IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-2331
[2017] NZHC 3217

IN THE MATTER	of the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991
IN THE MATTER	of appeals under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010
BETWEEN	MAN O'WAR FARM LIMITED Appellant
AND	AUCKLAND COUNCIL Defendant

…/cont

Hearing: 16 November 2017

Appearances: MJE Williams and N M Sutcliff for Man O'War Farm Ltd
R R Gardner for Federated Farmers of New Zealand Inc
MJL Dickey and D A Riley for Auckland Council
M C Wright and R B Enright for Royal Forest and Bird Protection Society New Zealand and Environmental Defence Society

Judgment: 20 December 2017

JUDGMENT OF GORDON J

This judgment was delivered by me
on 20 December 2017 at 11 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:	Clendons, Auckland P R Gardner, Federated Farmers of New Zealand Auckland Council, Auckland
Counsel:	MJE Williams, Napier
Copy To:	Royal Forest and Bird Protection Society of New Zealand Incorporated Environmental Defence Society

CIV-2016-404-2299

BETWEEN	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED Appellant
AND	AUCKLAND COUNCIL Defendant

Introduction

[1] On 22 July 2016, the Auckland Unitary Plan Independent Hearings Panel (the Panel) delivered its recommendations on the Proposed Auckland Unitary Plan (PAUP). The recommendations included a number of rules applying to activities undertaken in areas classified as Outstanding Natural Landscapes (ONL). Under the Panel's recommended rules, any new farm buildings, earthworks or forestry exceeding a specified area were classified as restricted discretionary activities requiring resource consent. The Auckland Council subsequently adopted the recommendations in their entirety (the Unitary Plan).

[2] The appellants, Man O'War Farm Ltd (MOW) and Federated Farmers of New Zealand Inc, have filed appeals on questions of law challenging aspects of the Unitary Plan relating to farming and forestry activities in ONLs. They seek orders amending the text and maps of the Unitary Plan and a direction that the Council reconsider the relevant provisions of the Unitary Plan, in light of the findings of the High Court.

[3] MOW owns some 2,300 ha of land located on Waiheke and Ponui Islands in Auckland's Hauraki Gulf. The property is applied to a range of pastoral and horticultural uses, including significant areas of vineyards and olive groves. There are existing buildings on the property, including some at significant scale, along with roads and tracks established through past earthworks. More than 75 per cent of the property (1,925 ha) is subject to an ONL overlay. ONL78 extends over much of the eastern end of Waiheke Island, while ONL85 extends over Ponui Island.

[4] Federated Farmers is a primary sector organisation that represents farming and other rural businesses. Federated Farmers considers itself to be the principal organisation representing the interests of rural people in New Zealand. It is the largest rural sector organisation representing landowners and the rural community.

[5] Each of the appellants expresses serious concerns about the impact of the proposed rules upon farmers operating in rural landscapes that are subject to ONL overlays. Both MOW and Federated Farmers challenge findings by the Panel that ordinary aspects of farming life, including the construction of essential farm buildings,

could give rise to adverse effects upon the rural landscape. MOW additionally submits that the process undertaken by the Panel was flawed.

[6] The Council opposes the appeal. It is joined in its opposition by the Royal Forest and Bird Protection Society of New Zealand Inc and the Environmental Defence Society Inc (together, the Societies), which as submitters on the PAUP have a right to be heard on the appeals.[1]

Environment Court proceedings

[7] The present appeal represents a new development in a long-running legal battle between MOW and local authorities regarding the extent and impact of ONL overlays affecting its property.

[8] In 2005, Plan Change 8 (PC8) to the Auckland Regional Policy Statement (ARPS) was publicly notified by the Auckland Regional Council. PC8 introduced new policy provisions for ONLs and a new set of ONL maps for the Auckland region.

[9] In *Man O'War Station Ltd v Auckland Council*, the Environment Court determined an appeal confirming the extent of the ONL overlay that should be applied under PC8 to MOW's land on Waiheke Island and Ponui Island.[2] The Court directed mapping changes to Hooks Bay and the inland boundary west of Cactus Bay, both on Waiheke Island, and northern Ponui Island as described in its interim decision.

[10] The interim decision was appealed to the High Court and in turn the Court of Appeal, but the appeals were unsuccessful.[3]

[11] The principal argument advanced by MOW in the Court of Appeal was that both the policies and mapping set for ONLs under PC8 reflected the "overall judgment" approach which had applied prior to the Supreme Court decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* (more

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1 Local Government (Auckland Transitional Provisions) Act 2010, s 158(5) and Resource Management Act 1991, s 301.

2 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167, [2014] NZRMA 335.

3 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329; *Man O' War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121.

commonly referred to as the *King Salmon* decision).[4] Since the Supreme Court in *King Salmon* had rejected that approach, it was argued that only landscapes that were exceptional on a national scale, or that were clearly outstanding, should be rated ONLs. That argument was rejected by the Court of Appeal, which held that the assessment of whether a landscape was an ONL was "essentially factual" and should not be affected by the restrictions that might apply to the land once it had been identified as such.[5]

[12] The Court of Appeal also rejected MOW's argument that it was relevant to the identification of a landscape comprising a working farm as an ONL that such identification would prohibit or severely constrain its future use of farming:

> [79] The fourth question asks whether it is relevant to the identification as ONL of a landscape (particularly in the coastal environment) comprising a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming. The question goes on to refer to whether the identification of an ONL should take account of future changes over time by reason of that landscape's character as a working farm.
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> [80] This is a further question predicated on a link between identification of an ONL and the activities contemplated by the relevant planning instrument within that ONL. For reasons we have already explained, we are not persuaded that there is a logical link between the two. Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those current taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

[13] The mapping changes that were adopted by the Environment Court in its interim decision were not carried through into the Unitary Plan.

Statutory background

[14] Before embarking upon an analysis of the questions of law posed in this appeal, it is helpful to consider the statutory context within which the Unitary Plan exists. In the *King Salmon* decision, the Supreme Court helpfully summarised the scheme of New Zealand's resource management law in the following terms:[6]

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

5 *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [61]-[62].

6 *King Salmon*, above n 3 (footnotes omitted).

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA, being defined to mean "a district rule or a regional rule".

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards, national policy statements and New Zealand coastal policy statements. Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement. Policy statements of whatever type state objectives and policies, which must be given effect to in lower order planning documents. In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region, which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region". Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules. Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region. Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies. They may also contain methods other than rules.

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans. There must be one district plan for each district. A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any) to implement the policies. It may also contain methods (not being rules) for implementing the policies.

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs. Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2), whereas regional and district plans operate above the line.

[13] For present purposes we emphasise three features of the scheme. …

> [14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".
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> [15] …
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> [16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted. The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

[15] The Unitary Plan is so called because it brings together the regional and district planning documents for the Auckland region into one single combined plan.[7] Notwithstanding that point of difference, the principles set out above apply equally to the Unitary Plan. In particular, the Unitary Plan must give effect to national planning standards or policy statements; and within the Unitary Plan, the provisions of the district plan for Auckland must give effect to the provisions of the regional policy statement (RPS). I return to this matter below.

The hearings process

[16] In 2010, Parliament enacted the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA). The stated purpose of the LGATPA is to resolve further matters relating to the reorganisation of local government in Auckland.[8] To that end, the Act provides a process for the development of the first combined planning

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7 Local Government (Auckland Transitional Provisions) Act, s 122(1).

8 Local Government (Auckland Transitional Provisions) Act, s 3(1).

document for Auckland Council under the Resource Management Act 1991 (RMA), now known as the Unitary Plan.[9]

[17] Part 4 of the LGATPA established a largely self-contained framework for developing the Unitary Plan. One of the key characteristics of the new framework was the modification of a typical Schedule 1 process under the RMA, establishing a 'one-off' streamlined hearing process for the development of the Unitary Plan. The process was described by Whata J in *Albany North Landowners v Auckland Council* as:[10]

> … [a]n iterative promulgation process, commencing with the s 32 analysis of the costs and benefits of the PAUP prior to notification, a central Government audit of the s 32 report, an alternative dispute resolution process, a full hearing process before the [Panel], a further s 32 report on proposed changes to the PAUP, recommendations by the [Panel], decisions on the recommendations by the Council, and limited rights of appeal; …

[18] The Panel was comprised of members with specialist knowledge of, and expertise in relation to, the RMA, planning instruments, tikanga Maori, Auckland and the mana whenua groups and other people of Auckland, and the management of legal proceedings.[11]

[19] One of the primary responsibilities of the Panel was to hold hearing sessions to receive submissions on the PAUP.[12] These hearings were scheduled by reference to approximately 80 separate topics.[13] The submissions by MOW and Federated Farmers regarding the mapping and rules applicable in ONLs were largely heard as part of "Topic 019 – Natural features, landscape and character". The submissions relating to earthworks were heard as part of "Topic 041 – Earthworks and Minerals".

[20] The streamlined process required the Panel to deliver its reports and recommendations on the PAUP within three years. This represented a highly compressed timeframe for the production of a unitary plan encompassing a regional policy statement, regional plan and a district plan for the entire Auckland region,

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9 Section 3(2)(d).
10 *Albany North Landowners v Auckland Council* [2017] NZHC 138.
11 Local Government (Auckland Transitional Provisions) Act, s 161(4).
12 Local Government (Auckland Transitional Provisions) Act, s 128.
13 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [14].

instead of the six to 10 years which might normally be expected under the normal Schedule 1 process.[14] Thereafter, the Council was afforded only 20 working days from receipt of the Panel's recommendations to make its decision.[15]

The PAUP

[21] The objectives and policies concerning ONL overlays were included in Chapters B4.3.1 and B4.3.2 of the PAUP, as part of the RPS.

[22] The RPS in the PAUP included both regional- and district-level objectives and policies relating to ONL overlays. However, in an interim guidance document issued on 9 March 2015, the Panel indicated its view that there should be a separation between the regional-level objectives and policies, and the district-level objectives and policies.[16] Accordingly, through evidence, the Council put forward a set of proposed district-level objectives and policies.

[23] The rules concerning ONL overlays appeared in Chapter J6.2 (Outstanding Natural Landscapes and Outstanding and High Natural Character) of the PAUP. As notified, the rules provided for all buildings and structures as permitted activities up to a gross floor area of 50 m^2 in an ONL, above which they were classified as restricted discretionary activities. The rules further provided for forestry up to 2 ha as a permitted activity in ONLs. Forestry of more than 2 ha was classified as a discretionary activity.

[24] The rules in Chapter H4.2 (Auckland wide provisions: Earthworks) of the PAUP provided for general earthworks up to 50 m^2 as permitted activities in ONLs, beyond which earthworks were restricted discretionary activities.

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14 *Albany North Landowners*, above n 10, at [14].
15 Local Government (Auckland Transitional Provisions) Act, s 148(4).
16 Auckland Unitary Plan Independent Hearings Panel *Interim Guidance Text for RPS General: PAUP Chapter B – Regional Policy Statement* (9 March 2015) [Interim Guidance Text].

