BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 25

ENV-2011-WLG-00059

IN THE MATTER of an appeal under section 120 of the Resource Management Act 1991

BETWEEN CARTER HOLT HARVEY HBU LIMITED
Appellant/Applicant

AND TASMAN DISTRICT COUNCIL
Respondent

Court: Environment Judge B P Dwyer
Environment Commissioner A Sutherland
Deputy Environment Commissioner O Borlase

Heard: At Nelson on 30 October 2012 to 2 November 2012
Final submissions received 20 December 2012

Counsel/Appearances:

N McFadden and V Hall for Carter Holt Harvey HBU Limited

J Ironside and A Besier for Tasman District Council

H Campbell for Friends of Nelson Haven and Tasman Bay Incorporated (s274 party)

D Mitchell for D and J Mitchell (s274 party)

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DECISION ON APPEAL

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Decision Issued: 27 FEB 2013

A: Appeal declined

B: Costs reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

*Introduction*

[1] Carter Holt Harvey HBU Limited (CHH) has filed an appeal pursuant to s120 Resource Management Act 1991 (RMA) against a decision of Tasman District Council (the Council) declining discretionary activity applications by CHH for:

- A subdivision consent to create 8 residential lots together with various reserve lots;
- A land use consent to erect a dwelling on each of the proposed residential lots;
- A land disturbance consent to carry out earthworks.

[2] The site of the proposed development is a property owned by CHH situated at 311 Kina Peninsula Road (the site), Kina Peninsula in the Tasman District.

[3] In addition to CHH and the Council, the following parties participated in the appeal pursuant to s274 RMA:

- The Friends of Nelson Haven and Tasman Bay Incorporated (the Friends);
- D and J Mitchell;
- New Zealand Historic Places Trust;
- Tiakina Te Taiao Limited.

(Only the Friends and Mr and Mrs Mitchell appeared as parties at the appeal hearing)[1].

[4] By the time the appeal came on for hearing CHH had made some amendments to the proposal as considered by the Council but there was no suggestion by any party to our proceedings that the amendments were not *within scope*. We will return to the details of the proposal further in this decision.

[1] Although Tiakina Te Taiao Ltd did not appear as a party at our hearing, the Council called Mr R W T Taylor as a witness. Mr Taylor gave evidence about cultural matters and had given evidence for Tiakina Te Taiao Ltd at the initial Council hearing.

***The site***

[5] Kina Peninsula is situated approximately 40km by road north west of Nelson. It is an elongated landform approximately 3.5km in length which partially separates the waters of the Moutere Inlet on the west of the Peninsula from those of Tasman Bay on the east. At the tip of the Peninsula a narrow channel enables the passage of water from Tasman Bay into the Inlet and separates the Peninsula from Jackett Island to the north.

[6] Moutere Inlet is a moderately sized (approximately 755ha) shallow, tidal lagoon bordered by the Kina Peninsula and Jackett Island on its eastern side and the Nelson/Motueka road on its western side.

[7] The site sits towards the northern end of the Peninsula. It contains a total of 10.7014ha and is defined by the irregular coastlines of Moutere Inlet and Tasman Bay (Kina Beach) on two sides. At its longest point the site is approximately 1km in length and at its widest approximately 300m[2].

[8] Adjoining the site to the north is a 4ha parcel of land which occupies the distal end of the Peninsula. This land is owned by Kina Development Co Limited (KDL). Although the KDL land is contained in one certificate of title it is occupied by 8 individually owned baches constructed under development rights provided for in KDL's company rules. We understand that this development took place 40 or more years ago at a time when such company developments were sometimes used (inter alia) to avoid controls which might have otherwise applied to conventional subdivisions.

[9] A feature of the KDL property is a long, narrow *leg-in* which connects to Kina Beach Road which ends at a point about two thirds of the way along the Peninsula. This leg-in runs through the approximate middle of the CHH site splitting it in two. The CHH land has a right-of-way over the leg-in. It is acknowledged that the track giving physical access to the KDL property does not follow the legal leg-in

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[2] Some of the dimensions in the decision have been estimated by the Court. The actual dimensions of the leg-in and the site were difficult to ascertain or calculate from the documents provided to the Court.

and is partially formed on CHH land. This matter would be tidied up as part of the CHH subdivision, should it proceed.

[10] On its southern side, the site adjoins an eight lot residential lifestyle subdivision largely developed on elevated land. These lots appear to contain a mix of pasture, orchards, olive groves, shelter belts, houses and ancillary buildings. Further rural/residential or coastal/residential style development extends to the south of these lots. These two southern nodes of development are separated by Kina Peninsula Road which traverses the Peninsula from the Moutere Inlet side to the Tasman Bay side approximately half way along the Peninsula.

[11] CHH acquired the site nearly 30 years ago. We understand that at the time of acquisition the site contained substantial pine plantings. Those have now been harvested. With most of the larger trees removed, the site is occupied by a scattered mix of remnant pines, other (mostly) exotic tree species, scrubby regenerating vegetation (native and exotic) and weeds. Much of the site consists of vegetation covered sand dunes with the main dune ridge running along the spine of the Peninsula. The maximum height of the dunes is somewhere about 6m Nelson Vertical Datum (NVD).

[12] A central portion of the site is occupied by a 3.96ha recreation area called the LEH Baigent Memorial Domain (the Domain), an open, grassed paddock with occasional clumps of larger trees and vegetation scattered in various places. The Domain contains a forlorn stone and timber memorial to LEH Baigent, a concrete block barbeque and a small toilet block. Generally, the Domain appeared to us to be somewhat unkempt and neglected but it would provide a suitable area for picnicking, casual sports and similar recreational activities.

[13] On the western side of the Domain there is a boat ramp which provides access to the Moutere Inlet. Although witnesses used the term boat ramp, this seemed to us to be a somewhat grandiose description of what is in reality an access point comprising compacted sand and gravels which would provide limited access to the Inlet for small boats at higher tides. At lower tides the ramp is about 20m or 30m away from the nearest waters of the Inlet.

[14] We were told that at the time of transfer of the site from Baigent Family interests (before acquisition by CHH) it was intended that the Domain would vest as reserve but that was never legally completed. Over the time of its ownership, CHH has allowed the public access to the Domain and has undertaken maintenance on it. Mr R E Townshend (a CHH executive) gave evidence that CHH typically spent around $40,000.00 each year on maintenance of the Domain and sometimes up to $80,000.00 when tree felling and land remediation was required.

[15] We understand that there has been regular public use of the Domain over the years. That has recently been restricted by CHH due to complaints made by submitters to the Council hearing of this application about use of the domain by freedom campers, including the lighting of fires. That led to CHH putting a locked gate on the site. Keys were provided to KDL residents and to community and school groups upon request. One of the beneficial effects of the proposed subdivision advanced by CHH was the vesting of the Domain as public reserve and we will return to that issue in due course.

***The application***

[16] In March 2010, CHH lodged its application for land use, land disturbance and subdivision consents to create 8 lifestyle lots varying in size from 0.21ha to 0.65ha and situated at elevations between 3.0m and 6.0m, NVD. CHH proposed to upgrade the Domain and to vest it and the balance of the site not required for residential lots as reserves (including esplanade reserve). Additionally, CHH proposed:

- Formation of an upgraded access way to the KDL land;
- Upgrading the Domain prior to vesting in the Council;
- Buildings would be confined to identified building platforms;
- A covenant to adhere to Iwi protocols for any archaeological sites which might be found;
- A covenant to construct dwellings on piles to minimum floor heights and for the dwellings to be relocatable;
- Covenants relating to enhancement and mitigation plantings, revegetation and a landscape management plan.

[17] As we have noted, there were various amendments to the initial proposal made by the time of our hearing. These included:

- A reduction in the number of residential lots from eight to six. The two lots removed were located on the Moutere Inlet side of the Peninsula;
- A resultant increase in the areas proposed to be vested in the Tasman District Council as reserves. The following reserves are now proposed:
  - Lot 9 (Walkway) 0.02ha;
  - Lot 11 (Walkway) 0.03ha;
  - Lot 13 (the Domain - Public Reserve) 3.96ha;
  - Lot 14 (Esplanade Reserve) 1.22ha;
  - Lot 15 (Esplanade Reserve) 3.29ha.
- Relocation and re-alignment of building platforms on Lots 3 – 8 (the residential lots) with the building location on Lot 5 shifted south west due to the identification of a possible burial site where initially proposed;
- Alteration of the access road to the subdivision so as to more closely follow the alignment of the existing formed access to the KDL land thereby reducing the extent of earthworks required for the subdivision;
- New tree planting at strategic locations within the site;
- Finally, in its closing submissions, CHH proposed a set of amended proposed conditions and covenants addressing a range of issues which were raised during the hearing.

We will refer to various aspects of these proposals where appropriate in the remainder of this decision.

***Planning – activity status***

[18] The site is in both the Rural 2 Zone and the Coastal Environment Area of the Tasman Resource Management Plan (the District Plan) which allows the erection of one dwelling on the existing title as a controlled activity.

[19] We heard evidence from two planning witnesses:

- Ms S J Allan for the Council;
- Mr T G Quickfall for CHH.

[20] A joint conference statement from the planning witnesses identified rules in the District Plan triggered by the revised proposal. The relevant activity and its status were agreed as follows:

- Subdivision (Rural 2 Zone) - Discretionary Activity (Rule16.3.6.2);
- Subdivision adjoining the Coast - Restricted Discretionary Activity (Rule 16.4.2.1);
- Right of way access - Restricted Discretionary Activity (Rule 16.2.2.6);
- Earthworks (Land Disturbance Area 1) - Restricted Discretionary Activity (Rule 18.11.3.2);
- Coastal Environment Area - Buildings within Lots 3, 4 and 8 would be a Restricted Discretionary Activity 9 (Rule 18.11.3.2). Buildings within the remaining lots would be Controlled Activity (Rule 18.11.3.1(b); and
- Wastewater discharge - Permitted (On each dwelling site)

The witnesses agreed that bundling of these activities made the whole proposal a discretionary activity.

[21] The witnesses also agreed that:

*No resource consents are required for servicing of the lots provided specific standards in various rules are achieved.*

*All lots can be physically serviced for all services.*

*Design of services can be specified through consent conditions.*

[22] With regard to vehicle access it was agreed that all lots could be provided with legal and physical access. However, the witnesses were uncertain of the legal position as to whether lots have legal access across an esplanade reserve in the event of road access no longer being available and we will return to that issue.

***Issues***

[23] In determining the outcome of the CHH application we will address the following issues:

- Coastal hazards;
- Access;
- Coastal environment and related effects;

- Wastewater;
- Avifauna.

We will then undertake our evaluation of the proposal having regard to the statutory criteria in light of our findings on these issues.

***Coastal hazards***

[24] Policy 24 of the New Zealand Coastal Policy Statement 2010 (NZCPS) requires identification of coastal hazards with their risks to be assessed for at least the next 100 years. Regard is to be had (inter alia) to physical drivers and processes which cause coastal change, including sea level rise, and to the potential for inundation. In this instance coastal erosion and inundation of both the site and the access road to it are of significance in our considerations.

[25] The Court received evidence on the above matters from four coastal engineers and a coastal scientist:

- Dr R G Bell (for the Council);
- Mr J L Lumsden (for CHH);
- Mr R A Reinen-Hamill (for CHH);
- Dr M B Single (for CHH);
- Mr E L Verstappen (for the Council).

[26] These witnesses produced an agreed statement which was particularly helpful to the Court. The witnesses agreed that the proposed lots and building platforms would be subject to hazard risk from coastal erosion and inundation arising from the effects of climate change within the 100 year assessment period. We briefly summarise the relevant evidence on this issue in the following paragraphs.

[27] CHH acknowledged the risks to the subdivided lots from erosion and inundation but contended that risk to the proposed building platforms and structures on them could be adequately mitigated by identifying minimum heights above sea level for the platforms, together with setbacks from present day MHWS. CHH proposed requirements by way of covenant that buildings erected on the lots would be relocatable and would be removed by their owners once their existence on the lots

became untenable as the result of coastal processes. CHH suggested a *trigger point* condition requiring reassessment of coastal hazards once the beach tidal interface was within 35m of any dwelling and removal or relocation off site of any dwelling once that distance was reduced to 20m.

[28] The witnesses agreed that the Council approach to estimating future inundation levels at the site should be the basis for setting minimum levels for the proposed building platforms and floor levels for the proposed dwellings. On this basis they agreed:

> *The proposed building platform level of 4.6m Nelson Vertical Datum-1955 (NVD-55) and finished floor level of 4.75m NVD-55 are appropriate to limit the potential risk of coastal-storm inundation over at least 100 years to 2115.*

[29] Insofar as setback of the building platforms from MHWS is concerned, the witnesses agreed that a proposed 90m set back for building platforms from the existing Tasman Bay coastline and 28m set back from the Moutere Inlet coastline was an appropriately conservative calculation for identification of the potential risk of erosion of the building platforms up to 2115.

[30] The set back distances arose out of a 2010 report from Tonkin & Taylor and the evidence of Mr Reinin-Hamill who is a senior engineer with that firm. It emerged that the calculations in this report as to the possible extent of erosion and inundation of the lots were based on estimates of a sea level rise of 0.9m above 1990 levels rather than 1.0m suggested in the Guidance Manual for Local Government, Ministry for the Environment, 2008 entitled *Coastal Hazards and Climate Change.*

[31] Dr Bell drew attention to this discrepancy but ultimately accepted that there was sufficient conservatism in the Tonkin & Taylor estimations to accommodate any difference in the estimated extents of erosion and inundation arising from use of the 0.9m and 1m figures. We understood that to be the agreed view of the other coastal witnesses also. Accordingly Dr Bell did not resile from the coastal witnesses' agreed statement that:

*The coastal-hazard erosion zone of 90m from the present-day MHWS is appropriate to delineate the potential risks of erosion to 2115 along the open coast inclusive of a 1.0m sea level rise.*

[32] Similar estimations for the Inlet side of the Peninsula suggested an erosion zone of 28m from MHWS over the 100 year period. No proposed dwelling sites are within this distance of MHWS on that side and thus no erosion risk exists to them over that period.

[33] Exhibit 2 was a plan on which Mr Reinin-Hamill had marked the predicted 90m and 28m erosion lines after 100 years together with 50 year erosion lines. The accuracy of the predictions is dependent on a number of variables, however the witnesses agreed that there is a substantial degree of conservatism in the predictions and that the erosion lines depicted on Exhibit 2 were realistic scenarios as to the extent of potential erosion and inundation damage to the subdivided lots after 50 and 100 years, in the event of a 1m sea level rise over the full 100 year period. Mr Verstappen described the lines as representing the *best estimate* based on *present knowledge*[3] and we understand those limitations.

[34] What Exhibit 2 shows is that after 50 years, the sea would have completely consumed all of the proposed esplanade reserve (Lot 15) immediately in front of the residential lots on the Tasman Bay side of the site together with parts of the proposed residential lots themselves. At that time the beach tidal interface would be within the proposed residential lot boundaries. After 100 years, erosion and inundation would have consumed approximately half of each of the proposed residential lots (in some cases more) and the beach tidal interface would be approaching the edge of the identified building platforms. We accept the scenarios depicted on Exhibit 2 as the basis of our subsequent evaluation.

[35] As further mitigation of coastal hazards, Mr Reinen-Hamill recommended a dune care programme with the planting of dune and backshore vegetation as well as the construction of relocatable buildings and the requirement for removal of those buildings when the beach tidal interface encroaches to within 20m of the building

[3] NoE, page 317.

platforms. He also proposed a condition prohibiting the use of hard protection structures on the proposed lots to support the requirement to relocate the buildings.

[36] The other witnesses did not comment on the suggestion of a dune care programme and CHH did not pursue that recommendation.

[37] Relocatable buildings and prohibition of the construction of hard protection structures were supported by the witnesses in their joint statement and accepted by CHH whose proffered conditions addressed these matters. The conditions also included trigger conditions as suggested by Mr Reinen-Hamill. The witnesses were unable to agree as to the merits of trigger conditions with Dr Bell and Mr Verstappen considering that a condition to prevent construction of hard protection was sufficient. We will return to these issues in our evaluation to the extent necessary.

[38] A programme to monitor future movements of the coastline was suggested in the witnesses' joint statement and we saw merit in that. Should we be minded to grant consent the parties would be asked to confer and suggest a mechanism whereby a monitoring programme could be implemented and maintained into the future.

[39] Having regard to the above, we have no doubt that the esplanade reserve immediately in front of the residential lots will be eroded as will a significant portion of each proposed residential lot during the 100 year period that we are required to consider. We will return to these issues elsewhere.

*Access*

[40] Access to the site is by way of Kina Peninsula Road, a portion of which runs along a narrow strip of land (20m or so wide) lying between steep coastal cliffs and Kina Beach on the Tasman Bay side of the Peninsula. This section of road (known locally as *the causeway*) is about 600m long. It sits at an elevation of approximately 3.5m, NVD-55 and is protected by rock armouring along the beach frontage. About 300m of the unsealed causeway is highly vulnerable to coastal processes. It was closed by storms as recently as June 2012 when portions of its rock armouring failed and is occasionally subject to slips from the steep Moutere gravel cliffs. In storm

and high tide conditions waves frequently break over the road. Mr Reinen-Hamill testified that erosion forces will increase in the future[4].

[41] Mr Verstappen told us that it costs the Council significant sums of money to maintain the causeway so as to provide a modest standard of road access to the site and KDL land. It was his opinion that without provision of substantial sums of money over the long term, access to the proposed lots is likely to be reduced to beach access only, potentially only at low tide and potentially a lot sooner than the 100 year period under consideration.

[42] Messrs Reinen-Hamill and Verstappen agreed that it was necessary to strengthen the existing rock wall in front of the causeway and to raise the level of the road by up to 500mm to provide adequate protection for the road at present. Mr Reinen-Hamill considered that such works might provide protection for up to half a metre rise in sea level but beyond that a further lateral extension of the protection works along the coast might be required[5].

[43] In addition to the evidence of the coastal engineers, we heard evidence from two traffic engineers on the issue of access to the site. They were :

- Mr G P Clark for the Council;
- Mr R J Edwards for CHH.

[44] The traffic witnesses provided the Court with a joint witness statement and advised that they agreed on all traffic issues relating to this appeal. They estimated that the northern section of the Kina Peninsula Road presently carries about 120 vehicles per day and that the proposed residential allotments will increase this by around 16 – 24 vehicles per day. They considered it reasonable to allow an additional 20 – 30 vehicles per day for the upgraded reserve facilities, although this was difficult to substantiate.

[45] Messrs Clark and Edwards agreed that the estimated additional traffic resulting from the proposed lots and any increased use of the Domain can be

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[4] NoE, page 144.

[5] NoE, pages 159-160.

accommodated by the existing road network. No wider road network upgrade works were considered necessary to accommodate the proposal but they agreed that the critical matter for this proposal is continued and viable access along the causeway.

[46] Messrs Clark and Verstappen told the Court that it was not certain that the Council would continue to maintain the causeway as sea levels rose, when damage could be expected to become more frequent and extensive. Mr Verstappen was quite robust in his view that the Council would not accept ongoing liability to keep the road open. Mr Clark said that *blue water* already overtopped the road in extreme events[6], meaning that the road was under attack not just from wave spray but from the body of waves overtopping and eroding the road and its protective rock wall.

[47] Ultimately any decision to maintain the causeway or not will be based on the cost of maintenance and the benefit accruing to users of the road. This was reflected in the coastal witnesses' agreed statement, that:

> *The road access (Kina Peninsula Road) to the proposed subdivision is already, and will continue to be affected by coastal erosion and storm-tide inundation. In its current form continued vehicle access to the subdivision by the existing district council road cannot be guaranteed.*

There was no dispute that the Council is entitled to close the road if it decides that is appropriate.

[48] CHH accepted this assessment. Its response was twofold:

- Firstly, it offered to make a cash contribution to upgrade the causeway;
- Secondly, it contended that even if the causeway was not maintained as a road, access to the site would continue to be available via the beach and by sea.

[49] Mr Townshend confirmed that CHH is prepared to contribute the sum of $200,000.00 as a contribution to the retention of the causeway as part of the conditions of subdivision consent. Mr Clark acknowledged that this sum had been

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[6] AEE, page 190.

estimated by a Council engineer during the resource consent process as a *rough order of costs* to undertake presently needed work (raising the road level and upgrading the protective rock wall) on the causeway[7], although he clearly had reservations about the accuracy of that figure. Even if the $200,000.00 figure is accurate, it simply reflects the cost of doing the work required at the present time. Mr Clark was clear that the on-going costs of maintaining this section of road will exceed $200,000.00 and it is likely that in the future TDC will not maintain the causeway because it would be unaffordable and unsustainable[8]. Mr Verstappen's view was the same. Mr Verstappen also considered that the access corridor at the end of the legal road within the site itself would be subject to progressive erosion and inundation and would be *...fraught in the longer term*[9].

[50] In addition to maintenance, Mr Clark agreed with Mr Reinen-Hamill's assessment that it was highly likely that because of possible end effects, future upgrade works would require a lateral extension of the existing rock protection wall along the causeway. He said that the $200,000.00 figure did not include the costs of such work but only covered necessary work on the current section[10].

[51] Significantly, Mr Clark advised that the upgrade works presently required would need to obtain resource consent. There can be no guarantee that such consent would be obtained for either the presently required works or any extension of the protective wall which might be required in the future.

[52] CHH's approach to the provision of access to the subdivided land if the road was closed (as appears highly likely if not inevitable) was casual to say the least. It essentially consisted of contention unsupported by any substantive analysis or evidence that in the event of the road being closed, access would be available for vehicles by use of the beach at certain stages of the tide, or alternatively by boat from

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[7] NoE, page 185.

[8] NoE pages 185 - 191.

[9] EiC, para 35.

[10] NoE, pages 185-186 and 189- 191.

the sea. Mr Quickfall, who prepared the CHH application, acknowledged that no investigation of the practicality of these forms of access had been undertaken[11].

[53] Mr Reinen-Hamill suggested that at lower stages of the tide, four wheel drive access would be available to the proposed lots across Kina Beach in the vicinity of the causeway if the road was unusable. Mr Clark acknowledged that there was a situation at Monaco near Nelson where vehicular access across a beach was used.

[54] Mr Reinen-Hamill's suggestion came by way of comment outside of his evidence in chief and appeared to have a certain *off the cuff* element to it. We were not provided with any information as to precisely where such access would be positioned, what percentage of the time and tide any access would be open and what if any physical works (such as the provision of ramps or access ways onto the beach) would be needed for practical purposes. We were not told how this access might be affected by changes to the beach profile which may occur. We did not understand Mr Reinen-Hamill to have undertaken any detailed analysis of these matters. If he had, it was not presented to us in evidence.

[55] Ultimately, we understood Mr Reinen-Hamill's evidence in this regard to be an observation that if the causeway was closed, some level of access to the CHH site might remain available to a limited range of vehicles at limited times by coming along the beach. We accept that is probably so, but have substantial reservations about and heard no evidence about the sufficiency of that access as legal and physical access to a six lot residential subdivision or the proposed public reserve. We were given no information as to the circumstances of the Monaco land which would enable us to make any comparison with that situation. We observe that there was no discussion of any of these issues in CHH's resource consent application, which clearly assumed there would be continuing vehicular access to the subdivided lots available from the causeway.

[56] Similar comments can be made about the proposition that boat access from the sea might provide legal and physical access to the subdivided land. Again, we

[11] NoE, para 244.

observe that no such proposition was discussed in CHH's resource consent application.

[57] We were given no evidence or information of any kind as to the possible effects of or requirements for sea access to the proposed residential lots. We are aware that sea access can be a viable form of legal and physical access to properties and that in parts of New Zealand (including the Tasman District) sea access is the only form of access to some subdivided land. We are also aware from our experience that sea access can require the provision of infrastructure such as moorings, jetties and adequate launching ramps. We heard no evidence about any of these matters and the application provided no information as to the need (or absence of need) for such facilities nor the effects which they might have on the coastal environment of the Moutere Inlet.

[58] The Court considered the issue of sea access in another Tasman case, *Haines v Tasman District Council*[12]. That case involved access to a proposed subdivision on Best Island in the Waimea Inlet, further down the Tasman coast towards Nelson. We were told in that case that the island would be accessible by sea about 40% of the time. We heard no such evidence as to the range of tides at which practical sea access would be available to the CHH site. Nor do we have any evidence as to possible effects of building equipment and materials possibly having to be barged to the site and unloaded across the foreshore of the Moutere Inlet (assuming that is feasible).

[59] Having regard to all of the above, we find that:

- There is a high degree of likelihood that road access will cease to be available to the subdivided land in the reasonably foreseeable and not too distant future;
- The causeway portion of Kina Peninsula Road presently requires maintenance and upgrading to adequately cope with existing tide level and sea conditions. Maintenance and upgrading include repair of the existing rock protection works and raising the level of the road;

[12] (2009) 15 ELRNZ 182.

- The contribution of $200,000.00 suggested by CHH as part of its proposed conditions of consent might possibly meet the currently outstanding maintenance and upgrade requirements of the road but will not be sufficient to meet on-going road maintenance and upgrade costs;
- We have insufficient evidence before us to assess the feasibility and practicality of the alternative forms of access to the site belatedly suggested by CHH.

We will return to these issues in our appraisal of the application.

***Coastal environment effects***

[60] The Court heard evidence on these issues from three landscape architects:

- Dr F Boffa for the Council;
- Mr S K Brown for CHH;
- Ms E J Gavin for the Friends.

[61] The landscape witnesses provided a joint conference statement to record discussions between them and agreements they had reached. The witnesses used a set of site and contextual photographs initially provided by Mr Brown as the basis for their evidence. Additionally the witnesses carried out assessments of effect having regard to a series of *Truescape* photo simulations prepared under the direction of Mr Brown.

[62] The landscape witnesses' joint statement relevantly recorded the following:

1. *The CHH site is within the Coastal Environment Area (TRMP Map19).*
2. *The margins of the CHH site and the coastal waters immediately to the north east of the site are within the Moutere Inlet which is identified in the TRMP (Map 188) as a Nationally Important Ecosystem.*
3. *The Moutere Inlet was identified in the 2005 Tasman District Council Landscape Character Assessment as being an outstanding natural feature.*
4. *While the CHH site is within an area generally acknowledged as having significant landscape/seascape attributes, it is not identified in the TRMP*

*as being an Outstanding Natural Feature or Landscape in terms of RMA s6(b).*

5. *The Moutere Inlet is an outstanding natural feature. The Peninsula and Jackett Island are integral to the definition and values of the Inlet. There is agreement that on a biophysical level, Kina Peninsula is an outstanding natural feature as part of the Moutere Inlet. On the perceptual values, Stephen Brown is of the opinion that the perceived values of the Peninsula as a feature are more limited. In the context of Kina Peninsula, the landscape architects agree that it is a feature and not a landscape.*
11. *The Kina Beach/Tasman Bay shoreline (at the north end of the peninsula) has at least moderate to high natural character values. Stephen Brown considers the natural character on the Moutere Inlet side has lower natural character values.*

[63] For the purposes of our considerations, three significant underlying agreements are contained in the witness statement:

- Firstly, that the CHH site is in the coastal environment;
- Secondly, that Moutere Inlet is an outstanding natural feature and that the Peninsula is integral to the definition and values of the Inlet;
- Thirdly, that at least some parts of the Peninsula have moderate to high natural character values.

[64] The agreement as to the Peninsula being in the coastal environment simply records the obvious. Setting that to one side, we consider that three primary issues arise out of the landscape evidence, namely:

- Is the Kina Peninsula an outstanding natural feature?;
- What degree of natural character do the site and the Peninsula possess?;
- What effects will the proposed development have on these values?

*Outstanding natural feature*

[65] The witnesses agreed that Moutere Inlet and the Kina Peninsula did not constitute a landscape but rather, viewed individually or together, constituted a natural feature. They also agreed that the Moutere Inlet was an outstanding natural

feature but disagreed as to whether or not the Kina Peninsula itself fell within that description. The significance of determining whether or not the Peninsula is an outstanding natural feature arises due to the application of s6(b) RMA and we will return to that matter in due course.

[66] The RMA does not define what constitutes an outstanding natural feature. In undertaking our considerations we have had regard to the following:

- We concur with the view previously expressed by the Court in the *Wakatipu Environmental Society*[13] case that the word *outstanding* means *...conspicuous, eminent, especially because of excellence; remarkable...*;
- We apply the word *natural* in the following manner:
  *The word "natural" does not necessarily equate with the word "pristine" except in so far as landscape in its pristine state is probably rarer and of more value than landscape in a natural state. The word "natural" is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and many other things of that ilk as opposed to man-made structures, roads, machinery, etc*[14];
- We understand a *feature* to be a distinctive and identifiable part, landform, characteristic or aspect of a district or region:
  *a distinctive attribute or aspect*[15];
  *a prominent or distinctive part, as of a landscape*[16].

[67] We observe that it will not generally be difficult to identify whether or not any given landform, characteristic or aspect is a natural feature. The more difficult question is whether or not it is *outstanding*.

[68] In considering that question, Mr Brown and Ms Gavin had regard to the series of commonly applied factors identified by the Court in *Wakatipu*

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[13] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59.

[14] *Harrison v Tasman District Council* [1994] NZRMA 193.

[15] *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008).

[16] *Collins Concise Dictionary* (3rd ed revised, HarperCollins Publishers, Glasgow, 1995).

*Environmental Society Incorporated v Queenstown Lakes District Council*[17]. These factors are known as the *modified Pigeon Bay factors*. We agree that they provide a series of considerations to which regard might be had when assessing the quality of natural landscapes and features. They are, however, not tests to be passed or failed, nor will every factor be applicable in every case. In light of the landscape witnesses' agreement that Moutere Inlet is an outstanding natural feature, we do not undertake a systematic application of those factors in this case.

