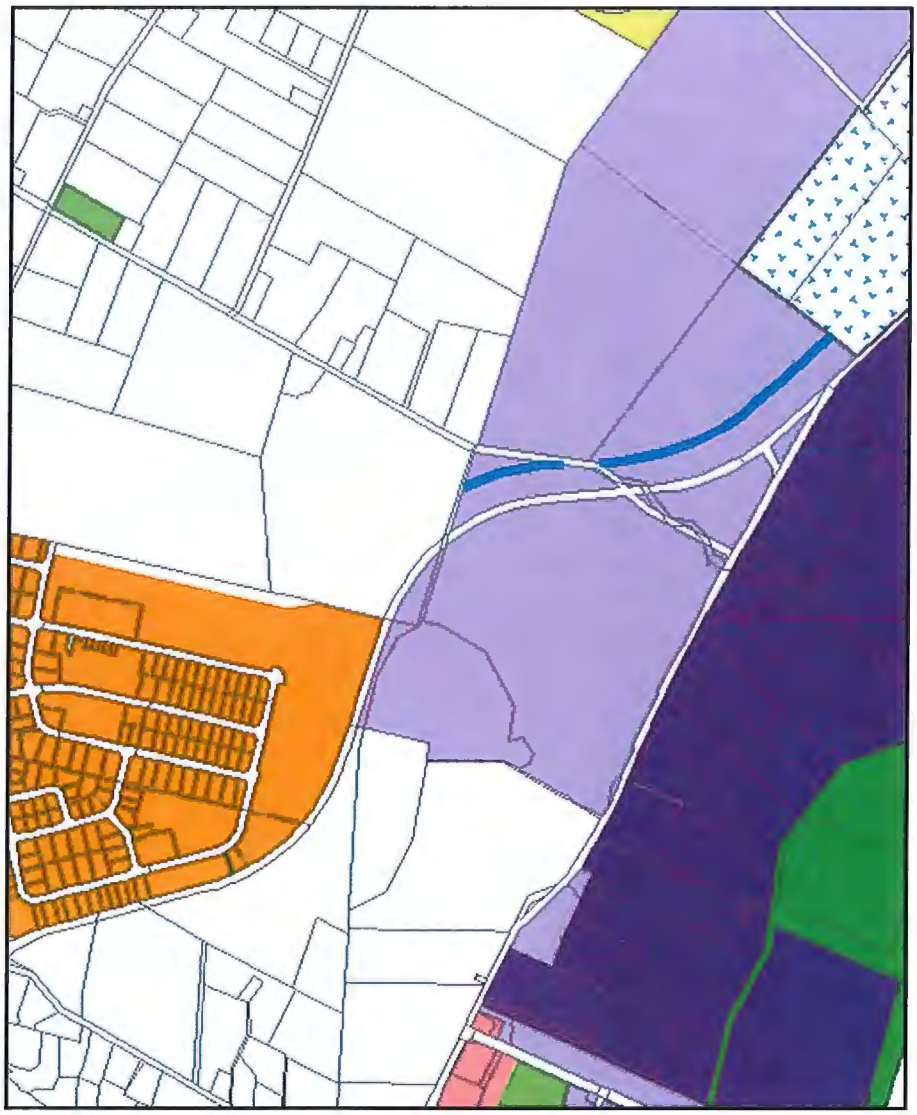


Kensington and Regent



Central City

Port Whangarei



Ruakaka

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 004

IN THE MATTER OF	appeals under clause 14 of the First Schedule of the Resource Management Act 1991 relating to Plan Change 109 – Transport of the Urban and Services plan change package
BETWEEN	KIWIRAIL HOLDINGS LIMITED (ENV-2020-AKL-000131) WAKA KOTAHI NEW ZEALAND TRANSPORT AGENCY (ENV-2020-AKL-000132) MARSDEN CITY LIMITED PARTNERSHIP (through its general partner MARSDEN CITY DEVELOPMENT LIMITED) (ENV-2022-AKL-000151) Appellants
AND	WHANGĀREI DISTRICT COUNCIL Respondent
AND	KĀINGA ORA – HOMES AND COMMUNITIES FOODSTUFFS NORTH ISLAND LIMITED THE UNIVERSITY OF AUCKLAND

SOUTHPARK CORPORATION LIMITED

Section 274 parties

Court: Environment Judge J A Smith sitting alone under s 279 of the Act

Date of Order: 18 January 2023

Date of Issue: 18 January 2023

CONSENT DETERMINATION

A: Under section 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

(1) The Noise and Vibration chapter and the Marsden City Precinct chapter of the Operative Whangarei District Plan are amended in accordance with Annexure 1;

(2) The Planning Maps are amended in accordance with Annexure 2;

(3) The District Wide – Noise topic is resolved in its entirety;

(4) The appeals by KiwiRail Holdings Limited and Waka Kotahi New Zealand Transport Agency are resolved in their entirety;

(5) The appeal by Marsden City Limited Partnership (through its general partner Marsden City Development Limited) is resolved through this determination and that in relation PC150 issued contemporaneously, except as to the issue of internal roading covered by the appeal on PC 150.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

C: I commend the Whangārei District Council on the prompt and reasonable resolution of the appeals and direct the amendments are incorporated into the plan Change. I understand the Change can then be made fully operative.

REASONS

Introduction

[1] This consent order relates to:

(a) The appeals by KiwiRail Holdings Limited (**KiwiRail**) and Waka Kotahi New Zealand Transport Agency (**Waka Kotahi**) against the decision of the Whangārei District Council (**the Council**) on Plan Change 109 – Transport (**PC109**) of the Urban and Services plan change package (**the Urban and Services plan changes**) to the Operative Whangārei District Plan (**the Plan**); and

(b) Consequential amendments associated with an appeal by Marsden City Limited Partnership through its general partner Marsden City Development Limited (**Marsden City Limited Partnership**) against the decision of the Council on Private Plan Change 150 – Marsden City (**PC150 – Marsden City**) to the Plan. This appeal is largely resolved by this determination and a separate determination issued contemporaneously in relation to PC150 but for one aspect relating to internal roading.

PC109 Appeals

[2] The relevant aspects of the appeals by KiwiRail and Waka Kotahi seek new provisions to protect amenity and human health, and to manage reverse sensitivity effects, for noise sensitive activities in close proximity to the state highway and rail networks across Whangārei district.

[3] These aspects of the appeals were allocated to the District Wide Noise topic of the appeals against the Urban and Services plan changes.

[4] These are the last remaining appeals, and this is the last remaining appeals topic, against the Urban and Services plan changes.

[5] This consent order resolves the remainder of the KiwiRail and Waka Kotahi appeals and the entirety of the District Wide Noise topic.

Marsden city PC150 appeal

[6] The Whangārei District Council are also processing appeals relating to change PC150 which in part deals with growth issues at Marsden Point and surrounding area. Marsden City Limited (through its general partner) filed appeals seeking more liberal provisions for development. Most issues have been resolved in a contemporaneous determination issued by this court on PC150.[1]

[7] In the course of discussions, it was agreed that noise sensitive activities (close to rail) at Marsden would be better dealt with as part of a district wide control rather than separately. Thus, the parties now agree and seek that this control be in the district wide provisions and also resolve the Marsden City appeal on this issue under PC150.

PC109

Operative Plan

[8] The Plan contains a Noise and Vibration (**NAV**) chapter including:

(a) Permitted activity sound insulation requirements for noise sensitive activities located within certain zones;[2] and

(b) Controlled activity rules for the construction of additional habitable rooms and new residential units within the mapped Outer Control Boundary of Whangārei Airport.[3]

[1] [2023] NZEnvC 5.
[2] NAV.6.5 Sound Insulation Requirements.
[3] NAV.6.6 Activities Establishing near the Airport Zone.

[9] The only existing requirements in the Plan managing noise sensitive activities in close proximity to the state highway and rail networks apply to mapped locations at Marsden.[4]

[10] There are no district wide requirements in the NAV chapter (or elsewhere in the Plan) managing noise sensitive activities in close proximity to the state highway and rail networks across Whangārei district.

Notification

[11] The notified Urban and Services plan changes did not introduce any provisions managing noise sensitive activities in close proximity to the state highway and rail networks across Whangārei district.

Submission

[12] KiwiRail and Waka Kotahi made complementary submissions (**the submissions**) on PC109 seeking a new suite of provisions (an objective, a policy and a rule) to ensure that new activities which locate in close proximity to transport networks are protected from potential adverse health and amenity effects. The proposed rule would apply to new buildings, or alterations to existing buildings, that contain an activity sensitive to noise with reference to:

(a) Road noise effects on noise sensitive activities in outdoor spaces, within 100m of a state highway carriageway;

(b) Road and rail noise effects on new or altered buildings containing noise sensitive activities, within 100m of a state highway carriageway or 100m from the legal boundary of a rail corridor; and

(c) Road and rail vibration effects on new or altered buildings containing noise sensitive activities, within 40m of a state highway carriageway or 60m from the legal boundary of a rail corridor.

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[4] NAV.6.5 Sound Insulation Requirements - Marsden Primary Centre Noise Zone 1 and Noise Zone 2A; Marsden City Precinct provisions.

Decision

[13] The Council decisions on the Plan Changes (**the Decisions**) did not introduce the new provisions requested in the submissions.

[14] The Decisions noted that further work was required to justify in section 32 terms the proposed provisions, including with reference to existing built development.

Appeal

[15] KiwiRail and Waka Kotahi appealed the Decisions seeking:

(a) relief consistent with the submissions; or

(b) alternative, additional or consequential relief to address the issues identified in the appeals.

Parties

[16] There are common s274 parties to the relevant aspects of the KiwiRail and Waka Kotahi appeals: Foodstuffs North Island Ltd, Kāinga Ora – Homes & Communities, Southpark Corporation Ltd, and University of Auckland. KiwiRail and Waka Kotahi are also s274 parties to each other's appeals.

[17] As we have noted Marsden City's interest arises from their appeal to PC150. Although this is specific to Marsden it raises the same issues as the PC109 appeals in this respect.

Agreement reached

[18] Following mediation and subsequent direct discussion the parties have reached agreement on a proposal to resolve the appeals.

[19] The agreement is founded on locating new provisions in the NAV chapter rather than in the Transport (**TRA**) chapter as sought in the appeals. The parties are agreed that the provisions are better located in the NAV chapter to align with the other plan objectives, policies and rules for noise, and that the National Planning Standards (**the Standards**) now require such provisions to be located in the NAV

chapter. The parties are satisfied that there is scope for this solution as both NAV and TRA are district wide chapters, and therefore there is no difference in application of the proposed rules. This is further addressed in the s32AA assessment below.