[25] Finally, the PAUP included Appendix 3.2 which comprised a schedule of all ONLs with their descriptions and assessments against what is known as the WESI criteria,[17] as required by the RPS.

Evidence before the Panel – building restrictions

[26] In the course of hearings regarding Topic 019, the Panel received evidence from Mr Stephen Brown, a landscape witness for Auckland Council. Mr Brown gave evidence about farming activities in rural landscapes that were subject to ONL overlays:

> 61. There is no exact science behind the limitation of future buildings within ONLs to 50m^2, other than that it approximates the size of a two-vehicle shed or small tractor shed. It is also a size that has been agreed for other planning instruments, such as the much debated, Far North District Plan, and is aligned with the concept that where farms are subject to ONL overlays, there is an acceptance that rural production is 'part and parcel' of that particular landscape. As a result, farming in such locations shouldn't be excessively constrained in terms of on-going activities or maintenance and development.
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> 62. However, this has to be balanced against the sensitivities of the landscapes in question, with Council wanting to exercise discretion in relation to the siting, scale, design and appearance of sheds where they might detract from ONLs. For instance, a plethora of structures on the high ridges of the Awhitu Peninsula's Tasman coastline, or across the steep slopes above south Pakiri Beach and Goat Island, could have a profound impact on those coastal landscapes.
>
> 63. Just as important, the size limit ensures that a clear distinction is drawn between 'sheds' and other buildings ancillary to farming activities and buildings that might be more akin to the size and configuration of a small dwelling. The 50m^2 ensures that there is little likelihood of buildings permitted across rural and coastal Auckland establishing a 'permitted baseline' for future residential development that can rapidly change the fundamental character of an area, and its perceived value - through diminution of such qualities as naturalness, rural amenity, and the sense of remoteness and solitude associated with some ONLs. …

[27] The Panel also received evidence from Mr Peter Reaburn, a planning witness for Auckland Council, regarding the 50 m^2 limitation. Mr Reaburn noted his agreement with Mr Brown's conclusions (as set out above) and went on:

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[17] The WESI criteria were prescribed by the Environment Court in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC).

> 10.3 Having regard to the need to ensure that adverse effects are avoided, any building or structure is of potential concern. Built development in areas that are identified for their natural values can, as Mr Brown states "rapidly change the fundamental character of an area, and its perceived value – through diminution of such qualities as naturalness, rural amenity, and the sense of remoteness and solitude". This is not to say that buildings and structures will always be inappropriate, however it does strongly suggest that Council should reserve discretion in relation to such matters as the location of a proposed building, its scale and design and any proposed or possible curtilage. It is accordingly my view that the PA [permitted activity] status should remain as notified. They should also be confined, as a PA, to buildings or structures that are ancillary to pastoral farming, cropping and other non-intensive forms of land production (excluding dwellings). Buildings and structures for other purposes should be subject to assessment through a resource consent.

[28] In his rebuttal evidence, Mr Reaburn stated:

> 4.24 … I have given consideration as to whether larger buildings accessory to farming could be provided for, and have discussed this matter with Mr Brown. I cannot see the "effects" basis for buildings of a different size based on property size, as adverse effects on landscapes are not property size-related. However I do acknowledge that, on a limited basis (and one per 10ha seems appropriate), it will quite often be the case that 200m^2 farm buildings will be appropriate. That would provide, for instance, for a common building type such as a hay barn. I also agree with a point made by Andrew Riddell in his evidence for the Minister of Conservation, that it is less likely for farm buildings to be located in prominent locations than, for instance, dwellings. My concern, however, is that buildings can become a focus for other activity, such as tracks, yards, vehicle storage etc which would not in themselves be controlled but could cross the "adverse effects on the landscape" threshold. These are the types of issues that are best resolved through looking at a specific case via a resource consent, and on that basis I consider the current 50m^2 permitted activity control is appropriate. …

[29] The Council in evidence proposed that other buildings and structures (not accessory to farming) should be either restricted discretionary or discretionary activities regardless of gross floor area, depending on whether there was an alternative location on a site for a building platform, outside of the ONL overlay.

Evidence before the Panel – earthworks

[30] No change was proposed by the Council in evidence to the Panel to the 50 m^2 restriction on permitted general earthworks within ONLs.

Evidence before the Panel – forestry restrictions

[31] The Panel received evidence from Mr Reaburn to the effect that a 2 ha restriction on "new" forestry (as opposed to simply "forestry") would be reasonable because it would allow for a sizeable woodlot to be established, while allowing the Council to manage any adverse effects arising from the new forestry. Mr Reaburn concluded:

> For an activity that has been assessed as being a sensitive one in view of its potential adverse effects I consider this is the minimum necessary to achieve the outcomes of the RMA and PAUP.

[32] Mr Reaburn supported a change from discretionary to restricted discretionary status for new forestry over 2 ha.

Evidence before the Panel – schedules

[33] With regard to the schedules, the Panel received evidence from Mr Brown that it would be appropriate to amend Appendix 3.2 (the schedule of ONLs) to make it clear that oyster and/or marine farms within individual ONLs had been taken into account in the course of identifying and mapping those ONLs; however the focus on, and description of, such farms should not be so lengthy or detailed that it effectively dominated the summary description of key characteristics. That was because the subject farms were not the main focus of each description, but – like farming operations and dwellings – they were part and parcel of some highly valued landscapes and it would be appropriate to recognise this.

Report and recommendations by the Panel

[34] The report of the Panel containing a summary of its recommendations in relation to Topic 019 (Topic 019 report) was released on 22 July 2016.[18]

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[18] Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 019: Natural features, landscape and character* (22 July 2016) [Topic 019 report].

[35] In the "Overview" section of its report, the Panel began by acknowledging the importance of the provisions addressed in Topic 019 and the relevance of key matters set out in ss 6, 7 and 8 of the RMA. It went on:[19]

> The New Zealand Coastal Policy Statement 2010 is also highly relevant in terms of the coastal environment. Section 62(3) of the Resource Management Act 1991 requires that the Unitary Plan must give effect to the New Zealand Coastal Policy Statement, and of particular note are Policies 13(1)(a) and 15(a) as they are directive, "avoid" policies by virtue of their construction.

[36] Turning to the submissions filed by the parties to this appeal, the Panel wrote:[20]

> The Societies noted that the Council had undertaken an extensive analysis of the Auckland region and had identified and mapped outstanding areas, and had adopted an avoidance policy framework. This avoidance approach, in their view, ensures this bottom line is met through triggering a requirement for resource consent when the size or intensity of a proposed activity has the potential to have adverse effects on the outstanding characteristics and qualities of an area. The Panel considers the provisions it is recommending reflect the submissions made by the Societies.
>
> Man O War Farms Limited and Clime Assets Management Limited opposed the way much of the mapping, in particular outstanding natural landscapes, had been undertaken. The submitter sought fundamental changes to the mapping to bring the Plan policies and mapping in to line if it were to give effect to the New Zealand Coastal Policy Statement. Legal submissions cited the King Salmon decision and its implication for how the Plan's mapping and policy approach were 'at odds' with each other.
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> Man O War Farms Limited and Clime Assets Management Limited submitted that when the mapping and policy were taken together, this would not allow key elements of basic farming activity within areas of mapped outstanding natural landscapes (submitted as being extensive on the submitter's land), and "would require resource consent applications to show that all adverse [effects] have been avoided" (paragraph 7 of the legal submissions).
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> Federated Farmers raised similar concerns as Man O War Farms Limited and Clime Assets Management Limited in relation to the impact on day-to-day farming operations.

[37] The Panel then summarised its recommendations:[21]

> While the Panel understand [sic] the concerns raised by the submitters, the Panel has not recommended fundamental changes to the methodology and approach to the mapping of outstanding natural landscapes, does not find there is a lack of alignment between the mapping and policy approach, and does not

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19 At 4.
20 At 5.
21 At 5.

> find that basic farming activities in the outstanding natural landscapes would require resource consents.
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> However, in response to these and other submitters the Panel has recommended a number of changes to the objectives and policies in the regional policy statement and the Plan which have an avoid focus. The Panel is very aware of the New Zealand Coastal Policy Statement 'avoid' policies (particularly Policies 11, 13 and 15) and the implications of the King Salmon decision. The changes make it clear what adverse effects are to be avoided, rather than simply stating that adverse effects are to be avoided. Changes have also been made to the assessment tables and schedules identifying that some activities exist within these sensitive areas, and that their presence does not cause adverse effects.

[38] The Panel then set out its recommendations and reasons in respect of the submissions filed by individuals or groups. In the section concerning MOW's submissions regarding the mapping of ONLs, the Panel wrote:[22]

> In respect of the identification of the outstanding natural landscapes, the Panel agrees with Mr Brown, and the Council's position as set out [in] their opening legal submissions and the closing statement. In section 32 and 32AA terms, the Panel has considered the options presented by both parties and finds the approach taken by the Council is most appropriate and effective in satisfying section 6(b) of the Resource Management Act 1991, and giving effect to the New Zealand Coastal Policy Statement 2010 (particularly Policy 15) and the provisions of the regional policy statement as recommended by the Panel.

[39] The Panel then repeated its earlier statement that a number of changes had been made to the RPS to make clear what adverse effects should be avoided, rather than simply stating that adverse effects should be avoided; and that changes had been made to the assessment tables and schedules to clarify that existing activities did not give rise to adverse effects.[23]

[40] Turning to the matter of farming activities in ONLs, the Panel said:[24]

> The Panel accepts that the overlay affects properties and how activities may be untaken [sic]. However the controls on existing farming activities are limited and the Panel has sought to ensure that at least existing farming activities are permitted. …
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> Some forestry and buildings are controlled as these are particular activities that may have adverse effects on natural character, features and landscape values. …

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22 At 13.
23 At 13-14.
24 At 14.

> In areas of outstanding natural landscapes, outstanding natural character and high natural character, existing farming activities have been specifically provided for in the in the [sic] activity table, and new farming activities are not prevented. It is not the pastoral use of an overlay area with which the policies are concerned about, but the natural aspects of the area. In this respect, the Panel notes that if a farm exists in an overlay area, it has then been accepted as part of the environment notwithstanding the farming activities. The Panel also notes that in many cases of farming use, the pasture is included in the description of the areas in Schedule 7 Outstanding Natural Landscapes Overlay Schedule …

[41] The Panel referred to Mr Reaburn's evidence that a 200 m^2 building would "quite often" be appropriate, but that he was concerned such buildings might become a focus for other activities that would cross the "adverse effects on the landscape" threshold.[25] The Panel wrote:[26]

> The Panel agrees and considers that the restricted discretionary activity status for some buildings is appropriate. The purpose of the restricted discretionary application process is to test the proposal against the requirement to avoid adverse effects on the natural characteristics and qualities of the overlay.

[42] With regard to buildings and forestry in ONLs, the Panel confirmed the following relevant amendments:[27]

(a) Buildings and structures accessory to pastoral farming, cropping and other non-intensive forms of land production (excluding dwellings) are permitted activities within ONLs where, inter alia, they do not exceed a maximum gross floor area of 50 m^2;

(b) Buildings and structures including any additions which exceed a maximum gross floor area of 50 m^2 are restricted discretionary activities within ONLs;

(c) Existing farming activities and viticulture (including supporting structure for vines) as at 30 September 2013 are permitted activities within ONLs;

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25 At 14-15.
26 At 15.
27 At 3-4.