[69] We also note the observation of the Court in *Waiareka Valley Preservation Society Inc. v Waitaki District Council*[18] (cited by Mr Brown), that in determining whether or not a landscape or feature is outstanding *...It is still necessary to stand back and ask the question "does this landscape or feature stand out among the other landscapes and features of the district?"*. We similarly agree with that.

[70] In assessing if Kina Peninsula itself constituted an outstanding natural feature, Mr Brown referred to other landscapes and features of the Tasman District such as the St Arnaud/Nelson Lakes, Farewell Spit, Whanganui Inlet, Abel Tasman and Kahurangi National Parks and Kaiteriteri Beach. He considered that the Kina Peninsula was several levels of naturalness and significance below the likes of those features and landscapes.

[71] Although we understand the point which Mr Brown was endeavouring to make, he was not comparing apples with apples. Some of the features and landscapes which he identified would be regarded as outstanding on both national and (possibly) international levels.

[72] We agree with Mr Brown's observation that Kina Peninsula is several levels of naturalness and significance below the likes of Farewell Spit or the coastal margins of Abel Tasman National Park (for example) but we think that he himself saw the weakness in that comparison. The fact that some landscapes and features of a district are pre-eminent in their significance cannot mean that other less significant landscapes and features may not in themselves be regarded as outstanding.

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17 [2000] NZRMA 59.

18 C 058/2009.

[73] That said, we share Mr Brown's reservations as to the outstanding nature of Kina Peninsula when it is viewed in isolation. Although it is an easily identifiable and quite distinctive land form we consider that in determining whether or not the Peninsula is outstanding, it is the fact that it is an integral part of the Moutere Inlet which is significant.

[74] All of the witnesses agreed that the Moutere Inlet was an outstanding natural feature. Dr Boffa made the observation that *...the significant Inlets and Estuaries which are a distinctive and characteristic feature of the Tasman District coast are individually and collectively outstanding natural features*[19]... That opinion was not challenged. He went on to observe *...it is clear to me that the Kina Peninsula, incorporating the application site is an integral part of what has been defined and classified in the TRMP as the Moutere Inlet*[20].

[75] We concur with that view. We do not consider that it is possible to separate the agreed outstanding qualities of the Inlet from those of the Peninsula which is one of the Inlet's defining features. Considered in isolation, it is possible that the Peninsula in itself might be regarded as no more than a typical coastal feature but we do not think that it is possible to consider it in this manner. As with anything, it must be considered in context and that context is that the Peninsula is an integral part of an outstanding natural feature.

*Degree of natural character*

[76] Paragraph 11 of the witnesses' joint statement (above) recorded that the Kina Beach/Tasman Bay shoreline has at least moderate to high character values at the northern end of the Peninsula but that Mr Brown considered that the Moutere Inlet side has lower natural character values. The witnesses all addressed this issue in their briefs of evidence.

[77] Mr Brown made it clear that his expertise is restricted to the perception of natural character. He identified the terracing, banks, shoreline, gravel dunes, back

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[19] EiC, para 6.5.

[20] EiC, para 6.6.

dunes and shrub land (particularly on the Tasman Bay side) of the Peninsula together with the surrounding water, all of which contribute to its natural character. He also referred to the *rather scarred and disturbed duneland of the proposed Esplanade Reserve and Lots 3 - 8*[21] and the overlay of rural/residential development on the Peninsula to which we have referred. He contended that the Kina Beach (Tasman Bay) side of the Peninsula appeared more natural than the edge of the Moutere Inlet but that the entire Peninsula was substantially modified. He concluded:

> *62. Assessed as a whole - with reference to a continuum from wholly developed coastline to wholly natural/pristine coastline - it is my opinion that most of the Kina Peninsula displays a Moderate level of natural character. However, around the subject site I think this rises slightly to a Moderate/High level and, down the Kina Peninsula Beach coastline, rises slightly to High/Moderate*[22].

[78] Dr Boffa referred to a 2005 assessment of the Tasman District coast which he had undertaken for the Council. At that time, he assessed Kina Peninsula overall as having a high level of natural character. Although he concurred with Mr Brown's view that the Tasman Bay and Moutere Inlet coastal margins exhibited different landscape characteristics, he considered that the natural character values of the Inlet were *...at least moderate to high overall in the vicinity of the application site*[23]. That is similar to Mr Brown's assessment.

[79] Dr Boffa recognised the partly degraded state of vegetation on the site arising from recent pine removal and related works but considered that natural elements, patterns and processes continued to be evident and that the level of human intervention in visual terms was relatively low. He expressed the view that, in this case, the significant issue was the protection of the natural character of the coastal environment from inappropriate subdivision, use and development.

[80] Ms Gavin considered that the site has high natural character both in the context of its immediate environment and when considered as part of the wider

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[21] EiC, para 60.

[22] EiC, para 62.

[23] EiC, para 7.1.

landscape. She recognised the existence of built form and density present at the ends of the Peninsula but described those as *relatively low level*[24].

[81] Distilling the differences in the witnesses' descriptions of the Peninsula generally and the site in particular, ranging between Moderate, Moderate/High, High/Moderate and High seems to us to be largely an exercise in semantics. However, we have arrived at a number of conclusions about natural character having considered the landscape evidence and in the light of our own observations of the site, Peninsula, Inlet and wider environment.

[82] Consistent with our discussion on the issue of outstanding natural features, we do not think it is possible to isolate natural character considerations for the site from those of the wider Peninsula, Moutere Inlet and coastal environment generally.

[83] In considering the natural form of the Peninsula, it was our observation that although the Peninsula forms one contiguous landform, there are obviously different aspects to parts of it.

[84] The southern base of the Peninsula appears to consist of elevated slopes and ridges which have been subject to the lifestyle development to which we have previously referred. Although the development in this area is readily apparent, the land form is broken up by shelterbelts, woodlots, orchards, olive groves and pasture which provide screening for many of the buildings on the elevated land. The intensity of development appears consistent with rural/residential development on land to the west of the Inlet. This node of development has occurred on land distinctly different in appearance to that contained at the northern end of the Peninsula where the site and the KDL land are situated.

[85] At the northern end of the causeway (about two thirds of the way or so along the Peninsula) the elevated land at the base of the peninsula descends into a lower spit, containing the CHH site and the KDL land.



[24] EiC, para 46.

[86] The baches on the KDL land undoubtedly diminish the natural character of the end of the spit. They are visible from a number of vantage points and the natural coastal vegetation on the KDL land has been largely replaced by domestic lawns, gardens, planting and development. However, the impact of the baches is limited because they are all small, single storey buildings of modest scale which appear to have been established at low elevations on the KDL site. We understand that they have been in place for 40 years or so and are now substantially enclosed by plantings and remnant pines which reduce their profile and impact.

[87] The CHH site divides these two residential nodes at the northern and southern ends of the Peninsula. It provides a substantial remnant buffer (1km or so in length) of land which is clear of residential development.

[88] There is no question that the natural character of the site (in perceptual terms) has been diminished by recent activities on it. Mr Brown described the site as being *...halfway between being scarred by recent harvesting and the early stages of natural recovery*[25]. Ms Gavin described the site as being *...in a visually confusing state* and in a *current state of flux*[26].

[89] Our observation of the site accords with the witnesses' descriptions. We consider that in terms of the values we are discussing, the site is scarred by recent forestry activity but successional plants are establishing and a natural recovery is occurring. We conclude from the witnesses' evidence that the site has at least a moderate degree of remnant natural character with parts of it having higher natural character.

[90] We agree that the natural character of the Peninsula has been diminished by the residential or rural/residential development which has occurred on it. We consider that the development on the KDL land is most significant in our assessment as it is closest to the proposed CHH development and the KDL land is of similar character on the lower sand spit.

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[25] EiC, para 44.

[26] EiC, para 48.

[91] We undertake our assessment of the effects of the proposal on natural character in light of the findings above.

*Effects of proposed development on natural values*

[92] We refer to our earlier discussion on the issue of whether or not Kina Peninsula is an outstanding natural feature and our finding that it was an integral part of Moutere Inlet, which all of the landscape witnesses agreed was an outstanding natural feature.

[93] We also refer to our finding that the site has at least a moderate degree of remnant natural character with parts of it having higher natural character. Recent tree harvesting has scarred the site but it is in a process of recovery and we would expect that over time, if left to its own devices, a more natural and coherent pattern in vegetation will emerge thereby increasing the degree of natural character, at least insofar as the site is perceived.

[94] The six residential lots are to be established at the northern end of the site near the KDL land. The lots proceed in single file along the highest point of the sand dunes. This positioning is dictated by the need to establish building platforms where they are least vulnerable to coastal erosion for the longest period and provide effluent and wastewater disposal fields at a height sufficiently elevated above groundwater. These factors preclude clustering of the proposed building platforms and mean that the residential lots will run along the dunes for a distance of about 250m - 300m.

[95] The conditions of consent proposed by CHH require that the building platforms do not exceed 260m$^2$. Only a single unit residential dwelling with a height of no more than 5.5m above finished ground level may be erected on each lot. The minimum ground level for any dwelling is to be 4.6m NVD-55 with a minimum floor level of 4.75m NVD-55. The conditions impose restrictions on building colour and design. Additionally the conditions propose the provision and implementation of a planting management plan. We have taken these issues into account in our

assessment including Mr Brown's more detailed descriptions of the proposal[27]. We consider all of those various mitigation measures in our assessment.

[96] Mr Brown considered the visual impact of the proposed development from a number of positions and provided Truescape simulations from four viewpoints. The simulations included vegetation growth after 15 years. On the simulations the building platforms were represented by boxes within which dwellings might be confined. Mr Brown considered the visual effect of the proposed dwellings from:

- The Moutere Inlet and Hills - Mr Brown acknowledged that from a number of these positions, buildings on the proposed building platforms would be visible but that the impact of this on the viewing audience's appreciation of the Peninsula would be diminished by factors of distance and the effects of existing and new vegetation. It was his opinion that after 10 years or so new tree planting would largely enclose and screen much if not all of the development;
- Baigent Domain - Mr Brown acknowledged that there would be an appreciable impact on perceptions of the Peninsula for persons using the Domain as a result of the development. New plantings would ultimately provide some screening from the Domain. However Mr Brown acknowledged that there would be a significant effect on the experience of using the Domain. He considered that this was primarily an amenity effect;
- Kina Beach - Mr Brown considered that the extent to which housing would be visible from the Beach depended on a number of factors including the position of the viewing audience on the fore-dunes or further out on to the foreshore. He accepted that from a number of positions the proposed buildings would be visible and would reduce the perceived naturalness and coherence of the coastal landscape and environment. He contended that effect had to be assessed having regard to the highly damaged state of the immediate environment as a result of recent tree removal operations and that visibility of the houses should be balanced against the benefits arising from re-vegetation, plant

[27] EiC, paras 10 - 20.

management and the vesting of reserves which were part of the CHH proposal.

[97] Dr Boffa agreed with a number of Mr Brown's comments but questioned whether or not the long term mitigating effects of vegetation suggested by Mr Brown would actually be achieved. He considered that maintaining maximum sea views would be an important consideration for owners of the lots and that they would seek to control and manage vegetation heights to protect sea views, which will be an important consideration for the owners of these properties.

[98] Ms Gavin pointed to the extent to which the Kina Peninsula formed a backdrop to the Moutere Inlet and contributed to its outstanding character. She considered that notwithstanding development which detracted from the natural character of other parts of the Kina Peninsula, the lack of development on the site contributed to the natural character of the Moutere Inlet by providing a backdrop which was natural in appearance.

[99] Ms Gavin considered that when viewed from the Moutere Inlet and hills, the proposed houses would be seen on the ridgeline in a more elevated and exposed location than the existing KDL houses and we agree with that. She considered that the new houses would be *perceived as a domesticating feature that would read as sprawl along the ridgeline, and will detract from both the natural qualities of the Moutere Inlet, and the natural line of the Kina Peninsula landform*[28]. She had similar reservations to Dr Boffa as to the extent to which mitigation planting would adequately remedy these effects. In her view the proposed development would increase the perceptible level of domestication on the Peninsula from a number of the viewpoints considered by Mr Brown.

[100] Ms Gavin's views were summarised in the following paragraph of her evidence:

> *The proposed building density will preclude the existing level of natural character from developing across the core of the site which Mr Brown agrees is in a state of transition. The perception of naturalness will be degraded*

[28] EiC, para 74.

*through the proposed subdivision development by issues such as residential lights and street lights at night time visible along the crest of the site which will reduce the natural darkness of the night sky. This introduction of development will detract from the wildness and isolation that can be experienced along Kina Beach. The presence of six houses above the natural form of the ridgeline will detract from its natural character and legibility - from both the mainland/Moutere Inlet side, and from Kina Beach and Tasman Bay*[29].

[101] Mr Brown contested Ms Gavin's views in this regard, pointing to the existing level of modification and the present weed-infested and scrubby nature of much of the site. He acknowledged that lighting and other signs of domestic occupation would diminish some of the Peninsula's naturalness particularly at night time. He contended, however, that such changes would be incremental and would not fundamentally change the nature of the landscape.

[102] We accept Ms Gavin's evidence on this topic. The proposed houses will be established on the highest parts of the site and realistically cannot be sited anywhere else. We consider it is inevitable that the houses, together with associated domesticating works and features will detract from the existing natural character of the site and wider Peninsula and Inlet. We also consider that Ms Gavin and Dr Boffa are correct in their reservations as to the mitigatory effects of planting for the reasons which they identified.

[103] In his rebuttal evidence, Mr Brown contended that Ms Gavin had been selective in her evaluation of the Peninsula and its natural character attributes. He said that ...*she perceives it as comprising a fundamentally natural landscape and part of the coastal environment. This is a crucial determination, which I cannot agree with*[30].

[104] We agree with Mr Brown's evidence that assessing the existing natural character attributes of the Peninsula and the site is a crucial determination in this

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[29] EiC, para 49.

[30] Rebuttal Evidence, para 33.

case. In our view, those attributes include the fact that the site is not presently subject to residential development and is in a period of recovery from logging operations and transition to a more natural vegetative state. The site is of sufficient size that it provides a clear and substantial break of undeveloped land between the nodes of residential or rural/residential development at each end of the Peninsula. The site has at least a moderate degree of natural character and in parts higher than moderate, even on Mr Brown's evaluation.

[105] Mr Brown considered that the changes to the natural character of the site and Peninsula which the development will bring about will be *incremental*[31]. We understood that to mean that the effects of the development would be cumulative upon the acknowledged adverse effects of the KDL development and that at the southern end of the Peninsula. We do not see that as being a mitigating factor at all. The site plays a significant part in diminishing the effects of the existing development by providing an undeveloped buffer between the two developed areas. We consider that is a significant factor in itself.

[106] We find that the proposed development will diminish the existing natural character of the site, the Peninsula and the wider outstanding natural feature of the Moutere Inlet in a significantly adverse manner.

***Treatment and disposal of domestic wastewater***

[107] CHH proposes to treat domestic wastewater on site to a secondary level of treatment, then disinfect the treated wastewater and dispose of it to land on each lot. It is intended that the specific design of the treatment and disposal system will be undertaken later by lot owners should consent for the subdivision be granted. Questioning of Mr P R Cochrane (an environmental consultant for CHH), established that the proposed treatment process involved primary effluent from a septic tank undergoing secondary treatment before being pumped to infiltration beds located on each lot.

[31] Rebuttal Evidence, para 18.

[108] The precise location of the infiltration beds on each lot[32], being somewhat problematical at this stage, was dependant on:

- Separation from building platforms and other facilities, 1.5m distance from any boundary, 20m from any groundwater bore, elevation above the 4.0m NVD contour (being within the predicted 2100 year shoreline);
- Separation from access ways, parking and vehicle turning areas and landscaping;
- The need to achieve a minimum of 500mm of unsaturated soil between the bottom of the wastewater disposal area and the average winter ground water table (ARC Guidelines);
- Avoidance of burial areas or any other site of archaeological or cultural significance which might be discovered.

[109] Notwithstanding these constraints, Mr Cochrane was confident that the site is suitable for the onsite treatment and disposal of domestic waste water from the proposed subdivision, including reasonably expected household holiday populations and that any effects on the environment from the discharge of secondary treated wastewater would be less than minor. The proposed onsite treatment and disposal of wastewater would in his opinion be able to meet the Permitted Activity Standard in the District Plan.

***Effects on avifauna***

[110] Dr R K McClellan, a senior fauna ecologist, and Mr D S Melville, an ornithologist, gave evidence for CHH and the Friends respectively. Both witnesses agreed that the Moutere Inlet and the section of the Kina Beach from west of the causeway to the point of the peninsula are significant habitats for shorebirds and waders.

[111] The witnesses produced a joint witness statement in which they identified nationally threatened and at risk species that regularly use this location for breeding, roosting and/or feeding. At risk species included Variable Oystercatcher (At Risk - Recovering), Banded Dotterel (Threatened - Nationally Vulnerable) and South Island

[32] Cochrane Exhibit 2.

Pied Oystercatcher (At Risk - Declining). Several more species are occasional visitors to the site, including Wrybill (Threatened - Nationally Vulnerable) and White Heron (Threatened - Nationally Critical). The site also supports international migrants such as Bar Tailed Godwit.

[112] The witnesses identified a section of Kina Beach which can support large numbers of Variable Oystercatcher at close to levels that would give the site international significance under Ramsar[33] criteria.

[113] Both witnesses identified possible adverse effects of the proposed subdivision and upgrading of the Baigent Reserve, namely:

- An increase in disturbance of shorebird populations from higher numbers of recreational users and their dogs;
- An increase in disturbance of shorebird populations from construction of houses on the proposed lots;
- An increase in predation due to domesticated cats belonging to owners of the proposed lots.

[114] In their joint statement the witnesses agreed that it is appropriate that any potential adverse effects on avifauna resulting from the proposed subdivision and reserve upgrade be minimised or mitigated where possible. These measures would include a vegetation management plan, installing bollards to prevent vehicles accessing Kina Beach and the shoreline of the Inlet, and setting back coastal walkways so that the existing and proposed coastal planting will largely screen walkers from shorebirds roosting and feeding along the coastline. Other measures could include the erection of interpretation panels and warning signs, a covenant on the lots to prevent ownership of cats and implementing a Leash Control Area in accordance with the Council Dog Control Bylaw 2009.

[115] In his Evidence in Chief, Mr Melville had said that he was in general agreement with the agreed mitigation proposals except that he did not believe that a



[33] International convention for defining internationally important wetlands.

proposed access way between the six lots should be implemented[34]. Mr Melville also agreed that access along the beach by vehicles at the southern end of the site should not unduly disturb bird life[35]. That observation was clearly based on the assumption that the access corridor within the CHH land would remain in or near its present position, something that Mr Verstappen thought was fraught in the longer term.

[116] We accept the evidence of the avifauna witnesses for the purposes of our appraisal, although we have reservations about the practicality and enforceability of some of the proposed mitigation measures. For example, how a Council enforcement officer is to determine the domicile of a wandering cat or dog, whether it has come from the covenanted CHH land or uncovenanted KDL land and how it might be legally removed from the Peninsula, all seem to us to be highly problematic. Ultimately however, resolution of this application revolves around other issues.

***Evaluation***

[117] We will undertake our evaluation of the CHH proposal having regard to the above findings and in the following sequence. We will consider:

- Firstly, s106 RMA;
- Secondly, s104 RMA;
- Finally, Part 2 RMA.

We propose to deal with s106 RMA first, because it requires consideration of discrete and limited matters rather that the wider considerations provided for in s104 and Part 2.

***Section 106***

[118] Section 106 RMA provides:

> *(1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that -*

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[34] EiC, para 65.

[35] NoE, page 413.

*(a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or*

*(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or*

*(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.*

*(2) Conditions under subsection (1) must be -*

*(a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1); and*

*(b) of a type that could be imposed under section 108.*

[119] In this case, the aspects of s106(1) which are under consideration are those found in subsection (a) (material damage by erosion or inundation) and subsection (c) (legal and physical access to each allotment to be created by the subdivision). Additionally, we will address issues arising out of the provisions of s106(2)(a). We commence our consideration of s106 by making some general observations before turning to its specific application in this case.

[120] We observe that, unlike s104, the application of s106 is not expressed as being *subject to Part 2.* The implication which we draw from that is that in the circumstances where application of s106 is appropriate, a consent authority may decline to grant a subdivision consent or impose conditions on such a consent, having regard solely to the narrow issues identified in s106 rather than the wider range of issues which must be considered under Part 2.

[121] Counsel for both CHH and the Council submitted that s106 confers a degree of discretion on consent authorities in its application. Section 106 provides that a consent authority *may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions* etc. We concur with that view. As with the exercise of any discretion, a consent authority (or the Court) must not act

capriciously but must take into account the full range of relevant factors when exercising its discretion in any given case.

[122] Insofar as application of s106(1)(a) is concerned, we consider that the evidence of the coastal witnesses conclusively establishes that lots created by the subdivision will be subject to material damage by erosion or inundation.

[123] The word material is not defined in RMA. We consider that in the context in which it is used in s106(1)(a) it has 2 potential meanings:

- Firstly, *significant* or *important*[36];
- Secondly, it might mean *relevant or pertinent*[37].

In our view, either meaning is appropriate.

[124] In this case, about half (more in some cases) of each of the proposed residential lots, is likely to be eroded or inundated by the sea within the 100 year period under consideration pursuant to NZCPS. It is difficult to describe loss to that extent as anything other than *significant*.

[125] We consider that damage may be regarded as *relevant* when it unduly restricts or impinges on the use to which it is intended that subdivided lots will be put. In the case of Lot 15 which is to vest as esplanade reserve, its use for that purpose will become untenable before the expiry of 50 years due to erosion and inundation. We consider that damage which restricts or precludes use of the esplanade reserve for the purpose for which it was vested, can properly be described as both significant and relevant.

[126] Mr Lumsden contended that s106(1)(a) was directed at the issue of hazard to structures on land rather than to the land itself however that contention is untenable in light of the quite specific reference in s106(1)(a) to ...*the land in respect of which a consent is sought, or any structure on the land...* Both land and structures on the land must be considered in the application of s106.

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[36] *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008).

[37] *Collins NZ Dictionary* (Harper Collins Publishers, 2009).

[127] We accept that not all damage by erosion and inundation to subdivided land will constitute material damage for the purpose of s106(1)(a). We concur with the proposition advanced by Mr McFadden (citing the *Maruia*[38] and *Foreworld*[39] cases) that it is not necessary to ensure that all parts of subdivided lots are free from the risk of damage by erosion or inundation. It seems to us that whether or not damage is material in any given instance will be determined by factors such as the size, shape and physical configuration of the subdivided lots, the extent of the potential damage to those lots and how damage affects use of the lots for the purposes for which they have been subdivided.

[128] In this case, we have no hesitation in finding that the probable loss of all of the esplanade reserve immediately in front of the residential lots within 50 years (and likely sooner than that) and the probable loss of half or more of the residential lots themselves within 100 years is material damage to land of the kind contemplated by s106.

[129] Insofar as s106(1)(c) is concerned, we consider that the determinative issue is whether or not *sufficient provision* has been made for legal and physical access to the subdivided lots. The word sufficient is not defined in RMA. Dictionary definitions include:

- *Enough to meet a need or purpose; adequate*[40];
- *Enough, adequate*[41];
- *Sufficing, adequate, enough*[42].

Mr Quickfall agreed that the term sufficient requires that there be practical physical access[43].

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[38] *Maruia Society Inc v Whakatane District Council* (1991) 15 NZTPA 65 (HC).

[39] *Foreworld Developments Limited v Napier City Council* (1998) 5 ELRNZ 69.

[40] *Collins Concise Dictionary* (3rd ed revised, HarperCollins Publishers, Glasgow, 1995).

[41] *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008).

[42] *The NZ Oxford Dictionary* (Oxford University Press, Melbourne, 2005).

[43] NoE, page 242.

[130] We consider that s106(1)(c) requires consent authorities to undertake a broadly based enquiry into the adequacy of both legal and physical access to lots created by subdivisions. Mr McFadden contended that both legal and physical access will be provided to each lot created by this subdivision at the outset and that the real question is whether sufficient provision for access will be maintained in the long term. We consider that both of those contentions are debatable.

[131] The evidence which we heard revolved around ongoing vehicular access by road to the subdivided lots. None of the witnesses suggested that foot access alone would be sufficient access to the residential lots and proposed public reserves (as had been suggested in the *Haines* case). The roading engineers agreed that road access to the subdivision is already affected by coastal erosion and storm tide inundation and that in its current form continued vehicle access to the subdivision by the existing road cannot be guaranteed[44].

[132] As we have noted, CHH's response to that agreed position was to offer the sum of $200,000.00 as a contribution to the upgrading works presently required. We refer to our earlier finding (para [59] above) that that amount (if it is correct) simply brings the causeway up to the required standard now and would not be sufficient to meet on-going road maintenance and upgrade costs.

[133] Further, it is clear from the evidence of Messrs Clark, Reinen-Hamill and Verstappen that as sea level rises, the upgraded protection works would need to be further extended. Such work would require not only further increase in height of the protection works but their lateral extension along the coast. The suggested $200,000.00 (or even a more accurately calculated contribution) would accordingly be simply the first instalment towards on-going requirements to maintain and ultimately further upgrade and extend the causeway and its protection works. The Council witnesses signalled very clearly that the Council is highly unlikely to meet such requirements.

[134] In his closing submissions, Mr McFadden contended that it is not just CHH which has an interest in keeping the causeway open but also the shareholders in

[44] Para [49] above.

KDL. He said it was never the intention of CHH that the cost of repair and ongoing maintenance of the causeway should fall solely on its shoulders.

[135] We agree with Mr McFadden's contention that the KDL property will also obtain the benefit of any upgrade works to the causeway. However, the need to carry out maintenance and upgrade the causeway is driven by the CHH subdivision. Without knowing all the background facts, it seems to us that the owners of the KDL land, which was developed in a manner which apparently avoided scrutiny of the kind to which a subdivision proposal might be subject, are not in a strong position to demand on-going maintenance of the road by the Council. That is not our decision to make, however Mr McFadden did not identify any means by which further contribution to the costs of doing that work could be extracted from the owners of the houses on the KDL land.

[136] Although it is not determinative in our considerations, we observe that approving the subdivision and allowing construction of six further houses on the CHH site, in a situation where CHH has made a cash contribution to upgrade the road, might place the Council in a very difficult position in the future. The payment of a financial contribution to roading by CHH as part of this subdivision may well create an expectation on the part of future owners of the residential lots that the Council would continue to maintain the road and keep it open, even if it makes no economic sense to do so.

[137] Having regard to all of the above, we find that the existing road access does not provide sufficient legal and physical access to subdivided lots on the CHH land at present and, further, that even if the causeway was upgraded to meet existing roading needs, it is unlikely to provide sufficient access in the future. For the sake of completeness we observe that the question of sufficiency of access extends to the proposed reserve (the Domain) as well as the residential lots. CHH proposes to create a reserve to which only limited access might be available to the general public.

[138] Insofar as the suggestions of sufficient provision for access being provided by vehicular access along the foreshore or by boat are concerned, we refer to our earlier

findings in that regard[45]. We do not consider that the alternatives of possible four-wheel drive access along the beach or access by boat constitutes sufficient provision for legal and physical access to the lots. We had no evidence before us as to the feasibility or practicality of those access options, just speculation that such options are available. The CHH application did not address those access possibilities at all and Mr Quickfall acknowledged that there had been no investigation of the practicality of those options.

[139] In his closing submissions, Mr McFadden speculated that *...at the point in time when access over the causeway is no longer possible, even by four-wheel drive vehicles, other options may have been discovered for accessing the lots*[46]. The possibility of some speculative future but unidentified access possibility does not satisfy us that sufficient provision for legal and physical access to the subdivided allotments is available now or in the future.

[140] Finally on this issue we refer to the provisions of s106(2) RMA which requires (inter alia) that conditions imposed under s106(1) must be:

> *(a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1);*

[141] None of the conditions proposed by CHH appeared to avoid, remedy or mitigate effects of erosion or inundation on the land of the subdivided lots. To the contrary, the suggested conditions prohibit the protection of that land by hard foreshore structures so that the erosion and inundation process would simply be allowed to consume that part of the esplanade reserve in front of the residential lots, and then the residential lots themselves.

[142] We accept that conditions as to the minimum height of building platforms and requiring removal of buildings once the beach tidal interface is within 20m of them, constitute mitigation of the effects of erosion or inundation on structures but we have reservations as to the practicality and enforceability of any condition requiring removal of buildings and as to the adequacy of such a condition as a

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[45] Paras [55] - [59] above.

[46] Submissions in Reply, para 4.4.

mitigation measure. Nothing in the CHH application or the evidence which we heard indicated to us that any serious consideration had been given to these issues. We questioned how removal might be effected if road access was not available, as appears inevitable. We were told that in such a case removal could possibly be undertaken by way of barge or helicopter. We accept those are possibilities and appreciate that we can only speculate as to what might happen in 100 years' time.

[143] However, the requirement for removal raises the question as to what might happen should owners of the residential lots at the relevant time simply decide to abandon the land or not have the means to remove buildings. If the owner of a lot was a corporate entity whose only asset was the land and any structures on it, any future Council seeking to enforce removal obligations or recover the cost of the Council having to do so could effectively be dealing with a shell.

[144] CHH sought to address this issue by a condition requiring provision of a bond of $40,000.00 secured against each lot. It was not clear to us whether the bond would be a cash payment *upfront* or would provide some other security. We accept that s108A(1)(a) RMA contemplates a bond securing conditions relating to the removal of structures and s109 enables registration of the bond against a title to a lot, although the security value of a bond registered against the title to a parcel of land which is being consumed by the sea and whose buildings have to be removed, seems questionable. In the event that we need to pursue those matters we shall do so.