[20] The agreed amendments relate to the following provisions:

(a) No new objectives or policies are required as the NAV chapter contains operative objectives and policies which appropriately support new provisions to protect human health and amenity, and to manage reverse sensitivity effects, for noise sensitive activities in close proximity to the state highway and rail networks across Whangārei district;

(b) Noise effects from road traffic on state highways and rail traffic on noise sensitive activities in new buildings or alterations to existing buildings will be managed by:

(i) Throughout the Whangārei district, mapping a State Highway Noise Control Boundary overlay within the modelled 53dB noise contour (and up to a maximum width of 100m) from the state highway carriageway;

(ii) From the Whangārei rail yards south, mapping a Rail Noise Control Boundary overlay within the modelled 53dB noise contour (and up to a maximum width of 100m) from the legal boundary of the rail corridor;

(iii) Including new provisions within existing NAV.6.5 Sound Insulation Requirements applying to the State Highway Noise Control Boundary and the Rail Noise Control Boundary overlays, including new permitted activity sound insulation requirements and an appendix containing alternative construction standards, a restricted discretionary activity, advice notes, compliance standards, and a notification rule;

(iv) North of the Whangārei rail yards, mapping a Rail Noise Alert Area overlay within the modelled 53dB noise contour (and up to a

maximum width of 100m) from the legal boundary of the rail corridor, and including a new permitted activity rule and accompanying advice note in the NAV chapter.

(c) Rail vibration effects on noise sensitive activities will be managed by mapping throughout the Whangārei district a Rail Vibration Alert Area overlay within 60m from the legal boundary of the rail corridor, and including a new permitted activity rule and accompanying advice note in the NAV chapter.

(d) Waka Kotahi will not pursue provisions relating to:

(i) Noise effects on noise sensitive activities in outdoor spaces; or

(ii) Vibration effects from traffic on state highways.

[21] Waka Kotahi, KiwiRail and the Council do not consider the statement in paragraph [22] of this order to be necessary but in the interests of an efficient settlement have agreed to its inclusion.

[22] The proposed provisions are for the purposes of addressing modelled noise effects from the North Island Main Trunk Line and State Highway Network, and reflect the particular circumstances of this District. Those provisions are not to be taken as a binding precedent for any other private or public plan change. The parties also agree that this statement does not preclude similar provisions being sought by any party in any other private or public plan change.

PC150 – Marsden City

[23] An area of land at Marsden, bounded by a rail designation to the north and SH15 Port Marsden Highway to the south east, is identified in the Plan as Marsden Primary Centre zone. The zone chapter includes mapped noise zones which are listed in the operative NAV sound insulation requirements.[5]

[5] NAV.6.5 Sound Insulation Requirements - Marsden Primary Centre Noise Zone 1 and Noise Zone 2A.

[24] PC150 – Marsden City sought to replace the Marsden Primary Centre chapter with a suite of National Planning Standards zones used elsewhere in the Plan (and a new Town Centre Zone) together with a Marsden City Precinct.

[25] The Council decision on PC150 – Marsden City (**the PC150 Decision**) pre-dated the agreement to introduce district wide noise provisions through resolution of the KiwiRail and Waka Kotahi appeals.

[26] The PC150 Decision included:

(a) Site-specific provisions and noise zones in the Marsden City Precinct chapter and updated nomenclature in the NAV chapter to protect human health and amenity, and to manage reverse sensitivity effects, for noise sensitive activities in close proximity to State Highway 15A and the rail designation adjacent to the Marsden City Precinct; and

(b) An extension of the proposed Commercial zone at Marsden City (from approximately 70m from the northern boundary to 100m from the northern boundary) as a further response to potential rail noise effects.

[27] Following mediation of the Marsden City Limited Partnership appeal the parties to that appeal have agreed that, as a consequence of the agreed district wide provisions, the PC150 – Marsden City site-specific noise provisions (and relocation of the Commercial zone boundary at Marsden City) are no longer necessary or efficient and should be deleted. The agreed district-wide provisions will instead apply to Marsden City.

[28] The parties agree that jurisdiction for deleting the site-specific Marsden City provisions arises consequentially from the KiwiRail and Waka Kotahi appeals against PC109 which are intended to apply a consistent approach across the district.

[29] There are common parties to the two sets of appeals:

(a) KiwiRail and Waka Kotahi are s274 parties to the relevant aspects of the Marsden City Limited Partnership appeal; and

(b) Southpark Corporation Ltd, which has a beneficial interest in Marsden City Limited Partnership, is a s274 party to the relevant aspects of the KiwiRail and Waka Kotahi appeals.

[30] The removal of the PC150 - Marsden City site-specific noise provisions is therefore sought as a consequential amendment of the KiwiRail and Waka Kotahi appeals against PC109. The agreed changes relate to the following provisions:

(a) Deletion of site-specific provisions in the Marsden City Precinct chapter in the Plan to protect human health and amenity, and to manage reverse sensitivity effects, for noise sensitive activities in close proximity to State Highway 15 and the rail designation adjacent to the Marsden City Precinct as these have been replaced by the district wide provisions; and

(b) Deletion of references to Marsden Primary Centre Noise Zone 1 and Noise Zone 2A in the NAV chapter and addition of references to Town Centre Zone, to reflect PC150 – Marsden City nomenclature.

[31] The Commercial zone boundary in the Marsden City Precinct is addressed in separate consent documents with respect to PC150. A contemporaneous determination will be issued.[6] This consent determination should be read in conjunction with that consent determination.

Section 32AA Evaluation

[32] Section 32AA of the Act requires a further evaluation for any changes to a proposal since the initial s 32 evaluation report. In this instance the changes are the introduction of specific provisions (through use of Noise Control Boundary and Alert Area overlays) for managing modelled road and rail noise effects on noise sensitive activities within new and altered buildings and any rail vibration effects on noise sensitive activities in close proximity to the state highway and rail networks across the Whangārei district.

[6] [2023] NZEnvC 5.

[33] The issue as to PC109 vis a vis PC150 is of no substantive moment in my view. Both appeals deal with the same issue albeit only for Marsden in PC150 and there are some common parties. I conclude resolution in the general provision is more effective and efficient.

[34] The parties provided a joint memorandum covering s32AA and advised as follows:

National Policy Statement on Urban Development

[35] Whangārei is a "tier 2" urban environment under the National Policy Statement on Urban Development (**NPS-UD**).

[36] In April and August 2021 consent determinations for rezoning of land within urban environments in the Whangārei district, which give effect to the NPS-UD, were issued. Those include General Residential Zone and Medium Density Residential Zone in proximity to state highways and the rail corridor.

[37] Objective 1 of the NPS-UD provides:

> **Objective 1:** New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.

[38] The agreed amendments to the Plan manage modelled road and rail noise effects on noise sensitive activities within new and altered buildings and any rail vibration effects on noise sensitive activities. Waka Kotahi, KiwiRail and the Council consider that the provisions do not compromise the ability to give effect to the NPS-UD, including by providing for permitted activity and consenting pathways. Kāinga Ora considers that the NPS-UD is not compromised in this particular context, due to the modelling exercise undertaken which results in a relatively limited spatial extent of provisions which attract consenting requirements and which apply over residentially zoned land (in particular the limited application of the Rail Noise Control Boundary over such land).

Regionally Significant Infrastructure

[39] State highways and railway lines are recognised as Regionally Significant Infrastructure (**RSI**) in the Regional Policy Statement for Northland[7] and in the Plan.[8]

[40] In March 2021 the consent determination for the RSI objectives and policies in the Plan, which give effect to the RPS, was issued. The RSI objectives and policies are located in the District Growth and Development (**DGD**) chapter of the Plan.

[41] The relevant RSI objectives and policies are:

> **DGD-O13 – Identification and Protection**
> Regionally Significant Infrastructure is identified and protected.
>
> **DGD-O14 – Recognised Benefits**
> The benefits of Regionally Significant Infrastructure are recognised and provided for.
>
> **DGD-P15 – Benefits of Regionally Significant Infrastructure**
> To recognise and provide for the social, economic and cultural benefits of Regionally Significant Infrastructure by enabling its ongoing operation, maintenance, development, and upgrading where adverse effects are managed

[42] The agreed amendments to the Plan give effect to the RSI objectives and policies by recognising the benefits of the state highway and rail networks and managing effects from traffic using those networks.

Incompatible Activities and Reverse Sensitivity

[43] Objectives and policies with respect to incompatible activities and reverse sensitivity are located in the DGD chapter and in the NAV chapter. The relevant objectives and policies are:

> **DGD-O5 – Incompatible Activities and Reverse Sensitivity**
> Avoid conflict between incompatible land use activities from new subdivision, use and development.

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[7] Part operative 9 May 2016, fully operative 15 May 2018.
[8] The Plan defines RSI as that listed in Appendix 3 to the RPS.

DGD-P2 – Incompatible Land Uses and Reverse Sensitivity

To manage the establishment and location of new activities and expansion of existing activities to avoid conflicts between incompatible land uses.

NAV.3 Objectives

NAV.3.1. To enable a mix of activities to occur across a range of Zones, while ensuring that noise and vibration is managed within appropriate levels for the health and wellbeing of people and communities, and for the amenity and character of the local environment.

NAV.3.2. To ensure that activities that seek a high level of acoustic and vibration amenity do not unduly compromise the ability of other lawful activities to operate.

NAV.4 Policies

NAV.4.2. To avoid reverse sensitivity effects by:

a. Requiring suitable acoustic design standards for noise sensitive activities located in or adjacent to areas anticipating high noise levels.

b. Restricting noise sensitive activities in Zones where they could unduly compromise the continuing operation of appropriate business activities.

c. Considering the use of other mechanisms, such as noise control boundaries, buffer areas or building setbacks, as appropriate tools to protect existing or future activities.

[44] The parties submit the agreed amendments to the Plan give effect to the objectives and policies with respect to incompatible activities and reverse sensitivity by mapping those areas where road and rail noise effects on noise sensitive activities within new and altered buildings and rail vibration effects on noise sensitive activities may occur and assisting to manage reverse sensitivity effects on RSI.