(d) Existing and new forestry are distinguished so existing forestry activities and new forestry of less than 2 ha are permitted activities within ONLs, while new forestry exceeding 2 ha is a restricted discretionary activity; and

[43] With regard to earthworks (Topic 041), the Panel confirmed the notified permitted allowance for general earthworks of 50 m^2 in ONLs (other than for maintenance of tracks, ancillary to farming).[28]

[44] The Council adopted the Panel's recommendations in their entirety. Under the terms of the LGATPA, the Council was not required to give reasons for accepting recommendations by the Panel. The High Court in *Transpower New Zealand Ltd v Auckland Council* held that where the Council had adopted a recommendation made by the Panel, it could be taken as having accepted the Panel's reasoning.[29]

The Unitary Plan

[45] The Unitary Plan is divided into 14 chapters, three of which are relevant to this appeal.

[46] Chapter B of the Unitary Plan contains the RPS.[30] The regional objectives and policies affecting ONLs are set out in B4 Natural Heritage. The relevant objectives and policies are as follows:

B4.2. Outstanding natural features and landscapes

B4.2.1. Objectives

(1) Outstanding natural features and landscapes are identified and protected from inappropriate subdivision, use and development.

…

B4.2.2. Policies

Identify, evaluate and protect outstanding natural landscapes

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28 See Auckland Unitary Plan: Operative in Part, E12.4.2(A28)-(A30).
29 *Transpower New Zealand Ltd v Auckland Council*, above n 13, at [57].
30 See Local Government (Auckland Transitional Provisions) Act, s 122(1)(a).

(1) Identify and evaluate a place as an outstanding natural landscape considering the following factors:

…

(2) Include a place identified as an outstanding natural landscape in Schedule 7 Outstanding Natural Landscapes Overlay Schedule.

(3) Protect the physical and visual integrity of Auckland's outstanding natural landscapes from inappropriate subdivision, use and development.

Identify, evaluate and protect outstanding natural features

…

Management of outstanding natural landscapes and outstanding natural features

(8) Manage outstanding natural landscapes and outstanding natural features in an integrated manner to protect and, where practicable and appropriate, enhance their values.

[47] Chapter D of the Unitary Plan sets out the objectives, policies and rules of the regional coastal plan and the district plan relating to overlays. The objectives and policies relating to ONLs are set out in D10 Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay as follows:

D10.2. Objectives [rcp/dp]

(1) Auckland's outstanding natural features and outstanding natural landscapes are protected from inappropriate subdivision, use, and development.

…

(4) Existing rural production activities are recognised as part of landscape values including in outstanding natural features and outstanding natural landscapes.

D10.3. Policies [rcp/dp]

(1) Protect the physical and visual integrity of outstanding natural landscapes by:

(a) avoiding the adverse effects of inappropriate subdivision, use and development on the natural characteristics and qualities that contribute to the values of the outstanding natural landscape:

(b) maintaining the visual coherence and integrity of the outstanding natural landscape;

(c) maintaining natural landforms, natural processes and vegetation areas and patterns;

(d) maintaining the visual or physical qualities that make the landscape iconic or rare; and

(e) maintaining high levels of naturalness in outstanding natural landscapes that are also identified as outstanding natural character or high natural character areas.

(2) Protect the physical and visual integrity of outstanding natural landscapes while taking into account the following matters:

(a) the extent of anthropogenic changes to the natural elements, patterns, processes or characteristics and qualities;

(b) the presence or absence of structures, buildings or infrastructure;

(c) the temporary or permanent nature of any adverse effects;

(d) the physical and visual integrity and the natural processes of the location;

(e) the physical, visual and experiential values that contribute significantly to the natural landscape's values;

(f) the location, scale and design of any proposed development; and

(g) the functional or operational need of any proposed infrastructure to be located in the outstanding natural landscape area.

…

(5) Enable use and development that maintains or enhances the values or appreciation of an outstanding natural landscape or outstanding natural feature.

(6) Provide for appropriate rural production activities and related production structures as part of working rural and coastal landscapes in outstanding natural landscape and outstanding natural feature areas.

(7) Encourage the restoration and enhancement of outstanding natural landscapes and outstanding natural features where practical, and where this is consistent with the values of the feature or area.

[48] The rules relating to activities in ONLs are set out in D11 Outstanding Natural Character and High Natural Character Overlay. The substance of the relevant rules is set out at [42] above and does not need to be repeated here.

Approach to appeal

[49] Under s 158 of the LGATPA, a person who made a submission on the PAUP may appeal to the High Court on a question of law in respect of a provision or matter relating to the PAUP:

(a) that the person addressed in their submission; and

(b) in relation to which the Council accepted a recommendation of the Panel, with the result that a provision was included in the Unitary Plan or a matter was excluded from the Unitary Plan.

[50] The approach to appeals under s 158 of the LGATPA was recently considered by the High Court in *Transpower New Zealand Ltd v Auckland Council*.[31] Wylie J held:[32]

> [52] Appeals from the Environment Court to the High Court are also limited to questions of law. In this context, the leading judgment is the decision of a full High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*. The Court there recorded that it should allow appeals from decisions of the Environment Court only if it considers that that Court:
>
> (a) applied a wrong legal test; or
>
> (b) came to a conclusion without evidence or to a conclusion which, on the evidence, it could not reasonably have come; or
>
> (c) took into account matters which it should not have taken into account; or
>
> (d) failed to take into account matters which it should have taken into account.
>
> It accepted that the Environment Court should be given some latitude in reaching findings of fact within its areas of expertise. It also accepted that any error of law found must materially affect the result of the Environment Court's decision before the High Court should grant relief.
>
> [53] This analysis has been applied by the courts, generally without comment, for many years. Recently it was adopted by Whata J in *Albany North Landowners v Auckland Council* in dealing with a number of appeals (and applications for review) arising out of the Council's decisions on the proposed Unitary Plan. The Council and the s 301 parties before me did not

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31 *Transpower New Zealand Ltd v Auckland Council*, above n 13.

32 Footnotes omitted.

> seek to criticise or distinguish the *Countdown* decision. In my view it is a correct statement of the applicable law.
>
> [54] It is also trite law that this Court must resist attempts by litigants to use an appeal limited to a question of law as an occasion for revisiting the factual merits of the case under the guise of a question of law. Where it is alleged that the court or tribunal below came to a conclusion without evidence, or one to which, on the evidence it could not reasonably have come, the appellant faces a "very high hurdle". It does not matter that this Court would almost certainly not have reached the same conclusion as the court or tribunal below. What matters is whether the decision under appeal was a permissible option. The appellate court will almost always have to be able to identify a finding of fact which was unsupported by evidence or a clear misdirection in law by the inferior court or tribunal.

[51] I agree with that statement of principle.

[52] It follows that in order to succeed on appeal, MOW and/or Federated Farmers must demonstrate that the Panel:

(a) applied a wrong legal test; or

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

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

(d) failed to take into account matters which it should have taken into account;

and that the error in question was one that materially affected the decision of the Council to adopt the relevant provisions of the Unitary Plan.

Questions of law on appeal

[53] The second amended notice of appeal filed by MOW lists eight questions of law, divided into three parts. The present decision deals only with the first part of the appeal, Part A, which raises two questions of law:

(a) Must the Council amend the ONL mapping for ONL78 and ONL85 as determined by the Environment Court in *Man O' War Station Ltd v Auckland Council*?[33]

(b) Where it is assumed in a decision that farming activities are not adverse, and the relevant policies set in the same decision (on a planning instrument prepared under the RMA) do not require the avoidance of adverse effects, can rules rationally or reasonably be included in the planning instrument on the basis that they do have adverse effects which must be avoided?

[54] The notice of appeal filed by Federated Farmers similarly lists eight questions of law, only one of which is to be answered in the present decision: whether the Council failed to take into account matters which it should have taken into account when it found, in deciding submissions on farming activities in ONLs, that some forestry and buildings should be controlled as they may have adverse effects on landscape values.

Statement of issues

[55] The fundamental challenge brought by MOW (and, to a lesser extent, Federated Farmers) is that the Panel's recommendations, and therefore the Council's decision, regarding the restrictions upon new farm buildings, earthworks and forestry within ONLs are irrational and unreasonable. That overarching contention then gives rise to a number of individual issues for consideration.

[56] In accordance with a direction of Whata J, the parties filed an agreed statement of issues which set out eight questions of law to be determined in the appeal, as follows:

(a) In light of the Panel's findings, was the adoption of rules restricting the permitted scale of rural buildings and earthworks to 50 m^2 (respectively) a decision which could reasonably have been made?

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33 *Man O'War Station Ltd v Auckland Council*, above n 2.

(b) Also in light of the Panel's findings and recommendations and the Council's subsequent decision, did the Council fail to take into account that policy 15(a) of the New Zealand Coastal Policy Statement 2010 (NZCPS) applies only to "inappropriate" subdivision, use and development when it found that some forestry and buildings in ONLs should be controlled?

(c) In light of the changes made to the objectives and policies of the RPS and the Unitary Plan recommended by the Panel (and adopted by the Council in its decisions), do these restrictions meet the requirements of ss 75(3) and (4) of the RMA?

(d) Do the restrictions at issue address effects on the environment (including on the natural characteristics and qualities inherent in the overlays) that are *adverse*, including for the purpose of policy 15 of the NZCPS, and the relevant objectives and policies of the Unitary Plan?

(e) Where changes to the objectives and policies in the RPS have been made such that they no longer direct avoidance of adverse effects, is it rational (reasonable or lawful) to adopt restrictions on land use premised on the assumption that the avoidance of adverse effects is directed by those provisions?

(f) Is it lawful to include restrictions on the physical or spatial extent of activities permitted under the Unitary Plan, out of concern over the effects which might arise if those activities are subsequently converted to use that requires resource consent under the Plan?

(g) Did the Panel fail to make (and the Council in turn fail to apply) changes to the Unitary Plan assumed in the Panel's reasoning as recorded in the Topic 019 report, being changes to the assessment tables and schedules identifying that some activities exist within the ONL areas and that their presence does not cause adverse effects?

(h) Should the extent of ONL overlays 78 and 85 as applied to Man O' War Station under the Auckland Unitary Plan maps be amended to accord with the extent of the ONL overlay (as to both ONL 78 and 85) as determined by the Environment Court in 2014 (recently confirmed by the Court of Appeal)?

[57] Of the four parties to the appeal, only the Council framed its submissions by reference to those stated issues. In the absence of any clear demarcation between the listed issues in either written or oral submissions, the agreed statement of issues loses much of its utility. It is difficult in many instances to determine which of the issues an individual submission is intended to address.

[58] These observations are not intended as a criticism of the submissions themselves, which were clear and comprehensive. However, for the reasons set out above, I consider it is helpful to reframe the agreed statement of issues as follows.