[145] For the reasons set out above, we conclude that:

- The CHH land, and any structure which might be erected on that land, is likely to be subject to material damage by erosion or inundation;
- In the case of the proposed esplanade reserve, such material damage will probably occur within 50 years or sooner;
- In the case of the proposed residential lots, such material damage may not occur for 50 years but is likely to occur sometime between 50 and 100 years;
- In the case of structures erected on the residential lots, material damage may not occur for up to 100 years;

- None of the conditions of consent proposed by CHH avoid, remedy or mitigate the effects of erosion or inundation on the esplanade reserve or on the land contained in the residential lots;
- The conditions of consent requiring structures to be erected on the elevated parts of the site and to be relocatable, provide some mitigation from the effects of erosion or inundation but we have reservations about the adequacy and practicality of such conditions;
- Sufficient provision has not been made in the proposed subdivision for legal and physical access to each allotment to be created by the subdivision;
- No conditions have been proffered by CHH which adequately avoid, remedy or mitigate the insufficiency of access.

***Section 104***

[146] Section 104 relevantly provides:

> *(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to-*
>
> *(a) any actual and potential effects on the environment of allowing the activity; and*
>
> *(b) any relevant provisions of-*
>
> *(i) a national environmental standard;*
>
> *(ii) other regulations;*
>
> *(iii) a national policy statement;*
>
> *(iv) a New Zealand coastal policy statement;*
>
> *(v) a regional policy statement or proposed regional policy statement;*
>
> *(vi) a plan or proposed plan; and*
>
> *(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

We now consider the aspects of s104(1) relevant to this application.

*Actual and potential effects*

[147] Section 3 RMA contains a series of examples of effects. It provides:

> *(3) In this Act, unless the context otherwise requires, the term* ***effect*** *includes-*
>
> *(a) Any positive or adverse effect; and*
>
> *(b) Any temporary or permanent effect; and*
>
> *(c) Any past, present, or future effect; and*
>
> *(d) Any cumulative effect which arises over time or in combination with other effects-*
>
> *regardless of the scale, intensity, duration, or frequency of the effect, and also includes-*
>
> *(e) Any potential effect of high probability; and*
>
> *(f) Any potential effect of low probability which has a high potential impact.*

A number of these effects are relevant considerations in this instance. The CHH application identified a series of relevant positive and adverse effects which arise under this application. We address the issue of effects using those identified by CHH.

[148] The positive effects which CHH identified as arising from its proposal included:

- *Formalisation of legal public access with a sealed surface and reduced dust nuisance*

  We note that the CHH subdivision proposal includes upgrade of the existing access road formed (largely but not entirely) on the right-of-way which CHH has over the KDL leg-in. Clearly this will provide a better standard of access to the subdivided sections, Domain and the KDL land than that which presently exists. For the purposes of this discussion, we have accepted that the general public may obtain access to the Domain which will vest as reserve, over the existing leg-in owned by KDL, although we have some reservations about that. However, it appears to us that these contended access benefits disappear if (as appears highly likely) the causeway road is closed.

- *Enhancement of existing public facilities*

As part of the subdivision proposal CHH is to provide new public car parking and boat-trailer parking, landscaping, timber bollards, upgraded toilet facilities and new access tracks. We accept that those are positive effects of the proposal and we refer to our earlier description of the Domain as being *somewhat unkempt and neglected*[47]. Again however these benefits must be assessed in light of the limitations as to access which will occur should the causeway be closed.

- *Upgrade of the existing Baigent Memorial*

We previously referred to the LEH Baigent Memorial as a *forlorn stone and timber memorial*[48]. We accept that its upgrade might more appropriately mark the contribution to the area made by Mr Baigent although we are uncertain as to whether or not there is any wider public benefit in that.

- *Improved amenity and security of the Domain*

We accept that as part of the handover of the Domain, CHH would undertake an upgrade of the existing Domain facilities and that overlooking the reserve by the proposed houses would provide a degree of security to its users. We accept that those are benefits but again those benefits are subject to our comments about loss of access due to closure of the causeway.

- *Creation of new walkways providing access to the coastal environment*

Lots 9 and 11 of the proposed subdivision are to be walkways giving access through the subdivided lots to Lot 15 which is to be an esplanade reserve. We accept that there is a benefit in those proposals however that benefit must be assessed in light of the fact that the coastal witnesses agreed that the northern portion of Lot 15 in front of the subdivided allotments would probably be entirely consumed by erosion and inundation within 50 years.

- *Provision of new dwellings*

We accept that the provision of new dwellings giving people the opportunity to reside in an attractive coastal setting is a positive effect of the proposal.

- *Vesting of the Domain in community ownership*

We consider that the contended benefits in this regard are largely illusory. There are a number of reasons for that. Firstly, we again refer to loss of

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[47] Para [12] above.

[48] Para [12] above.

access along the causeway. Ms R D Squire who gave evidence on behalf of the Council on the issue of reserves, noted the *significant reduction in value of the asset to the community* if road access became untenable[49]. That is consistent with the views which we have expressed. Secondly, Ms Squire identified the extent of existing reserves and public access to the coast in this vicinity. Both are generously provided for. She advised that in terms of both its Long Term Plan and the District Plan, the Council is meeting the levels of service required for provision of reserves in the Tasman area without the addition of the Domain to those reserves. Thirdly, we refer to Mr Townshend's evidence[50] that CHH typically spends between $40,000.00 and $80,000.00 per annum on maintenance of the Domain. This cost would be transferred to the Council for a reserve which it does not want and which is not required in terms of the Council's planning documents (although we accept that the need for maintenance might disappear or diminish if the reserve could not be practically used due to lack of access). Finally, we note that CHH propose vesting of reserves in substitution for the payment of any reserves fund contribution.

[149] Having regard to all of the above factors, we consider that the positive effects of the proposal advanced by CHH are limited in scope, in some cases are only temporary and insofar as vesting of the Domain is concerned verge on the illusory.

[150] CHH identified the following adverse effects in its application:

- *Amenity and landscape*

CHH contended that its landscape proposals with a restriction on the extent of building coverage together with building, colour and height limitations as well as requirements for replanting and landscaping, adequately addressed any adverse effects of the development on amenity and landscape values. Our findings on these matters are generally encompassed in paragraphs [92] - [106] above. Ultimately we refer to the finding which we made in para [106] that *...the proposed development will diminish the natural character of the*

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[49] EiC, para 25.

[50] Para [14] above.

*site, the Peninsula and the wider outstanding natural feature of the Moutere Inlet.*

- *Access and traffic*

CHH identified the improvements to the existing access situation which would arise from current access being upgraded, the provision of adequate car parking and the like. It contended that the access configuration would improve traffic flow to the Domain, retain legal access to KDL land and provide improvement as to amenities. Looked at in isolation, all of those claims may be correct. Regrettably, the access issue must be considered in light of the likely closure of the causeway.

- *Servicing*

We accept CHH's contentions that servicing requirements for wastewater, stormwater and rainwater could be adequately provided for in the subdivision development.

- *Archaeological sites*

CHH recognised the possibility that development might interfere with archaeological sites. CHH consulted with Iwi and undertook comprehensive archaeological assessments. The proposed subdivision avoids a known archaeological site and the proffered conditions of consent address this issue including the requirement for a General Authority under s12 Historic Places Act 1993 to be applied for and an Iwi monitoring person to be present during earthworks.

- *Coastal hazards*

The CHH application included a March 2010 report by Tonkin & Taylor which had concluded that the proposed lots are unlikely to be affected by coastal erosion or inundation hazards subject to minimum ground level of RL4.6NVD-55. We refer to our detailed discussion of this topic (paras [24] - [39]) and the evidence which we heard which clearly overtook the March 2010 report. In particular we refer to our findings that the esplanade reserve (Lot 15) would be subject to material damage by erosion or inundation within 50 years (probably less) and the proposed residential lots (Lots 3 - 8) thereafter. None of the proposed conditions of subdivision avoided, remedied or mitigated these effects. Buildings constructed on any of the residential allotments would probably be subject to material damage within 100 years.

CHH proposed a condition requiring removal of the buildings to avoid, remedy or mitigate those effects but we have reservations about the efficacy of that condition.

*Relevant provisions of the New Zealand Coastal Policy Statement*

[151] In their joint conference statement, the two planning witnesses identified the following provisions of NZCPS as being relevant to our considerations in this case:

- Objectives 1, 2, 3, 4, 5, 6;
- Policies 1, 2, 3, 4, 6(1), 13, 14, 15, 17, 18, 19, 20, 24, 25, 26.

Although we generally agree with the planners' identification it appears us that a number of those objectives and policies are at best marginally relevant in this case. We discuss those objectives and policies which appear to us to be determinative.

[152] Objective 2 NZCPS is:

*To preserve the natural character of the coastal environment and protect natural features and landscape values through:*

- *recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;*
- *identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and*
- *encouraging restoration of the coastal environment.*

Ms Allan contended that this objective appeared to relate primarily to plan preparation. The objective is arguably wider than that. Mr Quickfall linked this objective to the Council's subsequent introduction of Variation 32 and Plan Change 18 into its District Plan and we discuss those documents in the context of the District Plan.

[153] In light of the conclusions which we have reached as to the effects of the development on natural character of the Kina Peninsula, we do not consider that the

CHH proposal is in accordance with this objective, to the extent that the objective is relevant.

[154] Objective 4 NZCPS is:

*To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:*

- *recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;*
- *maintaining and enhancing public walking access to and along the coastal marine area without charge, and where there are exceptional reasons that mean this is not practicable providing alternative linking access close to the coastal marine area; and*
- *recognising the potential for coastal processes, including those likely to be affected by climate change, to restrict access to the coastal environment and the need to ensure that public access is maintained even when the coastal marine area advances inland.*

[155] Mr Quickfall and Ms Allan appeared to agree that the CHH proposal gave effect to this objective although Ms Allan noted that eventually the development will not achieve the objective. We concur with Ms Allan's reservation for the reasons which we identified in our discussion of s106 RMA. The subdivision may achieve the objective in the short term but will not do so in the medium to longer term as the proposed esplanade reserve is consumed by the sea.

[156] Objective 5 NZCPS is:

*To ensure that coastal hazard risks taking account of climate change, are managed by:*

- *locating new development away from areas prone to such risk;*
- *considering responses, including managed retreat, for existing development in this situation; and*
- *protecting or restoring natural defences to coastal hazards.*

[157] We will return to this issue in our discussion of Policy 25 NZCPS but we note that in general terms the objective seeks to locate new development away from areas

prone to coastal hazard risks and that the response of managed retreat is intended to apply to existing development.

[158] We do not consider that the CHH proposal is in accordance with this objective.

[159] Objective 6 NZCPS is:

> *To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development recognising that:*
>
> - *the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;*
> - *some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;*
> - *functionally some uses and developments can only be located on the coast or in the coastal marine area;*

(balance not relevant in this case).

[160] Ms Allan acknowledged that Objective 6 is an enabling one which allows some subdivision, use and development in the coastal environment. However, she noted that a significant consideration under Objective 6 is whether or not such subdivision use and development is *in appropriate places and forms, and within appropriate limits.* That is consistent with the view expressed by Dr Boffa[51].

[161] We do not consider that the CHH proposal is in accordance with this objective.

[162] Policy 3 NZCPS incorporates the precautionary approach. Relevant in this case is Policy 3(2) which provides:


[51] Para [79] above.

*In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:*

*(a) avoidable social and economic loss and harm to communities does not occur;*

*(b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and*

*(c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.*

[163] The precautionary approach is not a prohibition on the use and management of coastal resources which might be vulnerable to the effects of climate change. Innovative responses to the challenges of climate change should be appropriately considered. However, we do not consider the CHH approach in this case to be particularly innovative. It essentially seeks to use the esplanade reserve and parts of the residential lots as a diminishing buffer for built development from the effects of erosion and inundation. We are not sure that signalling to prospective owners of homes on the subdivided lots that they will be required to remove them in due course necessarily avoids social and economic loss and harm to those owners although we acknowledge they will have purchased the lots having made an informed decision. We are not satisfied that the proposed conditions of consent adequately ensure that the cost of removing any buildings does not ultimately fall on the wider community, although we acknowledge that our concerns in that regard might possibly be addressed in some way.

[164] We do not consider that the CHH proposal is in accordance with this policy.

[165] Policy 6 relates to activities in the coastal environment and relevantly provides:

*(1) In relation to the coastal environment:*

*(c) encourage the consolidation of existing coastal settlements and urban areas where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth;*

*(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;*

[166] Ms Allan noted in relation to Item 1(c) above that the District Plan contains specific provisions enabling coastal settlement elsewhere and contended that this proposal would be seen as a sporadic development in this sensitive coastal location.

[167] We consider that the significant issue in this regard is the proximity of the CHH development to the existing KDL development. Undoubtedly the KDL development which is situated at the distal tip of the Kina Peninsula, disconnected from other development, infrastructure and facilities, can be described as sporadic. The CHH proposal is for a line of six houses extending some 250m - 300m from the KDL land. The effects of such spread on the natural character of the site and the Peninsula would be adverse and cumulative on the effects of the KDL development. We have accepted the views of Dr Boffa and Ms Gavin that the conditions proposed by CHH do not avoid or adequately remedy or mitigate such effects.

[168] We do not consider that the CHH proposal is in accordance with this policy.

[169] Policy 13 relates to the preservation of natural character. Policy 13(1) seeks:

*(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development;*

*(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and*

*(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;...*

[170] In this case we note that a primary thrust of the policy relates to protection of natural character from inappropriate subdivision, use and development. We have not found the natural character of this site of the Peninsula to be outstanding (although it is part of an outstanding natural feature). We have however found that the adverse

effects on natural character identified by Dr Boffa and Ms Gavin are significant and the proposal fails to avoid or adequately remedy or mitigate those effects.

[171] We do not consider that the CHH proposal is in accordance with this policy.

[172] Policy 15 relates to natural features and natural landscapes. It seeks:

*To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:*

*(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and*

*(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;...*

We simply refer to our comments on Policy 13 and note that they are equally applicable in consideration of Policy 15.

[173] We do not consider that the CHH proposal is in accordance with this policy.

[174] Policy 18 relates to public open space. It seeks to:

*Recognise the need for public open space within and adjacent to the coastal marine area, for public use and appreciation including active and passive recreation, and provide for such public open space, including by:*

*(a) ensuring that the location and treatment of public open space is compatible with the natural character, natural features and landscapes, and amenity values of the coastal environment;*

*(b) taking account of future need for public open space within and adjacent to the coastal marine area, including in and close to cities, towns and other settlements;*

*(c) maintaining and enhancing walking access linkages between public open space areas in the coastal environment;*

*(d) considering the likely impact of coastal processes and climate change so as not to compromise the ability of future generations to have access to public open space; and*

*(e) recognising the important role that esplanade reserves and strips can have in contributing to meeting public open space needs.*

[175] At a superficial level, the CHH proposal accords with a number of aspects of this policy. It seeks to provide public open space (vesting of the Domain) in an area which is reasonably close to the cities and towns of the district and region. It provides walkways from the Domain to the esplanade reserve. However, these benefits are considerably diminished by the loss of access which we have identified and the effects which coastal processes will have on the esplanade reserve in particular.

[176] The CHH proposal is in accord with this policy but the public open space benefits which accrue from it are greatly diminished by the factors we have identified previously.

[177] Policy 25 relates to subdivision, use and development in areas of coastal hazard risk. It provides:

*In areas potentially affected by coastal hazards over at least the next 100 years:*

*(a) avoid increasing the risk of social, environmental and economic harm from coastal hazards;*

*(b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;*

*(c) encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;*

*(d) encourage the location of infrastructure away from areas of hazard risk where practicable;*

*(e) discourage hard protection structures and promote the use of alternatives to them, including natural defences;*

*(f) consider the potential effects of tsunami and how to avoid or mitigate them.*

[178] Policy 25 is of particular significance in this case. We consider that the proposal to construct six new houses in a situation where the building platforms are highly likely to be subject to erosion and inundation over the next 100 years fails to achieve the policy to *avoid* the risks identified in Policy 25(a) and (b).

[179] We acknowledge that the horizon of at least 100 years is very long indeed and that persons who choose to build on the residential lots will have made an informed choice to do so. We note that both Policies (a) and (b) seek to avoid increase in risk and that designing for relocatability under Policy 25(c) is seen as a way of reduction of the risk of adverse effects. We do not interpret Policy 25 as imposing a de facto prohibition on development in areas potentially affected by coastal hazards and we note that the provisions of NZCPS are only one of the factors in our considerations under s104. We refer to our earlier comment about innovative solutions.

[180] We also acknowledge that designing for relocatability is encouraged in the case of redevelopment or change in land use. These provisions appear inconsistent with Objective 5 which seeks to ensure that new development is located away from areas prone to coastal hazard risks and that managed retreat is proposed for existing development rather than new development. We do not consider that anything turns on those observations in this case. However, CHH's proposals to guarantee relocatability (in light of access issues to the site) and to ensure that the costs of relocation or demolition of structures do not become a burden on the wider community, were so vague as to raise serious questions in our minds as to their practicality, efficacy and enforceability.

[181] We concur with Ms Allan's observation that the *...circumstance of the road infrastructure which gives practical and legal access to the subdivision has some resonance in terms of item (d). While not directly aligned, Item (d) would seem to*

*recognise the vulnerability and cost of maintaining infrastructure, such as for example roads and associated power and communication services, in areas of coastal hazard risk*[52].

[182] We accept that the CHH proposal to prohibit hard protection structures on the residential allotments by way of covenant accords with Policy 25(e). However, we refer to the evidence of Mr Verstappen on this issue. He has some 20 years of experience in the Tasman District and Region. It was his observation, having encountered similar situations throughout Tasman, that in the face of erosion and inundation *...the almost universal human response is to fight and defend and preserve, not retreat and relocate*[53].

[183] Mr Verstappen testified as to the propensity for land owners to establish hard engineering defences to erosion and inundation, whether they were consented or not. He gave examples of this. As a matter of law, we do not think that we can assume that future land owners on the CHH land will act in defiance in the terms of consent conditions by erecting hard structures to protect their land. However Mr Verstappen's evidence raised real issues about the practicality of the *no hard structures* condition and the likelihood of conflict between future land owners seeking to protect their land and the Council seeking to enforce the conditions of any subdivision consent.

[184] Finally, on the issue of Policy 25, we were not presented with any evidence on the potential effects, or indeed the likelihood, of a tsunami.

[185] We do not consider that the CHH proposal is in accordance with this policy.

*Regional Policy Statement*

[186] The planning witnesses identified a number of Chapters of the Regional Policy Statement containing high level objectives and policies which may have been relevant to our considerations. They agreed however that these policies were unlikely to be determinative in our considerations. We concur with that. We note

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[52] EiC, para 135.

[53] EiC, para 27.

Ms Allan's evidence that the issues identified in the Regional Policy Statement find more explicit expression in the District Plan and we now turn to the relevant provisions of that document.

*The District Plan*

[187] In their joint statement, Mr Quickfall and Ms Allan identified Chapters 7 (Rural Environment Effects), 8 (Margins of Rivers, Lakes, Wetlands and the Coast), 9 (Landscape), 10 (Significant Natural Values and Cultural Heritage), 11 (Land Transport Effects), 12 (Land Disturbance Effects), 13 (Natural Hazards), 14 (Reserves and Open Space) and Part II Appendix 3 (Coastal Tasman Area Subdivision and Development Design Guide) as relevant to our considerations. We acknowledge the relevance of all of the above although in some cases the relevance is only marginal. We discuss what appear to us to be the significant issues arising out of the District Plan.

[188] Chapter 7 of the District Plan addresses *Rural Environment Effects* and Chapter 7.3 specifically addresses the issue of *Rural Residential Development in the Coastal Tasman Area.* Managing the pressure for and cumulative effects of residential development in the Coastal Tasman Area is specifically identified as an issue in the District Plan[54]. Policies of particular relevance under this head are:

- Policy 7.3.3 - *To ensure that the valued qualities of the Coastal Tasman Area, in particular rural and coastal character, rural and coastal landscape, productive land values, and the coastal edge and margins of rivers, streams and wetlands are identified and protected from inappropriate subdivision and development.*

  In light of the effects on natural (coastal) character and landscape which we have identified, the CHH proposal appears to be inconsistent with this policy. Again we note the issue is whether or not subdivision and development is *inappropriate.*

- Policy 7.3.3.6 - *To protect rural and coastal character, including landscape and natural character, and productive land and amenity values from development pressures in parts of the Coastal Tasman Area*

[54] Issue 7.3.1.

*outside the areas where development is specifically provided for, including Kina Peninsula and the land to the west of the Moutere Inlet*

We found this policy somewhat ambiguous. It is not clear as to whether Kina Peninsula and land to the west of the Moutere Inlet is an area where development is specifically provided for, or is outside such an area. Ms Allan contended that Kina Peninsula and Moutere Inlet are areas where development is specifically not provided for or is provided for as low density rural residential development only.

- Policy 7.3.3.11 - *To improve access and progressively upgrade roads throughout the Coastal Tasman Area in accordance with development, while avoiding or mitigating adverse effects on landscape, natural character and amenity.*

Mr Quickfall contended that *this is consistent with the RPS policy, and reinforces an obligation on the Council to maintain coastal access along Kina Peninsula Road*[55]. We do not go so far as Mr Quickfall has, but arguably if the development proposed by CHH is approved, then this policy would provide some basis for property owners to seek that Council maintains and improves the causeway (particularly if a financial contribution to the causeway had been made by the developer). That reinforces the concerns which we have previously expressed regarding access and we do not see it providing a positive reason for approving the subdivision.

[189] Chapter 8 of the District Plan relates to *Margins of Rivers, Lakes, Wetlands and the Coast.* Objective 8.2.2 is - *Maintenance and enhancement of the natural character of the margins of lakes, rivers, wetlands and the coast, and the protection of that character from adverse effects of the subdivision, use, development or maintenance of land or other resources, including effects on landform, vegetation, habitats, ecosystems and natural processes.* The CHH proposal appears to be inconsistent with this objective in light of the findings which we have previously made as to the effects of the proposal on natural character.

[190] Chapter 8 contains a series of relevant policies. These include:

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[55] EIC, para 65.

- Proposed Policy 8.2.3.7 - *To ensure that the subdivision, use or development of land is managed in a way that avoids where practicable, and otherwise remedies or mitigates any adverse effects, including cumulative effects, on the natural character, landscape character and amenity values of the coastal environment and the margins of lakes, rivers and wetlands.*

The CHH proposal appears to be inconsistent with this policy in light of the findings which we have previously made as to the effects of the proposal on natural character. In particular we refer to the issue of cumulative effects and our finding that the effects of the subdivision will be cumulative upon those of the KDL development at the distal tip of Kina Peninsula.

- Policy 8.2.3.8 – *To preserve natural character of the coastal environment by avoiding sprawling or sporadic subdivision, use or development*

The CHH proposal appears to be inconsistent with this policy in light of the findings which we have previously made as to the effects of the proposal on natural character and the cumulative effect of this subdivision which adds to the adverse effects of the sporadic KDL subdivision.

- Policy 8.2.3.16 - *To manage the location and design of all future buildings in the coastal environment to ensure they do not adversely affect coastal landscapes or seascapes.*

CHH sought to satisfy this policy by its location and design conditions. We do not consider that it was successful. The CHH proposal appears to be inconsistent with this policy in light of the findings which we have previously made as to the effects of the proposal on natural character.

- Policy 8.2.3.18 - *To avoid, remedy or mitigate adverse effects on natural coastal processes of the subdivision, use or development of land, taking account of sea-level rise.*

We refer to our detailed discussion of these issues in the context of s106(1)(a). The CHH proposal appears to be inconsistent with this policy.

[191] Chapter 9.1 of the District Plan relates to *Outstanding Landscapes and Natural Features*. We consider that Chapter 9 is relevant to our considerations in light of our finding that the Moutere Inlet is an outstanding natural feature and that Kina Peninsula is an integral part of the Inlet.

[192] Objective 9.1.2 is - *Protection of the District's outstanding landscapes and features from the adverse effects of subdivision, use or development of land and management of other land, especially in the rural area and along the coast to mitigate adverse visual effects.* We consider that the CHH proposal is inconsistent with this objective in light of the findings which we have previously made as to the effects of the proposal on natural character.

[193] There are two relevant policies which flow from Objective 9.1.2. They are:

- Policy 9.1.3.3 - *To ensure that structures do not adversely affect:*
  *(a) visual interfaces such as skylines, ridgelines and the shorelines of lakes, rivers and the sea;*
  *(b) unity of landform, vegetation cover and views*

  The CHH proposal is inconsistent with this policy in light of the findings which we have previously made as to the effects of the proposal on natural character.

- Proposed Policy 9.1.3.7 - *To ensure that land disturbance including vegetation removal and earthworks does not adversely affect landscape character and rural amenity in the Coastal Environment Area in locations of public visibility, particularly where there are distinctive natural landforms.*

  This proposed policy is directly applicable to the Coastal Environment Area where the site is situated and to the Kina Peninsula which is a distinctive natural landform. The CHH proposal is inconsistent with this proposed policy in light of the findings which we have previously made as to the effects of the proposal on natural character. We note that this is a proposed policy only and we were not advised how far through the Schedule 1 process it was.

[194] Chapter 13 of the District Plan relates to *Natural Hazards.* Objective 13.1.2 is - *Management of areas subject to natural hazard, particularly flooding, instability, coastal and river erosion, inundation and earthquake hazard, to ensure that development is avoided or mitigated, depending on the degree of risk.* Again we refer to our discussion of these issues in the context of s106(1)(a).

[195] Four relevant policies flow from this objective. They are:

- Proposed Policy 13.1.3.1 - *To avoid the effects of natural hazards on land use activities in areas or on sites that have a significant risk of instability, earthquake shaking, fault rupture, flooding, erosion or inundation, or in areas with high groundwater levels.*

We note that this and Proposed Policy 13.1.3.2 (discussed next) are proposed policies only. We are not aware of how far through the Schedule 1 process they are. We note that this proposed policy goes somewhat further than s106 in that it specifically seeks to avoid effects of the identified natural hazards rather than their mitigation.

- Proposed Policy 13.1.3.2 - *When determining appropriate subdivision, use or development in the coastal environment to assess the likely need for coastal protection works and, where practicable, avoid those sites for which coastal protection works are likely to be required.*

CHH has proposed a prohibition on hard coastal protection works coupled with a requirement for removal of buildings. That is an acknowledgment of the highly predictable outcome of coastal processes on the CHH site.

- Policy 13.1.3.3 - *To avoid developments or other activities that are likely to interfere with natural coastal processes including erosion, accretion, inundation, except as provided for in Policy 13.1.3.7.*

Again we note that the policy is avoidance rather than mitigation.

- Policy 13.1.3.4 - *Is to avoid or mitigate adverse effects of the interactions between natural hazards and the subdivision, use and development of land.*

We note in this instance that mitigation of adverse effects is considered as acceptable. Again we refer to our discussion of these issues under the head of s106(1)(a).

[196] Taken in totality, we consider that the CHH proposal is not consistent with the objectives and policies contained in Chapter 13.

[197] The final issue arising under consideration of the District Plan is the Coastal Tasman Area Subdivision and Development Design Guide (the Design Guide). This

provision was inserted into the District Plan on 26 September 2009 and was developed by the Council to guide subdivision and land development in the Coastal Tasman Area.

[198] The Design Guide identifies a number of discreet Landscape Units. Kina Peninsula forms part of the Kina unit which is Landscape Unit 4. Kina Peninsula itself is identified as sub-unit (4A). Section 4.7 of the Design Guide outlines methods to maintain landscape qualities within Landscape Unit 4. These involve (inter alia):

> *(a) Sensitivity to the views of development from the Coastal Highway, the Moutere Inlet and the Ruby Bay area in general.*
>
> *(d) Keeping all development off significant landforms and ridges.*
>
> *(f) Visually containing development within discrete locations.*

[199] In its commentary on Landscape Unit 4, Section 4.7 comments:

> *Within the Kina South (4C) and Tasman Golf Course (4B) Units there is potential for both infill development and/or small cluster developments. Development on the western slopes above the Coastal Highway is likely to be visually prominent and should be confined to discrete locations. Further development within the Kina Peninsula unit (4A) is limited.*

[200] Paragraph 4.7.3 of the Design Guide then goes on to make the following specific observation that *...maintaining landscape qualities will be achieved by limited opportunities for subdivision and the location of additional house sites in this landscape sub-unit.*

[201] Mr Quickfall advised that this provision of the Design Guide was *relaxed* from a previous guideline where additional subdivision was to be avoided[56]. He contended that this was consistent with the Council's approach in terms of not attributing outstanding status to the Kina Peninsula and in recognition that the *"horse has already bolted" in terms of coastal development in this location*[57].

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[56] EiC, para 65.

[57] EiC, para 65.

[202] We do not accept Mr Quickfall's views in this regard. We consider that his comment about the horse having bolted reflects an underlying and flawed approach on the part of CHH that the existing development on Kina Peninsula justifies the addition of more development. We reject that approach.

[203] The commentary to Chapter 4.7 acknowledges that residential development has occurred in the northern area of the Kina Peninsula unit and then goes on to state that the opportunity for further development within that unit is *limited*. In particular the commentary acknowledges the sensitivity of views of development on the Peninsula from the Coastal Highway and the Moutere Inlet and seeks to keep development off significant landforms and ridges and contained within discrete locations. We consider that the CHH proposal runs counter to all of these recommendations:

- The CHH development will be visible from the Coastal Highway and Moutere Inlet. We refer to our discussion of this issue on our section as to the effects of the development on natural character;
- The development is proposed on the highest point of the sand spit of the Kina Peninsula;
- The CHH subdivision proposes extension of the existing development which is presently contained within the KDL site and extending it along the highest point of the sand dunes.

[204] We find that the CHH proposal is inconsistent with the provisions of the Design Guide in light of the findings which we have previously made as to the effects of the proposal on natural character.