National Planning Standards

[45] The Standards include direction 7 – District wide Matters Standard which provides as a mandatory direction:

> 33. If provisions for managing noise are addressed, they must be located in the Noise chapter. These provisions may include:

…

> c. sound insulation requirements for sensitive activities and limits to the location of those activities relative to noise generating activities.

[46] The parties have therefore agreed that – while the appeals seek that the new provisions be located in the TRA chapter – the provisions must be located in the NAV chapter in order to comply with the Standards.

[47] As TRA and NAV are both district wide chapters the parties are satisfied that there is no difference in effect and no issue as to jurisdiction.

Overlays

[48] The Standards include direction 12 – District Spatial Layers Standard which provides:

> An overlay spatially identifies distinctive values, risks or other factors which require management in a different manner from underlying zone provisions

[49] The Standards specify that "provisions" introduced by the spatial layer must be located in the appropriate district wide chapter.

[50] The Standards define "provisions" as:[9]

> all content in a policy statement or plan, including but not limited to background content, issues, objectives, policies, methods, rules, and anticipated environmental results.

[51] The agreed amendments include both rules and non-rule methods (mapping, advice notes, compliance standards).[10]

Mapping standard

[52] The Standards include direction 13 - Mapping Standards, with a mandatory direction that a plan must use the symbols in table 20 of the Standards wherever maps

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[9] Standards direction 1 – Foundation Standard - Interpretation
[10] RMA s75(1)(c) and (2)(b).

display the features listed in that table and, if required, that symbols may be labelled on maps.

[53] Standards Table 20 – Symbol representation includes orange diagonal hatching for noise control boundary overlays:

[54] The agreed State Highway Noise Control Boundary and Rail Noise Control Boundary overlays have been mapped by the Council using the appropriate Standards symbology with the addition of labels to differentiate between the two overlays. A sample Plan map is included below (with the rail corridor at top denoted "NCB_R" and the state highway at bottom denoted "NCB_SH"):

[55] The agreed Rail Noise Alert Area and Rail Vibration Alert Area overlays are not noise control boundaries and therefore do not fall within the mandatory mapping symbols in Table 20. These overlays have been mapped by the Council using notation and labels to differentiate between the two overlays. A sample Plan map is included below (with the vibration overlay denoted as "VAA_R" and the noise overlay denoted as "NAA_R"):

[56] When the Plan maps are viewed via the Council's GIS, the four overlays (state highway and rail Noise Control Boundaries, and rail noise and rail vibration Alert Areas) can be turned on and off as separate layers to assist Plan users. The GIS menu showing the separate layers is included below:

e-plan layers:

Spatial mapping

[57] The appeals sought provisions managing road and rail noise effects on new and altered buildings containing noise sensitive activities within 100m of a state highway carriageway or the rail corridor, and road and rail vibration effects on new and altered buildings containing noise sensitive activities within 40m of a state highway carriageway or 60m of the rail corridor.

[58] The agreed spatial mapping includes:

(a) Throughout the Whangārei district, mapping a State Highway Noise Control Boundary overlay within the modelled 53dB noise contour (and up to a maximum width of 100m) from the state highway carriageway;

(b) From the Whangārei rail yards south, mapping a Rail Noise Control Boundary overlay within the modelled 53dB noise contour (and up to a maximum width of 100m) from the legal boundary of the rail corridor;

(c) North of the Whangārei rail yards, mapping a Rail Noise Alert Area overlay within the modelled 53dB noise contour (and up to a maximum width of 100m) from the legal boundary of the rail corridor; and

(d) Throughout the Whangārei district, mapping a Rail Vibration Alert Area overlay within 60m from the legal boundary of the rail corridor.

[59] The parties consider that mapping the Noise Control Boundary overlays to the modelled 53dB noise contour is more efficient and effective than applying provisions within a blanket 100m from a state highway carriageway or the rail corridor. The use of a mapped overlay ensures that the rules apply to locations and sites which may be subject to a level of noise that could cause adverse effects, rather than standard distances. The overlay ensures that sites which bear the costs (e.g., cost of consents, noise reports and insulation) are the sites that experience the effects generated by the road and rail corridors and receive the benefits (through improved health and amenity). The use of a noise control boundary is consistent with existing provisions in the Plan regarding Whangārei Airport.

[60] The methodology for the noise contour modelling was prepared by noise experts for the Appellants and reviewed by experts for the Council and other parties. The modelling has taken into account topography, buildings, road and rail alignments, existing noise barriers, and ground absorption; traffic data and road surfaces; and train volumes, train speeds, train types, tracks and tunnels.

[61] Overall, the noise contour methodology has produced mapping (and therefore effects management) which is targeted to the properties where the effects are most likely to be experienced.

[62] With respect to rail noise, mapping has been split into northern and southern portions due to the difference in rail movements (and therefore rail noise effects) on different parts of the network:

(a) The Rail Noise Control Boundary overlay applies from the Whangārei rail yards south. This overlay incorporates the rail designation for the Marsden line (to Northport). Existing rail movement data and future predictions indicate that this will be a relatively busy line in the Whangārei district context (including the addition of the Marsden line). That analysis (being the significant increase in predicted movements and the associated noise effects) supports this part of the network being mapped as a noise control boundary subject to sound insulation requirements;

(b) The Rail Noise Alert Area overlay applies north of the Whangārei rail yards. Existing rail movement data and future predictions indicate that this is currently and will continue to be a relatively quiet line in the Whangārei district context. That analysis supports this part of the network being mapped as an Alert Area subject to advisory management tools rather than sound insulation requirements.

[63] With respect to rail vibration, existing data and knowledge indicates that rail vibration effects in the Whangārei district context are also most appropriately managed by mapping an Alert Area subject to advisory management tools rather than through vibration isolation requirements.

[64] The various provisions are addressed further below.

[65] The noise contour methodology, together with rail movements analysis, has resulted in mapping tailored to the Whangārei district context.

Rules

[66] The agreed amendments to the Plan comprise two different sets of rules - for the Noise Control Boundary overlays, and for the Alert Area overlays.

Noise Control Boundary overlays

[67] For the Noise Control Boundary overlays, new provisions have been agreed to be added to existing NAV.6.5 Sound Insulation Requirements for new buildings, or alterations to existing buildings, containing noise sensitive activities. This includes a new permitted activity rule, a restricted discretionary activity, advice notes, compliance standards specifying how measurements are undertaken, and a notification rule. The existing Plan definition of "noise sensitive activities" is used in the provisions.

[68] Activities captured by the Noise Control Boundary overlay mapping have five pathways to compliance with the permitted activity rule:

(a) The space is designed, constructed and maintained to achieve the specified indoor design noise levels.[11]

(b) The space is designed, constructed and maintained in accordance with the construction schedule contained in a new appendix.[12]

(c) An acoustician demonstrates, by prediction or measurement, that the noise at all exterior façades is no more than 15 dB above the indoor design noise levels.[13]

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[11] NAV.6.5.3.
[12] NAV.6.5.4(d); NAV Appendix 1: NAV.6.5.4(d) Alternative Construction Schedule for Road and Rail Noise Control.
[13] NAV.6.5.4(b).

(d) The nearest exterior façade of the building is at least 50m from the formed carriageway or railway track, and a solid building, fence, wall or landform blocks line of sight from all windows and doors to the formed carriageway or track.[14]

(e) The construction is an alteration or extension to an existing building and:

(i) For buildings other than residential units, or for external alterations to residential units, does not increase the gross floor area of the noise sensitive activity within the mapped noise control boundary.[15] This option enables alterations which are outside the spatial area of concern (such as on the façade of the building facing away from the road or rail corridor).

(ii) For internal alterations to residential units, does not increase the gross floor area of the noise sensitive activity within the mapped noise control boundary by more than 5m² per 10 year period (that is, the life of the Plan).[16] This enables re-allocation of space between existing habitable rooms (such as partitioning or combining of existing bedrooms), and modest conversion of non-habitable space to habitable space (such as incorporation of a hallway or linen cupboard into an adjacent bedroom), in order to improve the function of a residential unit[17] at minimal cost; but ensures that the conversion of larger non-habitable spaces into habitable space (such as conversion of attached garaging into additional bedrooms) provides appropriate sound insulation.

[69] The permitted activity acoustic standards have been developed with acoustic advice from independent acousticians for Waka Kotahi and KiwiRail, the Council, Kāinga Ora, and University of Auckland.

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[14] NAV.6.5.4(a).
[15] NAV.6.5.4(c) and (d).
[16] NAV.6.5.4(e).
[17] Such as to relieve overcrowding.

[70] The parties have agreed that where compliance is not achieved via the permitted activity pathways a restricted discretionary activity consent is required, with matters of discretion including effects on health and indoor amenity, alternatives, whether it will lead to undue constraints on the continuing operation of the state highway and rail corridors, mitigation provided by natural or built features, and the outcome of any consultation with Waka Kotahi or KiwiRail. These matters appropriately focus an application for resource consent on the relevant effects and potential site-specific responses.

[71] A notification rule specifies that restricted discretionary activities shall not be publicly notified or limited notified unless Waka Kotahi or KiwiRail is determined to be an affected person or special circumstances exist. The notification rule assists the provisions to be efficient and effective by providing clarity and increasing certainty.

[72] The parties consider that it is more appropriate to manage these noise effects through sound insulation requirements with multiple permitted activity pathways, rather than more limited pathways (the more restrictive alternative) or to leave the effects entirely unmanaged (the more permissive alternative).

Rail Noise Alert Area and Rail Vibration Alert Area overlays

[73] For the Noise Alert Area and Rail Vibration Alert Area overlays, new permitted activity rules and accompanying advice notes have been agreed to be added to the NAV chapter.

[74] The Alert Area overlays make existing and prospective property owners aware of the potential presence of effects so that they can make informed decisions about the construction or alteration of buildings containing noise sensitive activities, without placing obligations on those landowners. While KiwiRail considers the effects in these Areas still require management, for the purposes of settlement the parties have agreed the current and predicted level of rail noise and/or vibration in these locations do not justify the introduction of provisions which impose sound insulation and vibration isolation requirements on noise sensitive activities at this time.

[75] For each overlay a new permitted activity rule has been drawn from similar permitted activity rules in the Urban and Services plan changes chapters of the Plan.[18] These new rules clarify to Plan users and Council consents planners that activities within the mapped Alert Area overlays remain a permitted activity.[19]

[76] The accompanying advice notes to the permitted activity rules:

(a) Explain that the Rail Noise Alert Area identifies the noise-sensitive area within a 53dB rail noise contour each side of the rail corridor, and that the Rail Vibration Alert Area identifies the vibration-sensitive area within 60metres each side of the rail corridor;

(b) Explain that no specific district plan rules or notification requirements apply as a result of the Alert Areas; and

(c) Advise that properties within the mapped overlays may experience rail noise and rail vibration.