[59] The key issues in the present appeal can be separated into three categories. The first category comprises issues which are directed to the substance of the rules recommended by the Panel and adopted by the Council:

(a) Whether farming activities on rural land that has been classified as an ONL may in some circumstances give rise to "adverse effects of inappropriate subdivision, use or development";

(b) Whether the rules imposing restrictions on new farm buildings, earthworks and forestry in ONLs are consistent with ss 75(3) and (4) of the RMA.

[60] The second category comprises issues which go to the reasoning that was employed by the Panel in making its recommendations:

(a) Whether, in light of the revised objectives and policies in the RPS, there was a sufficient evidential basis for the Panel's recommendation that

the Council impose restrictions on new farm buildings, earthworks and forestry;

(b) Whether the Panel was entitled to place weight upon the evidence of Mr Stephen Brown that a threshold of 50 m^2 in respect of new farm buildings would prevent the establishment of a "permitted baseline" for future residential development.

(c) Whether the final recommendations by the Panel were consistent with statements in the Topic 019 report that:

(i) Basic farming activities would be permitted under the rules;

(ii) Changes had been made to the assessment tables and schedules identifying that some activities exist within ONL areas, and that their presence does not cause adverse effects.

[61] The final category comprises a single issue concerning amendments to the mapping of ONL78 and ONL85 and can be expressed in the same terms set out in the agreed statement of issues, namely: should the extent of ONL overlays 78 and 85 as applied to Man O' War Station under the Unitary Plan maps be amended to accord with the extent of the ONL overlay (as to both ONL78 and ONL85) as determined by the Environment Court in 2014 (recently confirmed by the Court of Appeal)?

[62] I address each of these issues in turn, but first deal with a preliminary issue.

A preliminary point: application to adduce further evidence on appeal

[63] By a notice of application dated 9 June 2017, MOW sought leave to produce further evidence on appeal pursuant to r 20.16(3) of the High Court Rules 2016, being an affidavit of Mr Matthew Daniels. A minute of Whata J dated 30 June 2017 records the following:[34]

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[34] *Man O'War Farm Ltd v Auckland Council* HC Auckland CIV-2016-404-2331, 30 June 2017 (Minute of Whata J) (footnotes omitted).

[12] Mr Daniels' evidence relates to an aspect of the Court of Appeal's decision in *Man O' War Station Ltd*. Specifically, his evidence quantifies the extent of existing rural activities within the property and goes to the question of whether further rural activity would generate adverse effects. Mr Daniels is a Geographic Information Systems specialist.

[13] While there is existing material on this point within the body of evidence produced to the Independent Hearings Panel, Man O'War submits that it would be helpful for the Court to have additional, discrete and better quantified evidence on the issue.

[14] The constraints on admission of further evidence under r 20.16(3) of the High Court Rules 2016 are strict. The evidence must be fresh, cogent and credible.

[15] The Council opposes the application for leave to produce further evidence. It emphasises that in appeals on questions of law leave to adduce further evidence will only be granted in "very special circumstances":

(a) In an appeal on a point of law the alleged error must be found in the reasoning of the authority based on the evidence before it. This appeal is against a decision of the Independent Hearings Panel. In accordance with the clear intention of the Local Government (Auckland Transitional Provisions) Act 2010, the Court's function is not to assess the appropriate level of new development, as that was an evaluative matter for the Panel. As such the evidence is not relevant to finding an error of law.

(b) The Court of Appeal's comments in *Man O'War Station Ltd* do not call for the Court to assess the appropriate level of new development: they only go as far as to say that current activities do not constitute relevant adverse effects.

(c) The evidence is not fresh, as it does not concern a matter that has arisen after the date of the decision appealed against.

(d) The evidence is not contextual, but rather introduced as a means of challenging the basis for the Independent Hearings Panel's decision.

Assessment

[16] Mr Daniels' evidence is credible, but does not appear to be fresh. This is not a merits-based hearing. It is an appeal on questions of law, namely whether the Independent Hearing Panel erred in various respects in making recommendations on ONL provisions in the Auckland Unitary Plan. Evaluative matters are for the Panel. Moreover, as Man O'War notes, there is existing material on this that was before the Independent Hearings Panel.

[17] My current view therefore is that leave should be declined. But the trial judge will be better placed to assess its freshness and cogency. Accordingly, any final decision on admissibility will be for the trial judge.

[64] I agree with the conclusions of Whata J in their entirety.

[65] Mr Williams, who appeared for MOW, sought to persuade the Court that Mr Daniels' evidence could properly be described as "fresh" because it demonstrated that, had MOW understood the issue before the Panel to be the question of whether particular activities were inappropriate, then it could well have produced more direct evidence on that point than it did. With respect to Mr Williams, that is not the meaning of the term "fresh". "Fresh" in this context means evidence that could not, with reasonable diligence, have been adduced before the Panel.[35] I do not consider that threshold is met in the present case.

[66] The application for leave to adduce further evidence on appeal is dismissed.

The adverse effects of inappropriate subdivision, use or development

[67] This issue goes to the heart of the appeal. Mr Williams in his submissions focused largely upon the meaning of the term "adverse" and specifically, whether farming activities in a rural environment could as a matter of law give rise to "adverse effects". Mr Gardiner, who appeared on behalf of Federated Farmers, focused instead upon the meaning of the term "inappropriate" and specifically, whether farming activities in a rural environment could be said as a matter of law to be "inappropriate subdivision, use, or development". Given the clear similarities between these submissions, it is convenient to consider them together.

Submissions for Man O' War Farms Ltd

[68] Mr Williams submitted that the underlying issue in the appeal was whether rural buildings or earthworks could be said to generate relevant "adverse" effects on a rural landscape, having regard to the basis upon which the landscapes had been identified as outstanding. Rural landscapes, he said, have been classified as outstanding despite the presence of rural activities at a significantly greater existing scale, all established without any planning oversight as to scale, location or form.

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35 See *White v Spence* [2014] NZCA 298 at [15].

[69] Mr Williams submitted that his reasoning on this point was consistent with the statement of the Court of Appeal in the earlier proceeding, *Man O' War Station Ltd v Auckland Council* that:[36]

> … significant areas of native vegetation and pastoral land are both elements of ONL 78 together with buildings (albeit said to be subservient to other elements) and vineyard and olive grove activities. Although natural, it is not pristine or remote. As Mr O'Callahan acknowledged on behalf of Auckland Council, *it is in that setting the question of whether any new activity or development would amount to an adverse effect would need to be assessed*.
>
> (emphasis added)

[70] And, later in the judgment:[37]

> … Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

[71] Mr Williams submitted that, given the nature of MOW's property as a working rural landscape (albeit an outstanding one), the construction of new farm buildings and earthworks would be consistent with the ONL rating and would not generate adverse effects. And yet, he said, there could be no basis to set restrictions on the scale of buildings and earthworks permitted in an ONL, other than an assumption that the effects generated through such activities would be adverse. Mr Williams submitted that the Panel's recommendations were therefore irrational.

Submissions for Federated Farmers Ltd

[72] Mr Gardiner's central submission was that where an ONL overlay exists over farmland, rural production activities are an integral part of the landscape. Since the activities that will be "inappropriate" must be assessed against the backdrop of what is sought to be preserved or protected,[38] in this case farmland, rural production activities could not be described as "inappropriate". That being the case, Mr Gardiner said, rural production activities could not be said to cause adverse effects upon the

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36 *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [66].
37 At [80].
38 *King Salmon*, above n 4, at [101].

landscape values and there was no justification for adopting rules that restricted those activities.

[73] Mr Gardiner placed significant emphasis in his submissions upon policy 15 of the NZCPS and the decision in *King Salmon*. He noted that under policy 15, it is only "*inappropriate* subdivision, use, and development" which must be protected against. He also noted comments by the Supreme Court which emphasised the purpose of the RMA, set out in s 5, to promote sustainable management of natural and physical resources, as defined in subs (2):[39]

> In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[74] Mr Gardiner submitted s 5 contemplates the protection of ONLs which are working landscapes will necessarily involve the undertaking of activities to ensure that the land in those working landscapes is protected by maintaining and enhancing the land; to protect the potential of the land to meet the reasonably foreseeable needs of future generations; and to protect the life-supporting capacity of the water, soil and ecosystems, including the people, that exist on or rely on that land.

[75] Mr Gardiner acknowledged that one possible interpretation of policy 15 would be that the question whether subdivision, use or development is "inappropriate" should be assessed according to whether the subdivision, use or development has adverse effects on the qualities and characteristics of the ONL. However, he submitted that this interpretation would lead to the prevention of almost any activity taking place in a working landscape, which would alter a fundamental characteristic of the ONL – the "working" part of the working landscape.

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39 At [21]-[24].

[76] Another possible interpretation of policy 15, Mr Gardiner said, would be that the policy prohibits or severely constrains the use of rural production land that is in an ONL in the coastal environment for rural production purposes, because the use of that land for those purposes has adverse effects on the ONL. He submitted that this interpretation had been rejected by the Court of Appeal in *Man O' War Station Ltd v Auckland Council*, relying on the statement by the Court that they had not been persuaded "that the ongoing use of MOW's land … for purposes equivalent to those currently taking place would constitute relevant adverse effects".[40] Mr Gardiner submitted that this was equivalent to a finding that the ongoing use of rural production land for rural production purposes would not bring about adverse effects on ONLs.

[77] Assuming that working ONLs should be protected by enabling the continued use of the land for farming purposes, Mr Gardiner submitted, it would follow that rural production activities should be permitted in those ONLs in the same way that those activities would be permitted on any other farmland. Such activities could not have an adverse effect upon the ONL, because they would not affect the qualities and characteristics of the ONL as a working landscape. In the context of a working landscape, Mr Gardiner said, the changes arising from rural production activities (including forestry, earthworks and new buildings) are "natural changes" and are the dominant feature of the relevant landscape. In fact, Mr Gardiner said, the requirement that ONLs be protected must mean, in the context of "working landscapes", that what is to be protected are the production activities taking place on that land.

Submissions for Auckland Council

[78] Ms Dickey for Auckland Council submitted, first, that the question whether rural activities could give rise to an adverse effect on an ONL was a question of fact, rather than one of law. While I accept that the determination whether any *particular* activity results in an adverse effect upon the environment will be a matter of fact, I agree with Mr Williams that the question whether farming activities in a farming landscape *can* have an adverse effect on that landscape can properly be construed as a question of law. I therefore set that objection to one side.

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[40] *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [80].

[79] I do however accept the further submission by Ms Dickey that, to the extent MOW and Federated Farmers seek to challenge the *particular* thresholds adopted by the Council (namely 50 m^2 gross floor area in respect of farm buildings and 2 ha in respect of new forestry), there is no question of law involved.