[205] Looking at the relevant provisions of the District Plan overall, we find nothing which strongly supports the CHH proposal and many provisions with which it is inconsistent if not fundamentally in conflict.

[206] Finally on the provisions on the District Plan and the provisions of s104 RMA, for the sake of completeness we refer to s104(2) RMA which provides:

> *(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the*

*environment if a national environmental standard or the plan permits an activity with that effect.*

This provision refers to what is known as the permitted baseline.

[207] There was some limited debate between Mr Quickfall and Ms Allan as to whether the permitted baseline was applicable to our considerations. Mr Quickfall identified a number of permitted activities which were of some relevance. However, it seemed to us that the principal baseline consideration related to the possibility of construction of buildings on the site.

[208] New buildings which are further than 100m from mean high water springs are a controlled activity (buildings within 100m are discretionary). As Ms Allan observed buildings are subject to controls over height, bulk, location, materials and colour. Mr Quickfall contended that some degree of building was likely on the site and Ms Allan accepted that a single dwelling could not be refused but could be limited by location, height, bulk etc to being a very modest bach-like structure. We accept that evidence.

[209] We do not consider that there are any permitted baseline effects comparable with the effects of the six residential allotment development proposed in this instance and we do not propose to make any permitted baseline comparison.

*Section 104(1)(c)*

[210] The final matter for consideration under the umbrella of s104 is s104(1)(c) which requires the Court to take into consideration *...any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

[211] Ms Allan addressed the issues of both access to the site and the provisions of s106 under this head. She said that she had always understood s106 to be a *..."backstop" provision, available to territorial local authorities but used only when the relevant plan does not provide a sufficient framework to enable it to decline an application (e.g. the subdivision is a controlled activity and/or has insufficient*

*matters of control)*[58]. It will be apparent from our discussion of s106 that we consider it to be more than just a *backstop* provision. We refer to our earlier comment that s106 identifies discrete determinative issues for consideration irrespective of other Part 2 considerations.

[212] The remaining other matter arising from the evidence which we heard relates to precedent. Mr Quickfall's evidence contained an extensive discussion regarding Council decisions to grant consent to a new 500m$^2$ house at 188 Kina Peninsula Road (RM090247) and to subsequently re-zone the site of that house from a combination of Open Space and Rural 2 zoning to an entirely Rural Residential zoning (Plan Change 18).

[213] Mr Quickfall contended that the grant of resource consent and approval of the plan change signalled the limited value that the Council had placed on the Kina Peninsula. He noted that the issue of sea level rise and effect of the house construction on amenity did not appear to have featured in the Council's decision making processes on the resource consent or plan change. We have a number of observations to make regarding those propositions.

[214] The appearance of the house at 188 Kina Peninsula Road and its impact on natural character and amenity values in this area was the subject of considerable comment from witnesses. Mr Brown described the house in these terms *...Still incomplete, this concrete monstrosity dominates the road frontage and part of Kina Peninsula Beach at the point of public 'introduction' to Tasman Bay, and its proximity to both the road and beach only serves to exacerbate its role as major 'blot on the local landscape'.* Mr Brown's view was representative of the opinion of a number of witnesses.

[215] The house in question is situated on Kina Beach about half way along the Peninsula at the point where Kina Peninsula Road traverses the Peninsula from west to east. It is probably one to one and a half kms away from the proposed residential lots on the CHH site and is in a completely separate visual catchment. Any adverse

[58] EiC, para 178.

effect or influence which the house might have on the natural character and amenity of its immediate environment, does not extend to the sand spit end of the Peninsula.

[216] In our view, reference to this house as in some way supporting the CHH proposal in terms of precedent, simply highlights the inherent shortcomings in the precedent argument.

[217] It is well recognised that the precedent effect of granting of resource consents may be a relevant factor for a consent authority to take into account[59] in determining a resource consent application. That is on the basis that granting consent to an application may create an expectation that a like application will be treated in a like manner.

[218] However we refer to the comment of this Court in the *Haines* case that *...the so-called precedent provided by earlier decisions is an expectation of like treatment, not an absolute entitlement. It may be the case that, on examination (with the benefit of hindsight), the earlier decision on which an applicant seeks to rely is an inappropriate decision. It would clearly be wrong for one questionable decision to form the basis for a series of on-going questionable decisions. At the end of the day if a proposal does not otherwise meet the criteria specified in RMA for the grant of consent, it should not receive consent simply because another similar proposal had previously been approved.*

[219] Even if we accept for the purposes of this decision that the decisions in respect of the property at 188 Kina Peninsula Road show a disregard for the issues of coastal hazard and protection of the character and amenity of the Kina Peninsula on the part of the Council (as contended by CHH), we do not consider that justifies this Court in showing similar disregard. To justify the grant of a consent in this case on the basis of the development approved at 188 Kina Peninsula Road would be a prime example of one questionable decision giving rise to another.


[59] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) and *Scurr v Queenstown Lakes District Council* C 060/2005.

***Part 2***

[220] Finally in our evaluation we turn to the provisions of Part 2 RMA, noting that the purpose of the Act is to promote the sustainable management of natural and physical resources[60]. In achieving that purpose we are required to consider the provisions of ss6, 7 and 8 RMA.

*Section 6*

[221] Section 6 requires us to recognise and provide for certain matters of national importance in exercising our functions. In this instance, we consider that the relevant matters of national importance are:

(a) *The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:*

We refer again to the findings we made in the earlier section of this decision assessing the effects of the proposed development on natural values[61]. The CHH proposal fails to preserve the natural character of the coastal environment in and around the Kina Peninsula, and further, diminishes that natural character. The proposed residential development is positioned on the highest part of the site where it is most difficult to mitigate its adverse effects on natural character. The proposal is for a linear extension of existing residential development on the KDL land and the adverse effects of the proposal on natural character will be cumulative upon the acknowledged adverse effects of the KDL development. When taken in combination, these factors lead us to the view that the proposed subdivision, use and development is *inappropriate*.

(b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*

We have found that the proposed subdivision will have adverse effects on the Moutere Inlet which the landscape witnesses agreed was an outstanding natural feature. For the reasons contained in the preceding

[60] Section 5(1) and (2) RMA.

[61] Paras [92] - [106] above.

paragraph we have found that the development will diminish the natural character of that outstanding natural feature and we similarly hold that in terms of s6(b) the proposed subdivision, use and development is *inappropriate*. There are no adequate mitigating measures which contribute to protection of the outstanding natural feature.

*(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*

We acknowledge that by providing reserves which include recreation facilities, walkway access to the coast and an esplanade along the coast, the subdivision would contribute to the maintenance and enhancement of public access to and along the coastal marine area. However, due to likely restrictions on practical access to the recreation area and the effects of erosion and inundation on the esplanade reserve, these effects are of limited benefit.

***Section 7***

[222] Section 7 RMA requires us to have particular regard to the following relevant matters in reaching our decision:

*(b) The efficient use and development of natural and physical resources:*

We question the efficiency of allowing development of the site in a situation where access to it will either be extremely constrained or alternatively constitute a disproportionate drain on Council resources to keep open.

*(c) The maintenance and enhancement of amenity values:*

The CHH proposal may maintain and enhance amenity values insofar as the Domain is concerned. However we have identified that the benefits contended by CHH arising out of vesting the Domain as reserve are largely illusory. There would be some improvement of the amenity of the residential lots by the proposed planting programme which we assume may accelerate the transition presently occurring on the site.

*(f) Maintenance and enhancement of the quality of the environment:*

The CHH proposal fails to maintain and enhance the quality of the environment in that it diminishes the natural character of land in the

coastal environment which is an integral part of an outstanding natural landscape.

(i) *the effects of climate change:*

The effects of climate change are a particularly significant issue in this particular instance. We refer to our various findings in our discussion under s106(1)(a).

***Section 290A RMA***

[223] Section 290A requires us to have regard to the Council's decision in determining this appeal. We have done so. We note that the Council decision was a comprehensive decision and that many of the findings in it are consistent with the findings we have made. The Council declined consent. We have considered a slightly amended proposal and have had the advantage of cross examination of witnesses. Having done so, we substantially concur with the findings of the Council.

***Outcome***

[224] We consider that it is inevitable from the various findings which we have made that this appeal must be declined.

[225] Firstly, our findings in respect of s106 RMA of themselves lead us to the conclusion that we should not grant consent to the subdivision application. That comment refers to each of the two aspects of s106 to which we have referred, mainly s106(1)(a) and (c).

[226] We consider it is unarguable that erosion and inundation will cause material damage to the subdivided lots well within the 100 year time period which NZCPS requires us to take into account. We accept that not all damage to subdivided lots will constitute material damage and that even if there is material damage, we have available to us the option of granting consent with appropriate conditions to avoid, remedy and mitigate the effects of that damage, rather than simply declining consent.

[227] However, we are satisfied that the material damage in this case is of such significance that consent to the subdivision ought be declined on that ground alone. The factors which lead us to that conclusion are that:

- The loss of esplanade reserve in front of the residential lots by erosion and inundation substantially negates one of the contended benefits of the proposed subdivision;
- The predicted loss of over half of each of the residential lots themselves is of such magnitude as to call into account the appropriateness of the proposed subdivision;
- The high degree of predictability of the need to relocate houses constructed on the residential allotments similarly calls into question the appropriateness of the subdivision. This is not a situation where relocation is being provided for as a *backup* or *fall back position* in a situation where the need for it is uncertain. In this case it is highly likely that buildings erected on the residential lots will have to be relocated and the only issue is, when might that be required?;
- We have significant reservations about the practicality of relocation and achieving certainty that the costs of relocation (or demolition) of buildings constructed on the residential lots will not become a charge on the wider community;
- We are not satisfied that the conditions proposed by CHH adequately avoid, remedy or mitigate the effects of material damage to both land and buildings which we have identified.

[228] Insofar as s106(1)(c) is concerned we consider that the subdivision proposal has not made sufficient provision for legal and physical access to each lot and that consent ought be declined on that ground alone. In particular we consider that:

- The existing situation of the causeway is such that there is not presently sufficient legal and physical access to the subdivided lots. In making that finding we acknowledge that the road presently provides a modest standard of access to the site (in its present title configuration) and KDL land most of the time under most circumstances. However none of the witnesses disputed the fact that the rock wall in front of the causeway presently needs upgrading and that the causeway itself presently needs raising by about 500mm. Although CHH is prepared to make a substantial contribution to the capital cost of doing that work the Council will be required to meet the costs of on-going maintenance of the

causeway which Council witnesses signalled in very clear terms it is unlikely to accept;

- Even if the causeway was upgraded as presently required, further capital works will be required to keep it open in the future due to the predicted effects of sea level rise, including a potential doubling in the length of the protected area along the causeway. The Council is unlikely to expend further money on these works;
- The works required to bring the causeway up to standard at present and likely future works both require resource consent. There can be no guarantee that such consents will be granted;
- Although CHH contended that physical and legal access to subdivided lots might be provided by way of four wheel drive access along the beach, by boat from the sea or by some unidentified future means, none of the evidence which we heard suggested that these possibilities had been properly investigated to ensure that they might provide sufficient legal and physical access to the subdivided lots now or in the future.

[229] For all of the above reasons we would decline to grant consent to the subdivision solely having regard to the provisions of s106 RMA.

[230] Nor do we consider that consent ought be granted to the subdivision (and other consents) having regard to the provisions of s104 RMA and Part 2.

[231] We assume that granting the various applications will assist CHH in advancing its economic well-being by enabling it to dispose of what must now be an *orphan* parcel of land to best advantage. Those people who buy residential lots and erect houses on them would receive the social and cultural benefits of being able to reside or holiday in the coastal environment. We accept that the amenity of the residential lots would probably be enhanced by the planting proposed by CHH even if that planting did not adequately address the natural character issues which we have identified. There would be social and cultural benefits accruing to the wider public as the result of vesting the Domain as reserve and vesting of walkway and esplanade reserves.

[232] For the reasons we have identified however, those benefits are at best limited in extent and at worst are illusory. If the benefits are to be maintained they impose a disproportionate cost on the rest of the community due to the need to keep the causeway open and the costs of on-going maintenance of the Domain in a situation where the district is already amply served with facilities of this sort. If access to the Domain by most people is restricted due to loss of the causeway such benefits are significantly diminished. Benefits accruing from the esplanade reserve which must be weighted highly in our considerations due to the provisions of s6(d) are temporary due to predicted loss of a significant portion of the reserve to erosion and inundation.

[233] In our view, the positive effects of the proposal are more than outweighed by the adverse effects on the natural character of the coastal environment and on the outstanding natural feature of the Moutere Inlet which we have identified. Preservation and protection of these must be heavily weighted in our considerations pursuant to s6(a) and (b).

[234] We do not consider that allowing development of a residential subdivision whose practical physical access is under present and future threat and the upkeep of which is uneconomic, constitutes efficient use and development of natural resources. Even allowing for the enhanced planting to be undertaken as part of the subdivision proposal and improvements to the Domain, we have reservations as to whether or not the subdivision ultimately maintains and enhances amenity values and the quality of the environment. We have also considered the effects of climate change and consider that our findings in that regard are properly encompassed in our discussion of s106 (above).

[235] We consider that the proposal is in direct conflict with a number of provisions of NZCPS and the District Plan.

[236] Considered in the broad context, it is our view that granting consent to the CHH application would fail to achieve the purpose of the RMA and that consent ought be declined having regard to the provisions of s104 and Part 2. We would decline consent to the subdivision having regard to these provisions, irrespective of our findings under s106.

[237] When all of these provisions (s106, s104 and Part 2) are considered conjunctively they are even more decisive in our finding that consent ought not be granted to the CHH application.

[238] For all of the above reasons, the appeal is declined and the decision of the Council is upheld.

***Costs***

[239] Costs are reserved in favour of the successful parties to these proceedings. Any costs applications to be processed in accordance with paragraph 4.5.5 of the Court's Consolidated Practice Note 2011.

Dated at Wellington this 27th day of February 2013


B P Dwyer
Environment Judge for the Court.

**BEFORE THE ENVIRONMENT COURT**

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| | Decision No [2012] NZEnvC 285 |
| **IN THE MATTER** | of appeals under cl 14 of Schedule 1 to the Resource Management Act 1991 |
| **BETWEEN** | ANDREW DAY<br>(ENV-2010-WLG-0000158)<br>CHIEF OF THE NZ DEFENCE FORCE<br>(ENV-2010-WLG-000144)<br>EARNSLAW ONE LTD<br>(ENV-2010-WLG-000146)<br>FEDERATED FARMERS OF N Z<br>(ENV-2010-WLG-000148)<br>GENESIS POWER LTD<br>(ENV-2010-WLG-000159)<br>HANCOCK FOREST MANAGEMENT NZ LTD<br>(ENV-2010-WLG-000161)<br>HORTICULTURE NZ<br>(ENV-2010-WLG-000155)<br>MERIDIAN ENERGY LTD<br>(ENV-2010-WLG-000149)<br>MINISTER OF CONSERVATION<br>(ENV-2010-WLG-000150)<br>N Z FOREST MANAGERS LTD<br>(ENV-2010-WLG-000164)<br>N Z HISTORIC PLACES TRUST<br>(ENV-2010-WLG-000147)<br>N Z PORK INDUSTRY BOARD<br>(ENV-2010-WLG-000151)<br>N Z TRANSPORT AGENCY<br>(ENV-2010-WLG-000153)<br>OSFLO SPREADING INDUSTRIES LTD<br>(ENV-2010-WLG-000143)<br>P F OLSEN LTD<br>(ENV-2010-WLG-000165)<br>PROPERTY RIGHTS IN NEW ZEALAND INC<br>(ENV-2010-WLG-000152)<br>RAYONIER N Z LTD<br>(ENV-2010-WLG-000162)<br>TRUSTPOWER LTD<br>(ENV-2010-WLG-000145)<br>WANGANUI DISTRICT COUNCIL<br>(ENV-2010-WLG-000156)<br>WATER and ENVIRONMENTAL CARE ASSOCIATION INC<br>(ENV-2010-WLG-000160)<br>WELLINGTON FISH AND GAME COUNCIL<br>(ENV-2010-WLG-000157)<br>Appellants |
| **AND** | THE MANAWATU-WANGANUI REGIONAL COUNCIL<br>Respondent |

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner J R Mills

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DECISION APPROVING (IN PART) THE TERMS OF THE REGIONAL POLICY STATEMENT AND THE REGIONAL PLAN (THE ONE PLAN)

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Decision issued: 24 December 2012

Costs are reserved

*Background*

[1] The Court issued its decision on the Proposed One Plan appeals on 31 August 2012 ([2012] NZEnvC 182), and directed that the Manawatu-Wanganui Regional Council, conferring where necessary with affected parties, redraft the relevant provisions and present them to the Court for approval.

[2] In the process of drafting the final versions, we said that there may be a need to cross-refer to the draft Consent Orders already prepared to give effect to the mediated and negotiated outcomes.

[3] We have received the Council's report dated 2 November 2012 in response to the decision on the contested One Plan topics. That report is accompanied by the redrafted text of the One Plan.

[4] The Council states that it is yet to undertake a thorough evaluation of consequential changes to issues not argued before the Court, but is aware that further minor amendments such as cross-referencing will be required as a result of the Decision.

[5] The Council's approach to the redraft has involved:

- Council staff preparing a first redraft, including identifying consequential amendments and confirming text amendments previously sent to the Court via draft consent orders;
- Circulation to the affected parties for comment;
- Council considering the comments and improving the draft, although in some cases it considered the amendments proposed by the parties went beyond the directions given by the Court.

[6] The redrafted text of the One Plan (Proposed One Plan Redrafted for Environment Court 2 November 2012 – Tracked Changes Version) shows track changes sought by Consent Orders identified by yellow highlight and, in light green highlight, those made in accordance with our Decision. Our Decision does not deal with the text amendments previously sent to the Court via draft Consent Orders (the

matters in yellow highlight), unless these are clearly incompatible with the changes made as a consequence of our Decision.

[7] In response to the Council's report and the redrafted text of the One Plan, the Court has received the following memoranda:

- Memorandum of Counsel for the Wellington Fish and Game Council (Fish and Game) dated 9 November 2012, and attachments;
- Memorandum of Counsel for Palmerston North City Council dated 9 November 2012;
- Memorandum of Counsel on behalf of the Minister of Conservation dated 9 November 2012, and attachments;
- Memorandum on behalf of Horticulture New Zealand dated 12 November 2012, and accompanying Memorandum regarding mediation agreement on miscellaneous appeal points.

[8] While the Court did not receive memoranda from Fonterra, Federated Farmers and Ravensdown, the Council has provided a table (Tab 6 of the Report) with their comments (along with those from Fish and Game, the Minister of Conservation, Horticulture NZ and the Palmerston North City Council) and the Council's responses to them. Where the Council has not actioned the comments and suggestions, we will mention our views on them.

[9] We now deal with each of the Parts of our Decision in turn.

*Part 2 - Landscapes and Natural Features*

[10] The redrafted text of Appendix F (ia) of the One Plan does not accord with the Decision (para [2-55]).

[11] The Council is directed to amend Appendix F Outstanding Natural Features or Landscapes: to read:

> The series of highest ridges and highest hilltops along the full extent of the Ruahine and Tararua ranges, including within the Forest Parks described in items (h) and (i).

The characteristics and values associated with that ONFL are to read:

(i) Visual, natural and scenic characteristics of the skyline of the Ruahine and Tararua ranges, as defined by the series of highest ridges and highest hilltops along the full extent of the Ruahine and Tararua Ranges, including the skyline's aesthetic cohesion and continuity, its prominence throughout much of the region and its backdrop vista in contrast to the Region's plains.

(ii) Importance to tangata whenua and cultural values

(iii) Ecological values including values associated with remnant and regenerating indigenous vegetation

(iv) Historical values

(v) Recreational values.

With these changes, the redrafted text is approved.

*Part 3 – Indigenous Biodiversity*

*Schedule E*

[12] In closing submissions the Minister of Conservation put forward proposed changes to Schedule E and an addition to the Glossary as recommended by Ms Amy Hawcroft, an ecologist called by the Minister of Conservation. We directed that the ecologists – Ms Fleur Maseyk, called by the Council, Mr Matiu Park for Meridian and TrustPower, and Ms Hawcroft, confer and prepare a joint statement giving the reasons for any refinement of Schedule E arising from Ms Hawcroft's proposals, and identifying any disagreement between them.

[13] The Council advises that the ecologist witnesses conferred and refined the description of habitats, and that Schedule E Table E.1 has been redrafted to include the agreed amendments with annotations indicating alternatives, and where amendments are not agreed.

[14] We now work through the Glossary and differences of opinion between the ecologists on the Schedule E amendments, and give reasons for our decision on them. Where numbers are referred to (whether or not in brackets), these relate to the table provided by the ecologists and included in the Council's report as Tab 1.

[15] Ms Hawcroft had initially proposed to relocate dune habitat (Active duneland, Stable duneland and Inland duneland) from the 'Naturally Uncommon Habitat Types Classified as Rare' section to the 'Wetland Habitat Types Classified as Rare or Threatened' – and a consequential change to that title to read 'Wetland and Dune Habitat Types classified as Rare or Threatened'.

[16] Ms Hawcroft also suggested that the classification of 'Active Duneland' be changed from Rare to Threatened and also that the classification of 'Stable Duneland' be changed from Rare to Threatened. However, further published research had convinced her that the classification of the dune habitat types should remain as *Rare*, with Mr Park agreeing with the comments of Ms Maseyk and Ms Hawcroft: (refer 3-4). No amendment is required to the classification of the dune habitat types *Active duneland* and *Stable duneland.*

[17] The experts agreed that there should be a new habitat type 'Cliffs, scarps, and tors of acidic rock'. Ms Hawcroft considered this habitat type should have a classification of *At-Risk* as opposed to *Rare,* and commented that the recently published *Holdaway et al 2012* paper refers to cliffs, scarps and tors of acidic rock (there called silicic-intermediate rock) as rare, but it also concludes they are not threatened. Mr Park agreed with Ms Hawcroft. We concur with the reasons given by Ms Maseyk for the *Rare* classification.

[18] Changes to the habitat type label of *Screes and boulderfields* to *Screes of acidic rock* were agreed, along with a change to Definition and Further Description. For Classification there was disagreement about the deletion of the words *Exotic species may be present* proposed by Mr Park. We agree with Ms Maseyk and Ms Hawcroft that these words should not be deleted, for the reasons they set out. For Classification there was disagreement for the same reasons as covered in the discussion of the addition of the habitat type *Cliffs, scarps and tors of acidic rock* (refer 11). We agree with Ms Maseyk that the Classification should be *Rare* and not *At-Risk* for the reasons she gives.

[19] Finally, we do not consider that Ms Hawcroft has made the case for relocating dune habitat types in Schedule E Table E.1 (refer 2), or to re-title *Naturally*

*Uncommon Habitat types classified as Rare* to *Rocky Substrate Habitat types Classified as Rare or At-Risk* (refer 5). We agree with the reasons given by Ms Maseyk, particularly in the light of our decisions on the Classification of the disputed habitat types as *Rare*. Ms Hawcroft herself appears to recognise that relocating and re-titling headings will not change the treatment of these habitat types under the policies and rules in the Regional Plan.

With the additions and other changes to Schedule E shown in Annexure 1, the redrafted text in the Proposed One Plan Redrafted for Environment Court 2 November 2012 – Tracked Changes Version - is approved.

*Part 4 – Sustainable Land Use/Accelerated Erosion*

[20] The Council's report notes that at paragraph [4-81] of the Decision, several matters were referred back to the Council. Council officers addressed those questions by:

- Providing redrafted text which has been circulated to all parties to the hearing; and
- Preparing a brief report that directly answers those questions. Other parties have not viewed this report (Tab 3) because it has only recently been completed.

[21] The Council states that Fish and Game and Federated Farmers provided comment in consultation on the Council's redrafted provisions. The Fish and Game comments on drafting errors and improving the rules for *controlled* and *discretionary* activity status resulted in amendments to the Plan. Federated Farmers made what the Council considered to be a helpful observation about Rule 12-4A, but the Council considered that the omission identified was carefully chosen because the activity would be captured in another part of the rule stream. Federated Farmers did not raise this matter with the Court.

[22] None of the other parties made any comments on the Council's redrafts.

*Introduction* 5.1.3

[23] As pointed out by Fish and Game, the sixth paragraph needs a cross-reference to Rule 12-5.

*Objectives 5-1 and 5-2*

[24] The Council substituted the term *water bodies* for the term *waterways* (in the MWRC-V-POP) for consistency with the rest of the DV-POP (presumably as a consequential change). We agree with that change.

*Policy 5-2A(a)*

[25] Fish and Game sought consequential amendments to reflect the Court's Decision on Sustainable Land Use/Accelerated Erosion rules in Chapter 12, and specifically about the regulation of activities within riparian zones under Rule 12-5. The regulatory regime is to ensure that land use activities which have the potential to exacerbate land erosion, or are likely to release sediment to surface water, are managed to reduce this risk.

[26] That requires what Fish and Game describe as *minor editing amendments* to clarify that vegetation clearance, land disturbance, or cultivation activities within riparian areas are regulated under Rule 12-5. We agree with the change sought to Policy 5-2A(a) and the deletion of *any increase in* from this clause, so it should read:

> In order to achieve Objective 5-2, the Regional Council must regulate vegetation clearance, land disturbance, forestry and cultivation through rules in the Plan and decisions on resource consents, so as to minimise the risk of erosion, minimise discharges of sediment to water, and maintain the benefits of riparian vegetation for water bodies.

*Anticipated Environmental Results* 5.6 – paras [4-10] and [4-11]

[27] In making the necessary changes, the Council, presumably as a consequential amendment, substituted the term *voluntary management plan* for the term *Whole Farm Business Plan*. We agree.

*Ancillary activities to cultivation* - para [4-48]

[28] We asked whether activities ancillary to cultivation in a riparian setback could be dealt with as a *restricted discretionary* activity rather than as a *discretionary* activity. In response the Council states:

> Presumably this question arose because cultivation is treated as special kind of land disturbance. Setbacks are used as a standard or condition in Rules 12-1A, 12-1, 12-4A and 12-4. In the normal course of events, Council would interpret land disturbance within the setbacks for any purpose (including for the purposes of constructing erosion and sediment control methods to minimise run-off to water) as not complying with activity standards and the activity would default to Rule 12-5 as a discretionary activity.
>
> That means ancillary activities (to cultivation) in a riparian setback are most appropriately dealt with as discretionary activities.

That was not the question. The Court asked whether the issues could be equally well dealt with through a *restricted discretionary activity* status (as it did for the default activity status in paragraph [4-76]). However, none of the parties argued for a different status, and so we confirm the *discretionary* activity status.

*Default activity status* – para [4-76]

[29] What should the default activity status be – *restricted discretionary* or *discretionary* activity? This refers to the activity status of default Rule 12-5. The Council recommends, after consideration, that the activities covered by Rule 12-5 be *discretionary* as this provides the most appropriate rule *cascade*. No party raised issues with this approach so we confirm it.

*Rule drafting* – para [4-78] and [4-79]

[30] How should the rules for *controlled* and *restricted discretionary* activity status be improved? The Council advised that redrafting was done to improve the wording of reservations or restrictions, using the Decision and wording put forward by the parties during the hearing, as a guide. Terminology and some clauses were also changed to be consistent with the rest of the Regional Plan.

[31] For Rule 12-1 the conditions/standards/terms requires: *The activity must be undertaken in accordance with an Erosion and Sediment Control Plan.* The Council then proposes that control is reserved over:

> The content of and standard to which the *Erosion and Sediment Control Plan* must be prepared, the implementation of the plan, and the timing of when it must be prepared and submitted.

This is different from Rule 12-4 - *Specified vegetation clearance, land disturbance or cultivation in a Hill Country Erosion Management Area;* where discretion is restricted to (among other matters):

> ... the requirement to provide an *Erosion and Sediment Control Plan*, the content of and standard to which the plan must be prepared, the implementation of the plan, and the timing of when it must be prepared and submitted.

[32] There is a definition of *Erosion and Sediment Control Plan* in the Glossary which reads:

> **Erosion and Sediment Control Plan** means a plan prepared in accordance with the 'Erosion and Sediment Control Guidelines for the Wellington Region' dated September 2002:
>
> (a) In all cases the Erosion and Sediment Control Plan shall include, but not be limited to:
>
> (i) A description of the nature, scale, timing, and duration of land disturbance;
>
> (ii) Water run off controls;
>
> (iii) Methods to prevent slumping of batters, cuts and side castings;
>
> (iv) Measures to maintain slope stability;
>
> (v) Methods of sediment retention and control of sediment run off;
>
> (vi) Methods to avoid effects on riparian margins and waterbodies;
>
> (vii) Re-vegetation requirements;
>
> (viii) Methods to monitor achievement of the plan; and
>
> (ix) Contingency measures for heavy rainfall events.
>
> (underlining added)

[33] The extent to which the Council has reserved its control under Rule 12-1 might imply that it cuts directly across the condition/standard/term that the activity must be undertaken in accordance with an Erosion and Sediment Control Plan (at least the elements of which are required by the definition of an Erosion and Sediment Control Plan). There is also the requirement that the activity be undertaken in accordance with that Plan (the details of which are left to be decided through the consent process). We conclude that the provision should be redrafted so that there is no implication that the consent authority can dispense with the minimum requirements specified in the definition of an Erosion and Sediment Control Plan. The Rule 12-1 condition/standard term is to be reworded to read:

> Additional content of and the standard to which the *Erosion and Sediment Control Plan* must be prepared, the implementation of the plan and the timing of when it must be prepared and submitted.

*Other Changes* – para [4-80]

[34] The predominant issue here is the terminology for what the DV-POP calls Schedule D 'surface water quality targets' in Rules 12-1(d), 12-2(m), 12-3(c) and 12-4A dealing with visual clarity. We have referred the topic of *numerics* back to the parties and will address this matter further once we have received the responses.