[77] The parties consider that it is more appropriate to manage these noise and vibration effects through Alert Area overlays subject to advisory management tools which signal that higher levels of noise and vibration may be experienced in this location, rather than by imposing sound insulation and vibration isolation requirements on landowners (the more restrictive alternative) or leaving the effects entirely un-addressed (the more permissive alternative).

[78] The parties considered as an alternative method mapping the Alert Areas only in the Council's GIS (which is used to inform both LIMS and PIMs) rather than in the Plan. However, on balance, there are efficiencies in having all of the rail noise and vibration mapping (Noise Control Boundaries and Alert Areas) kept together in the Plan.

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[18] For example the General Residential Zone rule GRZ -R1 Any Activity Not Otherwise Listed in This Chapter.

[19] NAV.6.5A Activities within the Rail Noise Alert Area and NAV.6.5B Activities within the Rail Vibration Alert Area.

PC150 Consequential Amendments

[79] As a consequence of the agreed district wide provisions, the PC150 – Marsden City site-specific noise provisions sought by Marsden city Limited in their appeal to PC150 are no longer necessary or efficient.

[80] The agreed changes relate to the following provisions:

(a) Deletion of site-specific provisions in the Marsden City Precinct chapter in the Plan as these have been replaced by the district wide provisions.

(b) Replacement of outdated references to Marsden Primary Centre Noise Zone 1 and Noise Zone 2A in the NAV chapter with references to Town Centre Zone to reflect PC150 – Marsden City nomenclature.

Sufficient information

[81] The parties agree that this is not a situation where there is uncertain or insufficient information such that the risk of acting or not acting needs to be evaluated. The location of the state highway and rail corridors, and the adverse effects of road and rail noise with respect to noise sensitive activities, are well understood.

[82] As described earlier, since filing of the appeals the parties have worked collaboratively to develop the noise contour mapping methodology, and to achieve an appropriate balance between costs and benefits in the Whangārei district context through adoption of sound insulation requirements within the targeted modelled noise contour Noise Control Boundaries and advisory management tools within the Alert Areas.

Court Evaluation

[83] In making this order the Court has now read and considered the appeals and the consent memorandum of the parties dated 30 November 2022.

[84] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

(a) all parties to the proceedings have executed the memorandum requesting this order;

(b) all parties agree that the agreed amendments to the Noise and Vibration chapter resolve the KiwiRail and Waka Kotahi appeals in relation to the District Wide – Noise topic in full;

(c) all parties agree that the agreed consequential amendments to the Noise and Vibration chapter and the Marsden City Precinct chapter resolve the appeal by Marsden City Limited Partnership (through its general partner Marsden City Development Limited) in part; and

(d) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

[85] This determination does not represent the outcome of a full hearing by the Court, but rather an agreement reached between parties represented by experienced counsel.

[86] The parties have provided an analysis under s 32AA regarding why the change in position is justified. I am satisfied that there is sound rationale for the changes.

[87] I am of the view that the inclusion of amendments into the NAV chapter rather than the TRA chapter is within scope. This gives effect to National Planning Standards directions 7 and 12, and the provisions apply district wide. Similarly, I have already concluded that the Marsden PC150 appeal on Noise is best addressed in the district wide provisions. This aids with certainty (uniform rule and clarity (in NAV section)).

[88] I agree that the amendments do not compromise the ability to give effect to the NPS-UD. There is a limited spatial extent, and the purpose of the amendments is consistent with Objective 1 NPS-UD in that the focus of the changes is on protecting human health, wellbeing and amenity.

[89] I agree with the parties that the agreed amendments to the Plan give effect to the RSI objectives and policies by recognising the benefits of the state highway and rail networks and managing effects from traffic using those networks.

[90] The agreement reached gives effects to the NAV objective and policies which provide for noise, vibration, noise sensitive activities and reverse sensitivity.

[91] The agreed State Highway Noise Control Boundary and Rail Noise Control Boundary overlays have been mapped by the Council using the appropriate Standards symbology with the addition of labels to differentiate between the two overlays. The agreed Rail Noise Alert Area and Rail Vibration Alert Area overlays are appropriately differentiated and labelled. The ability to turn on and off the layers is practical and helpful.

[92] The overlays are efficient and will be effective in ensuring the rules have a focused application to locations which may be the subject of adverse effects, rather than standard distances. There is a balance of cost and benefit. I am satisfied that the noise contour modelling had expert input and the methodology and rail movement analysis has enabled targeted mapping.

Conclusion

[93] I am of the view that it is beneficial to have pathways to compliance for activities within noise control boundary overlays. I am satisfied that the restricted discretionary matters of discretion focus on relevant effects and are targeted.

[94] I agree that the notification rules provide clarity and certainty.

[95] I consider the advisory management tools adopted in the alert area overlays strike an appropriate balance to ensure management without imposing obligations.

[96] I agree with the parties that as a consequence of the agreed district wide provisions, the PC150 – Marsden City site-specific noise provisions are no longer necessary or efficient.

[97] I conclude the parties have taken a robust and workable approach, and the agreed amendments are the most appropriate way to achieve the purpose of the Act and the objectives in the Plan. Overall, I consider the sustainable management purpose and the other relevant requirements of the Act are broadly met.

Orders

[98] Therefore the Court orders, by consent, that:

(a) the Noise and Vibration chapter and the Marsden City Precinct chapter of the Operative Whangarei District Plan are amended in accordance with Annexure 1;

(b) The Planning Maps are amended in accordance with Annexure 2;

(c) The District Wide – Noise topic is resolved in its entirety;

(d) The appeals by KiwiRail Holdings Limited and Waka Kotahi New Zealand Transport Agency are resolved in their entirety;

(e) The appeal by Marsden City Limited Partnership (through its general partner Marsden City Development Limited) is resolved through this determination and that in relation PC150 issued contemporaneously, except as to the issue of internal roading covered by the appeal on PC 150.

(f) There is no order as to costs.

J A Smith
Environment Judge

Annexure 1

(Please note that the Plan uses red underlined text for defined terms. Tracked amendments are in black text generally highlighted in yellow for deletions and blue for additions, except for significant blocks of new underlined text where only the heading is flagged in blue highlight)

NAV
Noise and Vibration

NAV Noise & Vibration

Noise has the potential to cause adverse effects, depending on a number of factors including frequency, timing, volume and the type of noise. Disturbance of sleep is often the greatest complaint in relation to noise, however other adverse effects include general nuisance, psychological and chronic health effects, interference with speech communication and interference with learning processes, thinking and education.

Excessive noise can detract from the character and amenity values associated with the local environment. Noise generating activities can also be restricted by noise 'sensitive' activities in proximity that seek a higher level of amenity (reverse sensitivity). In an urban sense noise is a significant issue (especially at night) in mixed use zones and in 'interface' areas where noise sensitive activities (e.g. residential uses) are located in close proximity to high noise emitting land uses (e.g. bars and panel beaters).

The Resource Management Act 1991 (RMA) addresses noise in two ways. First, under section 16 there is a duty on every occupier of land and every person carrying out an activity in, on, or under a water body or the coastal marine area to adopt the best practical option to not emit more than a reasonable level of noise. Section 16 of the Act states that a national environmental standard, plan or resource consent may prescribe noise emission standards. Section 16 therefore guides how district plans can address noise emissions.

The other way the RMA addresses noise is through the control of excessive noise. There are specific provisions in the Act to deal with excessive noise, which normally involves intermittent noise sources that require immediate attention, for example loud stereos associated with parties. The excessive noise provisions stand apart from district plan provisions.

Noise rules have been designed to provide an adequate level of protection from the potential effects of noise. The rules within this chapter provide certainty about the level of ambient sound permitted during

specific time frames within each Zone and acknowledge that there will be some noise associated with activities. The rules aim to strike a balance between the need for land to be used for its intended purpose while ensuring that other land users are not exposed to unreasonable levels of noise.

Permitted noise levels are set at a limit that is consistent with the character and amenity values anticipated in each Zone. Differing noise limits are established in interface areas between Zones to ensure that reasonable noise limits can be maintained. Reasonable noise limits are established for other activities such as, construction and demolition, airport operation, temporary military training, use of explosives, helicopter landing areas, shooting ranges and wind turbines.

In certain areas noise sensitive activities are restricted in order to ensure the unhindered and continued operation of high noise generating activities. In other areas the provision of acoustic insulation requirements for buildings containing noise sensitive activities in high noise environments will allow various activities to co-exist in Zones anticipating mixed use. Guidance from the most recent New Zealand Standards will ensure that noise levels are measured and analysed in accordance with international best practice.

Vibration is generally only a concern adjacent to construction or demolition projects; where there is operation of mechanical plant near or attached to buildings or structures; or in relation to explosives use and blasting. Accordingly vibration limits have been provided to ensure that vibration from construction, demolition, fixed mechanical plant and use of explosives and blasting does not exceed reasonable levels. For construction, demolition and fixed mechanical plant, a simplified approach has been taken whereby single velocity limits have been specified. This approach is considered to be the least complicated and will ensure the required level of amenity if maintained. For explosives use and blasting a more flexible approach has been adopted to achieve operational efficiency and to ensure the required level of amenity is maintained.

NAV.2 Eligibility

The following provisions shall apply district wide in addition to any other provisions in this District Plan applicable to the same area or site.

NAV.3 Objectives

1. To enable a mix of activities to occur across a range of Zones, while ensuring that noise and vibration is managed within appropriate levels for the health and wellbeing of people and communities, and for the amenity and character of the local environment.
2. To ensure that activities that seek a high level of acoustic and vibration amenity do not unduly compromise the ability of other lawful activities to operate.

NAV.4 Policies

1. To establish reasonable noise and vibration limits and controls that enable appropriate activities to operate while maintaining the characteristic amenity values of each Zone.
2. To avoid reverse sensitivity effects by:
    1. Requiring suitable acoustic design standards for noise sensitive activities located in or adjacent to areas anticipating high noise levels.
    2. Restricting noise sensitive activities in Zones where they could unduly compromise the continuing operation of appropriate business activities.
    3. Considering the use of other mechanisms, such as noise control boundaries, buffer areas or building setbacks, as appropriate tools to protect existing or future activities.