[80] In respect of the meaning of "*adverse* effects", Ms Dickey submitted that Mr Williams' characterisation of the Court of Appeal decision in *Man O' War Station Ltd v Auckland Council* put the obiter comments of the Court too broadly. The relevant comments by the Court of Appeal were made in response to submissions by MOW that "the applicable policy framework would prohibit or severely constrain its future use for farming".[41] Ms Dickey submitted that the Court of Appeal did not agree and in any case, was considering the appropriateness of the mapping, not the rules governing activities in ONLs. She interpreted the Court's comment to indicate that what MOW was currently doing would not be constrained. Furthermore, the Court of Appeal's comment was limited to MOW's property and ONL78. It did not refer to the greater Auckland area.

[81] Turning to the question of "inappropriate subdivision, use, and development" Ms Dickey submitted that it was clear the Panel was aware of and had considered policy 15 of the NZCPS in its decision. That consideration was reflected in the Panel's statement that:[42]

> Notwithstanding the above, the Panel has recommended a number of changes to the objectives and policies in the regional policy statement and the Plan which have an 'avoid' focus. The Panel is very aware of the New Zealand Coastal Policy Statement 'avoid' policies (particularly Policies 1, 13 and 15) and the implications of the King Salmon decision. The nature of the changes made are to make clear what adverse effects are to be avoided, rather than simply stating that adverse effects are to be avoided.

[82] The relevant changes to the policies in the PAUP inserted the term "inappropriate" into the policy requiring the "[avoidance of] adverse effects of inappropriate subdivision, use, and development".[43]

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41 *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [79].
42 Topic 019 report, above n 18, at 13-14.
43 Auckland Unitary Plan: Operative in Part, D10.3(1)(a).

[83] The rules themselves also referenced the requirement to protect against "inappropriate subdivision, use, and development." The assessment criteria for buildings, for example, refer to the "effects on the characteristics and qualities that contribute to the natural character and/or landscape values of the area", in other words whether the activity is "inappropriate".[44] Buildings which are larger than 50 m^2 may also be appropriate in some circumstances, but this must be assessed on a case-by-case basis.

[84] Finally, Ms Dickey submitted that Federated Farmers had erred in its submission that what is "inappropriate" should not be assessed against whether the subdivision, use or development has adverse effects on the qualities and characteristics that define the values of the landscape being protected. Ms Dickey referred to a submission by Mr Gardiner that this interpretation was "highly improbable" because it would lead to the prevention of almost any activity taking place in working landscapes. She submitted that this was precisely the manner in which appropriateness of subdivision, use and development should be determined. Those characteristics are what make the landscape "natural" and "outstanding" and it is effects on those qualities that should be avoided.

Submissions for the Societies

[85] Ms Wright on behalf of the Societies submitted the fact that an ONL overlay applies (in whole or in part) to an area that is presently used for farming does not mean all farming activities in that place must be appropriate, nor that farming activities cannot give rise to adverse effects. Appropriate is to be assessed against what is sought to be protected; that is, the characteristics and qualities that contribute to the ONL. Farming activities may be appropriate in respect of the pastoral characteristics of an ONL but not other characteristics.

[86] Ms Wright submitted that new farming activity, in particular, might not have an adverse effect on the pastoral characteristics of an ONL but might adversely affect other characteristics, for example connectivity in coastal ridgeline topography. Or, new farming activity might be of a different scale or style to existing activity and might

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44 Auckland Unitary Plan: Operative in Part, D11.8.1.

jar with the ONL's existing pastoral characteristics. Ms Wright submitted that Mr Gardiner's submission that changes arising from farming activities are "natural changes" incorrectly focused on farming, rather than its effect on the landscape's characteristics and qualities. The scale and intensity of the new activity will also affect its appropriateness.

[87] Like Ms Dickey, Ms Wright rejected Mr Williams' interpretation of the Court of Appeal dicta in *Man O'War Station Ltd v Auckland Council*. The Court of Appeal made no comment on activity status for farming activities in ONLs or the validity of regulatory oversight. It simply observed that is was "not persuaded that the ongoing use of MOW's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects."[45] That statement, Ms Wright said, expressed no preference as to whether ongoing use would be provided for by permitted activity status, or by grant of a resource consent.

Discussion

[88] I turn first to the meaning of the terms "adverse" and "inappropriate" in the context of policy D10.3(1)(a). The Supreme Court decision in *King Salmon* is highly relevant to this issue.[46]

[89] The *King Salmon* decision was released in April 2014, shortly after the commencement of the hearing process. The effect of the decision was significant. In *King Salmon*, the Supreme Court was asked to consider the meaning of the words, "give effect to" in the context of a requirement to give effect to the NZCPS. The decision-maker in that case, a five-member board chaired by a retired Environment Court Judge, had considered that the requirement to give effect to higher level planning documents could be met by adopting an "overall judgment" approach. On that approach, the fact that a decision would breach one or more of the individual policies in a higher level document was not considered determinative, provided that the decision would give effect to the document as a whole. The Supreme Court

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45 *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [66].
46 *King Salmon*, above n 4.

rejected that approach, holding that the requirement to "give effect to" the NZCPS could not be met by adopting an overall judgment approach.

[90] The relevant policies in that case were policies 13(1)(a) and 15(a) of the NZCPS. Policy 15 is of relevance in the present proceeding also and for that reason I set the relevant parts of that policy out below:

> **Natural features and natural landscapes**
>
> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> …

[91] In determining the scope of the requirement to "give effect to" policy 15 of the NZCPS, the Supreme Court considered the meaning of the terms "avoid", "adverse effects" and "inappropriate". The Court held that "avoid" in the context of policy 15 had its ordinary meaning of "not allow" or "prevent the occurrence of".

[92] The Court then considered the meaning of the term "inappropriate" in the context of "inappropriate subdivision, use, and development":[47]

> [98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development. This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.
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> [99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:
>
> > 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;
>
> …

[47] Footnotes omitted.

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says 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", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that were the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development by *avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

…

> [105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS.

[93] That approach is equally applicable when interpreting policy D10.3(1)(a). The standard for determining what is "inappropriate subdivision, use and development" relates back to the natural characteristics and qualities that contribute to the values of the ONL in question. Some types of activity will be inappropriate in every ONL, regardless of surrounding context. In general, however, the question whether a particular "subdivision, use [or] development" is appropriate in a particular ONL must be assessed on a case-by-case basis. Similarly, whether an activity gives rise to "adverse effects" must be assessed according to its effect on the natural characteristics and qualities that contribute to the values of the ONL. Again, this calls for a case-by-case assessment of the proposed activity and its effect on the environment. There is a degree of overlap between these two definitions: an activity which gives rise to adverse effects on the ONL is likely to be inappropriate and vice versa.

[94] What, then, are the natural characteristics and qualities against which the effect of an activity must be assessed? The focus is upon the *natural* characteristics and qualities of the ONL in question. The ordinary meaning of the word "natural" is "existing in or caused by nature; not artificial".[48] I see no reason to depart from the ordinary meaning of that word in this context. Man-made features including buildings, tracks and fences associated with farming may be characteristics or qualities of the ONL, but they are not *natural* characteristics or qualities of the ONL.

[95] Accordingly, whether an activity causes "adverse effects" or whether an activity is "inappropriate subdivision, use [or] development" will be determined by its effect on the characteristics and qualities of the ONL that are "existing in or caused by nature". This is a contextual assessment. Where there are existing farming activities,

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[48] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005). See also *Long Bay-Okura Great Park Society Incident v North Shore City Council* EnvC Aukcland A078/08, 16 July 2008 at 78, citing *Harrison v Tasman District Council* [1994] NZRMA 193 (EnvC) and *Wakatipu Environment Society Inc v Queenstown Lakes District Council*, above n 17, at [89].

the mere continuation of those activities will not ordinarily give rise to adverse effects on the natural characteristics and qualities of the ONL.[49]

[96] The presence of existing farming activities will also be relevant to the assessment of any new activity.[50] The construction of a 200 m^2 hay shed in an ONL where farm buildings already form a part of the landscape, for example, is less likely to give rise to adverse effects on the natural characteristics and qualities of the ONL than the construction of the same shed in an ONL which is pristine. That is not to say, however, that the construction of a 200 m^2 hay shed in an ONL where farming activities exist can *never* give rise to adverse effects. To quote Ms Wright's submissions, a barn that is appropriately sited, screened and coloured may be acceptable; a barn on a prominent ridgeline with no screening vegetation and painted bright orange may not.

[97] I am satisfied that, as a matter of law, new farming activities in a rural environment which is subject to an ONL may in some instances give rise to "adverse effects" and may in some instances be properly described as "inappropriate subdivision, use [or] development".

[98] These principles flow through to the rules contained in the Unitary Plan. Where the Council is satisfied, in respect of a particular activity, that the activity cannot give rise to adverse effects upon the natural characteristics and qualities of the ONL, the activity may be granted permitted status. So, for example, rule D11.4.1(A3) of the Unitary Plan provides that existing farming as at 30 September 2013 is a permitted activity in ONLs. At the other end of the spectrum, where the Council is satisfied, in respect of a particular activity, that the activity will in every instance give rise to adverse effects upon the natural characteristics and qualities of the ONL, the activity must be prohibited. For example, rule D11.4.1(A8) provides that landfills are prohibited activities in ONLs.

[99] In many cases, however, it may be impossible to make any generalisation regarding the effects of an activity on ONLs. In that case, the effect of the proposed

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49 See *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [80].
50 See *Man O'War Station Ltd v Auckland Council* (CA), above n 3, at [66].

activity on the natural characteristics and qualities of the ONL must be considered on a case-by-case basis to determine whether the activity will give rise to adverse effects.

[100] This reasoning is evident in the Panel's comments regarding farming activities in ONLs:[51]

> The Panel accepts that the [ONL] overlay affects properties and how activities may be untaken [sic]. However the controls on existing farming activities are limited and the Panel has sought to ensure that at least existing farming activities are permitted. A summary of the key amendments to the rules covered by this report are set out in section 1.2 above, however the Panel notes that other sections of the plan (e.g. earthworks and vegetation management) also affect how activities may be undertaken.
>
> Some forestry and buildings are controlled as these are particular activities that may have adverse effects on natural character, features and landscape values. …
>
> In areas of outstanding natural landscapes, outstanding natural character and high natural character, existing farming activities have been specifically provided for in the in the [sic] activity table, and new farming activities are not prevented. It is not the pastoral use of an overlay area with which the policies are concerned about, but the natural aspects of the area. In this respect, the Panel notes that if a farm exists in an overlay area, it has then been accepted as part of the environment notwithstanding the farming activities. The Panel also notes that in many cases of farming use, the pasture is included in the description of the areas in Schedule 7 Outstanding Natural Landscapes Overlay Schedule and Schedule 8 Outstanding Natural Character and High Natural Character Overlay Schedule.

[101] The rules recommended by the Panel in respect of new buildings, earthworks, and forestry in ONLs are, as a matter of law, entirely consistent with a requirement to avoid the adverse effects of inappropriate subdivision, use and development. Each of those activities is a restricted discretionary activity, meaning that resource consent is required before undertaking that activity. In determining the outcome of a resource consent application, the Council may have regard to a number of criteria, including:[52]

> (2) Whether, taking into account the characteristics and qualities of the site, the activity, building or structure is located within an area that has the greatest potential to absorb change and minimise adverse effects on the landscape and/or natural character values.
>
> (3) Whether the proposed mitigation measures will ensure that there will be no more than minor effects on all of the following:

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51 Topic 019 report, above n 18, at 14.