*Overall Finding on Part 4*

[35] We have identified changes required to the Plan. With the exception of the terminology to replace *numerics* and the other changes required as a consequence of Part 5, the redrafted text is approved.

*Part 5 – Surface Water Quality – Non-Point Source Discharges*

*Schedule D Nutrient standard for shallow lakes* – para [5-46]

[36] We invited the Council to consider invoking the s293 process, suggesting that the process could be an appropriate mechanism to amend the Schedule D standard for shallow lakes. The Council's redrafted provisions Table D.4A include the new figures specified in Part 5, paragraph [5-46].

[37] The Council made the following procedural observations:

(a) It must be acknowledged that this amendment was not included in the provisions circulated for consultation with other parties.

(b) The Council considers that directions for consultation or wider notification of the amendment is unnecessary given the limited scale of the amendment; the undisputed evidence on the matter; the lack of prejudice to parties as the leaching rates will not be affected, and the probability that all parties with an interest in participating in debate on this issue were present at the hearing.

[38] No other parties made any comments casting doubt on the Council's position. We conclude that the nutrient standard (see table D.4A) for shallow lakes in Schedule D can be included in the One Plan.

*Deposited Sediment Cover / Visual Clarity Percentages in Schedule D*

[39] In its conclusions the Court asked the Council to settle the appropriate figures for both deposited sediment percentages and visual clarity percentages in Schedule D. Part 4 (paras [4-65] to [4-72]) had referred to visual clarity percentages in Schedule D as a condition or standard to be a requirement for cultivation and ancillary activities, but Part 5 also covered the appropriateness of the treatment of visual clarity in Schedule D for completeness – para [5-45].

[40] We noted at para [5-44] that the parties had agreed that the Deposited Sediment Cover percentage for each Water Management Sub-zone would only apply to State of the Environment Monitoring, and that compliance with it would not be a threshold condition for activity status. There is a footnote to Schedule D to that effect which will need some attention in the light of our Minute on the use of the word *numerics*.

[41] The Council states that it has settled on 15%, 20% and 25%: - figures derived from the evidence of Kathryn McArthur and Dr Russell Death, and that they have been consulted about those figures. It further points out that while Federated Farmers considers that the Court's decision allows only a maximum change of 20% or 30%, Council officers did not consider themselves so constrained by the direction

in paragraph [5-45]. The version provided by the Council makes changes only to the Deposited Sediment Cover percentage.

[42] The Council further reports that the comments from Federated Farmers are:

> The redrafted schedule D shows some deposited sediment standards set at 15%. The expert evidence presented by Fish and Game at the Environment Court hearing suggested a deposited sediment standard between 20 – 30% ([5-45] of EC decision). The version of the water provisions that the Court has generally supported is that put forward by Fish and Game. Therefore the sediment standards within schedule D should reflect that and the reference to a 15% deposited standard should not be put forward for any water bodies within schedule D.

[43] We are puzzled by the comments from Federated Farmers (and by the Council to some extent). As tabled by the Council at the hearing, all the versions sought by the parties for deposited sediment cover percentages had yellow highlight, to show the changes discussed at mediation and conferencing which were acceptable to the Council. Those versions had 15% for several of the Water Management Zones. Those put forward in the version now received from the Council include several that are 15% (and even one that is 10% additional for all specified sites/reaches of rivers with a Trout Spawning value 1 May to 30 September), and look similar to the figures in the various versions sought by the various parties. We are not aware of Federated Farmers, or any other party, suggesting alternatives through the hearing process.

[44] For Tables D.2A and D.3A we approve the percentages for Deposited Sediment Cover for each Water Management Zone that were put before us at the hearing as having been agreed by the parties at mediation. Those percentages were in an A3 document labelled One Plan Surface Water Quality – Non-point Source Discharges Hearing commencing 30 April 2012 which highlighted in yellow the changes discussed at mediation and conferencing and acceptable to MWRC.

[45] We dealt with the points raised by Horticulture NZ in Part 4 which did not require any change to Schedule D visual quality. No change is required to the visual clarity percentages as a consequence of Part 5 of the Decision.

*The Policies*

[46] We did accept that there may be a need to refine some of the policy provisions in the RPS and Regional Plan in light of the Court's Decision – [5-192] to [5-194]. Unfortunately in some respects the Council has taken a somewhat narrow view of our direction. That makes it important to carefully consider the comments made by the other parties. We have raised some questions about particular policy provisions in a separate Minute.

*RPS Policy 6-7A*

[47] We approve the following parts of RPS Policy 6-7A, and then give reasons for that.

> Policy 6-7A: Land use activities affecting groundwater and surface water quality.
>
> The management of land use activities affecting groundwater and surface water must give effect to the strategy for surface water quality set out in Policies 6-2, 6-3, 6-4 and 6-5, and the strategy for groundwater quality in Policy 6-6, by managing diffuse discharges of contaminants in the following manner:
>
> (a) Identifying in the regional plan targeted Water Management Sub-zones. Targeted Water Management Sub-zones are those sub-zones where, collectively, land use activities are significant contributors to elevated contaminant levels in groundwater or surface water
>
> (b) Identifying in the regional plan intensive farming land use activities. Intensive farming land use activities are rural land use activities that (either individually or collectively) make a significant contribution to elevated contaminant levels in the targeted Water Management Sub-zones identified in (a) above
>
> (c) Actively managing, the intensive farming land use activities identified in (b) including through regulation in the regional plan, in the manner specified in Policy 6-7
>
> (d) The Regional Council must continue to monitor ground and surface water quality in Water Management Sub-zones not identified in (a) and rural land uses not identified in (b). Where monitoring shows the thresholds in (a) and (b) are met then the regional plan must be amended so that those

further Water Management Sub-zones and rural land uses are included in the management regime set out in (c).

[48] Policy 6-7A(d) is to be amended as proposed by the Minister of Conservation and Fish and Game and the word *not* (inserted in response to comments from Horticulture New Zealand on the redraft the Regional Council distributed for consultation) is to be deleted.

[49] We agree that the word *not* does not make sense in this context. The thresholds in (a) and (b) are positive thresholds and when a water management zone or land use is identified as an issue, then it should be included in the Plan.

*RPS Policy 6-7: Regulation of intensive farming land use activities affecting groundwater and surface water quality*

[50] We approve some parts of the following version of Policy 6-7 for (a) Nutrients, and then give reasons for the changes:

(a) Nutrients

(iaa) Nitrogen leaching maximums must be established in the Regional Plan which:

(1) Take into account all the non-point sources of nitrogen in the catchment, and

(2) Will achieve the strategies for surface water quality set out in Policies 6-2, 6-3, 6-4 and 6-5, and the strategy for groundwater quality in Policy 6-6, and

(3) Recognise the productive capability of land in the Water Management Sub-zone, and

(4) Are achievable on most farms using good management practices, and

(5) Provide for appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums.

(i) Existing intensive farming land use activities must be regulated in targeted Water Management Sub-zones to achieve the nitrogen leaching maximums specified in (iaa).

(ia) New intensive farming land use activities must be regulated throughout the Region to achieve the nitrogen leaching maximums specified in (iaa).

[51] The Council states that it received the following comments from parties:

Federated Farmers:

> The redrafting of this policy as now presented is a direct transcription of the provisions put forward by Fish and Game. A number of these provisions can not be provided for including provision 1 (not all non-point sources are captured only intensive land uses) and 4 (given that OVERSEER® Version 6 produces far higher N leaching losses than the previous Version 5.4 use of best management practices will not (sic) mean that most farms will be able to achieve the N loss limits) if the N leaching maximums that are established for the plan are not recalculated using OVERSEER Version 6. Given that policies 13-2C links through to 6-7 and 13-2D links through to 13-2C the ability for the redrafted rules to give effect to these policies is marginal and arguably not even possible.
>
> Regarding the setting of cumulative N leaching losses in Table 13-2. Given that OVERSEER 6 has been shown to produce N leaching loss values significantly higher than version 5.4 which was used to calculate Table 13-2 the limits as set in Table 13-2 are not now as achievable as previously and in fact are inaccurate in the light of more robust scientific analysis. To continue to include the table 13-2 limits as directed in the Decision whilst using OVERSEER 6 and its improved mechanistic methodology to determine current N leaching losses from intensive farms is a serious flaw in the redrafted rules.
>
> In the redrafted policy 6-7(iaa) 2 second line, the words water quality are unnecessarily repeated (page 6-15 chapter 6).

Fonterra: The qualifier 'most' farms is vague and uncertain. It needs to be clarified.

Ravensdown:

> Policy 6-7(iaa)(4) is vague and it is not clear what 'Are achievable on most farms' might mean.

Horticulture NZ:

> Using a maximum does not account for rotations that are likely to have peaks and troughs that are not representative of the whole operation over time.

Add in new subclause (1A)

(iaa) Nitrogen leaching maximums must be established in the Regional Plan which:

(1) Take into account all the non-point sources of nitrogen in the catchment, and

(1A) Takes into account the average nitrogen leaching over the whole farm and the rotational cycle of the operation, including any pasture phase in the rotation.

[52] The Council response to these comments is:

- The comments from Federated Farmers and Horticulture NZ are beyond the scope of the matters the Court has referred for redrafting.
- The policy is in a RPS and the reference to *most* is in that context. This matter was not raised by Fonterra or Ravensdown in evidence to the Court.

[53] We agree that the RPS policy may be aspirational. As pointed out in our Decision, it is desirable for all rural land use nitrogen-leaching activities to be included in the Regional Plan policy and rule regime (recognising that the option of including extensive sheep and beef farming was not within the scope of the present proceedings).

[54] The questions being raised by Federated Farmers about the robustness of the approach are matters that should have been raised at the original hearing and in evidence. It is too late to raise them now.

[55] We substitute *good management practices* for *best management practices.* We note this is the terminology used in the Second Report of the Land and Water Forum.

[56] The addition proposed by Horticulture NZ does not reflect the approach we approved for the One Plan in Part 5.

[57] We looked at the policy provisions put forward by the various parties at the hearing to see whether these would assist, but found these were directed at the separate and different regimes proposed.

[58] However, we take on board the comment from Federated Farmers about the repetition in policy 6-7(iaa). In addition, Policies 6-4 and 6-5 do not refer only to *maintenance* of water quality, but also to *enhancement* of degraded surface water. We delete the phrase ... *and result in a maintenance of water quality.*

*Regional Plan*

[59] We approve those parts of the Policy 13-2C and D Regional Plan provisions which we now set out in full, before giving an explanation of the reasons for preferring these versions. We do not approve (b) and (e) of Policy 13-2C which are the subject of a Minute.

*Policy 13-2C: Management of intensive farming land uses*

In order to give effect to Policy 6-7A and Policy 6-7, intensive farming land use activities affecting groundwater and surface water quality must be managed in the following manner:

(a) The following land uses have been identified as intensive farming land uses:

  (i) Dairy farming

  (ii) Commercial vegetable growing

  (iii) Cropping

  (iv) Intensive sheep and beef

(b) ...

(c) Nitrogen leaching maximums have been established in Table 13.2.

(d) Existing intensive farming land uses regulated in accordance with (b)(i) must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the nitrogen leaching maximum values for each year contained in Table 13.2, unless the circumstances in Policy 13-2D apply.

(e) ...

(f) Intensive farming land uses regulated in accordance with (b) must exclude cattle from:

  (i) A wetland or lake that is a rare habitat, threatened habitat or at-risk habitat.

  (ii) Any river that is permanently flowing or has an active bed width greater than 1 metre.

(g) All places where cattle cross a river that is permanently flowing or has an active bed width greater than 1 metre must be culverted or bridged and those culverts or bridges must be used by cattle whenever they cross the river.

*Policy 13-2D: Resource consent decision making for intensive farming land uses*

When making decisions on resource consent applications, and setting consent conditions, for intensive farming land uses the Regional Council must:

(a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 13-2C.

(b) An exception may be made to (a) for existing intensive farming land uses in the following circumstances:

(i) where the existing intensive farming land use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500mm or greater; or

(ii) where the existing intensive farming land use cannot meet year 1 nitrogen leaching maximums in year 1, they shall be managed through conditions on their resource consent to ensure year 1 nitrogen leaching maximums are met within 4 years.

(c) Where an exception is made to the nitrogen leaching maximum the existing intensive farming land uses must be managed by consent conditions to ensure:

(i) Good management practices to minimise the loss of nitrogen, phosphorus, faecal contamination and sediment are implemented.

(ii) Any losses of nitrogen, which cannot be minimised are remedied or mitigated, including by other works or environmental compensation. Mitigation works may include but are not limited to, creation of wetland and riparian planted zones.

(d) Ensure that cattle are excluded from surface water in accordance with Policy 13-2C(f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle

> stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus, faecal contamination and sediment are remedied or mitigated by other works or environmental compensation. Mitigation works may include (but are not limited to) creation of wetland and riparian planted zones.

[60] We turn now to look at changes sought by the parties.

- *Policy 13-2C(g)*

[61] Policy 13-2C(g) is amended to accord with the reasons given by the Minister of Conservation and Fish and Game. That will make it consistent with other redrafted provisions e.g. Policy 13-2C(f)(ii) and the wording of the clause in Rule 13-1 and 13-1B.

- *Policy 13-2D Resource consent decision making for intensive farming land uses*

[62] A new provision (c) was proposed which we accept with one change.

The Council states that Fonterra raised:

> References to the words 'minimised' and 'environmental compensation' are vague and there is no guidance as to what would be required. We also query whether any evidence was called during the hearing about what environmental compensation might involve. The concept was not in the POP as notified or in the decisions version. It was also not expressly mentioned in the Court's Decision. Fonterra seeks clarification on these points.

However, it considers the comments from Fonterra are beyond the scope of the matters the Court has referred for redrafting.

[63] We conclude that this Policy performs an important function in terms of the objectives and policies in the RPS, and the objectives and other policies in the Regional Plan. There may be other ways of assisting improvements in water quality, and these may take time to establish and be effective, such as the two examples given – the creation of wetland and riparian planted zones.

[64] We also conclude it is preferable to substitute (as we did earlier) *good management practices* for *best management practices.*

[65] The Council put forward a version of (d) from which the Minister of Conservation and Fish and Game sought the exclusion of *or the effects of cattle stock movements are avoided, remedied or mitigated,* or the word *and* to replace *or*. The latter was chosen by the Council so as to achieve consistency with the provisions as changed by the Court in Part 5. We accept this approach.

*Glossary:*

*Intensive sheep and beef farming*

[66] The phrase used throughout the Plan and in the Rules is *intensive sheep and beef farming* and the glossary has been amended to be consistent with this.

[67] The Minister of Conservation submitted that the definition, as currently worded, could be the subject of disputed interpretation on the basis that all of the land used for farming of sheep and cattle must be irrigated to trigger the definition. It is unlikely that all land would be irrigated. This was not the interpretation sought in the evidence in chief of Ms Marr, for the Minister. The Minister of Conservation provided two alternative wordings:

> **Intensive sheep and beef farming** refers to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated.
>
> OR
>
> **Intensive sheep and beef farming** means using land for sheep, beef and mixed sheep/beef farming on properties greater than 4 ha where irrigation is used in the farming activity.

[68] It was not the Court's intention that the whole of a farm needed to be irrigated to trigger the provision. The Court directs the glossary term be amended to read:

> **Intensive sheep and beef farming** refers to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated.

*Commercial vegetable growing*

[69] The Council provided the following definition to deal with Part 5 of the Decision - para [5-63] (G):

> **Commercial vegetable growing** means using an area of land greater than 4 ha for producing vegetable crops for human consumption. It includes the whole rotational cycle, being the period of time that is required for the full sequence of crops, including any pasture phase in the rotation. Fruit crops, vegetables that are perennial, dry field peas or beans are not included.

The Council said this was to achieve consistency with the definition as changed by the Court and incorporating changes from Horticulture NZ.

[70] Horticulture NZ had commented:

> The definition has not been the subject of any input or debate prior to this point in time. These amendments have been made to provide some clarity to the definition and to reflect the rotational nature of commercial vegetable growing.
>
> **Commercial vegetable growing** means using contiguous area of land greater than 4 ha for producing vegetable crops for human consumption. It includes the whole rotational cycle, being the period of time that is required for the full sequence of crops, including any pasture phase, in the rotation. Fruit crops, vegetables that are perennial, dry field peas or beans are not included.

[71] We concur with the definition put forward by the Council. The Horticulture NZ introduction of *contiguous* could defeat the purpose of the policy and regulatory approach.

*Cropping*

[72] The Court decided that all intensive land uses – dairying, cropping, horticulture and intensive sheep and beef - should be brought within the policy and rules regime in Part 5 - paras [5-63] to [5-71].

[73] The Council submits that:

> In relation to the definition for cropping the Court Decision [para 5-82] defines the area for cropping as 40 hectares. Evidence presented variously describes areas of 4 ha and 20 ha. Confirmation is sought from the Court that the area should be 40 ha.

In addition, there is a question as to whether conversions are intended to capture horticultural activities which are on a crop rotation. That is, when does a paddock that may previously have been used for vegetable growing become a conversion as opposed to an existing activity?

[74] The Council provided the following:

> **Cropping** refers to properties where the cropping area is greater than 40 ha and the crops grown are cereal, coarse grains, oilseed, peanuts, lupins, dry field peas or dry field beans. This does not include occasional use of land for these crops or growing of fodder crops which are to be used on the property.

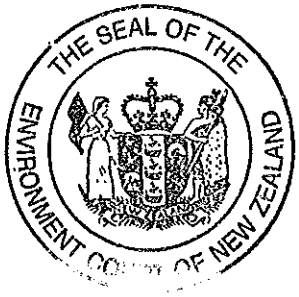
The Minister of Conservation and Fish and Game provided two alternatives:

> **Cropping** refers to properties where the cropping area is greater than 20 ha and the crops grown are cereal, coarse grains, oilseed, peanuts, lupins, dry field peas or dry field beans. This does not include growing of fodder crops which are to be used on the property.
>
> or
>
> **Cropping** means using an area of land in excess of 20 ha to grow crops. A 'crop' is defined as cereal, coarse grains, oilseed, peanuts, lupins, dry field peas or dry field beans. This definition does not include crops fed to animals or grazed on by animals on the same property.

- *The Threshold for Cropping*

[75] The Minister of Conservation and Fish and Game state that:

- Wording for a definition for cropping, including reference to 20 ha (rather than 40 ha) was sought by the Minister of Conservation and shown in Ms Marr's evidence in chief
- The Court refers to the definition of cropping having either a 4 ha threshold, or a 40 ha threshold [para 5-82]



- No party sought a 40 ha threshold, the only definition of cropping in evidence to the Court was the definition put forward by the Minister of Conservation which included a 20 ha threshold.

[76] The Council also states that 40ha was not a figure presented in any evidence to the Court, nor was it a figure in the versions of POP provided to the Court. In NV-POP, the figure was 4 ha. In DV-POP there was no figure because *cropping* was not regulated and required no definition.

[77] There may be no scope in appeals to increase the cropping threshold to 40 ha. Scope exists to keep the definition at 4ha (the NV-POP, as sought at the hearing by Fish and Game) or 20ha (as sought at the hearing by Andrew Day).

[78] It appears that there was a typographical error in the Court's Decision. If the figure of 4 ha, in accordance with the NV-POP, was adopted that would be consistent with the areas for intensive sheep and beef farming and commercial vegetable growing. However, the Minister of Conservation (and Fish and Game) put forward a definition which included a 20ha threshold, and we find that acceptable.

- *The reference to 'occasional' use of land*

[79] The Minister of Conservation and Fish and Game state:

- The wording for a definition of *cropping* in Ms Marr's evidence in chief did not refer to excluding ... *occasional use of land for these crops* ...
- Cropping is often an *occasional* use of land on properties that also undertake other farming activities
- It was intended that occasional use of land for cropping be captured, and not excluded from the Plan
- The Court rejected arguments that occasional or transient uses of land should be excluded from the provisions of the Plan (paras [5-80] to [5-83])
- To exclude *occasional* use of land from cropping would limit the application of the Rules to *permanent* cropping. This was not the intention of the Court's Decision and this phrase should be deleted.

Fish and Game also submit that:

- Evidence from Dr Dewes discussed the increase in nitrogen leaching that may result from otherwise extensive farming operation engaging in cropping.

[80] Ravensdown said that the definition of *cropping* uses uncertain terms (i.e. *occasional*) which may cause confusion. We agree that needs to be clarified.

[81] The Court was very clear about what was intended here – see Part 5, paras [5-80] to [5-83]. The words *occasional use of land for these crops or*, as proposed by the Council, are to be deleted.

- *Approved Definition*

[82] We approve the second alternative put forward by the Minister of Conservation and Fish and Game with a threshold of 20ha, as follows:

> **Cropping** means using an area of land in excess of 20 ha to grow crops. A 'crop' is defined as cereal, coarse grains, oilseed, peanuts, lupins, dry field peas or dry field beans. This definition does not include crops fed to animals or grazed on by animals on the same property.

*Interim Tool for Assessing N Loss for Horticulture*

[83] In Part 5 we said that pending the outcome of trialling OVERSEER 6 for horticultural activities, possibly an interim tool for assessing N loss for horticulture may need to be considered – see para [5-66].

[84] The Council states that:

> In the absence of any specific guidance from the Court regarding an interim tool for use by horticulture no redrafting has been provided. It is noted that Lake Horowhenua, which is the main target catchment where existing horticultural activities occur, will not be regulated until July 2015 (given the staging in dates included in the redrafting). This allows for further work to be undertaken regarding the use of OVERSEER 6 for horticultural activities.

[85] Horticulture NZ states:

> The recent release of OVERSEER 6 has confirmed that there are still technical issues preventing standard operation and use of the programme on vegetable rotations.
>
> It is the submission of Horticulture NZ that an interim solution ought to be included now and a proposed option was discussed with the full Council and officers on Tuesday 30 November (presumably actually October). Horticulture growers and Council officers are progressing this matter with a further meeting on Wednesday 14 November.
>
> The proposal involves using a research model operated under licence by Plant and Food Research Ltd known as the Agricultural Production Systems Simulator (APSIM). Over 60% of the horticultural land in Canterbury is currently being modelled using this method.
>
> No specific changes are required to the provisions in Chapter 13 should the changes to the definition for *Nutrient Management Plan* be accepted by the Court.

[86] In relation to the definition of *Nutrient Management Plan*, Horticulture NZ seeks the following changes:

> **Nutrient management plan** means a plan prepared in accordance with the Code of Practice for Nutrient Management (NZ Fertiliser Manufacturers' Research Association 2007) which records (including copies of the nutrient budget input and output files used to prepare the plan) and takes into account all sources of nutrients for *intensive farming*[1] and identifies all relevant nutrient management practices and mitigations, and which is prepared by:
>
> 1. A person who has both a Certificate of Completion in Sustainable Nutrient Management in New Zealand Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University; or
> 2. A Certificate of Completion in Sustainable Nutrient Management in NZ Agriculture from Massey University and can provide evidence of at

[1] The memo from Horticulture NZ refers to dairy farming but it is assumed that this is a mistake and it should refer to intensive farming as does the version provided by the Council.

least 5 years professional experience in the management of pastoral, horticulture, or arable farm systems; or

3. A tertiary qualification in agricultural sciences and can provide evidence of at least 5 years professional experience in nutrient management for pastoral, horticulture or arable farm systems.

[87] The Council considers the redraft of the glossary term *nutrient management plan* is beyond the scope of the matters the Court has referred for redrafting, but Horticulture NZ considers a change to the definition to be consequential, given that commercial vegetable growing has been included in the nutrient management regime.

[88] The definition requires a consequential change so that it does not relate only to dairy farming, as the Council recognises. However, we find the changes sought by Horticulture NZ go too far.

[89] Firstly, they relate to more than horticulture, and there was no challenge to the approach in the definition of *nutrient management plan* and the use of the OVERSEER input and output files by the other parties at the hearing for other activities. In fact, the Federated Farmers, Ravensdown and Fonterra approaches all used it. We are also unclear as to why the word *annually* is proposed to be struck out as no explanation is provided. Both Rule 13-1(a) *Existing intensive farming land use activities* and Rule 13-1B (a) *New intensive farming land use activities* require that a *nutrient management plan* must be prepared and provided annually to the Regional Council.

[90] Secondly, we have no evidence that completing a Certificate of Completion in Sustainable Nutrient Management in New Zealand Agriculture or a tertiary qualification in agricultural sciences and 5 years professional experience in the management of pastoral, horticulture, or arable farm systems, would qualify a person to undertake the preparation of a nutrient management plan. It is possible (and indeed likely) that a person who has a tertiary qualification in agricultural sciences and 5 years professional experience in the management of farm systems would have obtained the necessary certificates.

[91] The *nutrient management plan* is a key component of the policy and rule approach in the Plan. Horticulture NZ should have put forward such changes, and their evidential basis, at the hearing and it is too late to propose them now.

[92] Given the timeframe before the targeted Water Management Sub-zones come into effect for those catchments with vegetable cropping, and the ability of the Council to promote a plan change providing for an alternative approach if it sees fit, we see no reason to amend the requirement for the use of OVERSEER input and output files.

*Table 13-1: Dates for Targeted Water Management Sub-zones to come into effect* - para [5-205]

[93] A revision of the Table 13.1 dates for various targeted Water Management Sub-zones to come into effect is required. The Council states:

> As the matters have been appealed to the High Court and the timeframe for a hearing is unknown it is proposed to commence the staging in dates from July 2014.

[94] Horticulture NZ asks:

> What is the rationale for the dates? Those WMZ's added through the Decision should be later to give time for adjustments. .... Date changes are proposed below.
>
> Waikawa – 1 July 2016. (Council – 1 July 2014)
>
> Other south-west catchments (Papaitonga) – 1 July 2016 (Council – 1 July 2014).
>
> Lake Horowhenua – 1 July 2017 (Council – 1 July 2015).

The Council states that this timeframe was followed to be consistent with the DV-POP and that the years proposed by Horticulture NZ lengthen the *rolling in* period for the rules.

[95] We concur with the dates proposed by the Council as it is important that the rules come into effect as soon as possible in order to achieve the objectives and policies of the RPS and the Regional Plan.

*Reference to OVERSEER*

[96] The Council states that Fonterra considers that the One Plan regime should be implemented using OVERSEER version 5.4 and that this should be clear in the provisions. Fonterra states that OVERSEER version 5.4 was used to predict current farm N losses to assess the relative achievability of N reductions from farm to farm. Clause 31 of Schedule 1 to the Act also provides that documents incorporated by reference in plans can only be updated through a further variation or plan change. Fonterra seeks that references to OVERSEER in the One Plan be clarified to refer to 'OVERSEER version 5.4'.

[97] The Council considers the comments from Fonterra are beyond the scope of the matters the Court has referred for redrafting.

[98] Disappointingly, this issue was not identified at the hearing, particularly given that there was some focus on whether OVERSEER 6 would deal with issues Horticulture NZ raised. The regimes proposed by Fonterra, Federated Farmers and Ravensdown relied on OVERSEER as the basis of decision-making.

[99] Clause 30 of Schedule 1 refers to incorporation by reference of written material of the following kinds:

(a) standards, requirements, or recommended practices of international or national organisations;

(b) standards, requirements, or recommended practices prescribed in any country or jurisdiction;

(c) any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.

That material can be incorporated, in whole or in part, and with specified modifications, additions, or variations. A plan change or variation is required to amend the material incorporated by reference, such as to introduce a new version (Clause 31).

[100] However, OVERSEER is a computer model, and a tool or technique, to measure potential N leaching and achievement of the cumulative nitrogen totals in Table 13.2 (accepting the limitations pointed out at the hearing). As such, it may not be the type of written material referred to in Clause 30, and although arguably it may be a recommended practice it does not appear to be prescribed in NZ (for example there is no National Environmental Standard or mention in the National Policy Statement for Freshwater Management 2011, prescribing it.) There is also the question of ongoing changes that may be made to the computer model software to update information on inputs and outputs and problems that might be identified with its running. It may in fact be difficult to find, and to run version 5.4, it being older software which may not be supported.

[101] We therefore accept that it is open to the Council to have a generic reference to OVERSEER rather than referring to a specific version, in order to provide the necessary flexibility in the approach to measuring potential N leaching.

[102] As to the argument that the Council's regime was based on an earlier version of OVERSEER and that this in some way means the policy and rule approach is not robust, we do not accept that.

*The Rules*

*Table 13.2 introductory text*

[103] As identified by the Minister of Conservation and Fish and Game the drafting error should be rectified and the phrase 'intensive farming land use activities' used, for consistency with other parts of the Plan including the rules and the introductory text of Table 13.1.

*Rule 13-1*

[104] The Council stated that Fonterra and Horticulture NZ disagreed with the following threshold for existing intensive farming land use activities:

> Where the existing intensive farming land use is located partly on land within one or more of the Water Management Sub-zones listed in Table 13.1 and partly on other land, this rule only applies if at least 20% of the intensive land use is located on land within the listed Water Management Sub-zones.

The Council said that this threshold was inserted from the evidence of Fish and Game on the basis of our conclusion Decision Part 5, point T at page [5-78] (which refers to RPS and Plan policy provisions) and that Fonterra commented that the Court did not expressly determine to include the phrase. Fonterra also commented that Mr Gerard Willis, planning witness for Fonterra, requested in his evidence that the rule state that once the 20% threshold is breached for existing dairy farming, then just that part of the farm (being >20% of the farm) that falls within the targeted sub-catchment would be regulated by Rule 13-1. Horticulture NZ questioned the rationale for 20% and sought 60%.