3. To ensure that high noise generating activities located in noise sensitive areas maintain the characteristic amenity values of each Zone by:

    1. Establishing noise limits that are consistent with anticipated noise and vibration levels in each Zone.

    2. Requiring high noise generating activities to provide suitable mitigation measures to maintain appropriate noise levels for the health and wellbeing of people and communities, and for the amenity and character of the local zone.

4. To avoid restricting primary production activities by providing provisions that acknowledge their seasonal characteristics, transitory periods of noisiness and the effects of reverse sensitivity.

5. To ensure that noise associated with activities in open spaces and on public recreational areas is appropriate to the amenity values anticipated in the surrounding environment.

NAV.5 Noise Measurement and Assessment

Unless specified otherwise, noise shall be measured in accordance with New Zealand Standard NZS 6801:2008 *"Acoustics – Measurement of environmental sound"* and assessed in accordance with New Zealand Standard NZS6802:2008 *"Acoustics - Environmental Noise."*

NAV.6 Permitted Activties

Unless specifically stated otherwise, any activity shall be a permitted activity provided it complies with all of the noise standards given in the following section(s) *NAV.6.1 – NAV.6.15* and all other relevant Zone and District Wide rules.

NAV.6.1 Noise Arising from Activities within Zones

The following noise limits shall apply within and between Zones:

Noise emitted from any site in the following Zone	Noise measured within the applicable boundary of any of the following Zones (refer to following table for applicable assessment location)	Daytime 0700 to 2200 hours	Night-time 2200 to 0700 hours		Notes [8,9]
		dB L_{Aeq}	dB L_{Aeq}	dB L_{AFmax}	
Light Industrial Commercial Sport and Active Recreation	Residential Zones Neighbourhood Centre Natural Open Space Open Space Rural Production Rural Living Rural Village Residential Rural (Urban Expansion)	55	45	75	
Port Rural Village Industrial Heavy Industrial	Residential Zones Neighbourhood Centre Natural Open Space Open Space Rural Production Rural Living Rural Village Residential Rural (Urban Expansion)	55	45	75	
All Zones other than: Heavy Industrial Light Industrial Commercial Sport and Active Recreation Rural Village Industrial Strategic Rural Industries [All SIRZ]	Residential Zones Neighbourhood Centre Rural Production Rural Living Rural Village Residential Rural (Urban Expansion)	50	40	70	1, 2, 3
	Open Space Natural Open Space Rural Production City Centre Waterfront	55	40	70	1, 2, 3
All Zones other than: - Strategic Rural Industries [All SIRZ]	City Centre Waterfront	60	55	80	4, 5
	Light Industrial Commercial Sport and Active Recreation	65	60	80	

Noise emitted from any site in the following Zone	Noise measured within the applicable boundary of any of the following Zones (refer to following table for applicable assessment location)		Daytime 0700 to 2200 hours	Night-time 2200 to 0700 hours		Notes 8,9
			dB L_{Aeq}	dB L_{Aeq}	dB L_{AFmax}	
	Shopping Centre Hospital Airport					
	Mixed Use Local Centre Rural Village Centre Town Centre		60	50	75	
	Heavy Industrial Rural Village Industrial Strategic Rural Industrial [All SIRZ]		75	75	-	
	~~Marsden Primary Centre - Noise Zone 1~~		~~65~~	~~65~~	~~70~~	~~3~~
	Port Nikau Development Area		60	55	70	3
	~~Marsden Primary Centre – Noise Zone 2 and Noise Zone 2A~~		~~55~~	~~45~~	~~70~~	~~3~~
	~~Marsden Primary Centre - Town Centre~~		~~55~~	~~45~~	~~70~~	~~3~~
Kauri Strategic Rural Industries	At the Kauri Milk Processing Site – Noise Control Boundary	Outer	55	45	75	9
Mineral Extraction Areas	Any noise sensitive activity not owned or controlled by the quarry owner or operator		**Low noise Environment**			6, 7
			50	40	70	
			High noise Environment			
			55	45	75	

The above noise rules shall apply within the relevant boundary assessment location as set out below:

Site boundary	Notional Boundary
1. Open Space 2. Airport 3. Port 4. Port Nikau Development Area 5. Town Centre 6. ~~Marsden Primary Centre - Noise Zone 1 and 2~~	1. Any noise sensitive activity not owned or controlled by the quarry owner or operator in a Quarrying Resource Area 2. Rural Production 3. Rural Living 4. Rural (Urban Expansion)

1. ~~Marsden Primary Centre - Town Centre~~ 2. City Centre 3. Mixed Use 4. Commercial 5. Local Centre 6. Shopping Centre 7. Light Industrial 8. Heavy Industrial 9. Sport and Active Recreation 10. Waterfront 11. Medium Density Residential 12. General Residential 13. Neighbourhood Centre 14. Hospital 15. Rural Village	1. Low Density Residential 2. Large Lot Residential 3. Natural Open Space
Note: Except that where noise is generated from the Kauri Milk Processing Site, the noise rules shall apply at the Kauri Milk Processing Site – Noise Control Boundary as shown on the Planning Maps.	

1. Normal residential activity occurring in any zone such as children's play, spontaneous social activities, lawnmowing and home Maintenance work undertaken by/for the occupier is excluded from compliance with the noise rules during the daytime provided such activity is reasonable in terms of duration and noise level and in the case of home Maintenance does not exceed the rules for construction noise. This exclusion does not apply to non-residential land use within the Residential Zones (such as childcare centres).
2. NAV. 6.1 shall not apply to mobile machinery used for a limited duration as part of agricultural or horticultural activities occurring in the Rural Production, Rural Living, Rural (Urban Expansion) or Large Lot Residential Zones. Limited duration events are those activities normally associated with industry practice, of relatively short duration, and where no reasonable alternative is available. Any such activity shall be subject to Section 16 of the Resource Management Act.

   "Limited duration activities" in this context include, but are not limited to:

   1. Spraying and harvesting of crops and/or weeds for horticultural or agricultural purposes e.g. topdressing or Aerial spraying

2. Primary forestry activities (not including milling or processing) This

   exclusion does not apply to:

   3. static irrigation pumps;
   4. motorbikes that are being used for recreational purposes;

3. NAV.6.1 shall not apply if the activity under consideration is a mineral extraction activity included in the QRA Chapter Appendix 1. Where this occurs the limits and stated timeframes in Appendix 1 shall apply.
4. Noise generated by temporary activities in the Waterfront Zone may exceed the noise rules in any Zone for 12 days every calendar year provided that noise does not exceed a level of 65 dB L_{Aeq} between 0900 and 2300 hours at the boundary of any Residential Zone.
5. In the City Centre Zone the "daytime" noise standard shall apply between 0700 and 0000 hours (midnight) on Fridays and Saturdays. The "night-time" noise standard shall apply between 0000 and 0700 hours on Saturday and Sunday mornings.
6. In Mineral Extraction Areas the "daytime" noise standard shall apply between 0630 and 2130 hours. The "night-time" noise standard shall apply between 2130 and 0630 hours.
7. Except where an alternative noise limit is provided for the activity within the District Plan [See Appendix 14 – Schedule of Existing Mineral Extraction Areas] then the activity shall comply with

the noise limit stated within the notional boundary of a noise sensitive activity not owned or controlled by the quarry owner or operator.

8. NAV.6.1 shall not apply to the following specific activities which are provided for elsewhere:
    1. Construction activities. Refer to Section [NAV.6.2] for specific rule.
    2. Wind turbines and wind farms. Refer to Section [NAV.6.3] for specific rule.
    3. Shooting ranges. Refer to Section [NAV.6.4] for specific rule.
    4. Helicopter and aircraft landing areas. Refer to Section [NAV.6.7] for specific rule.
    5. Engine testing at the airport. Refer to Section [NAV.6.8] for specific rule.
    6. Noise from explosives. Refer to Section [NAV.6.9] for specific rule.
    7. Temporary military training activities. Refer to Section [NAV.6.10] for specific rule.
    8. Bird Scaring devices. Refer to Section [NAV.6.11] for specific rule.
    9. Road traffic noise. Refer to Section [NAV.6.12] for specific rule.
    10. Frost fans. Refer to Section [NAV.6.13] for specific rule.
    11. Emergency Generator Testing. Refer to Section [NAV.6.14] for specific rule.
9. The noise rules shall not apply to the following activities:
    1. Level crossing warning devices.
    2. The operation of emergency service vehicles or emergency callout sirens.
    3. Noise from aircraft and helicopters when in flight.
    4. Unamplified noise from sporting events in Open Space and Sport and Active Recreation Zone where these occur for up to 20 hours per week between 0700 and 2100 hours.
    5. Unamplified noise from standard school outdoor activities where this occurs between 0700 and 1800 hours Monday to Sunday.
    6. Rail movements within Fonterra's Kauri Milk Processing site (the area encompassed within Scheduled Activity 15); excluding the loading and unloading of goods from trains within the site.
    7. Emergency generators used to ensure the continued operation of network utilities. This exemption shall not include emergency generator testing which are required to comply with NAV.6.14.
    8. The noise limits do not apply to noise generated within the Marsden Point Energy Precinct when measured within a Conservation or Open Space zone.

NAV.6.2 Construction Noise

Noise from demolition and construction, including that undertaken as part of temporary military training activities, shall comply with the guidelines and recommendations of NZS 6803: 1999 *"Acoustics - Construction Noise"*. Noise levels shall be measured and assessed in accordance with New Zealand Standard NZS 6803: 1999 *"Acoustics - Construction Noise"*. NAV.6.2 shall not apply to permitted Maintenance or utility works undertaken within the road carriageway of a road where:

1. It has been demonstrated to Council that these works cannot reasonably comply with the referenced noise guidelines at the time when they must be carried out; and
2. A construction noise and vibration management plan, as prepared by a Recognised Acoustician, has been provided to Council.

NAV.6.3 Wind Turbines

Noise from wind turbines and wind farms shall comply with NZS6808:2010 *"Acoustics – Wind farm noise".*

NAV.6.4 Shooting Ranges

Where any new shooting range is established, or an existing shooting range or its use is altered or extended:

1. Between 0900 and 1800 sound levels from the shooting range activity shall not exceed 50 dB L_{AFmax} from the notional boundary of any noise sensitive activity or visitor accommodation and;
2. Between 1800 and 2200 and 0730 and 0900 sound levels from the shooting range activity shall not exceed 40 dB L_{AFmax} from the notional boundary of any noise sensitive activity or visitor accommodation and;
3. No shooting shall occur between 2200 and 0730.