52 Auckland Unitary Plan: Operative in Part, D11.8.2.

(a) amenity values or views, both from land and sea;

(b) landscape and natural character values; and

(c) people's experiences and values associated with an area, including the predominance of nature and wilderness values.

…

(7) Whether the activity, building or structure will result in adverse cumulative effects, having regard to other activities, building or use and development.

…

[102] There is a clear link between these criteria (and others listed in rule D11.8.2) and the objectives and policies of the NZCPS, RPS and district plan.

[103] For completeness I note that, contrary to the submissions by Mr Williams and Mr Gardiner, there is nothing in the report or recommendations of the Panel which states, expressly or impliedly, that farming activities including new buildings, earthworks and forestry will in every case amount to "adverse effects of inappropriate subdivision, use, and development". Indeed, had the Panel reached that conclusion, then it would as a matter of law have been required to recommend that those activities be categorised as prohibited activities. It did not do so.

Section 75 of the Resource Management Act 1991

[104] The second issue asks whether the rules imposing restrictions on new farm buildings, earthworks and forestry in ONLs are consistent with ss 75(3) and (4) of the RMA. Neither MOW nor Federated Farmers dedicated any significant attention to this issue, despite its inclusion in the agreed statement of issues. Nonetheless, I address this point briefly below.

[105] Section 75 of the RMA relevantly provides:

75 Contents of district plans

(1) A district plan must state—

(a) the objectives for the district; and

(b) the policies to implement the objectives; and

(c) the rules (if any) to implement the policies.

…

(3) A district plan must give effect to—

(a) any national policy statement; and

(b) any New Zealand coastal policy statement; and

(ba) a national planning standard; and

(c) any regional policy statement.

(4) A district plan must not be inconsistent with—

(a) a water conservation order; or

(b) a regional plan for any matter specified in section 30(1).

…

[106] The Supreme Court in *King Salmon* held that "give effect to" means "implement" and the instruction to "give effect to" a higher order planning document was a "strong directive, creating a firm obligation on the part of those subject to it."[53]

[107] Although s 75(3) requires a district plan to give effect to a number of higher order planning documents, the focus for the purposes of the present appeal is upon the consistency between the rules regulating new farm buildings, earthworks and forestry and the relevant policies and objectives of the RPS in the Unitary Plan. This focus arises from differences between the RPS in the PAUP and the RPS in the Unitary Plan.

[108] Chapter B of the PAUP contained all of the objectives and policies for the RPS, the regional plan, the regional coastal plan and the district plan. It relevantly provided:

Objectives

[rps/rp/rcp/dp]

1. Auckland's ONLs and ONFs are protected from inappropriate subdivision, use, and development.

…

Policies

---

53 *King Salmon*, above n 3, at [77].

[rps/rp/rcp/dp]

…

Protection

…

16. Protect the physical and visual integrity and the landscape values of ONLS by:

    a. appropriate type, scale, intensity and location for subdivision, use and development

    …

    c. avoiding activities that individually or cumulatively detract physically or visually from the values of the landscape

    …

[109] On 9 March 2015, the Panel released an interim guidance text in respect of Chapter B of the PAUP, indicating its intention to separate those objectives and policies comprising the RPS from those contained in the regional plan, regional coastal plan and district plan.[54] The Panel did not however give any indication how that separation would occur. Submitters were therefore left in a position where they were effectively required to make their best guess as to the content of the RPS.

[110] For the purposes of the Topic 019 hearings, submitters largely relied upon a draft version of the RPS prepared by Mr Reaburn, one of the Council's witnesses, and annexed to his evidence. The relevant objectives and policies of the RPS, as proposed by Mr Reaburn, were as follows:

Objective 1	Auckland's ONLs and ONFs are protected from inappropriate subdivision, use, and development.

…

Policy 5	Protect the physical and visual integrity of ONLS by: a. avoiding the adverse effects of subdivision, use and development within the ONL on the natural characteristics and qualities that contribute to the values of the ONL. …

[54] Interim Guidance Text, above n 16.

[111] The substance of policy 5 above was ultimately included in the Unitary Plan, but as part of the Chapter D (the regional coastal plan and district plan) rather than the RPS. The relevant objectives and policies of the RPS in the Unitary Plan instead provide:

> **B4.2. Outstanding natural features and landscapes**
>
> **B4.2.1. Objectives**
>
> (1) Outstanding natural features and landscapes are identified and protected from inappropriate subdivision, use and development.
>
> …
>
> **B4.2.2. Policies**
>
> *Identify, evaluate and protect outstanding natural landscapes*
>
> …
>
> (6) Protect the physical and visual integrity of Auckland's outstanding natural landscapes from inappropriate subdivision, use and development.
>
> *Identify, evaluate and protect outstanding natural features*
>
> …
>
> *Management of outstanding natural landscapes and outstanding natural features*
>
> (8) Manage outstanding natural landscapes and outstanding natural features in an integrated manner to protect and, where practicable and appropriate, enhance their values.

[112] Mr Williams submitted that the removal of any policy requiring avoidance of adverse effects from the RPS had a profound effect upon the meaning of that document. He submitted that the RPS now required management only rather than avoidance and that, as a consequence, the rules restricting new farm buildings, earthworks and policies were now inconsistent with the objectives and policies of the RPS, in contravention of s 75 of the RMA.

[113] Ms Wright submitted that Mr Williams' characterisation of changes to the policies between the PAUP and the Unitary Plan was overstated and wrong. The Panel did not delete the policy to avoid adverse effects, but simply moved it to Chapter D of the Unitary Plan (comprising the regional coastal plan and district plan). Ms Wright

submitted that the management direction in the RPS was given effect to by the specific and directive objectives and policies in Chapter D10 of the Unitary Plan, including the requirement to avoid adverse effects of inappropriate activities on ONL characteristics and qualities

[114] I agree with those submissions. Contrary to Mr Williams' submission, the most relevant policy of the RPS is not policy B4.2.2(8) requiring the management of ONLs, but rather policy B4.2.2(6) requiring the protection of ONLs from inappropriate subdivision, use and development. That policy in turn reflects objective B4.2.1(1), which similarly provides that ONLs should be protected from inappropriate subdivision, use and development. The rules which restrict new farm buildings, earthworks and forestry give effect to that objective and that policy. There is no breach of s 75.

An evidential basis for the Panel's recommendation

[115] The third issue asks whether, in light of the revised objectives and policies in the RPS, there was a sufficient evidential basis for the Panel's recommendation that the Council impose restrictions on new farm buildings, earthworks and forestry. This issue similarly arises from the changes to the wording of the policies pertaining to ONLs over the course of the hearings process, specifically policy D10.3(1)(a) of the Unitary Plan.

[116] The requirement to avoid adverse effects of subdivision, use and development first appeared in policy 5 of Mr Reaburn's proposed RPS, set out at [110] above. The final version of the policy is set out in Chapter D10.3 of the Unitary Plan:

> (1) Protect the physical and visual integrity of outstanding natural landscapes by:
>
> (a) avoiding the adverse effects of inappropriate subdivision, use and development on the natural characteristics and qualities that contribute to the values of the outstanding natural landscape;
>
> …

[117] The focus of the parties' submissions was the effect of including the word "inappropriate" in "inappropriate subdivision, use and development".

Submissions for Man O' War Farms Ltd

[118] Mr Williams submitted that the Panel's recommendations, first, to move the policy requiring the protection of the physical and visual integrity of ONLs from the RPS to the district plan; and second, to insert the term "inappropriate" into the phrase "avoiding the adverse effects of inappropriate subdivision, use and development" represented a substantial revision to the policy setting underpinning the restrictions upon farm buildings and earthworks.

[119] This revision was significant, Mr Williams submitted, because the restrictions at issue were supported in evidence to the Panel on the basis that the objectives and policies in the PAUP required the complete avoidance of adverse effects, and that permitting rural activities (rural buildings and earthworks specifically) above 50 m^2 would generate adverse effects.

[120] In support of this point Mr Williams referred to an extract of Mr Reaburn's evidence on Topic 041 in which Mr Reaburn wrote:[55]

> 9.2 Of significance, in relation to the natural heritage provisions, is the decision of the Supreme Court in **Environmental Defence Society Incorporated v New Zealand King Salmon Limited** (the "**King Salmon**" decision). **King Salmon** states that an 'overall balancing approach' should not be used when implementing directive the policies [sic] of the NZCPS. In that regard, adverse effects should not be balanced against positive effects through revisiting Part 2 of the RMA. While this was in relation to the coastal environment only, Mr McPhee's expert evidence on Topic 010 was that the management approach required by section 6(2) of the RMA in terms of the protection afforded to ONLs, ONCs and ONFs does not differentiate between coastal and non-coastal locations. Section 6(b) requires the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development as a matter of national importance, regardless of location. I agree with Mr McPhee that it does not make sense to afford a different level of protection, for instance, to a portion of the Waitakere Ranges which may be only metres apart from another portion of the Waitakere Ranges with the same values, where one side is in the coastal environment and the other side is not.
>
> 9.3 The **King Salmon** decision also contains important guidance on how policies are to be interpreted, particularly where policies are prescriptive in their intent. Policies 13(1)(a) and 15(a) of the NZCPS require that planning instruments shall 'avoid' adverse effects on

[55] Footnotes omitted.

> ONCs, ONLs and ONFs in the coastal environment. The words in the NZCPS are clear and directive. Where the word 'avoid' is used it means 'not allow' or 'prevent the occurrence of'. This has clear implications in respect of methods and rules – they need to carefully address situations where activities may have adverse effects.

[121] In Mr Williams' submission, the passage set out above makes it clear that the requirement in the Council's proposed policy to "avoid adverse effects" played a very significant role in Mr Reaburn's conclusions and recommendations regarding the rules to apply in ONLs.

[122] That approach also affected the evidence given by MOW's own expert witness, Ms Gilbert:

> 146. Mr Reaburn's evidence addresses the rules for the ONL, HNC and ONC areas. Mr Reaburn explains that many of the rules have been developed to achieve consistency with regional objectives and policies, which, broadly speaking, require an 'effects avoidance' approach for ONLs and ONC areas, and a 'significant effects avoidance' approach for HNC areas (consistent with *King Salmon*).
>
> 147. As mentioned previously, a number of the consequential restrictions on such basic activities as track formation and rural buildings ($50m^2$ in each case) are extremely restrictive in terms of normal farming operations. However, within the context of an overarching 'avoidance as a bottom line' policy approach, I agree that such controls are likely to be appropriate (from a landscape perspective). This points to the inherent tension between mapping large tracts of rural farmland as ONL under the *King Salmon* policy context.
>
> 148. Further I note the extensive farm tracks and large scale buildings within the PAUP ONL mapped area (e.g. red staff accommodation building for seasonal workers: approximately $1,250m^2$). Clearly these were assessed to be an acceptable and appropriate part of the high value landscape under the 'old world' cultured nature or *WESI* paradigm, yet ironically it is difficult to see how these fundamental components of the working rural landscape at MOWF could be contemplated under the (now) proposed PAUL policy context for ONLs.