[105] We find the 20% threshold would better achieve the objective and policies of the One Plan and that the case is not made out for any change to the percentage threshold. At the hearing Fonterra had put forward a proposed addition, along with a splitting of the rule to read:

> Where the existing intensive farming land use is located partly on land within one or more of the Water Management Sub-zones listed in Table 13.1 and partly on other land, this rule only applies:
>
> (a) if at least 20% of the existing intensive farming land use is located on land within the listed Water Management Sub-zones; and
>
> (b) to the portion of the existing intensive farming land use that is located within the Water Management Sub-zone listed in Table 13-1.

We find this a suitable and clearer approach that should be applied to all existing intensive farming land uses.

*Rules 13-1 Existing intensive farming land use activities* and *13-1B New intensive farming land use activities*

[106] Horticulture NZ seeks separate rules to cover cropping and commercial vegetable production on the basis that it is easier to conduct discrete plan changes involving fewer parties when good management practice etc is added to the rule. The Council correctly considers the comments from Horticulture NZ are beyond the matters the Court has referred for drafting.

*Rule 13-1 Existing intensive farming land use activities*

[107] Conditions/Standards/Terms

(ii) The activity must be undertaken in accordance with the *nutrient management plan* prepared under (a).

Fonterra states:

> Although this wording translates the Court's Decision, it raises practical issues in that farming practices can change throughout the year and hence the NMP may not be able to be strictly complied with to the letter. The rule should allow some flexibility to adapt the NMP throughout the year provided it does not affect the environmental outcome being sought. Fonterra suggests a provision which indicates that the farm must generally comply with the NMP, subject to permitting variations in farming practices which do not affect the ability to achieve the farm's cumulative nitrogen leaching maximum.

The Council considers this beyond the scope of the matters the Court has referred for redrafting. We do not find such a provision necessary, given the reality of the enforcement of any minor variations in farming practices which do not affect the ability to achieve the farm's annual cumulative nitrogen leaching maximum.

[108] Ravensdown mentions that Rules 13-1, 13-1A, 13-1B and 13-1C all mention a *nutrient management plan* (NMP) (defined in the glossary) – and suggests that the Council is seemingly asking for an NMP to contain more than the definition allows. The Council, as it recognises, will be required to comply with the Plan definition.

*Rules 13-1A and 13-1C*

[109] The Council stated that comments made by Horticulture NZ seem reasonable but considered that, since the Court had directed that provisions as suggested by the Minister of Conservation and Fish and Game be adopted, no change has been made.

[110] In principle we concur with the proposal from Horticulture NZ for existing and new intensive farming land uses. On reflection we see that for *restricted discretionary* activities for existing and new intensive farming land uses (which, by definition, cannot comply with the cumulative nitrogen leaching maximums specified as the threshold for *controlled* activities), one of the matters discretion is restricted to should be:

> *the extent of non-compliance with the cumulative nitrogen leaching maximum specified in Table 13.2.*

That replaces ... *compliance with the cumulative nitrogen leaching maximum specified in Table 13.2.* That change should be made to Rule 13-1A (*existing intensive farming land use activities not complying with Rule 13-1*) and to Rule 13.1C (*new intensive farming land use activities not complying with Rule 13.1B).* We note that our agreement in principle to this change may require some consequential reconsideration of the wording of these provisions in the light of our Minute to the parties on the threshold for *controlled* activities for new intensive farming land uses.

*All references to 'soil conditioner'*

[111] Fish and Game point out that the term *soil conditioner* has been deleted from the glossary, but remains in other places. It suggests that it should be deleted from those places identified in the version of Chapter 13 attached to the Fish and Game memorandum. We concur. It also points out that there may be other references in the Plan that need to be removed. That may be so, and the Council has powers under Clause 16 of Schedule 1 to make such amendments, if these prove necessary.

*All references to 'nitrogen leaching maximums'*

[112] This term is used in several places in the policies and rules. The term *cumulative nitrogen leaching maximum* is defined in the glossary and has a specific meaning. It should be used consistently and be shown as a defined term (by adding an asterisk and showing the words in italics) in all places it is used, as provided in the version of Chapter 13 attached to the Minister of Conservation and Fish and Game memoranda.

*Other Comment*

[113] As we said in the introduction, the Council also provided a table with the comments made in consultation on the Council's redrafted provisions along with the Council's responses to them. Some areas of disagreement are not addressed specifically in the Council's report. Parties have not raised them directly with us, but we have considered them under the appropriate heading in case anything has been missed.

*Whole of Chapter 13*

[114] Fish and Game point out that the version provided to the Court and parties is not complete and that it is not possible to tell if any consequential amendments and cross-references have been made. Fish and Game requested a full copy of the plan showing all necessary and consequential amendments made. As noted, the Council is able to make such amendments under Clause 16 of Schedule 1 if that should prove necessary.

*Conclusion*

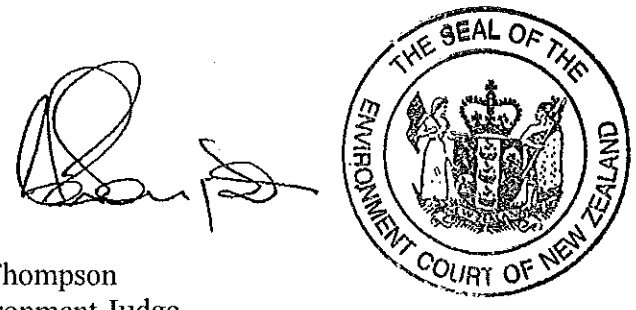
[115] The Court approves the tracked changes version of the One Plan provided by the Council - with the exception of the provisions identified in this Decision as requiring amendment, or requiring reconsideration in response to our Minute.

*Costs*

[116] As indicated in the earlier Decision, costs are reserved.

Dated at Wellington this 24th day of December 2012

For the Court




C J Thompson
Environment Judge

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

**CIV 2012-485-2004**
**CIV 2012-454-654**
**CIV 2013-485-165**
**CIV 2013-454-50**
**CIV 2013-454-253**
**CIV 2013-454-368**
**[2013] NZHC 2492**

| | |
|---|---|
| UNDER | the Resource Management Act 1991, s 299 |
| BETWEEN | HORTICULTURE NEW ZEALAND |
| | FEDERATED FARMERS OF NEW ZEALAND INC<br>Appellants |
| AND | MANAWATU-WANGANUI REGIONAL COUNCIL<br>Respondent |
| AND | WELLINGTON FISH & GAME COUNCIL |
| | ANDREW DAY<br>Interested Parties |

| | |
|---|---|
| Hearing: | 29-31 July, 1 August 2013 |
| Counsel: | H A Atkins for Horticulture New Zealand<br>P R Gardner for Federated Farmers of New Zealand<br>J W Maassen with N Jessen for Manawatu-Wanganui Regional Council<br>R J Somerville QC with J A Burns and L S Fraser for Wellington Fish & Game Council<br>A Day in person |
| Judgment: | 24 September 2013 |

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**JUDGMENT OF THE HON JUSTICE KÓS**

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[1] Nitrogen forms the greatest part of the atmosphere we live within. It is an essential element in the growth of plants and in the formation of proteins in plants and animals. That is the reason why nitrogen-based fertilizers are applied to aid the growth of crops, vegetables and grasses.[1] Animal feed and excreta also contain nitrogen. But plants and animals do not capture all available fixed nitrogen. Large amounts can run into the water system. There it can cause eutrophication (the overloading of waterways with nutrients, causing growth of algae) and hypoxia (depletion of oxygen, affecting fish and animal life adversely). The problems associated with nitrogen leaching greatly exceed those of other macro-nutrients.[2]

[2] These appeals concern the legitimacy of a combined regional policy statement and regional plan that sets out in part to tackle these problems.

[3] It is said by the appellants that the reforms go too far. One of the appellants describes the thrust of the new scheme as "too aspirational and distant from the reality of the Manawatu-Wanganui region – a region whose economy is based on its rural-based activities, most particularly farming". The appellants prefer the more limited and "more practical" version of the scheme recommended by an independent hearings panel in 2010. But that more limited approach was set aside by the Environment Court in 2012. The appellants identify what they say are a number of errors of law in that Court's decision.

[4] The respondent Council and the other parties disagree. They say that the Court did not err in law in reinstating the original scope of the scheme first notified by the Council in 2007. They say that in reinstating the scheme in that form, proper effect is given to s 5 of the Act: promotion of the sustainable management of natural and physical resources, while safeguarding the life supporting capacity of air, water, soil and ecosystems.

[5] A summary of questions posed in these appeals, and the answers given, appears at [184]. In short, save in one limited respect, the appeals are dismissed.

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1 Some plants (eg legumes such as clover) can capture nitrogen directly from the atmosphere.

2 Nitrogen, phosphorous and potassium are "macro-nutrients", vital in large quantities for plant propagation.

**Background**

[6] The Manawatu-Wanganui region is a large one. It runs from the Horowhenua area on the south west coast of the North Island up to Waitomo in the centre of the island, and across the Ruahine Ranges to the Tararua area on the east coast of the island. It includes a number of nationally important waterways. The Rangitikei and Manawatu rivers, its largest, for instance. Under the Resource Management Act 1991 (the Act), land, water and air quality are the regulatory bailiwick of the Manawatu-Wanganui Regional Council.

[7] The problems described earlier have been considered by the Council since at least 1997. In 2004 the Parliamentary Commissioner for the Environment issued a report.[3] The report is said to have greatly influenced the Council's thinking. It noted that farming in New Zealand was becoming more intensive. That is, it involved increasing use of inputs (fertiliser, energy, water, knowledge and capital). And it now produced more food from the same area of land. The report undertook a detailed examination of the issue of nitrogen in fresh water resources. It noted a substantial increase in synthetic fertiliser usage across most farming sectors in recent years. Use of nitrogen fertiliser was said to have soared. The report considered that intensive farming needed to be put on a more sustainable footing. Doing so would provide benefits to New Zealand both economically and environmentally. The report noted:[4]

> In the short term, New Zealand needs to move rapidly to a situation where all farmers are using nutrient management plans and tools which balance nutrient inputs with plant uptake and minimise nutrient outputs which cause environmental damage. A suite of tools, management practices and policy instruments are available ... Given the declining trends in the quality of the environment, particularly fresh water, it would appear that voluntary approaches used to date are not sufficient. Regulation will probably be required. The exact type of approach would best be developed with the characteristics of individual catchments in mind.

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3 *Growing for Good: Intensive Farming, Sustainability and New Zealand's Environment* (Parliamentary Commissioner for the Environment, October 2004).

4 At [7.4.1].

[8] On 31 May 2007 the Council notified the Proposed One-Plan (the POP). It is a combined regional policy statement and regional plan.[5] It is a "second generation plan", replacing six earlier plans that had been operative since the 1990s. The most immediately relevant aspects of the Notified Version were summed up by the Environment Court in this way:

> [5-12] The Notified Version of POP (NV POP) brought within a regulatory regime the four intensive land uses of dairying, intensive (i.e. involving the use of irrigation) sheep and beef farming, cropping, and commercial vegetable growing, both existing and new. The regulatory regime was based around Land Use Capability (LUC) classification with limits on nitrogen leaching varying according to the LUC class of the land in question. Further, the N leaching limits became more stringent from year 1 and thereafter at years 5, 10 and 20. It covered existing uses (except extensive sheep and beef farming) in 34 targeted water management sub-zones (WMSZ) within 11 catchments as well as new uses throughout the Region. The philosophy of this version was, and is, strongly supported by the Minister of Conservation and Fish and Game.

[9] After notification the process set out in Sch 1 of the Act was followed by the Council.

[10] A hearings panel was convened to consider submissions. It comprised elected councillors and independent commissioners. It recommended a number of significant changes to the Notified Version. Most significant for present purposes was the exemption of intensive sheep and beef farming, cropping and commercial vegetable growing from nitrogen leaching regulation. Only new dairy farming (and existing dairying in targeted water management subzones) would be regulated in this way. The number of these subzones was reduced from 34 to 24. And the Land Use Capability (LUC) control system was largely abandoned, in favour of "reasonably practicable farming practices".

[11] The Council adopted these recommendations and notified the Decision Version of the POP in August 2010.[6]

[12] Appeals were filed in the Environment Court by 21 parties. They included landowners, farmers, foresters, electricity generators, the Minister of Conservation

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5 Resource Management Act 1991, s 80(2). That version of the POP is referred to in this judgment as the "Notified Version".

6 This version of the POP is referred to here as the "Decision Version".

and regulatory agencies. Those that concern us directly were Horticulture New Zealand, Federated Farmers of New Zealand Inc, the Wellington Fish & Game Council and Mr Andrew Day, a farmer. In addition a number of parties filed notices of intention to appear.

[13] Prior to the Environment Court hearings, extensive negotiation, mediation initiatives and expert witness conferencing occurred. That resulted in many matters raised in the appeals being at least conditionally resolved.[7]

[14] The Environment Court substantially restored the management regime in the initial Notified Version of the POP. Cropping and commercial vegetable growing are included again in the regulatory regime. So is existing dairying. The LUC classification method is restored. Limits based on a calculation of cumulative nitrogen leaching values, assessed using that method, are set on a "step down" basis over 20 years.

**Parties**

*Horticulture New Zealand*

[15] Horticulture NZ is the "industry good" body for the horticultural sector. It was established in 2005. It combines the former New Zealand Vegetable and Potato Growers, New Zealand Fruit Growers and New Zealand Berry Fruit Growers Federations. It represents 5,600 growers, producing over $6 billion in revenue from domestic and export consumption. It was an original submitter on the POP before the hearings panel. And it was an appellant before the Environment Court.

[16] Horticulture NZ advances 11 questions, which it says are ones of law. As Ms Atkins for Horticulture NZ put it, the essence of the appeals by her client are that the Court was wrong in law to include commercial vegetable growing within the same regulatory framework as all other land uses defined by the POP as "intensive". The 11 questions are those numbered 1-11 below. Of them, Ms Atkins places most weight on Questions 5, 9 and 10. The 11th question was abandoned at the hearing.

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7 That expression is used by Horticulture NZ.

*Federated Farmers of New Zealand Inc*

[17] Federated Farmers needs little introduction. It represents over 26,000 farmers in 24 provinces, and across a range of arable, livestock and mixed farming activities. Along with Horticulture NZ it was a submitter on the notified POP, took an active part before the hearings panel, and was an appellant before the Environment Court.

[18] Federated Farmers generally supports the Decision Version of the POP. It is opposed to most of the changes described at [14] above, made by the Court. Originally it advanced 18 questions for this Court's consideration. But time, clearer thinking and palliative aspects of the implementation plan proposals since issued by the Council have whittled that number down to eleven. A number were abandoned at the hearing. Questions 1, 8 and 9 posed by Horticulture NZ were also posed by Federated Farmers. Albeit, in slightly different terms. However, Mr Gardner for Federated Farmers was content to adopt the form posed by Horticulture NZ.

[19] So that is 19 questions in all. Eleven from Horticulture NZ, three of which overlap with Federated Farmers, and then another eight from that appellant alone.

*The Council*

[20] The Council, before me, strongly supported the decision of the Environment Court. Thus to the extent that the Court overruled the decision of the hearings panel (which the Council had earlier resolved to adopt) and reinstated the more extensive water quality management provisions of the Notified Version, the Council largely acquiesced. Before the Environment Court, it had presented a modified version of the POP, based in part on the Decision Version but based otherwise on negotiations and Court-assisted mediations.

[21] The appellants were critical of the apparent apostasy of the Council. Ms Atkins acknowledged that this was not formally a question for the High Court. But she expressed concern that this "modified version" had not been through any formal consent order process. That is because some of the agreed positions were conditional rather than unconditional.

[22] This question is not directly before me. It is not suggested that the Council's qualified defence (at best) of the Decision Version raises a question of law for my consideration. Conceivably the conduct of a consent authority in the handling of a subsequent appeal may give rise to rights of review, within or apart from the appeal process itself. In *Waitakere City Council v Estate Homes Ltd*[8] McGrath J, giving the reasons of the Supreme Court, held that "considerable care" was required before the Environment Court should permit an application for a resource consent to be granted on a "materially different" basis from that put forward to the Council originally. Where the Council itself departs from its earlier decision (perhaps as a result of negotiation with an appellant) it is essential that it acts transparently, and gives other parties reasonable notice of its change of position. Natural justice may require that discovery be given of documents relevant to the consent authority's change of position.[9]

[23] In the present case, the Council filed a memorandum in February 2011 noting that Court-assisted mediation should be used intensively to resolve appeals on narrow disputes. As its counsel, Mr Maassen said, the position before the Environment Court was spectrally diverse: Wellington Fish & Game sought restoration of the Notified Version, Horticulture NZ supported the Decision Version (because that would take them outside the regulatory regime) and Federated Farmers either supported the Decision Version or asked that all controls over intensive food production be removed. The Council took the position that it would re-present all the scientific evidence presented in support of the Notified Version. It would call planning evidence that broadly supported the position of the hearings panel, without constraint on the independence of the planner in respect of changes arising in the course of the Environment Court hearing. And it would seek otherwise to assist the Court perform its statutory functions in conducting a de novo hearing into the POP.

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8 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [35].

9 *Canterbury Regional Council v Christchurch City Council* [2000] NZRMA 512 (EnvC) at [34]; *Mead v Queenstown Lakes District Council* EnvC Christchurch C061/09, 25 August 2009 at [14].

*Wellington Fish & Game Council*

[24] The Wellington Fish & Game Council is one of 12 regional councils of the New Zealand Fish & Game Council. The latter is a statutory body established under s 26B of the Conservation Act 1987. It manages, maintains and enhances New Zealand sport fish and game resources. These councils are elected by people who buy hunting and fishing licences. The Manawatu-Wanganui region falls within the Wellington Fish & Game's responsibility. Wellington Fish & Game was a submitter on the POP before the hearings panel. It was an appellant in the Environment Court.

[25] Wellington Fish & Game strongly supported the Notified Version of the POP. Likewise, it supported the reversionary changes made by the Environment Court to the Decision Version. It described the Notified Version as a "forthright and positive approach to resolving the serious threats to water quality and quantity" in the region. It considered the Decision Version:

> ... lacked certainty, did not place any limits on nitrogen discharges from intensive land uses (except for new dairy farming), would not prevent excessive intensification of land uses, would not reduce nitrogen discharges, would not maintain or enhance water quality, would not safeguard the life-supporting capacity of rivers and lakes, would not protect the habitat of trout and salmon, and ultimately would not enable the sustainable management of natural and physical resources as required by s 5.

*Mr Andrew Day*

[26] Mr Andrew Day is a sheep, beef and dairy support farmer from Pahiatua. His family has farmed land there since 1929. He was provincial president of Tararua Federated Farmers from 2006 to 2010, coinciding with notification of the POP. Mr Day supported the Notified Version of the POP. He appealed against the Decision Version of the POP. He considered it was unlikely to result in improved water quality in the region's most degraded catchments. And he did not approve of the grandparenting provisions for nitrogen loss allocation. He called evidence at the Environment Court stage, including planning and valuation evidence.

[27] Mr Day accepts that agricultural land use is largely responsible for the elevated nitrogen levels in the region's waterways. Secondly, he considers that efforts to address that need to be equitable for all landowners in the target

catchments. Thirdly, he is a strong supporter of LUC classification as a nitrogen loss allocation tool.

**Approach on appeal**

[28] The parties are in agreement on the approach this Court must take on appeal from the Environment Court. There is no general merits appeal right from that Court. Appeals under s 299 of the Act are confined to questions of law. The questions posed in this case are qualifying distillations from issues posed in notices of appeal that ranged in many cases well beyond such confines. There are strong policy reasons for constraining appeals on plan changes. As this Court has said:[10]

> Parliament has circumscribed rights of appeal from decisions of the Environment Court for an obvious reason. A Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise. To succeed on appeal an aggrieved party must prove that the Court erred in law – never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

[29] The High Court will only interfere with a decision in the Environment Court if it considers that that Court:

(a) applied a wrong legal test;

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

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.[11]

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10 *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1].

11 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

[30] The principles to consider are summarised in *Nicholls v Papakura District Council*:[12]

(a) The High Court is not to concern itself with the merits of a case under the guise of a question of law.[13]

(b) The appellate Court's task is to decide whether the Court has acted within its powers.[14]

(c) The question of weight to be given to the assessment of relevant considerations is for the Environment Court alone.[15]

(d) Any error of law must materially affect the result of the Environment Court's decision before the appellate Court will grant relief.[16]

(e) To succeed, an appellant must identify a question of law arising out of the Environment Court's determination and then demonstrate that that question of law has been erroneously decided by the Environment Court.[17]

(f) On an appeal under s 299 it is not for the High Court to say whether the Environment Court was right or wrong in its conclusion but whether it used the correct test and all proper matters were taken into account.[18]

[31] Challenges to factual findings by the Environment Court face a "very high hurdle" before they may be considered to raise a true question of law.[19] The finding

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12 *Nicholls v Papakura District Council* [1998] NZRMA 233 (HC) at 235.
13 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 (FCA) at 371.
14 *Hunt v Auckland City Council* [1996] NZRMA 49 (HC) at 54.
15 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437. See also *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [43].
16 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *BP Oil NZ Limited v Waitakere City Council* [1996] NZRMA 67 (HC) at 69.
17 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC) at 159.
18 *West Coast Regional Abattoir Co Ltd v Westland County Council* (1983) 9 NZTPA 289 (HC) at 296.
19 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [19].

must lack evidential underpinning to such an extent that it simply could not reasonably have been reached.[20]

[32] I turn now to the questions of law posed on appeal.

**Question 1: Was the Environment Court correct in determining and interpreting that for the purposes of s 290A of the Act it only needed to consider those aspects of the Decision Version of the POP that had not been changed by the Council during the course of negotiations, mediations and witness conferencing?**

[33] This question was advanced by both Horticulture NZ and Federated Farmers. The version above is that posed by Horticulture NZ. The version posed by Federated Farmers was only immaterially different.

[34] Between delivery of the Decision Version of the POP in August 2010 and the Environment Court hearing, negotiations were held and other attempts made to resolve the dispute. As a result there is a consensus that some parts of the Decision Version should be changed. Sometimes that consensus was conditional.

[35] The Court said:

> So what we are dealing with now is not, in many respects, the pure Decision Version of the POP, and for those issues s 290A is thus of limited or no practical effect. But some elements of the [Decision Version] remain and we shall have regard to it accordingly.

*Submissions*

[36] Ms Atkins submitted that the appellate body (here the Environment Court) must give genuine attention and thought to the original decision.[21]

[37] Here, she says, it had not done so. It had simply adopted the mediated, revised outcomes. But those were not necessarily unconditionally agreed, and the Court was not presented with consent orders. Further, she submits that in directing that the LUC classification system be used as the basis of leaching limits (including

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[20] *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 706.

[21] *Man O'War Station Ltd v Auckland Regional Council* [2011] NZRMA 235 (HC).

for commercial vegetable growing), the Environment Court failed to give reasons for departing from the Decision Version. That submission was also made by Mr Gardner, for Federated Farmers.

[38] Mr Gardner submitted that the approach taken in the passage above represented the Environment Court ignoring the opinion of the tribunal whose decision was the subject of appeal. That is, the hearings panel that produced the Decision Version.[22] The Court was required to have regard to the decision notified in August 2010 and "not any purportedly modified version thereof".

*Evaluation*

[39] Alternative dispute resolution is a valuable part of the Environment Court's armoury to resolve disputes in relation to plans and resource consents. It is provided for especially in s 268 of the Act. Sometimes the outcome of alternative dispute resolution is consensus amongst all parties to the appeal. In that case consent orders may be advanced. In other cases, substantial progress is made, but outright consensus or consent is not possible. This is one such case.

[40] I do not read s 290A as requiring that the decision under appeal be regarded as some sort of arresting anchor point. Rather, the provision was introduced in 2005 to clarify that, in the context of a de novo hearing, the Court must at least consider the preceding decision. It is a counsel of efficiency rather than obedience.[23]

[41] In this case, the Environment Court was under no misapprehension that the revised version of the disputed portions of the POP Decision Version presented to it by the Council was supported by some parties only. As it said:

> While [the discussions and negotiations and mediations] have not resulted in overall agreement, they have produced a further version of the debated portions of the POP which the Council, and some parties, to a greater or less extent, find acceptable.

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22 Citing *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29].

23 *Man O'War Station Ltd v Auckland Regional Council* above n 21, at [63]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70]–[72].

[42] The hearings panel decision is extensively referenced in the Environment Court decision. The core respects in which the Environment Court overturned the Decision Version – the reinclusion of commercial vegetable growing and regulation of existing dairying – are the subject of exhaustive attention in the Environment Court decision. There can be no suggestion that the Court failed to have regard to what the hearings panel had recommended on those matters. Indirectly, that consideration arose because the Court was considering changes to the Decision Version mooted by the Council and some parties. The methodology employed by the Environment Court in this case can therefore be distinguished from that of a differently constituted Court which had erred in making only passing reference (as a matter of record) to the earlier Council decision in *Man O'War Station Ltd v Auckland Regional Council*.[24]

*Conclusion*

[43] The answer to Question 1 is that the Court did not err in law in its traversal of the Decision Version.

**Question 2: Did the Environment Court fail to consider and determine whether it had jurisdiction to include the deposited sediment limit in Schedule D of the POP?**

[44] The Notified and Decision Versions of POP included a Sch D. In the Notified Version Sch D was headed "Values that apply to Waterbodies in the Manawatu-Wanganui Region". In the Decision Version it was renamed "Surface Water Quality Targets". Some of the material in Sch D shifted to different parts of the POP. This appeal question concerns the inclusion of a deposited sediment standard in Sch D.

[45] Neither the notified nor the Decision Version included a deposited sediment standard. The Notified Version of the POP originally contained a turbidity standard in Sch D, Table D.16. The Wellington Fish & Game Council supported that standard being included. However, the hearings panel in the Decision Version recommended its deletion. The deposited sediment standard was included in the Council version

[24] *Man O'War Station Ltd v Auckland Regional Council* above n 21, at [57] and [67].

offered to the Court. It was included in the version approved by the Environment Court, on the basis that it was requested by Wellington Fish & Game Council.

*Submissions*

[46] Ms Atkins submitted that there was no scope to include such a standard into the POP because the submission of Wellington Fish & Game on the Notified Version of the POP did not seek the inclusion of such a standard. Rather it sought that standard only later, in its appeal. Horticulture NZ lodged a s 274 notice in relation to this appeal point contesting scope. It pursued this issue in the Environment Court. But, she says, the Environment Court failed to make a ruling on scope. Ms Atkins submits that I should remit this point to the Environment Court. She accepts that Court might then exercise its power in s 293 to direct the Council to include the standard.

*Evaluation*

[47] The concern raised by Horticulture NZ is a question of jurisdiction, or scope. In *Mawhinney v Auckland Council* Wylie J held:[25]

> ... the [Environment] Court's jurisdiction on an appeal under clause 14 of the Act is not unlimited ... the Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions. When it is dealing with an appeal in relation to a plan change, it must consider whether any proposed amendment goes beyond what is reasonably and fairly raised in the original submission and the notice of appeal. After hearing the appeal, the Court may, instead of allowing or disallowing the appeal, exercise its discretion under s 293 to direct the local authority to prepare changes to the plan to address matters identified by the Court. It cannot go beyond that.

[48] So far as relevant, cl 14 of Sch 1 of the Act provides 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

[25] *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

(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.

[49] This Court has said that the question of scope involves a three step test:[26]

(a) Did the appellant make a submission?

(b) Does the appeal relate to one of the four matters referred to clause 14(1)?

(c) If the answer to (b) is "Yes", did the appellant refer to that provision or matter in their submission?

[50] Narrow technical interpretations should be avoided. The words "provision" and "matter" should be given a liberal interpretation.[27] As Ronald Young J put it in *Option 5 Inc v Marlborough District Council*:[28]

> As long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal.

[51] The essential issue is one of natural justice. Is the matter contended for by the appellant fairly within the scope of that party's original submission (bearing in mind the broad approach that is required to be taken in accordance with the *Option 5* decision)? What prejudice might be caused?

[52] In this case the original Wellington Fish & Game submission supported the Notified Version. It did not say anything in particular about Table D.16. Wellington

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26 *RFBPS v Southland District Council* [1997] NZRMA 408 (HC).
27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at [15].
28 At [15].

Fish & Game called evidence. The thrust of that evidence appears to be that there were difficulties with a turbidity standard as a measure of sediment loads. And that a deposited sediment standard was preferable. The hearings panel then removed the turbidity standard altogether from Table D.16. It suggested no replacement. The reasons for that are not readily apparent.

[53] In its appeal Wellington Fish & Game sought the inclusion of a quantifiable sediment standard to "ensure that the ... Council is in a position to determine whether voluntary mechanisms have worked to protect the life supporting capacity of the regions' rivers and streams impacted by sedimentation". It is important that the proposed standard was to monitor the state of the environment, and assist in the judging of the effectiveness of plan provisions in preventing excess sedimentation. It is not a control. It does not affect, at least directly, the status of activities. Nor does it control what persons may do.

[54] I accept Mr Somerville QC's submission that the monitoring of sediment in waterways is a central aspect of the water quality chapter in the regional plan part of the POP. Regional councils have a duty to monitor the state of the environment in a region to the extent appropriate to enable them to effectively carry out their functions: s 35(2)(a). Indeed that seems relatively uncontroversial from the perspective of Horticulture NZ. It accepts that it is likely that the Environment Court would direct such a standard under s 293.

[55] The Environment Court noted that the evidence from the Wellington Fish & Game's expert, Professor Death, was essentially undisputed in terms of the logic of including such a sediment standard. Horticulture NZ had the opportunity to call contrary evidence, but did not do so. The standard would apply only to state of environment monitoring. Compliance with it would not be a threshold condition for activity status. The Court accepted that the introduction of such a standard was "an appropriate step".