For the avoidance of doubt, in relation to alterations or extensions to an existing shooting range, compliance with items a, b and c is required for the altered or extended component of the activity.

NAV.6.5 Sound Insulation Requirements

1. Any noise sensitive activity established within a City Centre, Mixed Use, Commercial, Waterfront, Local Centre, Active Sport and Recreation, Rural Village Centre Zones, Port Nikau Development Area, or Town Centre Zone ~~Marsden Primary Centre Noise Zone 1 or 2A~~, or within the [Kauri Milk Processing Site] – Noise Control Boundary shall be designed and constructed to ensure the following internal design noise levels:

Zones	Bedrooms and sleeping areas within dwellings or units 2200 – 0700 hours	Other habitable spaces within dwellings or units 0700 - 2200 hours	Teaching spaces, places of religious assembly, health and veterinary service buildings 0700 – 2200 hours
City Centre Sport and Active Recreation Mixed Use Local Centre Waterfront Rural Village Centre Town Centre [Kauri Milk Processing Site, Crofts Timber, GBC] – Noise Control Boundary	30 dB L_{Aeq}	40 dB L_{Aeq}	35 dB L_{Aeq}
Port Nikau Development Area	35 dB L_{Aeq}	45 dB L_{Aeq}	35 dB L_{Aeq}
~~Marsden Primary Centre Noise Zone 1 and Noise Zone 2A~~	~~35 dB L_{Aeq}~~	~~45 dB L_{Aeq}~~	~~35 dB L_{Aeq}~~

2. For design purposes, the following external L_{eq} noise levels shall be used. These noise levels shall be assumed to be incident on the façade.

Zone	Design noise level (dB L_{eq}) - incident							
	63	125	250	500	1k	2k	4k	dBA
Bedrooms and Sleeping Areas	**Hz**	**Hz**	**Hz**	**Hz**	**Hz**	**Hz**	**Hz**	
Waterfront	66	65	55	54	49	42	38	55
City Centre Sport and Active Recreation Port Nikau Development Area ~~Marsden Primary Centre Noise Zone 2A~~	67	64	61	58	55	52	49	60
Mixed Use Local Centre Town Centre	57	54	51	48	45	42	39	50
~~Marsden Primary Centre Noise Zone 1~~	~~72~~	~~69~~	~~66~~	~~63~~	~~60~~	~~57~~	~~54~~	~~65~~
Kauri Milk Processing Site – Noise Control Boundary	65	6-	53	45	40	38	35	50
Other Habitable Rooms								
City Centre Waterfront Mixed Use Local Centre Town Centre	71	70	60	59	54	47	43	60
Sport and Active Recreation Port Nikau Development Area ~~Marsden Primary Centre Noise Zone 1 and Noise Zone 2A~~	72	69	66	63	60	57	54	65
Kauri Milk Processing Site – Noise Control Boundary	65	60	54	45	40	38	35	50

3. Where any activity listed in NAV.6.5 Table 1 is located partly or wholly within the State Highway Noise Control Boundary or the Rail Noise Control Boundary, the entire room or space shall be designed, constructed and maintained to achieve the indoor design noise levels in NAV.6.5 Table 1.

NAV.6.5 Table 1

	State Highway Noise Control Boundary	**Rail Noise Control Boundary**
Activity	**L_{Aeq}(24h) from state highway noise**	**L_{Aeq}(1h) from railway corridor noise**
Residential		
Bedrooms	40 dB	35 dB
All other habitable rooms	40 dB	40 dB
Educational		
Lecture rooms / theatres, music studios, assembly halls	35 dB	35 dB
Teaching areas, conference rooms and drama studios,	40 dB	40 dB
Libraries	45 dB	45 dB
Designated sleeping rooms for children aged 6 years or younger	40 dB	40 dB
Hospitals		
Overnight medical care, wards	40 dB	40 dB

Clinics, consulting rooms, theatres, nurses' stations	45 dB	45 dB
Place of Assembly		
Church, place of worship, marae	35 dB	35 B

4. NAV.6.5.3 does not apply where any of NAV.6.5.4(a) – (f) apply:

    1. The nearest exterior façade of the building accommodating the activity listed in NAV.6.5 Table 1 is at least 50m from the formed carriageway of the state highway and 50m from the formed railway track and there is a solid building, fence, wall or landform that blocks the line of sight from all parts of all windows and doors to that activity to:
        1. All parts of the formed carriageway of the state highway.
    2. All points 3.8m directly above the formed railway track; or
    2. It can be demonstrated by way of prediction or measurement by a Recognised Acoustician that the noise at all exterior façades of the listed activity is no more than 15 dB above the relevant noise levels in NAV.6.5 Table 1; or
    3. An alteration or extension to an existing building other than a residential unit does not increase the gross floor area of an activity listed in NAV.6.5 Table 1 within the State Highway Noise Control Boundary or the Rail Noise Control Boundary; or
    4. An **external** alteration or extension to an existing residential unit does not increase the gross floor area of an activity listed in NAV.6.5 Table 1 within the State Highway Noise Control Boundary or the Rail Noise Control Boundary; or
    5. An **internal** alteration to an existing residential unit does not increase the total gross floor area of activities listed in NAV.6.5 Table 1 by more than 5m^2 within each 10 year period from [operative date] within the State Highway Noise Control Boundary or the Rail Noise Control Boundary; or
    6. The activity is designed, constructed and maintained in accordance with the construction schedule in NAV Appendix 1 and meet the ventilation requirements at NAV.6.5.5.

5. 5. Where windows are required to be closed to achieve the sound levels in NAV.6.5.1 – 2, the room or space shall be designed, constructed and maintained to:

    1. Provide mechanical ventilation that satisfies clause G4 of the New Zealand Building Code and is adjustable by the occupant to control the ventilation rate in increments up to a high air flow setting that provides at least 6 air changes per hour; and
    2. Provide relief for equivalent volumes of spill air; and
    3. Provide cooling and heating that is controllable by the occupant and that can maintain the inside temperature of the room or space between 18^{0}C and 25^{0}C.

Ensure that where a ventilation or ~~colling~~ cooling system is used that it does not generate more than 35dBL_{Aeq} when measured 1m away from any grille or diffuser at the minimum level required to achieve the temperatures in NAV.6.5.3(c).

6. Any activity which does not comply with NAV.6.5.3 is a Restricted Discretionary activity. Discretion is restricted to:

    1. The effects on people's health and internal residential amenity, including effects on future residents and effects from future levels of noise anticipated when the application is being assessed.
    2. Whether activity listed in NAV.6.5 Table 1 could be designed or located to achieve compliance with the rules.

3. The extent to which non-compliance with the rules could unduly compromise the continuing operation of the state highway corridor, or railway corridor as enabled within Designations KRH-1 and KRH-2.
4. Any natural or built features of the site or surrounding area which will mitigate noise effects.
5. The outcome of any consultation undertaken with Waka Kotahi or KiwiRail.

Notes:

1. NAV.6.5.4(d) and (e) apply where an existing building continues to be used as a residential unit.
2. NAV.6.5.4(e) provides for:
    1. alterations that partition, combine, or re-allocate space between, habitable rooms.
    2. the incorporation of a maximum of 5m^2 of non-habitable space into habitable rooms.

~~Note~~ Compliance Standards:

1. A certificate from a Recognised Acoustician~~, confirming that the building accommodating the noise sensitive activity will achieve the minimum sound insulation requirements,~~ is required to confirm compliance with the acoustic requirements of NAV.6.5. When confirming compliance with NAV.6.5.3 and NAV.6.5.4(b):
    1. Railway noise is assumed to:
        1. be 70 dB L_{Aeq}(1h) at a distance of 12m from the track; and
        2. reduce at a rate of 3 dB per doubling of distance of up to 40m and 6 dB per doubling of distance beyond 40m.
    2. Road noise is based on measured or predicted noise levels plus 3 dB.
2. Where more than one standard within NAV.6.5 applies that requires insulation of a noise sensitive activity or a noise sensitive space from an external noise source, each of those standards must be complied with.

Notification:

1. Any restricted discretionary activity under NAV.6.5.6 shall not be notified or limited notified unless Waka Kotahi or KiwiRail (as relevant) is determined to be an affected person in accordance with section 95B of the Resource Management Act 1991 or Council decides that special circumstances exist under section 94A(4) of the Resource Management Act 1991.

NAV.6.5A Activities within the Rail Noise Alert Area

1. Within the Rail Noise Alert Area any activity is a permitted activity where:
    1. Resource consent is not required under any rule of the District Plan.
    2. The activity is not prohibited under any rule of the District Plan.

Note:

1. The Rail Noise Alert Area identifies the noise-sensitive area within a 53dB rail noise contour each side of the rail corridor. Properties within this area may experience rail noise. No specific district plan rules or notification requirements apply as a result of this Rail Noise Alert Area.

NAV.6.5B Activities within the Rail Vibration Alert Area

1. Within the Rail Vibration Alert Area any activity is a permitted activity where:
    1. Resource consent is not required under any rule of the District Plan.

2. The activity is not prohibited under any rule of the District Plan.

Note:

1. The Rail Vibration Alert Area identifies the vibration-sensitive area within 60metres each side of the rail corridor. Properties within this area may experience rail vibration. No specific district plan rules or notification requirements apply as a result of this Rail Vibration Alert Area.

NAV.6.6 Activities Establishing near the Airport Zone

1. Within the Air Noise Margin:
    1. A minor addition or alteration to an existing building, which is not to be used as a habitable room, is a permitted activity.
    2. The following are **controlled** activities within the Outer Control Boundary:
        1. The addition of a habitable room;
        2. The construction of a new residential unit if:
            1. The net site area associated with each residential unit is at least 1000m^2.
                2. The proposed construction is the first residential unit upon an allotment that is less than 1000m^2 and that allotment existed before 1 December 2005.
        3. Visitor's accommodation.
    3. Control is reserved over:
        1. The effect of aircraft noise on the living standard within buildings or habitable rooms. Whether the design and materials used in the construction achieves an internal design level of 40 dB L_{dn} for noise within any habitable room.
    4. Any activity that does not comply with the standard for a **permitted** or **controlled** activity is a **discretionary** activity. See NAV.7 for Discretionary activity criteria.
2. Within the Air Noise Boundary:
    1. New noise sensitive activities are **prohibited** activities
    2. Visitor Accommodation is a **discretionary** activity:

Note 1 - Conditions of consent: Any application for land use consent for a residential or other noise-sensitive activity in the Outer Control Boundary, will be required to have a notice registered against its title and included in the LIM report which alerts the owner that the property falls within a noise-sensitive area and can therefore expect noise levels higher than would normally be expected in that Zone.