[123] It is clear, Mr Williams said, that the restrictions at issue were premised on both an assumption that the provisions of the Unitary Plan RPS required adverse effects of activities in ONLs to be avoided. In contrast, Mr Williams submitted, RPS policy B.4.2.2(8) of the Unitary Plan did not make any reference to an avoidance imperative at all:

> (8) Manage outstanding natural landscapes and outstanding natural features in an integrated manner to protect and, where practicable and appropriate, enhance their values.

[124] In light of the subsequent changes to the policies, Mr Williams said, the premise behind the restrictions was no longer valid. In basic terms, Mr Williams said, the restrictions had been evaluated in the Council's evidence as being appropriate to serve the avoidance imperatives stressed by Mr Reaburn, not the "management" imperative set by the Panel. There was a "fundamental disconnect" between the restrictions and the Panel's reasoning, findings and other recommended changes to the Unitary Plan.

[125] Mr Williams acknowledged that the avoidance imperative did still appear in policy D10.3(1)(a) of the Unitary Plan, but submitted that the inclusion of the word "inappropriate" in "inappropriate subdivision, use and development" represented a material difference between the wording of policy D10.3(1)(a) and that employed by Mr Reaburn in his evidence.

Submissions for Auckland Council

[126] Ms Dickey submitted that Mr Williams had over-emphasised the impact of the particular RPS policies upon Mr Reaburn's conclusions. She submitted that the policies in Chapter D of the Unitary Plan retained the "avoidance" imperative and that the insertion of the word "inappropriate" into the phrase "inappropriate subdivision, use and development" was not a material change.

[127] In any event, Ms Dickey said, there was no clear basis for the argument that the Panel did not have its proposed changes to the policy framework in mind when it set the rule framework. She submitted it was clear from statements made in the Topic 019 report that the Panel did have regard, in particular, to the effect of including the word "inappropriate" in policy D10.3(1)(a) of the Unitary Plan. The Panel wrote:[56]

> … the objectives and policies should clearly identify what is to be enabled in which locations and what is to be avoided. In a number of situations, some types of development may be enabled in sensitive locations while other types of development should not be. For example, while a marine farm would be

[56] Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council: Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) [Overview report] at 40.

> inappropriate in an outstanding natural landscape or seascape, a lighthouse may not be …

[128] In addition, Ms Dickey noted, the Panel was required to include in its recommendations a further evaluation of its recommendations in accordance with s 32AA of the RMA. The Panel wrote:[57]

> This evaluation is only for the changes that the Panel recommends be made and is undertaken at a level of detail that corresponds to the scale and significance of the changes.
>
> The entire hearing process and the Panel's deliberations have constituted its review for the purposes of section 32AA of the Resource Management Act 1991. The hearing sessions for each topic enabled the Panel to test possible amendments to the provisions of the Unitary Plan as notified.
>
> The Panel's evaluation is based primarily on the Council's original section 32A report, any section 32AA evaluation provided by Council or other submitters during the course of the hearings, and the information and analysis contained in submissions, responses and questions, and supporting evidence presented to the hearings.
>
> …
>
> The Panel's evaluation is contained in the body of its recommendation report for each topic where changes are proposed to the Unitary Plan as notified. A summary of the main changes recommended by the Panel is contained in this Overview and is part of but not the full evaluation.

[129] Ms Dickey submitted that it was clear from the Topic 019 report that the Panel had evaluated its changes to the structure of the RPS provisions. It then immediately turned to the appropriateness of the rules which flowed out of those provisions. One rule was included to ensure that existing farming had been provided for. Another rule provided for farm buildings up to a certain size. Ms Dickey submitted that the Panel had assessed those rules and determined them to be appropriate and necessary to give effect to the higher order provisions.

Submissions for the Societies

[130] Ms Wright did not accept that the insertion of the word "inappropriate" into policy D10.3(1)(a) of the Unitary Plan resulted in any material difference to the Unitary Plan's policy framework. The focus on inappropriate activities was not new,

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[57] Overview report, above n 56, at 20-21.

she said. In the PAUP, objective 1 of the RPS required that "Auckland's ONLs are protected from inappropriate subdivision, use, and development".

Discussion

[131] I do not accept Mr Williams' submission that there was an insufficient evidential basis for the Panel's findings, for three reasons.

[132] The first reason is that, although the word "inappropriate" was not incorporated into Mr Reaburn's draft policy 5, the word "inappropriate" was nevertheless included in his draft objective 1 (which adopted the same wording as that used in the PAUP). Policy 15 of the NZCPS similarly requires that the natural landscapes of the coastal environment are protected from inappropriate subdivision, use, and development. As noted above, s 75 of the RMA requires that a district plan must give effect to both the NZCPS and the RPS. The submitters to the Panel, and the expert witnesses giving evidence on their behalf, should have been aware that the question whether any particular subdivision, use or development was "inappropriate" would be a relevant consideration.

[133] The second reason is that the experts who gave evidence on behalf of Auckland Council – specifically Mr Reaburn and Mr Brown – acknowledged that the assessment whether a particular activity gave rise to effects which were "adverse" would be contextual and supported the thresholds of 50 m^2 gross floor area for new farm buildings and 2 ha for new forestry on that basis. Mr Brown said:

> 61. There is no exact science behind the limitation of future buildings within ONLs to 50m^2, other than that it approximates the size of a two-vehicle shed or small tractor shed. It is also a size that has been agreed for other planning instruments, such as the much debated, Far North District Plan, and is aligned with the concept that *where farms are subject to ONL overlays, there is an acceptance that rural production is 'part and parcel' of that particular landscape*. As a result, farming in such locations shouldn't be excessively constrained in terms of on-going activities or maintenance and development.
>
> (emphasis added)

[134] Mr Reaburn expressly recorded his agreement with this statement by Mr Brown. In circumstances where both experts had already acknowledged a

contextual element to their analysis, I do not consider that the insertion of the word "inappropriate" into policy D10.3(1)(a) was a significant change. It certainly did not render the basic premise behind the restrictions invalid, as Mr Williams suggested.

[135] I acknowledge that Ms Gilbert did not adopt this approach. Rather, she wrote, "*King Salmon* effectively raises the 'bar': no longer are such landscapes simply to be protected from inappropriate use and development, there should now (essentially) be an avoidance of adverse effects". She did not consider any contextual aspect to the assessment of whether a particular activity would give rise to adverse effects. That omission was unfortunate and I accept that, with the benefit of hindsight, MOW (and others) might prefer to present different evidence on this point. The omission, however, was not due to any fault by the Panel.

[136] Finally, and in any case, Mr Williams faces a more fundamental difficulty in that the alleged error of law under this heading arises directly from the consultation process prescribed by the LGATPA. As noted above, Part 4 of the LGATPA established a streamlined hearing process for the development of the Unitary Plan, which required the Panel to deliver its recommendations within a highly compressed timeframe of three years. In order to achieve that outcome, the opportunities for public consultation were necessarily limited. Submitters were, by design, required to present their submissions and evidence on the PAUP at a time when the objectives and policies of the RPS (and the district plan) had not yet been finalised. It was inevitable that, in at least some cases, there would be a mismatch between the objectives and policies upon which the parties had based their submissions and/or evidence, and those which were ultimately adopted in the Unitary Plan. The existence of that mismatch does not provide a proper basis for a successful appeal.

Taking into account irrelevant considerations

[137] The next issue in the appeal asks whether the Panel was entitled to place weight upon the evidence of Mr Brown that a threshold of 50 m^2 in respect of new farm buildings would prevent the establishment of a "permitted baseline" for future residential development.

[138] In Mr Williams' submission, Mr Brown's statement regarding a "'permitted baseline' for future residential development" was a reference to the possibility that a rural building might later be converted to residential use. Mr Williams submitted that, as a matter of law, a permitted activity should be justified by reference to the adverse effects (or potential adverse effects) of the activity itself, and not a potential future conversion to some other use.[58] In the present case, he argued, rule D.11.4.1. provides that residential dwellings are a discretionary activity. A resource consent would therefore be required before any residential use could be made of the buildings at issue and the effects of concern to Mr Brown would be addressed through that process.

[139] Ms Wright rejected Mr Williams' characterisation of Mr Brown's evidence. A review of the evidence, she said, revealed that concerns regarding a permitted baseline were not related to the conversion of a farm building to residential use, but rather concerns that lack of regulatory oversight would mean buildings of equivalent size and bulk to residential buildings could be built with significant adverse effects. If such buildings were established for farming purposes, their existence would establish a permitted baseline for applications for separate but proximate residential dwellings.

[140] The "permitted baseline" test was developed by the Court of Appeal in *Bayley v Manukau City Council*:[59]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which the consent is sought will not have any adverse effect on the environment which is more than a minor effect. *The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right*.
>
> (emphasis added)

[141] Originally, the test was only considered relevant in the context of notification decisions under s 94 of the RMA. However the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council* held that the test was equally applicable in the context of ss 104 and 105 of the RMA, which govern decisions by consent authorities whether to grant an application for resource consent.[60]

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58 Citing by analogy *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA).
59 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576.
60 *Smith Chilcott v Auckland City Council* [1991] 3 NZLR 473 (CA) at [24].

[142] The relevant section of Mr Brown's evidence reads as follows:

> 63. Just as important, the size limit ensures that a clear distinction is drawn between 'sheds' and other buildings ancillary to farming activities and buildings that might be more akin to the size and configuration of a small dwelling. The 50m^2 ensures that there is little likelihood of buildings permitted across rural and coastal Auckland establishing a 'permitted baseline' for future residential development that can rapidly change the fundamental character of an area, and its perceived value, - through diminution of such qualities as naturalness, rural amenity, and the sense of remoteness and solitude associated with some ONLs. …

[143] Contrary to the submission by Mr Williams, I do not consider that Mr Brown by this statement was suggesting that a permitted building of 200 m^2 might later be converted into residential use. In my view, the correct interpretation of Mr Brown's evidence is this.

[144] Suppose, for the purposes of the present discussion, that farm buildings of up to 200 m^2 gross floor area were to be categorised as permitted activities within ONLs. Suppose, also, that MOW wished to construct a residential building of a similar (or smaller) size, a discretionary activity under the Unitary Plan. In considering whether to grant resource consent for the dwelling, the Council would be required to consider whether the construction of a residential dwelling in that place would have an adverse effect on the environment. Applying *Bayley v Manukau District Council*, the Council would be required to conduct a comparison between the activity for which resource consent was sought – the construction of a residential dwelling with gross floor area of less than 200 m^2 – and a permitted activity in that zone, namely the construction of a farm building with gross floor area of around 200 m^2.

[145] Mr Brown's concern appears to be that in this hypothetical situation, the Council might well conclude that the construction of a residential dwelling of the proposed design would have an equivalent effect to the construction of a permitted farm building and would grant the resource consent on that basis. I accept that is a valid concern and the Panel was entitled to take that concern into account in making its decision.