[56] Because the sediment standard is:

(a) responsive to the core responsibility of the Council under s 35(2);

(b) responsive to the deletion of the turbidity standard by the hearings panel (which standard the Wellington Fish & Game had supported in its submission); and

(c) not evidently causative of prejudice to any other party:

I conclude that the relief sought by Wellington Fish & Game from the Environment Court was not beyond the scope of its original submission for the purposes of clause 14(2).

*Conclusion*

[57] The answer to Question 2 is that the Court possessed jurisdiction to include the deposited sediment standard in Schedule D.

**Question 3: Did the Environment Court fail to take into account relevant considerations and did it take into account irrelevant considerations when:**

**(a) it placed significant reliance on the joint witness conferencing statement in determining that there was agreement that all intensive land uses ought to be included in a leachate management regime; and**

**(b) then only included some but not all intensive land uses?**

[58] A joint witness statement produced on 23 March 2012 by a number of experts (including Dr L E Fung, a witness for Horticulture NZ) included the observation:

> In some catchments, other land uses may present significant opportunities to make improvements to water quality. For example, commercial vegetable production, cropping.

That was the only reference in the joint witness statement in relation to commercial vegetable growing.

[59] The Court went through the joint statement. Then it said:

> Little more need be said. The case is plainly made out for including the intensive land uses of dairying, cropping, horticulture and intensive sheep and beef farming within a leachate management regime. Issues of equity

> also arise if only dairy farming is subject to controls, while other land use activities which also leach nitrogen are not, a point repeatedly made by Mr Day. All intensive land uses need to be brought into the mix in order for the regulatory regime to be efficient and effective.

*Submissions*

[60] Ms Atkins' submissions on Question 3 were in some ways a precursor to a more substantial point made under Question 7.

[61] Ms Atkins accepted that the joint witness statement was part of the evidence before the Court. The Court was entitled to rely on it. But apart from the exception noted in [58], it did not refer to commercial vegetable growing. Ms Atkins did not contest that commercial vegetable growing does result in nutrient leaching. The debate is about the extent of that leaching, both by activity and its relative proportion of the regional land area. She submitted that there was nothing in the joint witness statement supporting the conclusion that a case was "plainly made out for including commercial vegetable growing". Ms Atkins' complaint was that the Court did not ask itself a question as to what contribution commercial vegetable growing was making to nutrient leaching. Nor whether it was appropriate to include it in a scheme focused on pastoral land use.

*Evaluation*

[62] The difficulty with Ms Atkins' submission was that the Court was plainly entitled to place reliance on the joint witness and conference statement, as she accepted. The only reason why some intensive land uses (other than commercial vegetable growing) were omitted was because they were not within scope of the appeals being dealt with by the Court. But that cannot mean it was wrong for the Court to have included commercial vegetable growing in the provisions of the POP concerning land use activities affecting surface water quality.

[63] In the original Notified Version of the plan, four intensive land use activities were identified: dairy farming, cropping, market gardening and intensive sheep and beef farming. In the Decision Version that emerged from the hearings panel, these activities were confined to dairy farming. The Environment Court allowed appeals challenging that reduction. In essence the Environment Court's decision restores the

original scope in the Notified Version of the POP. There is really no substantial challenge to its entitlement to undertake that restoration.

[64] In the end Ms Atkins accepted that Question 3 had to be answered in the negative.

*Conclusion*

[65] The answer to Question 3 is "No".

**Question 4: Did the Environment Court correctly apply s 32 of the Act when it concluded that it was both practical and cost effective to require all existing commercial vegetable growing activities in the specified water management zones and all new such activities everywhere else in the region to require resource consent?**

[66] The Court considered the practicality and costs of obtaining consents and permits for horticulture. It noted a practice of crop rotation, in particular in relation to potato cropping. It also noted that crops may be grown on land not owned or leased, and that different lessees may lease land in successive years. It noted that the lease arrangements are "frequently quite informal, arranged at short notice and settled at a handshake". The Court noted the argument that such casual and short term arrangements could not reasonably be accommodated within a resource consent regime. But the Court said:

> [5.81] We have come to agree with Ms Helen Marr, the planner called by Fish and Game, that this concern has become overstated. If it was only to be the individual growers who could or would be required to seek the consents, we could see the basis for that argument. But, as was discussed at the hearing, it seems to understand that it would make far more sense for a landowner, who knew or hoped that some of his or her holding might be attractive for such a purpose, to make a *whole of farm* application for a resource consent, with leachate and other factors being assessed at the high but plausible end of the range. The application would be presented on the basis that only a finite portion of the farm would be so used at any one time, and thus be leaching at up to the defined rate, in any one year. Depending on the exact nature of the consent required, its term could be indefinite or for a finite but still ample period of years, and the cost of the consent could be amortised over that time.
>
> [5-82] We note too that, at present, (and there was no suggestion of changing them) to fall within the definitions of *cropping* and *commercial vegetable growing* in POP the areas occupied by those activities at any one

> time would have to exceed 40 ha and 4 ha respectively. That, we imagine, may move many such casual and short-term uses outside the requirements for resource consents. If a consent was required, we assume it would be treated the same as other land uses.

*Submissions*

[67] Ms Atkins explained that the principal concern of Horticulture NZ was the manner in which commercial vegetable growing was included in the nutrient management framework. That activity will require a resource consent, either as a controlled or restricted discretionary activity depending on the ability of the activity to meet relevant standards.

[68] It is accepted by Horticulture NZ that commercial vegetable growing does result in nitrogen leaching from that activity. Expert evidence on this ranged, but taking a crop of potatoes for instance, it had leach rates of between 44 and 92 kgN/ha/year, in contrast to dairying which had figures in the high 20s. Other evidence before the hearings panel modelled potatoes at 48, carrots at 18-19 and brussels sprouts at 30 kgN/ha/year.[29] While the figure for potatoes is high, what is important to remember is that relatively small areas of land are used compared to dairying, and use is intermittent because of crop rotation. Potatoes tend to be cropped in a particular location for two to three years, and then the land is allowed to lie fallow (grassed) for the next five or so.

[69] It is accepted by Horticulture NZ that commercial vegetable growing is an intensive land use. The Environment Court considered the risks associated with not acting were unacceptable. To be consistent, it was necessary to minimise the risk of serious damage. Horticulture NZ complains that the Court failed to consider an alternative regime proposed by Horticulture NZ and other parties.[30] The Court was however faced with jurisdictional limits in including all intensive land uses. That is because not all were the subject of appeals before the Court.

[70] Ms Atkins accepted that the Court clearly considered the costs of obtaining consents and permits for horticulture. But it was an area where there was conflicting

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[29] This evidence came from a notional study prepared in 2009 to show how the POP would work in practice. The author was a consultancy, Land Vision Ltd.

[30] See Question 7 below.

evidence before the Court, from Ms Marr (for Wellington Fish & Game) and from Mr Stuart Ford (for Horticulture NZ). Ms Atkins accepted that the Court was entitled to prefer the evidence of one expert over another. But she submits that Mr Ford's evidence (he being an expert agricultural economist) should have been preferred to that of Ms Marr (who is a consultant planner). It was submitted that Ms Marr had made substantial concessions in relation to the impact of a consenting regime for horticulture. Ms Atkins submitted that the Court came to a view on the evidence that it could not reasonably have come to in finding that the difficulties associated with the consenting regime for commercial vegetable growing were overstated.

*Evaluation*

[71] As has already been noted, the standard for an appellant to meet in challenging a conclusion based on a weighing of the evidence by the Environment Court is a very high one. In this case the position of the appellant is not assisted by the fact that the Environment Court was unable to produce a transcript of the proceedings before it. That is regrettable, but it cannot alter the onus lying on the appellants. Faced with this obstacle, they had two choices. First, an agreed account as to the evidence on this point. Secondly, affidavit evidence from counsel at the original hearing. Neither was done. However, as Ms Atkins accepted in reply, little really turned on this difficulty at the end of the day. I think she was right to say that.

[72] Ultimately, Ms Atkins was constrained to accept that the decision reached by the Court was one open to it on the evidence, and could not be disturbed on appeal by this Court. She accepted it was not a position she could take further.

*Conclusion*

[73] The answer to Question 4 is "Yes".

**Question 5: Did the Environment Court fail to take into account relevant considerations when it determined that the LUC classification approach was applicable to commercial vegetable growing?**

[74] The POP throughout has referenced particular land by land use capability classes. These are sometimes called LUCs. There are eight such classes. Class 1 is the most versatile, productive land, and the highest permissible nitrogen leaching maxima apply to it. Class 8 on the other hand is less productive land, hilly, prone to erosion and generally used for forestry and catchment protection. Classes 1 to 4 are suitable for arable and pastoral use. Classes 5 to 7 are most useful for pastoral grazing and forestry production. The nutrient management plan to be prepared for land use for intensive farming (including commercial vegetable growing) must, if the activity is to be controlled and not restricted discretionary, demonstrate that the nitrogen leaching loss from the activity will not exceed the cumulative nitrogen leaching maxima specified in Table 13.2. It is useful to set out that table in its present form:

Table 13.2 *Cumulative nitrogen leaching maximum by Land Use Capability Class*

| Period (from the year that the rule has legal effect) | *LUC* I | *LUC* II | *LUC* III | *LUC* IV | *LUC* V | *LUC* VI | *LUC* VII | *LUC* VIII |
|---|---|---|---|---|---|---|---|---|
| Year 1 | 30 | 27 | 24 | 18 | 16 | 15 | 8 | 2 |
| Year 5 | 27 | 25 | 21 | 16 | 13 | 10 | 6 | 2 |
| Year 10 | 26 | 22 | 19 | 14 | 13 | 10 | 6 | 2 |
| Year 20 | 25 | 21 | 18 | 13 | 12 | 10 | 6 | 2 |

The figures in the table refer to kgN/ha/year.

[75] In preparing the nutrient management plan, farm land affected may be divided into different classes. The systems now available are sufficiently sophisticated to do that.

[76] Horticulture NZ had submitted that an LUC-based regime was inappropriate for commercial vegetable growing, because it was a pasture-based classification system. The Court did not accept that proposition. It noted that it was an intended consequence of the proposed regime to encourage more intensive land use on higher

quality soils where fewer inputs such as nitrogen based fertiliser were required. Such soils would provide more options for production and more options for mitigating nitrogen loss. The Court found that the evidence strongly supported the use of the LUC approach as a plan tool for allocating nitrogen limits.

*Submissions*

[77] Ms Atkins submitted that the Court had clear undisputed evidence that the LUC classification regime was developed to apply to a legume-based pastoral farming system. She submitted there was no evidence before the Court that supported the application of the LUC approach to commercial vegetable growing. A Council witness, Mr Lachlan Grant, had confirmed that the LUC regime was a legume-based pastoral system. She submits that the Court's conclusion that the evidence supported the use of an LUC approach as a tool for allocating nutrient limits for a wider range of land uses was not based on any supporting evidence before the Court.

*Evaluation*

[78] I do not find Horticulture NZ's complaint (under the heading of Question 5) to be sustainable. The question as posed was whether the Environment Court failed to take into account relevant considerations. What were those relevant considerations? As Ms Atkins put it, it was the evidence that the LUC classification system was developed to apply to legume based pastoral farming. I cannot accept that criticism. In this case the Environment Court clearly had that submission in mind. It expressly referred to it at [5.19] of its decision when it said:

> [Horticulture NZ] opposes the position taken by the Minister and Fish and Game; in particular it regards an LUC based regime as inappropriate for vegetable growing because it regards LUC as a pasture based classification system. Its view is that if vegetable growing is brought within a rules framework, it should be as a permitted activity.

[79] The Court also expressly acknowledged the reservations of the horticulture industry over the workability of past and current versions of the OVERSEER tool for horticulture. It recorded Ms Atkins' submission that an alternative means of calculating leachate may be needed to be found for use in that industry. The Court

acknowledged that in its December 2012 decision. It noted that "possibly an interim tool for assessing N loss for horticulture may need to be considered."

[80] It is clear that the Court had before it the evidence of Horticulture NZ's experts in making its decision. In particular, the evidence of Dr Fung. That decision restored the scope of r 13.1.[31] To adopt a common scheme for different farming activities cannot be said to be irrational. That has not been suggested by Horticulture NZ in any case. I agree with Mr Maassen's submission that the Court clearly addressed the reasons why it adopted LUC classification as part of the rules regime for water quality.

[81] As Mr Maassen put it, the first question is, "how do you set limits?" The choice is between setting limits on the basis of the resources (and their qualities) or on the basis of the activities that occur on and within those resources. To set limits on the basis of resources and their qualities (which is what the Environment Court did) is logical. Resource qualities do not readily change, whereas activities do. The fundamental unit to be managed is the resource. The Environment Court had before it evidence that the LUC classification system was a robust one for classifying the productivity of the soil resource. Drs McKay and Douglas explained in their evidence that the LUC system is an adaptation of a United States Department of Agriculture system first published in 1961. It focuses on the capability – or versatility – of the land to support more intensive farming. Commercial vegetable growing and cropping tend to fall within the initial class groups (higher versatility soils). An entire farm may be treated as falling within a single unit, or the farm may be subdivided into different parts, each falling within a distinct LUC class.

[82] The second question to be asked is what amounts may be leached before the activity becomes a discretionary one. In the present case the choice in Rule 13.1 is between the controlled activity which meets (i.e. does not exceed) the cumulative nitrogen leaching maxima set out in Table 13.2 and those that do not (which will become restricted discretionary activities). I note the Council expressly does not accept that it is inevitable that commercial vegetable growing on all soils will exceed

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[31] Changing the activity "market gardening" to "commercial vegetable growing" – a change which it has not been suggested before me to have made any material difference.

those maxima. Whether that activity does or does not will depend to a significant extent on the extent of fertilisation, and whether the total levels of nitrogen available to the vegetable variety exceeds its ability to absorb that element. That is a scientific assessment beyond the scope of this question of law. But as Mr Maassen says, even if Horticulture NZ is correct, and commercial vegetable growing cannot meet those maxima, the result of that regime is that it will be a restricted discretionary activity. There is no non-complying class for intensive farming activities. They remain restricted discretionary whatever the extent of excess of the maxima. As Mr Maassen put it:

> [The Council] does not consider it plausible for [Horticulture NZ] to suggest that commercial vegetable growers would not obtain a consent if they exceed Table 13.2, despite adopting all available measures to operate as nitrogen-efficiently as possible. That is a fanciful proposition. If [the Council] adopted that position in respect of any resource consent application there is a right of appeal to the Environment Court.

[83] No compelling case of an error of law of the kind suggested has been made out under this heading. The concerns expressed by Horticulture NZ and its experts were plainly considered by the Court. There was an evidential underpinning for the conclusion reached by the Court. Its conclusion could not be said to be irrational. What methodology should be adopted for a regulatory regime, including nitrogen leaching limits for specified activities, is a matter of assessment and evaluation. It is a merits decision for the Environment Court as a specialist Court. It is not for this Court to alter it under the guise of an error of law.

*Conclusion*

[84] The answer to Question 5 is "No".

**Question 6: Did the Environment Court fail to take into account relevant considerations in relation to assessment of the social and economic costs of the regime it determined was applicable to commercial vegetable growing?**

[85] I need not spend any time on this question. The same considerations apply to it as applied to Question 4. Ms Atkins dealt with the two questions together. She accepted in the case of both of them the approach taken by the Environment Court was one open to it.

*Conclusion*

[86] The answer to Question 6 is "No".

**Question 7: Did the Environment Court take into account irrelevant considerations and fail to take into account relevant considerations when it determined that the leachate management regime for commercial vegetable growing ought not to be by way of a permitted activity rule?**

[87] Horticulture NZ had proposed a permitted activity framework for commercial vegetable growing in its closing submissions. The Court rejected that proposal. After discussing why a permitted activity framework would not be suitable for dairy farming, it went on:

> [5-200] We find the logic of that line of thought compelling and agree that a controlled activity status would better give effect to the purpose of the Act. We do not accept the *permitted* activity rule put forward by Horticulture NZ in closing for similar reasons. We note that Fish and Game submitted that we have no scope to impose *permitted* activity status in any event, but we do not need to decide the point, given our decision that *permitted* activity status is not justified.

*Submissions*

[88] Ms Atkins submitted that in rejecting a permitted activity rule for commercial vegetable growing, the Court took into account irrelevant considerations. For example, the reasons why a permitted activity regime ought not to apply to other land uses. The Court failed to take into account relevant considerations, such as the reasons set out in the case for Horticulture NZ and the acceptance by the planner for Wellington Fish & Game that a permitted activity rule for commercial vegetable growing could meet the same objective as a controlled activity rule.

[89] Ms Atkins criticised the analysis of the Court in finding a number of reasons why the permitted activity rule would not work in relation to dairy farming, and then concluding that the same logic applied to all intensive farm activity. She submitted that the Environment Court had wrongly treated commercial vegetable growing as the same as all other land uses, even though it accepted that there were significant differences in other parts of its decision. One such was the perceived potential

limitation of the OVERSEER modelling tool to calculate nitrogen leaching for commercial vegetable growing.

*Evaluation*

[90] I do not think it can be said that the Environment Court erred in law in this respect. In [5-199] it examined at length reasons why a permitted activity rule would be inappropriate for dairy and intensive sheep and beef farming. Some 12 reasons were given. A number of those apply also to commercial vegetable growing, as the Court noted at [5-200]. Managing nitrogen leaching effectively would require significantly more interaction between local authority and farmer than a permitted activity would allow. The control of land use to identify water quality outcomes was best achieved by a consent identifying the metes and bounds of farming activity, available from inspection of public records. A resource consent provides greater certainty for a farm than permitted activity status (which can be changed). Another was s 70. It requires that before a rule can be included in a regional plan that allows, as a permitted activity, discharge of a contaminant into water, or onto land in circumstances where it may enter water, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s 70(1)(g), "any significant adverse effects on aquatic life". There was, the Court found, no evidential basis on which it could conclude that that high requirement would be met.

[91] I also accept Mr Maassen's submission that there is an inconsistency in Horticulture NZ's submission. It asserts that there are special complexities associated with commercial vegetable growing, and with preparation of annual nutrient management plans for it. If that is indeed the case, greater interaction with the regional council will be beneficial. I agree, too, that it does point to the need for greater monitoring, able to be undertaken on a costs recovery basis, where monitoring is provided for as a condition of consent. That is not possible with a pure permitted activity rule. That was another point that the Environment Court noted in [5-199] of its decision.

*Conclusion*

[92] The answer to Question 7 is "No".

**Question 8: Did the Environment Court fail to consider the extent to which the POP gave effect to the National Policy Statement on Freshwater Management?**

[93] The POP was originally notified in May 2007. Submissions were received by the end of that year. Hearings took place between July 2008 and April 2010. The hearing panel Decision Version was notified in August 2010. Appeals had to be filed by November 2010, and s 274 notices by the end of January 2011. The National Policy Statement on Fresh Water Management (NPSFM) was gazetted only on 12 May 2011.

[94] The Environment Court noted that s 55 of the Act requires operative and proposed regional policy statements and regional plans to be amended to give effect to a national policy statement. That must be done as soon as practicable, or within the time specified in the national policy statement. The NPSFM provided that regional councils were to implement the policy "as promptly as is reasonable in the circumstances, so it is fully completed by no later than 31 December 2030." It also provided that where it was impracticable to complete implementation of the policy fully at the end of 2014, a council might implement it by a programme of "defined time-limited stages" up to the end of 2030. That programme was required to be formally adopted within 18 months of the gazetting of the NPSFM. At the time of the Environment Court hearing the Council had taken no decisions under those provisions. If it decided full implementation by the end of 2014 was impracticable, it had until 12 November 2012 to adopt time-limited stages of implementation.

[95] The Court then said:

> [5-189] All of which rather begs the question of what effect should be given to, or what account taken of, the NPSFM now – in the course of considering the appeals about the POP with the purpose of it becoming operative. That it must be given some status appears clear from the direct and mandatory command of s 62(3) in respect of regional policy statements:
>
> > A regional policy statement ... must give effect to a national policy statement ...

And the matching provision of s 67(3) in respect of regional plans:

> A regional plan must give effect to –
>
> (a) Any national policy statement

> [5-190] That may mean that unless steps are taken to modify them sooner, when these documents become operative at the end of the appeal process, they will not comply with s 62 and s 67 because so far, in the Schedule 1 process for the POP, no effort has been made to address the NPSFM. This is a matter the Council will need to turn its mind to. While we had evidence about the extent to which different versions of the provisions met the policy directives of the NPSFM we cannot give this any weight. That is not intended as a criticism – the NPSFM (as noted above) only came into force long after the POP was well advanced.

*Submissions*

[96] This point was not advanced, said Ms Atkins, as a "big hit" (let alone a "king hit"). But it was nonetheless important. She submitted that regional policy statements and plans must be amended to give effect to a national policy statement, either as soon as practicable or within the time period specified in the statement.[32] Ms Atkins submitted that all the parties before the Environment Court (apart from Fonterra) had been of the view that the Act required the Court to use the appeal opportunity to consider the NPSFM. The Court's failure to consider whether the POP gave effect to the NPSFM was, she said, an error of law. It was inappropriate for the Court not to determine the matter and just leave it to the Council to attend to.

[97] For Federated Farmers, Mr Gardner advanced the point rather differently. He submitted that the approach taken by the POP (relying on the OVERSEER model, "inextricably linked" with LUC classifications) was incompatible with the NPSFM. The nub of his point as to inconsistency was that the POP encouraged development, through Table 13.2, in LUC classes 1 and 2. The result of that was, potentially, over-allocation. That was inconsistent with the NPSFM. By focusing on potential, rather than actual, productivity of given land, the "maximum amount of the water resource calculated as being available for the disposal of leached nitrogen in the case of any given water body may be less than, or more than, the limit which the Council has yet to set as directed by the NPSFM".

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[32] Resource Management Act 1991, s 55.

*Evaluation*

[98] It is convenient to start with Horticulture NZ's submission. Section 55 requires a local authority to make amendments to plans required to give effect to any provision in the NPSFM that affects a plan.[33] Those amendments must be made either as soon as practicable, or within the time specified within the NPSFM (if applicable), or before the occurrence of any event specified in the statement.[34] That provision is responsive to the NPSFM, as is s 65(3)(g) which provides that a regional council is to consider the desirability of preparing a regional plan when the implementation of a NPSFM arises, or is likely to arise.

[99] It is also important to bear in mind that the Environment Court's jurisdiction is functionally limited. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions.[35] I agree with Mr Maassen's submission that the Environment Court does not sit in an executive plan-making and plan-changing role. That is the local authority's role.

[100] In this case the NPSFM was gazetted only after appeals and s 274 notices had been filed. I consider that the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step".[36]

[101] Policy E1 of the NPSFM anticipates decisions being made by regional councils. Implementation must be undertaken using the process in Sch 1.[37] Notification and consultation is a key part of that process. There is no justification for that to be short-circuited through a hurried implementation exercise in the course

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33 Section 55(2B).
34 Section 55(2D).
35 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
36 *National Policy Statement for Freshwater Management 2011, Implementation Guide* (Ministry for the Environment, Wellington, 2011) at [1.2].
37 Section 55(2C).

of a party-confined, and jurisdictionally confined, appellate process that commenced before the NPSFM was gazetted.

[102] I do not, therefore, find that the Environment Court erred in failing to consider the extent to which the POP gave effect to the NPSFM in the paragraphs complained of. Implementation of the NPSFM will need to be addressed in accordance with its own terms, and under Sch 1, separately. Should the Council fail to give effect to the NPSFM, then the appellants may seek declaratory relief from the Environment Court under Pt 12 of the Act, or seek judicial review in the High Court.

[103] I turn now, and briefly, to Mr Gardner's submission. I think Mr Maassen is right to say its premise is incorrect. As he put it:

> OVERSEER is not inextricably linked with LUC any more than the single Nkg/ha limit (irrespective of LUC) proposed by Federated Farmers and measured by OVERSEER are inextricably linked.

[104] The NPSFM does not identify an allocation mechanism. It cannot be said that the LUC allocation regime reflected in table 13.2 is contrary to and incompatible with the NPSFM. But in any event, the point is taken prematurely. It is a point that can be made during the Sch 1 process for the implementation of the NPSFM in that region, in due course.

*Conclusion*

[105] The answer to Question 8 is "No".

**Question 9: Did the Environment Court correctly apply clauses 30 to 35 of Schedule 1 of the Act when it determined that it was open to the Council to have a generic reference to OVERSEER?**

[106] OVERSEER is a computerised model developed in New Zealand to predict farm nitrogen losses, amongst other things. What the Environment Court said in the relevant part of its judgment is as follows:[38]

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[38] At [5-100].

> However, OVERSEER is a computer model, and a tool or technique, to measure potential N leaching and achievement of the cumulative nitrogen totals in Table 13.2 (accepting the limitations pointed out at the hearing). As such, it may not be the type of written material referred to in Clause 30, and although arguably it may be a recommended practice it does not appear to be prescribed in NZ (for example there is no National Enviromental Standard or mention in the National Policy Statement for Freshwater management 2011, prescribing it.) There is also the question of ongoing changes that may be made to the computer model software to update information on inputs and outputs and problems that might be identified with its running. It may in fact be difficult to find, and to run version 5.4, it being older software which may not be supported.

[107] A preliminary point is what reference in fact is made in the POP to that system. The principal, relevant reference in the POP to the OVERSEER system is the definition of "nutrient management plan" in the POP glossary. The definition is an important one, because it appears within performance conditions in rr 13-1 to 13-1C, which are the heart of the present appeals. That definition provides:

> **Nutrient management plan** means a plan prepared annually in accordance with the Code of Practice for Nutrient Management (NZ Fertiliser Manufacturers' Research Association 2007) which records (including copies of the OVERSEER input and output files used to prepare the plan) and takes into account all sources of nutrients for intensive farming and identifies all relevant nutrient management practices and mitigations, and which is prepared by a person who has both a Certificate of Completion in Sustainable Nutrient Management in New Zealand Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University.

[108] The Code of Practice referenced in the definition does not however compel use of OVERSEER. Rather, it says:

> There are several ways to produce a nutrient budget. One popular approach is to use the nutrient budgeting software "OVERSEER".

[109] There are other references to OVERSEER in other rules, but they are not the subject of the present appeals, or within the scope of these appeals. Certainly none are concerned with commercial vegetable growing.

*Submissions*

[110] Ms Atkins accepted that it was appropriate that OVERSEER be referenced as a "recommended practice" as provided for in cl 30 of Sch 1 of the Act. Indeed no party took issue with that. As she puts it:

> The issue before this Court is whether, in order to comply with the requirements set out in clauses 30 to 35, the POP needs to refer to a specific version of OVERSEER. We say that it does for the reasons that follow.

Ms Atkins submits that the effect of cl 30(3) is that material incorporated by reference in a plan has legal effect as part of that plan. As a result, OVERSEER is part of POP. Because a specific version of OVERSEER is not referenced, subsequent versions of OVERSEER will therefore be deemed to be part of the POP. But without any consideration being given to the difference between versions, and without the variation or plan change process being followed. The figures in Table 13.2 were based on version 5.40 of OVERSEER. Following the Environment Court decision in August 2012, version 6 became available. That, Ms Atkins submits, may result in different outcomes for plan users – because of changes inherent in the new version. Yet those plan users will not have had the opportunity to submit on the effects of that particular version on their interests. That too, she says, mandates the precise version of OVERSEER being correctly referenced. A generic reference to OVERSEER is not sufficient.

*Evaluation*

[111] Section 67(6) of the Act provides that a regional plan may incorporate material by reference under Pt 3 of Sch 1. That takes us to cls 30-35 of that schedule. Clause 30(3) provides that material incorporated by reference in a plan or proposed plan has legal effect as part of that plan.

[112] As Ms Atkins acknowledged in her closing submissions, the discussion before the Court proceeded on the basis that there is no requirement that OVERSEER must be used in producing a nutrient management plan. That was also the position taken by the Council before me. It must be right, given [107] – [108] above. That acknowledgment is seen as one of particular benefit by Horticulture NZ.

[113] In this context some focus in argument was also given to Policy 13-2D:

> **Resource consent decision making for intensive farming land uses**

When making decisions on resource consent applications, and setting consent conditions, for intensive farming land uses the Regional Council must:

(a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 13-2C.

(b) An exception may be made to (a) for existing intensive farming land uses in the following circumstances:

(i) where the existing intensive farming land use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500mm or greater; or

(ii) where the existing intensive farming land use cannot meet year 1 cumulative nitrogen leaching maximums in year 1, they shall be managed through conditions on their resource consent to ensure year 1 cumulative nitrogen leaching maximums are met within 4 years.

(c) Where an exception is made to the cumulative nitrogen leaching maximum the existing intensive farming land uses must be managed by consent conditions to ensure:

(i) Good management practices to minimise the loss of nitrogen, phosphorous, faecal contamination and sediment are implemented.

(ii) Any losses of nitrogen which cannot be minimised are remedied or mitigated, including by other works or environmental compensation. Mitigation works may include, but are not limited to, creation of wetland and riparian planted zones.

...

I do not need to say anything about this Policy, other than to record that the Council stated, expressly, that they consider the exception in (c) to be a separate exception from (b). I record that submission because it too was seen as important to the appellants.

[114] I return now to the substantive issue. What is required, by way of performance condition in rr 13-1A to 13-1C, is a nutrient management plan prepared "in accordance with" the 2007 Code of Practice. The sufficiency and adequacy of that plan will be determined in accordance with the code. No particular version of OVERSEER need be used. Other models – such as SPASMO and APSIN – may be

used for commercial vegetable growing, for instance.[39] Nothing in this offends the Act.

*Conclusion*

[115] The answer to Question 9 is "Yes".

**Question 10: Was the Environment Court correct in determining that the definition of Nutrient Management Plan should not be amended as requested by Horticulture NZ without providing an opportunity to address the concerns the Environment Court had about the definition?**

[116] Question 10 is related to Question 9. Horticulture NZ had submitted to the Environment Court, following its August 2012 decision, that a change should be made to the definition of nutrient management plan in the glossary.[40] Specifically, Horticulture NZ sought a definition which removed the word "annual" from the requirement. It would also require it to be prepared by a person with certain specific tertiary qualifications.