Note 2 - Notification: Council has identified reverse sensitivity effects that new noise-sensitive activities may have on the safe and efficient operation of the Whangārei Airport. It has also identified potential adverse effects of the Airport on noise-sensitive activities. Therefore, applications for resource consent may require the written approval of the Whangārei Airport as an affected party if such applications are to be considered on a non notified basis.

NAV.6.7 Aircraft and Helicopter Landing Areas

Helicopter landing areas, including those used for military training activities, shall comply with and be measured and assessed in accordance with NZS 6807:1994 *"Noise Management and Land Use Planning for Helicopter Landing Areas"*. NAV.6.7 shall not apply to emergency services helicopter movements. Noise from aircraft other than helicopters shall comply with NZS6805:1992 *"Airport Noise Management and Land Use Planning."*

The use of aircraft and helicopters undertaking rural production activities on an intermittent and infrequent basis are exempt from compliance with NAV.6.7.

NAV.6.8 Engine Testing

Aircraft engine testing in the Airport Zone is a permitted activity if:

1. Between the hours of 0700 and 2300, the noise generated by aircraft engine testing, assessed at any point within the boundary of any Residential Zone, does not exceed 55 dB L_{Aeq} (16 hours) and 65 dB L_{Aeq} (15 minutes);
2. Between the hours of 2300 and 0700, noise generated by aircraft engine testing assessed at any point within the boundary of any Residential Zone, does not exceed 45dB L_{Aeq} (8 hours) and 65 dB L_{AFmax};
3. Between the hours of 2300 and 0700, for the purposes of essential, unscheduled Maintenance and engine testing on a maximum of 15 occasions within any calendar year, noise generated within the boundary of any Residential Zone does not exceed 55 dB L_{Aeq} (8 hours) and 70 dB L_{AFmax}. In these circumstances the noise limits set out in b. above shall not apply;
4. The time, duration and other essential details of any testing undertaken in accordance with the requirements of c. above shall be recorded and advised to the Whangārei District Council within two weeks of any such event.

NAV.6.9 Explosives Use

Peak noise levels from explosives, excluding those from Temporary Military Training Activities, use shall not exceed the following limits when measured within the notional boundary of any building set out in the following table:

Affected building type	Permitted blasting time window	Number of blasts per year	Max peak sound level applying to all blasts dB L_{peak}
Occupied noise sensitive activity and visitor accommodation	0700 to 1900 hours	≤ 20 >20	120 115
Occupied commercial and industrial buildings	All hours of occupation	All	125
Unoccupied buildings	All times	All	140

NAV.6.10 Temporary Military Training Activities

Temporary military training activities are permitted activities provided that they comply with the following rules:

1. *Weapons firing and/or the use of explosives*
    1. Weapons firing and explosives use on any site shall not exceed a total of 31 days in any 365 day period.

    2. Weapons firing and/or use of explosives shall comply with the following:

Table 1:

Activity	Time (Monday to Sunday)	Separation distance required between the Boundary of the activity and the notional boundary to any building housing a noise sensitive activity
i. Live firing of weapons and single or multiple explosive events	0700 to 1900 hours	At least 1500m
	1900 to 0700 hours	At least 4500m
ii. Firing of blank ammunition	0700 to 1900 hours	At least 750m
	1900 to 0700 hours	At least 2250m

Table 2:

Rules to be complied with if minimum separation distances for sources NAV.6.10.1(i) and (ii) cannot be met:		
Rule	**Time (Monday to Sunday)**	**Noise level at the notional boundary to an individual building housing a noise sensitive activity**
(a)	0700-1900hrs	For the use of explosives: 120 dB L_{peak} For the use of small arms and pyrotechnics: 90 dB L_{peak} with one period in any 365 day period of up to five days consecutive use up to 120 dB L_{peak}
(b)	1900-0700hrs	For the use of explosives: 90 dB L_{peak} For the use of small arms and pyrotechnics: 60 dB L_{peak} with one period in any 365 day period of up to five days consecutive use up to 90 dB L_{peak}
(c)	A Noise Management Plan prepared by a suitably qualified expert is provided to Council at least 15 working days prior to the activity taking place. The Noise Management Plan shall, as a minimum, contain: 1. A description of the site and activity including times, dates, and nature and location of the proposed training activities. 2. Methods to minimise the noise disturbance at noise sensitive receiver sites such as selection of location, orientation, timing of noisy activities to limit noise received at sensitive receiver sites. 3. A map showing potentially affected noise sensitive sites and predicted peak sound pressure levels for each of these locations. 4. A programme for notification and communication with the occupiers of affected noise sensitive sites prior to the activities commencing, including updates during the event. 5. A method for following up any complaints received during or after the event, and any proposed de-briefing meetings with Council.	

Note: "Small arms" include, but are not limited to, revolvers, self-loading pistols, rifles and carbines, assault rifles, submachine guns and light machine guns.

Note: "Explosives" include but are not limited to explosive charges, cannons, grenades, mortars and rockets.

6. Mobile noise sources, excluding sources NAV.6.10.1(i) and (ii)

1. Activities shall comply with the "typical duration" noise limits set out in Tables 2 and 3 of *NZS6803:1999 Acoustics – Construction Noise* (with reference to 'construction noise' taken to refer to other, mobile noise sources) provided that no building housing a noise sensitive activity is exposed to noise above 35 dB L_{AFmax} from a Temporary Military Activity mobile source for more than a total of 31 days in any 365 day period.

2. Activities that do not comply with the duration limit in NAV.6.10.2(a) shall comply with the noise limits in NAV.6.10.3. Fixed (stationary noise sources).

Note: mobile noise sources (other than firing of weapons) include sources such as personnel, light and heavy vehicles, self-propelled equipment, earthmoving equipment.

7. *Fixed (stationary) noise sources, excluding sources NAV.6.10.1(i) and (ii)*

Time (Monday to Sunday)	Noise level at the notional boundary to any building housing a noise sensitive activity *	
0700 to 1900 hours	55 dB L_{Aeq} (15 min)	n.a.
1900 to 2200 hours	50 dB L_{Aeq} (15 min)	
2200 to 0700 hours the next day	45 dB L_{Aeq} (15 min)	75 dB L_{AFmax}

Note: fixed (stationary) noise sources (other than firing of weapons and explosives) include noise sources such as power generation, heating, ventilation or air conditioning systems, or water or wastewater pumping/treatment systems.

8. *Helicopter landing areas*

Helicopter landing areas shall comply with noise limits set out in *NZS6807:1994 Noise Management and Land Use Planning for Helicopter Landing Areas*.

9. *Restricted Discretionary Activities*

Any activity that does not comply with rules NAV.6.10.1 – NAV.6.10.4 shall be a Restricted Discretionary Activity. Discretion is restricted to those matters listed in NAV.7.1(a) – (m).

NAV.6.11 Bird Scaring Devices

The use of bird scaring devices is a **permitted** activity in the Rural Production Zone if:

1. Bird scaring devices do not operate between half an hour after sunset and half an hour before sunrise.
2. Each device operates at not more than 6 “events“ per hour where an “event” includes clusters of up to three shots from gas operated devices or three individual shots from a firearm in quick succession. (This rule does not apply to bird scaring devices that generate a noise level of less than 55 dB L_{AE} within the notional boundary of any noise sensitive activity not owned by the operator of the device).
3. The sound level from any event does not exceed 65 dB L_{AE} within the notional boundary of any noise sensitive activity not owned by the operator of the device.
4. The bird scaring device is only operated when a crop is at risk from bird damage.

The use of bird scaring devices in other Zones is a **discretionary** activity.

Advice Note: Existing use rights may apply where a bird scaring device has been lawfully established prior to the operative date 24 May 2016 of the NAV chapter.

NAV.6.12 Road Traffic

1. Noise from any new or altered road shall be assessed in accordance with and meet the provisions of New Zealand Standard NZS 6806:2010 *“Acoustics - Road-traffic noise - New and altered roads.”*
2. The installation and operation of Audio-Tactile pedestrian call buttons at traffic signal controlled intersections and pedestrian crossings is a permitted activity. Installations shall comply with Australian Standard AS2353: 1999 Pedestrian Push- button Assemblies.

NAV.6.13 Frost Fans

The use of frost fans is a **permitted** activity in the Rural Production Zone if:

1. Noise generated by single or multiple frost fans on a site does not exceed 55 dB L_{Aeq} (10 minute) at any time when assessed at the notional boundary of any noise sensitive activity on a separate site under different ownership.

   Note: The noise rule includes a correction for the special audible characteristics of frost control fans and no further penalty shall be applied to measured noise levels.

2. Operation of frost fans during the night period shall be for protection of crops from frost only. Any other operation, such as for the purposes of Maintenance, shall be undertaken during the day period.

3. A legible notice shall be fixed to the road frontage of the property on which the frost fan is being used giving the name, address and telephone number of the person responsible for its operation.

The use of frost fans in any other Zone is a **discretionary** activity.

Advice Note: Existing use rights may apply where a frost fan has been lawfully established prior to the operative date 24 May 2016 of the NAV chapter.

NAV.6.14 Emergency Generator Testing

The testing of emergency generators is a permitted activity in all Zones if:

1. The duration of testing does not exceed 12 hours total per annum;
2. Testing occurs between 0900 and 1700 hours only;
3. Noise levels do not exceed the following:
   1. 60 dB $L_{Aeq(15\ min)}$ within the relevant boundary assessment location of any ~~Marsden Primary Centre – Town Centre Living~~, Open Space, Natural Open Space Rural Production, Rural Village Residential or Residential Zones.
   2. 65 dB $L_{Aeq(15\ min)}$ within the site boundary of any Business 1, 3, Rural Village Centre, City Centre, Mixed Use, Local Centre, Neighbourhood Centre or Waterfront Zones or Port Nikau Development Area, or Town Centre Zone ~~Marsden Primary Centre Noise Zone 2.~~
   3. 70 dB $L_{Aeq(15\ min)}$ within the site boundary of any Light Industrial, Commercial, Sport and Active Recreation, Hospital or Airport Zone, ~~or Marsden Primary Centre Noise Zone 1 Zone.~~
   4. 85 dB $L_{Aeq(15\ min)}$ within the site boundary of any Heavy Industrial, Strategic Rural Industries, Rural Village Industry or Port Zone.

NAV.6.15 Vibration

1. Continuous Vibration from Stationary Machinery

Vibration from building services is a permitted activity if vibrating, reciprocating and rotating machinery and all piping, ducting and other equipment attached to such machinery is installed and maintained so that any resulting vibration does not exceed the levels in the following table when measured in adjacent buildings or areas of buildings under different ownership from the source of vibration:

Affected occupied building type	Time	Maximum vibration level in mm/s rms between 8 and 80 Hz
Industrial	All	0.8
Commercial	All	0.4
Noise sensitive activity	0700 to 2200 hours	0.2
	2200 to 0700 hours	0.14
Surgery rooms of healthcare facilities	All	0.1

2. Construction Vibration

Vibration from construction and demolition activity is a permitted activity if it does not exceed the following levels when measured at the point of effect.

1. For human annoyance, vibration should be assessed at the location of the affected person inside the building, typically on the appropriate floor. Vibration should be measured in three orthogonal directions orientated to the axes of the building and assessed in the single axis in which vibration is greatest.
2. For building damage, vibration should be assessed at the horizontal plane of the highest floor of the building. Vibration should be measured in two horizontal orthogonal directions orientated to the axes of the building and assessed in the single axis in which vibration is greatest. Note that for the building damage criteria in NAV 6.15.2 Note 2 an alternative measurement location is defined.

Effect	Affected occupied building	Activity	Time	Maximum vibration level mm/s ppv	Notes
Annoyance	Occupied noise sensitive activity or visitor accommodation in any Zone	General construction activity	2200 to 0700	0.3	1
			0700 to 2200	1	1
	Occupied commercial or industrial activity in any Zone	General construction activity	2200 to 0700	5	
			0700 to 2200	1	
Building damage	Unclassified structures of great intrinsic value such as historic buildings	All activity	All times	2.5	
	Non-occupied dwellings and buildings of similar design	All activity	All times	5	
	Non-occupied commercial and industrial buildings	All activity	All times	10	

[1] Except that in surgery rooms of hospital facilities, maximum vibration levels from construction and demolition activities shall not exceed 0.1mm/s rms between 8 and 80Hz.

[2] NAV.6.15.2 shall not apply to permitted Maintenance or utility works undertaken within the road carriageway where the following levels are achieved:

Table 1

Effect	Receiver	Location	Details	Maximum vibration level (mm/s PPV)
Annoyance and building damage	Occupied noise sensitive activity or visitor accommodation building in any Zone	As set out in NAV.6.15.2 above	2000 to 0630 hours	1
			0630to 2000 hours	5
	Occupied commercial or industrial activity building in any Zone	Inside the building	0630 to 2000 hours	5
Building damage	Unoccupied buildings	Base of building on side of building facing vibration source or, where this is not practicable, on the ground outside the building	Vibration – transient (including blasting)	Refer to table 2 below
			Vibration – continuous	Refer to table 2 below - 50% of Table 2 Values

Table 2

Type of building	Peak component velocity (PPV) in frequency range of predominant pulse	
	4 to 15 Hz	15 Hz and above
Reinforced or framed structures Industrial and heavy commercial buildings	50 mm/s	50 mm/s
Unreinforced or light framed structures Residential and light commercial buildings	15 mm/s at 4Hz increasing to 2 0mm/s at 15 Hz	20 mm/s at 15Hz increasing to 50 mm/s at 40 Hz

Notes:

1. All values referred to in table 2 are at the base of the building
2. For unreinforced or light framed structures and residential and light commercial buildings at frequencies below 4 Hz a maximum displacement of 0.6mm (zero to peak) is not to be exceeded.

3. Vibration from Explosives Use and Blasting

Vibration from explosive use and blasting from activity other than provided for in NAV.6.15.2 is a permitted activity if it does not exceed the levels set out in the following table, when measured in general accordance with the provisions of Australian Standard AS2187.2: 2006 Explosives – Storage and use – Use of explosives.

Category	Type of blasting operations	Peak component particle velocity (mm/s)

Occupied noise sensitive activities and visitor accommodation	Operations lasting longer than 12 months or more than 20 blasts per year	5 mm/s for 95% blasts per year 10 mm/s maximum unless agreement is reached with the occupier that a higher limit may apply
Occupied noise sensitive activities and visitor accommodation	Operations lasting less than 12 months or less than 20 blasts per year	10 mm/s unless agreement is reached with the occupier that a higher limit may apply
Occupied non-sensitive site, such as factories and commercial premises	All blasting	25 mm/s unless agreement is reached with the occupier that a higher limit may apply

NAV.7 Discretionary Activties

1. Assessment of Discretionary Activities for NAV.6.1 – NAV.6.15

Unless specifically stated otherwise, any activity shall be a discretionary activity where it does not comply with all of the permitted noise and vibration provisions given in the previous sections NAV.6.1 – NAV.1.6.15. When assessing discretionary applications pursuant to these sections, the assessment shall include (but is not limited to):

1. The level of sound likely to be received
2. The existing ambient sound levels
3. The nature and frequency of the noise including the presence of any special audible characteristics
4. The effect on noise sensitive activities within the environment
5. The likely time when noise will be audible and the extent of the exceedance of the noise rule at that time
6. Whether the level and character of the noise is below recognised guidelines or standards for the preservation of amenity
7. The potential for cumulative effects to result in an adverse outcome for receivers of noise
8. The effects of noise on recreation or Conservation areas within the Natural Open Space Zone.
9. The value and nature of the noise generating activity and the benefit to the wider community having regard to the frequency of noise intrusion and the practicality of mitigating noise or using alternative sites.
10. Any proposed measures to avoid, remedy or mitigate noise received off-Site
11. The potential for any reverse sensitivity effects
12. The level of involvement of a Recognised Acoustician in the assessment of potential noise effects and/or mitigation options to reduce noise.
13. The ability of noise sensitive activities to unduly compromise the continuing operation or future development of other lawful activities

2. Assessment of Discretionary Activities for NAV.6.6 Activities Establishing Near the Airport Zone

When assessing discretionary applications pursuant to section NAV.6.6, the assessment shall include (but is not limited to):

1. Consideration of the proposed location of the noise-sensitive activity in relation to airport activities;

2. Effects, or potential effects arising from the proximity of the airport, aircraft approach/takeoff paths, lead-in lighting, navigational aids; and the potential of buildings or structures to create glare, electromagnetic interference, smoke, mechanical turbulence or other adverse effects;
3. The effect, or potential effect of the noise-sensitive activity on the operation of Whangārei Airport; particularly having regard to helicopter TLOF and hover points and the runway centreline alignments, requirements for aircraft on approach, and aircraft utilising navigational aids/lighting.
4. The effect, or potential effect of airport operations, in particular noise, and health/safety effects from low flying aircraft, on the noise-sensitive activity, given low ground clearances for aircraft on approach/ takeoff over this area, and high single event noise levels and average daily noise levels;
5. The effect of topographical characteristics of the land in relation to shielding of airport noise;
6. Relevant objectives and policies, as they relate to the protection of a regionally significant transportation resource;
7. Any remedial measures to avoid, remedy or mitigate potential conflict with the safe and efficient operation of the airport;
8. Whether there has been adequate and meaningful consultation with the Airport Authority with respect to the current or potential effects associated with the operation of the airport resource, whether any issues have been resolved and any mitigation measures that have been proposed.

NAV Appendix 1 NAV.6.5.4(d) Alternative Construction Schedule for Road and Rail Noise Control

Elements	Minimum construction for noise control in addition to the requirements of the New Zealand Building Code	
Exterior Walls	Wall cavity infill of fibrous insulation, batts or similar (minimum density of 9 kg/m^3)	
	Cladding and internal wall lining complying with either Options A, B or C below:	
	Option A - Light cladding: timber weatherboard or sheet materials with surface mass between 8 kg/m^2 and 30 kg/m^2 of wall cladding	Internal lining of minimum 17 kg/m^2 plasterboard, such as two layers of 10 mm thick high-density plasterboard, on resilient/isolating mountings
	Option B - Medium cladding: surface mass between 30 kg/m^2 and 80 kg/m^2 of wall cladding	Internal lining of minimum 17 kg/m^2 plasterboard, such as two layers of 10 mm thick high-density plasterboard
	Option C - Heavy cladding: surface mass between 80 kg/m^2 and 220 kg/m^2 of wall cladding	No requirements additional to New Zealand Building Code
Roof / Ceiling	Ceiling cavity infill of fibrous insulation, batts or similar (minimum density of 7 kg/m^3)	
	Ceiling penetrations, such as for recessed lighting or ventilation, shall not allow additional noise break-in	
	Roof type and internal ceiling lining complying with either Options A, B or C below:	
	Option A - Skillion roof with light cladding: surface mass up to 20 kg/m^2 of roof cladding	Internal lining of minimum 25 kg/m^2 plasterboard, such as two layers of 13 mm thick high-density plasterboard
	Option B - Pitched roof with light cladding: surface mass up to 20 kg/m^2 of roof cladding.	Internal lining of minimum 17 kg/m^2 plasterboard, such as two layers of 10 mm thick high-density plasterboard
	Option C - Roof with heavy cladding: surface mass between 20 kg/m^2 and 60 kg/m^2 of roof cladding	No requirements additional to New Zealand Building Code
Glazed Areas	Aluminium frames with full compression seals on opening panes	
	Glazed areas shall be less than 35% of each room's gross floor area	
	Either: 1. double-glazing with: 1. a laminated pane of glass at least 6 mm thick; 2. a cavity between the two panes of glass at least 12 mm deep; and 3. a second pane of glass at least 4 mm thick Or 2. any other glazing with a minimum performance of Rw 33 dB	
Exterior Doors	Exterior door: 1. within the state highway noise control boundary with a line-of-sight to any part of the state highway road surface; or within the railway corridor noise control boundary with a line-of-sight to any point 3.8m directly above the formed railway track.	Solid core exterior door, minimum surface mass 24 kg/m^2, with edge and threshold compression seals; or other doorset with minimum performance of Rw 30 dB
	Exterior door outside of the state highway noise control boundary and railway corridor noise control boundary, or with no line-of-sight to any part of the state highway road surface or to any point 3.8m directly above the formed railway track	Exterior door with edge and threshold compression seals

NAV

Noise and Vibration

Revision and Sign-off Sheet

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