[117] The Court found the changes sought by Horticulture NZ went too far. A change from an annual plan was not accepted by the Court. And it did not think that the specific tertiary qualifications needed be added. The Court went on:

> [91] The *nutrient management plan* is a key component of the policy and rule approach in the Plan. Horticulture NZ should have put forward such changes, and their evidential basis, at the hearing and it is too late to propose them now.
>
> [92] Given the timeframe before the targeted Water Management Sub-zones come into effect for those catchments with vegetable cropping, and the ability of the Council to promote a plan change providing for an alternative approach if it sees fit, we see no reason to amend the requirement of the use of OVERSEER input and output files.

*Submissions*

[118] Ms Atkins submitted that the Court appeared thus to have found that the changes Horticulture NZ was seeking were beyond scope, in terms of cl 10(2) of Sch 1. That is to say, it went beyond a "consequential alteration arising out of

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[39] Evidence before me, however, suggested these are more research oriented systems.
[40] See [107] above.

submissions". She submitted that while Horticulture NZ's appeal did not specifically request an amendment to the definition of "nutrient management plan", it did challenge the use of OVERSEER for commercial vegetable growing. An amendment to the definition to recognise the concerns Horticulture NZ had with the use of OVERSEER for commercial vegetable growing was, she submitted, "a form of consequential relief". All parties had an opportunity and did comment on Horticulture NZ's definition. The primary focus at the hearing had been whether commercial vegetable growing was within the nutrient management regime. Only after the interim decision was issued could the flow-on consequences be fully assessed, considered and addressed. The Court failed to take into account a relevant consideration, and therefore approved a definition which was "not the most appropriate" in terms of s 32.

*Evaluation*

[119] I do not think there is anything in this further point advanced by Horticulture NZ. Indeed it largely falls away because of the consensus achieved at the appeal hearing before me that the definition of "nutrient management plan" did not mandate the use of OVERSEER only. The primary position taken by Horticulture NZ before the Environment Court was that commercial vegetable growing should not be included in the regulatory regime. Although the passages quoted from the Court's judgment at [117] above suggest that it saw Horticulture NZ's proposed amendments as beyond scope, the reality is that earlier at [89] and [90] of its decision the Court considered the merits of Horticulture NZ's specific proposals. No justification was found by it for removing the word "annually". Nor is it apparent to me in what respect the Court can be said to have erred in law in rejecting the other amendment suggested concerning the qualifications of the person to prepare the nutrient management plan.

*Conclusion*

[120] The answer to Question 10 is that the Court did not err in law in rejecting the amendments proposed by Horticulture NZ.

**Question 11: Was the Environment Court correct in not providing an alternative for conversion and changes in land use from extensive to intensive outside the targeted Water Management Subzones?**

[121] This question was abandoned by Horticulture NZ.

**Question 12: Was there jurisdiction for the Environment Court to direct that Policy 6-7(a)(iaa) be included in the POP?**

[122] Policy 6-7 is part of a suite of policies in the POP setting the regional strategy for the management of discharge and land use activities that affect water quality. Policy 6-7(a)(iaa) now provides:

> **(a) Nutrients**
>
> (iaa) Nitrogen leaching maximums must be established in the regional plan which:
>
> (1) Take into account all the non-point sources of nitrogen in the catchment, and
>
> (2) Will achieve the strategies for surface water quality set out in Policies 6-2, 6-3, 6-4 and 6-5, and the strategy for groundwater quality in Policy 6-6, and
>
> (3) Recognise the productive capability of land in the *Water Management Sub-zone*, and
>
> (4) Are achievable on most farms using good management practices, and
>
> (5) Provide for appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums
>
> ...

[123] This wording was included in the POP by the Environment Court in its second decision dated 24 December 2012. It followed receipt of the Council's report dated 2 November 2012 following consultation with the parties after delivery of the Court's first decision on 31 August 2012. The particular policy wording appears to have drawn on consultation with Wellington Fish & Game.

*Submissions*

[124] Mr Gardner submitted that the Court lacked jurisdiction to direct the inclusion of that policy. It exceeded, he said, anything requested in any submission or requested by Wellington Fish & Game in its appeal to the Court. Its inclusion was, therefore, an error of law.

*Evaluation*

[125] This is a purely jurisdictional question. Wellington Fish & Game had supported Policy 6-7 in the Notified Version. The Decision Version of the POP split Policy 6-7 into 6-7 and 6-7A. In its appeal the Wellington Fish & Game Council sought a return to the Notified Version, Policy 6-7, or "such other or further relief as addresses the issues raised by this appeal point". As Mr Maassen submits, those "issues" were the ability of the policy to address the issues and objectives identified in the POP and the purposes and principles of the Act.

[126] There is force in the submission by Mr Somerville QC for Wellington Fish & Game that policies to establish nitrate leaching maxima were always a potential outcome of his client's appeal in the Environment Court. Indeed, he points out, Federated Farmers had suggested its own maxima during the course of the hearing. All of this was then the subject of a great deal of evidence.

[127] I repeat my reservations at [50] and [51] above. No surprise or prejudice is pointed to by Mr Gardner. I am satisfied there is nothing in this point.

*Conclusion*

[128] The answer to Question 12 is "Yes".

**Question 13:**

**(a) Did the Environment Court correctly conclude that Federated Farmers raised questions about the robustness of the LUC/OVERSEER based approach to leaching losses in the comments it made to the Council, as reported to the Court by the Council?**

**(b) Did the Environment Court correctly conclude that it was "too late" for questions about the robustness of the LUC/OVERSEER based approach to leaching losses to be raised?**

**(c) Did the Environment Court, in rejecting the argument that the policy and rule approach was not robust because the Council's regime was based on an earlier version of OVERSEER, come to a conclusion without evidence, take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account?**

[129] Question 13 is in a sense related to Question 10 advanced by Horticulture NZ.

[130] After release of its initial decision in August 2012, the Court directed that the Council, conferring where necessary with affected parties, redraft the relevant provisions of the POP to conform to its decision and present them to the Court for approval. The Court made it clear that the redrafting process was "not ... an opportunity for any party to relitigate issues".

[131] Federated Farmers retained concerns as to the robustness of the LUC/OVERSEER-based approach to leaching losses. Specifically, Federated Farmers said, in its comments to the Council:

> Given that OVERSEER6 has been shown to produce N leaching loss values significantly higher than version 5.4 which was used to calculate table 13-2. The limits as set in table 13-2 are not now as achievable as previously and in fact are inaccurate in the light of more robust scientific analysis.

It maintained that to include the limits in Table 13-2 in these circumstances was a "serious flaw" in the redrafted rules.

[132] The Council took the view that those comments went beyond scope of the matters that the Court had referred for redrafting by the Council.

[133] The Court accepted that response. It said:

> The questions being raised by Federated Farmers about the robustness of the approach are matters that should have been raised at the original hearing and in evidence. It is too late to raise them now.

*Submissions*

[134] Mr Gardner submits that the comments made by Federated Farmers concerned a flaw in the redrafting of the provisions. OVERSEER version 5.4 was used to set the nitrogen leaching limits, but using version 6 to estimate the subsequent leaching losses from farms. He submitted that the Court's decision was expressly an interim decision. The Court had sought comments from parties on errors or omissions. The Court might alternatively address the matter under s 294, on the basis that new and important evidence had become available. The Court had recognised that OVERSEER 6 needed to be trialled, particularly in the context of horticulture. But it did not have version 6 at the time it made its interim decision in August 2012.

[135] In the end the point was in substance abandoned. Mr Gardner sought instead a direction from this Court as to whether Federated Farmers could make application under s 294 for review of its earlier decision, given the availability of "new and important evidence".

[136] I should therefore record that Mr Maassen's submission to me was that as far as the Council is concerned, it was not too late for Federated Farmers to make application under s 294. What Mr Maassen said was:

> If FF considers version 6 does ... have materially different outputs from version 5.4 then the best avenue is to apply for a rehearing based on new evidence pursuant to RMA, s 294. In that way all parties can consider whether there is any evidential basis for the issue to be readdressed and [the Council] could make its own informed decision based on that technical and scientific evidence.

*Evaluation*

[137] It is not for the High Court to pre-empt the jurisdiction of the Environment Court on such an application. I decline, therefore, to give the direction sought by

Federated Farmers. But given the Council's attitude, there does not appear to be any obstacle in the way of Federated Farmers making an application under s 294.

[138] I need say no more about Question 13.

**Question 14: Was there jurisdiction for the Environment Court to direct that the phrase "reasonably practicable farm management practices", or phrases containing words to that effect, be removed from the surface water quality objectives, policies or rules of the POP?**

[139] This question was abandoned by Federated Farmers.

**Question 15: Was there jurisdiction for the Environment Court to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated?**

[140] One of the activities to which the new water quality regime applies is "intensive sheep and beef farming". Its original definition was as follows:

> **Intensive sheep and beef farming** refers to properties greater than 4 ha mainly engaged in the farming of sheep and cattle, where the land grazed is irrigated.

[141] The Minister of Conservation submitted that that definition was ambiguous. Potentially it gave scope for disputed interpretation. Was it required that *all* of the land used to graze sheep and cattle be irrigated to trigger the definition? It was highly unlikely that all such land would be irrigated in fact.

[142] In the Court's second interim decision of December 2012 the Court said:

> It was not the Court's intention that the whole of a farm needed to be irrigated to trigger the provisions. The Court directs the glossary term be amended to read:
>
> > **Intensive sheep and beef farming** refers to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated.

*Submissions*

[143] Mr Gardner noted that in its first (August 2012) decision the Court had rejected a submission by Mr Day that land used for *extensive* sheep and beef farming could also be brought within the POP water quality regulatory regime. The Council opposed that proposition on the basis of *Estate Homes Ltd v Waitakere City Council*.[41] The Environment Court agreed that there was no scope to bring extensive sheep and beef farming into the regime as an appellate outcome.

[144] Mr Gardner submitted that given that that was the case, the Environment Court lacked necessary jurisdiction to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than four hectares engaged in the farming of sheep and cattle, where *any* of the land grazed was irrigated. In essence his argument was that if the extensive sheep and beef farming was beyond scope, then what would otherwise be extensive and sheep and beef farming could not be brought into scope as "intensive" because some parts were irrigated.

*Evaluation*

[145] Intensive sheep and beef farming had been removed as a regulated land use from the Decision Version of the POP. The Environment Court reintroduced regulation of that activity. A definition was again required. The Environment Court had directed redrafting of the POP provisions in accordance with its decision. The Council had prepared a definition of "intensive sheep and beef farming", in consultation with the parties. That was provided to the Court with its report on 2 November 2012. The definition provided to the Court raised the problem of potentially disputed interpretation referred to earlier. Did the words "where the land grazed is irrigated" require that all the land used be irrigated, or only some? The Court made clear its view in the passage quoted above. It had the jurisdiction to direct clarification under s 292(1)(a) of the Act.

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41 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA).

*Conclusion*

[146] The answer to Question 15 is "Yes".

**Question 16:**

**(a) Did the Environment Court take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account in reaching its decision that cultivation on slopes greater than 20 degrees should be a restricted discretionary activity?**

**(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?**

[147] Question 16 was abandoned by Federated Farmers.

**Question 17:**

**(a) Did the Environment Court take into account matters which it should not have taken into account when it reached its decision to direct that the words "any increase in" be deleted from Policy 5-2A(a)?**

**(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?**

[148] Policy 5-2A(a) had read:

> In order to achieve Objective 5-2, the Regional Council must regulate vegetation clearance, land disturbance, forestry and cultivation through rules in the Plan and decisions on resource consents, so as to minimise the risk of *any increase in* erosion, minimise discharges of sediment to water, and maintain the benefits of riparian vegetation for waterbodies.

[149] Wellington Fish & Game sought amendments to reflect the Court's August 2012 decision on Chapter 12 (land use rules). Specifically, the regime to ensure that land use activities which have the potential to exacerbate land erosion, or are likely to release sediment to surface water, are managed to reduce that risk. Wellington Fish & Game sought deletion of the italicised words in Policy 5-2A(a) quoted above. The Court agreed with that submission.

*Submissions*

[150] Mr Gardner submitted that what was permitted was minor drafting changes only, and this represented a substantial change. Removal of the words "any increase in" implied that the risk of erosion needed to be minimised, rather than requiring only any increase in the risk of erosion to be minimised. The Environment Court's minute of 21 September 2012 directed that the Council was to redraft the provisions of the POP to accord with the Court's 31 August 2012 decision. While offering parties the opportunity to make written submissions on any "significant error or omission", the Court had made it clear that the redrafting process was "not ... an opportunity for any party to relitigate issues". Further, the Court had not, contrary to s 32, assessed the costs of the policy to farmers who may undertake activities which may result in erosion. Nor had it assessed the benefits to farmers of being able to undertake such activity.

[151] In response, Mr Somerville submitted that minimising the risk of erosion is a reasonably practicable means of avoiding accelerated erosion and increased sedimentation in water bodies. That is a reference to Objective 5-2 of the POP. It provides that:

> Land is used in a manner that ensures ... accelerated erosion and increased sedimentation and water bodies ... caused by vegetation clearance, land disturbance, forestry or cultivation are avoided as far as reasonably practicable, or otherwise remedied or mitigated.

Mr Somerville submitted that the amendment made by the Court in its 24 December 2012 decision was a necessary drafting change to achieve that objective.

[152] Further, the Court was not required to specifically refer to s 32 in respect of each determination it made throughout its decision. Nor was it obliged to include a specific s 32 analysis of whether or not to include the words "any increase" in Policy 5-2A. The exclusion of those words was an exercise of planning judgment by the Court, based upon evidence, and did not give rise to any question of law.

*Evaluation*

[153] I accept, immediately, the second of Mr Somerville's submissions. Section 32 does not require a cost-benefit analysis to be undertaken on consequential changes made by the Environment Court in the course of determining appeals on the duly notified proposed plan.

[154] I do not, however, accept his first submission. In [4-4] of its 31 August 2012 decision, the Court noted that Objectives 5-1 and 5-2 (which Policy 5-2A is calculated to support) concern "managing accelerated erosion" and "regulating potential causes of accelerated erosion". The expression "accelerated erosion" appears throughout those objectives. The expression "erosion" simpliciter does not. "Accellerated erosion" is a defined term. It means:

> ... erosion which is caused or accelerated by human activity.

It does not include naturally-caused erosion. Methods identified in Chapter 5 of the regional policy statement part of the POP are all focused on "accelerated erosion", including catchment strategies for hill country land in certain areas. So too is Objective 12-1 within the regional plan part of the POP.

[155] Policy 5-2A logically should reflect that same terminology. To provide that the Council must regulate these activities to "minimise the risk of erosion" is inconsistent with the more limited nature of Objective 5-2. There is also an inconsistency in the current terms of Policy 5-2A in its use of the word "erosion" simpliciter. In those terms it would include erosion from natural causes. That goes beyond what is necessary to achieve Objective 5-2.

*Conclusion*

[156] The answer to Question 17(a) is that the Environment Court erred in law in deleting the words "any increase in" in Policy 5-2A(a). Either the original wording should have been retained, or the words "accelerated erosion" should have been used in Policy 5-2A.

[157] Mr Somerville suggested that I could remit that matter back to the Environment Court for further consideration. He did not press the point strongly. In my view the proper outcome in this case is plain, and it is not necessary to remit the matter back to the Environment Court.

[158] Pursuant to r 20.19(1)(a), I allow the appeal in this limited respect. I hold that for the maintenance of consistency within Chapter 5 of the regional policy statement part of the POP, the word "accelerated" is to be substituted for the words "any increase in" before the word "erosion" in Policy 5-2A(a).

[159] The answer to Question 17(b) is "Yes".

**Question 18:**

**(a) Was there jurisdiction for the Environment Court to direct that Policy 13-2C, in particular Policy 13-2C(d), be included in the POP?**

**(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?**

[160] Policy 13-2C(d) provides that:

> Existing intensive farming land use regulated in accordance with (b)(i) must be managed to ensure that leaching of nitrogen from those land uses does not exceed the cumulative nitrogen leaching maximum values for each year contained in Table 13.2, unless the circumstances in policy 12-2D apply.

How it came to be included is discussed below.

*Submissions*

[161] Mr Gardner submitted that the Notified Version of the POP included a number of matters to which the Council is required to have regard when it makes decisions about consents for any discharge to land. There is no reference in former Policy 13-2 to the need to have particular regard to Table 13.2. No submissions to Council requested that the nitrogen leaching maximum specified in Table 13.2 be referred to directly in the matters to which the Council is required to have particular regard in Policy 13-2. The hearings panel then divided Policy 13-2 into a number of other policies, including Policy 13-2C which specifically related (then) to the

management of dairy farming land uses. The nitrogen leaching maxima specified in Table 13.2 were not referred to directly as matters which the Council was required to consider. Rather Policy 13-2C(c) required decision makers to:

> Ensure that nitrogen leaching from new dairy farming land does not exceed nitrogen leaching rates based on the natural capital of each LUC class of land use for dairy farming.

[162] Mr Gardner submitted that in this case there was "no hint anywhere in the POP as notified, nor in any submissions on it, that Table 13.2 might be applied at a policy level to existing dairy farms". He therefore submits that the Court did not have jurisdiction to direct that Policy 13-2C(d) be included.

[163] In addition Mr Gardner contended that the Court failed to assess the costs and benefits of including Policy 13-2C, contrary to s 32.

*Evaluation*

[164] Federated Farmers' complaint is not sound.

[165] Table 13.2[42] appeared in the rules section of chapter 13 of the regional plan part of the Notified Version. Apart from the heading, it was not formally described as a rule. But there was an introductory comment:

> Table 13.2 sets out the maximum nitrogen leaching/run-off date allowed for land within the specified land use capability classes after the specified date. The year 1 date is the date from Table 13.1 for the particular water management zone in which that land class is situated. The following dates in the table are the number of years after the year 1 date.

However, Table 13.2 was expressly referenced in Rule 13-1 of the Notified Version which states:

> When calculating the maximum nitrogen leaching/run-off values allowed for the whole farm in accordance with preparing a FARM Strategy as required by (b), the values for each land use capability class (LUC) in Table 13.2 shall be used.

[166] The Wellington Fish & Game submission said:

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[42] See [74] above. The values stated in the Notified Version of Table 13.2 are the same as those set out in [74], except that the values for year 1 were generally higher in the Notified Version.

> The status of this table is confusing. Water management zones or subzones have been the entity on which the water quality standards, with respect to nutrients and intensive farming, are based ... This table introduces land use classes and sets nitrogen limits on each of these classes – how is this to reconcile against the objectives, policies, Table 13.1 and the standards for SIN in Table D17? The obscurity of the relationship between the different values used confuses the link between objective, policy and standard.

[167] Federated Farmers submitted expressly in opposition to r 13-1 in the Notified Version. It said:

> FFNZ is concerned at the proposed policy approach given the lack of robust information at a catchment and farm scale.

It sought a redraft of r 13-1 based on a set of principles, including:

> Clarity and capacity: include policies and methods that are clear and achievable and within the capacity of individuals to deliver within the timeframe.

[168] I accept Mr Jessen's submission for the Council that either of those submissions provided scope for the hearings panel to insert policy 13-2C into the Decision Version of the POP.

[169] Policy 13-2C commences with the words "in order to give effect to Policy 6-7A and policy 6-7 ...". Those policies are found in the regional policy statement part of the POP. But having made policies there for dairy farm land use activities and other rural land use activities affecting ground water and surface water quality, the plan part of the POP was sparse as to the policy framework for the plan rules. I accept Mr Jessen's submission that s 67(3)(c) required the policy statement provisions to be given effect to, and Policy 13-2C does that. In other words, the regional policy statement was there, the regional plan rule was there, but the regional plan policy framework was deficient.

[170] There can be no jurisdictional error here by the Court in incorporating this policy. Wellington Fish & Game's submission had expressly noted the inadequacy of the objectives and policy support for Table 13-2. Policy 13-2C provides that underpinning. Federated Farmers in their submissions had, as I have said, sought the deletion of r 13-1. Alternatively, its redrafting, together with "policies and methods

that are clear and achievable". That invited, at least jurisdictionally, Policy 13-2C(d).

[171] Finally, there is no basis for the contention that the inclusion of this policy element specifically triggered s 32. No authority for such a proposition was advanced by Mr Gardner. I refer to what I said at [153] above.

*Conclusion*

[172] The answer to Question 18 (both parts) is "Yes".

**Question 19:**

**(a) Was there jurisdiction for the Environment Court to direct that matter to which discretion is restricted (ab) in Rules 13-1A and 13-1C be included in those rules in the POP?**

**(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?**

[173] Rule 13-1 concerns existing intensive farming land use activities where the nutrient management plan demonstrates that the nitrogen leaching loss from the activity would not exceed the cumulative nitrogen leaching maxima specified in Table 13-2. Such a land use activity is a controlled activity under the POP. Likewise new intensive farming land use activities that meet that standard: r 13-1B. The two rules at issue in this question are rr 13-1A (existing intensive farming land use activities that do not comply with the condition in Rule 13-1) and 13-1C (new intensive land use activities that do not comply with that condition). They are restricted discretionary activities under the plan. And the discretion is restricted, inter alia, to:

> (ab) The extent of non-compliance with a cumulative nitrogen leaching maximum specified in Table 13.2.

*Submissions*

[174] Mr Gardner submits that in the case of r 13-1A in the Decision Version of the POP, the nitrogen leaching maxima specified in Table 13.2 were not referred to as

matters over which discretion was reserved. In the case of new dairy farming discretionary activity under r 13-1C, the nitrogen leaching maxima specified in Table 13.2 were referred to as matters over which discretion was reserved. Table 13.2 in the Decision Version contained no requirement to "step down" the nitrogen leaching rates over time.

[175] In appealing to the Environment Court, Wellington Fish & Game had sought reinstatement of the Notified Version of Table 13.2, the reinstatement of r 13-1 as notified "including the requirement to meet nitrogen loss standards specified in Table 13.2", or the amendment of rr 13-1A and 13-1C to require specified cumulative nitrogen leaching standards as specified in Table 13.2. The latter course was adopted by the Environment Court. But Mr Gardner submits such relief was outside the scope of submissions made by the Council, which made no reference to r 13-1.

[176] Mr Gardner, again, submitted that the Environment Court had not considered the costs and benefits of including this matter, contrary to s 32.

*Evaluation*

[177] I do not consider the objections sound.

[178] In the Notified Version of the POP, all relevant intensive farming activities were covered within r 13-1. All were to be controlled activities. It was the hearings panel that made the decision to split r 13-1 into the component parts now featured in the Decision Version. And to change the classification for some of those component parts from controlled to restricted discretionary activity. So rr 13-1A and 13-1C derive from r 13-1 in the Notified Version. Rule 13-1 had reserved control over "the level of compliance with the FARM Strategy workbook (Horizons Regional Council, April 2007)". That provided for nitrogen leaching/run-off values maxima. Rule 13-1 also provided that:

> When calculating the maximum nitrogen leaching/run-off values allowed for the whole farm in accordance with preparing a FARM Strategy as required by (b) the values for each land use capability class (LUC) in Table 13.2 shall be used.

[179] It follows that both the Notified Version r 13-1 and the present versions r 13-1A and 13-1C reserved the control or discretion of the decision maker over the extent of compliance, or the level of non-compliance for the activity, by reference to values set out in Table 13.2.

[180] Wellington Fish & Game's appeal to the Environment Court against the Decision Version sought reversion to the Notified Version of r 13-1. As we have already seen, it sought strict provisions be inserted in relation to the leaching/run-off values in Table 13.2. However its original submission on the Notified Version did not include a specific reference to r 13-1. Federated Farmers contends that because of that absence of specific reference, the appeal against the Decision Version does not meet the requirements of cl 14(2) of the Sch 1 of the Act.

[181] There is a regrettable aridity about this argument. Wellington Fish & Game's submission, referencing Table 13.2 and seeking strict provisions in relation to the application of the values in that table, was in effect a submission on r 13-1. That, as I have said, carries Table 13.2 into regulatory (as opposed to objective or policy) effect. I repeat here what I said at [49] to [52] under the heading of Question 2. Narrow interpretations under cl 14 of Sch 1 are to be avoided. Secondly, and in any event, Federated Farmers' own submission seeking redrafting of r 13-1, on which I remarked in the context of Question 18, either alone or in conjunction with the submission by Wellington Fish & Game, provided the Environment Court with the jurisdiction to direct the inclusion of subclause (ab) in those rules.

[182] Finally, for reasons given earlier,[43] I reject the submission that the Court's approach infringes s 32.

*Conclusion*

[183] The answer to Question 19 (both parts) is "Yes".

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[43] At [153] and [171].

## Summary

[184] The questions of law posed, and answers given, in this judgment are as follows:

> **Question 1:** Was the Environment Court correct in determining and interpreting that for the purposes of s 290A of the Act it only needed to consider those aspects of the Decision Version of the POP that had not been changed by the Council during the course of negotiations, mediations and witness conferencing?
>
> ***Answer:*** *The Court did not err in law in its traversal of the Decision Version.*
>
> **Question 2:** Did the Environment Court fail to consider and determine whether it had jurisdiction to include the deposited sediment limit in Schedule D of the POP?
>
> ***Answer:*** *The Environment Court possessed jurisdiction to include the deposited sediment standard in Schedule D.*
>
> **Question 3:** Did the Environment Court fail to take into account relevant considerations and did it take into account irrelevant considerations when:
>
> (a) it placed significant reliance on the joint witness conferencing statement in determining that there was agreement that all intensive land uses ought to be included in a leachate management regime; and
>
> (b) then only included some but not all intensive land uses?
>
> ***Answer:*** *No*
>
> **Question 4:** Did the Environment Court correctly apply s 32 of the Act when it concluded that it was both practical and cost effective to require all existing commercial vegetable growing activities in the specified water management zones and all new such activities everywhere else in the region to require resource consent?
>
> ***Answer:*** *Yes.*

**Question 5:** Did the Environment Court fail to take into account relevant considerations when it determined that the LUC classification approach was applicable to commercial vegetable growing?

***Answer:*** *No.*

**Question 6:** Did the Environment Court fail to take into account relevant considerations in relation to assessment of the social and economic costs of the regime it determined was applicable to commercial vegetable growing?

***Answer:*** *No.*

**Question 7:** Did the Environment Court take into account irrelevant considerations and fail to take into account relevant considerations when it determined that the leachate management regime for commercial vegetable growing ought not to be by way of a permitted activity rule?

***Answer:*** *No.*

**Question 8:** Did the Environment Court fail to consider the extent to which the POP gave effect to the National Policy Statement on Freshwater Management?

***Answer:*** *No.*

**Question 9:** Did the Environment Court correctly apply clauses 30 to 35 of Schedule 1 of the Act when it determined that it was open to the Council to have a generic reference to OVERSEER?

***Answer:*** *Yes.*

**Question 10:** Was the Environment Court correct in determining that the definition of Nutrient Management Plan should not be amended as requested by Horticulture NZ without providing an opportunity to address the concerns the Environment Court had about the definition?

***Answer:*** *The Court did not err in law in rejecting the amendments proposed by Horticulture NZ.*

**Question 11:** Was the Environment Court correct in not providing an alternative for conversion and changes in land use from extensive to intensive outside the targeted Water Management Subzones?

***Answer:*** *This question was abandoned.*

**Question 12:** Was there jurisdiction for the Environment Court to direct that Policy 6-7(a)(iaa) be included in the POP?

***Answer:*** *Yes.*

**Question 13:**

(a) Did the Environment Court correctly conclude that Federated Farmers raised questions about the robustness of the LUC/OVERSEER based approach to leaching losses in the comments it made to the Council, as reported to the Court by the Council?

(b) Did the Environment Court correctly conclude that it was "too late" for questions about the robustness of the LUC/OVERSEER based approach to leaching losses to be raised?

(c) Did the Environment Court, in rejecting the argument that the policy and rule approach was not robust because the Council's regime was based on an earlier version of OVERSEER, come to a conclusion without evidence, take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account?

***Answer:*** *This question in substance was abandoned.*

**Question 14:** Was there jurisdiction for the Environment Court to direct that the phrase "reasonably practicable farm management practices", or phrases containing words to that effect, be removed from the surface water quality objectives, policies or rules of the POP?

***Answer:*** *This question was abandoned.*

**Question 15:** Was there jurisdiction for the Environment Court to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated?

**Answer:** Yes.

**Question 16:**

(a) Did the Environment Court take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account in reaching its decision that cultivation on slopes greater than 20 degrees should be a restricted discretionary activity?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

***Answer:*** *This question was abandoned*.

**Question 17:**

(a) Did the Environment Court take into account matters which it should not have taken into account when it reached its decision to direct that the words "any increase in" be deleted from Policy 5-2A(a)?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

***Answer to 17(a):*** *The Environment Court erred in law in deleting the words "any increase in" in Policy 5-2A(a). Either the original wording should have been retained, or the words "accelerated erosion" should have been used in Policy 5-2A.*

***Answer to 17(b)****: Yes.*

**Question 18:**

(a) Was there jurisdiction for the Environment Court to direct that Policy 13-2C, in particular Policy 13-2C(d), be included in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

***Answer:*** *Yes (both parts).*

**Question 19:**

(a) Was there jurisdiction for the Environment Court to direct that matter to which discretion is restricted (ab) in Rules 13-1A and 13-1C be included in those rules in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

**Answer:** Yes (both parts).

## Result

[185] The appeals are dismissed, save in the single respect noted at [156]–[158], under Question 17(a), where the appeal of Federated Farmers is allowed.

[186] If costs are in issue, brief memoranda may be filed. By those applying, within 21 days. By those responding, within a further seven days.

**Stephen Kós J**

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