Consistency between statements in Report and final recommendations

[146] The fifth issue on appeal asks whether the final recommendations of the Panel were consistent with statements in its Topic 019 report that:

(a) Basic farming activities would be permitted under the rules; and

(b) Changes had been made to the assessment tables and schedules identifying that some activities exist within ONL areas, and that their presence does not cause adverse effects.

Submissions for Man O' War Farms Ltd

[147] Mr Williams submitted that decision of the Panel was inconsistent with the explicit statements made in its report and was therefore unreasonable or irrational. In particular, he submitted that the Panel found that basic farming activities would not require resource consents, but that the restrictions set under the Unitary Plan were directly at odds with that finding. The restrictions would trigger the need for resource consents for virtually any rural building, and earthworks at a scale typically undertaken on a rural property. Mr Williams submitted that these activities were basic to farming and therefore, according to the statements of the Panel in its Topic 019 report, should have been permitted under the rules. It was not sufficient, he said, for the Panel to provide that "existing farming" would constitute a permitted activity.

[148] Mr Williams submitted also that the Panel had failed to recommend (and the Council had failed to adopt) changes to the assessment tables and schedules that had been indicated in its Topic 019 report. In respect of the assessment tables, Mr Williams said that MOW had sought express recognition that the presence of some farming activities in ONLs would not be considered adverse, and that the Panel in its report had indicated that recognition would be forthcoming; however, had failed to make the necessary changes as indicated. In respect of the schedules, Mr Williams said that MOW had sought an amendment to the schedules describing ONL87 and ONL85 to expressly recognise that farming activities existed within those ONLs and did not give rise to adverse effects. Again, however, the promised changes were not forthcoming.

Submissions for Federated Farmers

[149] Mr Gardiner did not expressly address this issue in his submissions to the Court. He did however submit that "basic farming activities" must be interpreted to mean those farming activities which, in areas that are not ONLs, are permitted activities (including farm forestry). Those activities can be contrasted with other farming activities which, in areas that are not ONLs, nonetheless require resource consent. Mr Gardiner submitted that the definition of "basic farming activities" advanced by the Council paid no heed to the practicalities of farming.

Submissions for Auckland Council

[150] Turning first to the statement in the Topic 019 report that "basic farming activities" would be permitted in ONLs, Ms Dickey submitted that this was an accurate representation of the effect of the rules in the Unitary Plan. In particular, she said, both existing farm activities (as at the notification date for the PAUP, being 30 September 2013) and new buildings with a gross floor area of up to 50 m^2 are permitted.

[151] In support of this submission, Ms Dickey referred to the text of the Topic 019 report. She submitted that the statement by the Panel that it did "not find that basic farming activities in the outstanding natural landscapes would require resource consents"[61] needed to be read in the context of subsequent comments that "the Panel has sought to ensure that at least existing farming activities are permitted"[62] and that "[s]ome forestry and buildings are controlled as these are particular activities that may have adverse effects on natural character, features and landscape values."[63]

[152] In respect of changes to the assessment tables and schedules, Ms Dickey submitted that there was nothing in the Topic 019 report to suggest that the changes to schedules would be made with regard to farming activities. Rather, she said, a full reading of the Topic 019 report showed that the changes referred to were changes to

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61 Topic 019 report, above n 18, at 5.
62 At 14.
63 At 14.

Schedule 7 in respect of marine farming. Ms Dickey cited in particular the comments by the Panel that:[64]

> Aquaculture New Zealand sought an acknowledgment that existing marine farms were located within sensitive areas of outstanding and high natural character and that their existence was not causing adverse effects. This was an important issue for them given the 'avoid' emphasis in the New Zealand Coastal Policy Statement 2010, particularly Policies 13 and 15, and the implications of the King Salmon decision.
>
> The Council set out this position at the hearing and Aquaculture New Zealand indicated that it accepted that the proposed amendment to the schedules would meet its concerns and provided a list of items to be amended in the assessment tables.

[153] Ms Dickey submitted that it was clear the Panel's intention was not to add any further text to Schedule 7 in relation to general farming activities but only to marine farming.

Submissions for the Societies

[154] Ms Wright submitted there were multiple ways to provide for "basic farming activities". The Panel did so, in her submission, by drawing a distinction between maintenance and continuation of existing farming activities (with some flexibility for adjustment) and new farming activities relating to an existing farming enterprise. She submitted that, although the appellants had adopted a different "definition" of "basic farming activities", this did not render the Panel's approach unreasonable or irrational.

Discussion – basic farming activities

[155] I agree with the submission by Ms Dickey that the comments of the Panel must be read in context. The paragraph which MOW relies upon is included in the section of the Topic 019 report titled "Overview", the relevant parts of which are set out below:[65]

> Man O War Farms Ltd and Clime Assets Management Limited submitted that when the mapping and policy were taken together, this would not allow key elements of basic farming activity within areas of mapped outstanding natural landscapes (submitted as being extensive on the submitter's land), and "would

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64 Topic 019 report, above n 18, at 7.
65 At 5.

> require resource consent applications to show that all adverse [sic] have been avoided" (paragraph 7 of the legal submissions).
>
> Federated Farmers raised similar concerns as Man O War Farms Limited and Clime Assets Management Limited in relation to the impact on day-to-day farming operations.
>
> While the Panel understand [sic] the concerns raised by the submitters, the Panel has not recommended fundamental changes to the methodology and approach to the mapping of outstanding natural landscapes, does not find there is a lack of alignment between the mapping and policy approach, and *does not find that basic farming activities in the outstanding natural landscapes would require resource consents*.
>
> (emphasis added)

[156] Later in the report, under the heading "Farming activities in the outstanding natural landscapes", the Panel wrote:[66]

> Man O War Farms Limited and Clime Assets Management Limited submitted that when the mapping and policy were taken together, this would not allow key elements of basic farming activity within areas of mapped outstanding natural landscapes (submitted as being extensive on the submitter's land), and "would require resource consent applications to show that all adverse [sic] have been avoided" (paragraph 7 of the legal submissions). Federated Farmers also raised similar concerns about the imposition that the plan provisions would have on farming operations.
>
> The Panel accepts that the overlay affects properties and how activities may be untaken [sic]. However the controls on existing farming activities are limited and the Panel has sought to ensure that at least existing farming activities are permitted. A summary of the key amendments to the rules covered by this report are set out in section 1.2 above, however the Panel notes that other sections of the plan (e.g. earthworks and vegetation management) also affect how activities may be undertaken.
>
> Some forestry and buildings are controlled as these are particular activities that may have adverse effects on natural character, features and landscape values. …
>
> In areas of outstanding natural landscapes, outstanding natural character and high natural character, existing farming activities have been specifically provided for in the in the [sic] activity table, and new farming activities are not prevented. …

[157] As its name suggests, the "Overview" section of the Topic 019 is intended to provide an overview or summary of the relevant findings. A statement in the "Overview" section cannot be considered in isolation; it must be interpreted by

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66 Topic 019 report, above n 18, at 14.

reference to the Panel's findings, as set out in full in subsequent sections of that report. In the present case, this means the statement that "basic farming activities in the outstanding natural landscapes would [not] require resource consents" must be interpreted in light of the findings made by the Panel in the section of the report titled "Farming activities in the outstanding natural landscapes".

[158] There is no reference in the "Farming activities in the outstanding natural landscapes" section to the concept of "basic farming activities". However, the Panel did find that:

(a) The ONL overlay will affect the activities that may be undertaken on properties;

(b) Controls on existing farming activities are limited (rather than non-existent);

(c) The Panel has sought to ensure that existing farming activities are permitted;

(d) Some forestry and buildings are controlled, as these activities may have adverse effects on landscape values;

(e) Other sections of the plan will also affect how activities, including earthworks, may be undertaken.

[159] These findings can be reconciled with the statement in the "Overview" section that "basic farming activities in the outstanding natural landscapes would [not] require resource consents" if "basic farming activities" is interpreted to include most (but not all) existing farming activities and some (but not all) new activities. In other words, the Panel's conception of "basic farming activities" clearly did not extend to new farm buildings measuring more than 50 m^2 in gross floor area; or new forestry exceeding 2 ha; or earthworks exceeding 50 m^2 (other than for the maintenance of tracks, ancillary to farming).

[160] I accept that this definition is almost certainly inconsistent with the definition that an average farmer might give, if asked to define the scope of his or her "basic farming activities". I agree it is highly likely that many farmers would consider, for example, the construction of a new hay shed measuring more than 50 m^2 in gross floor area as an utterly routine, necessary and indisputably basic part of their farming activities.

[161] Notwithstanding that objection, I consider that it was open to the Panel to summarise their findings in that way. Even if I am wrong on this point, however, the fact remains that the statement regarding "basic farming activities" was only intended as a summary of the actual findings. It was not a finding in and of itself. The Panel's findings, as set out in the section titled "Farming activities in the outstanding natural landscapes" are entirely consistent with the rules that the Council ultimately adopted. The fact that the Panel may have adopted an imprecise summary of those findings in the "Overview" section cannot be described as an error of law having a material effect on the decision of the Council to adopt the relevant provisions of the Unitary Plan.

Discussion – changes to assessment tables and schedules

[162] The relevant paragraph of the Topic 019 report is written in response to points raised by MOW and Clime Assets Management Ltd regarding the mapping of ONLs. The Panel effectively rejected the submissions by those parties and found that the approach taken by the Council was the most appropriate and effective in meeting the requirements of the RMA, the NZCPS and the RPS. The Panel then continued:[67]

> Notwithstanding the above, the Panel has recommended a number of changes to the objectives and policies in the regional policy statement and the Plan which have an 'avoid' focus. The Panel is very aware of the New Zealand Coastal Policy Statement 'avoid' policies (particularly Policies 11, 13 and 15) and the implications of the King Salmon decision. The nature of the changes made are to make clear what adverse effects are to be avoided, rather than simply stating that adverse effects are to be avoided. As set out earlier in this report, changes have also been made to the assessment tables and schedules identifying that some activities exist within these sensitive areas, and that their presence does not cause adverse effects. The section below on farming activities is also relevant.

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67 Topic 019 report, above n 18, at 13-14.

[163] Although this paragraph formed part of a section which, generally, responded to submissions raised by MOW and Clime Assets Management Ltd, it is clear that the changes described in this paragraph are changes to the PAUP as a whole, not only those parts of the PAUP which affect MOW directly. The statement that "changes have also been made to the assessment tables and schedules" must be read in that context. The statement does not suggest that changes have been made to the assessment tables and schedules affecting MOW's land specifically.

[164] The general statement that "changes have been made to the assessment tables and schedules identifying that some activities exist within these sensitive areas, and that their presence does not cause adverse effects" is consistent with the changes that were in fact recommended by the Panel. In respect of the assessment tables, the Panel recommended that existing farming activities and viticulture be categorised as permitted activities and therefore, by necessary implication, identified that those activities do not cause adverse effects. This represented a change from the PAUP, which did not provide for those activities.

[165] In respect of the schedules, the Panel made changes to the section of Schedule 7 which clarified, in respect of some marine areas, that marine farming was included within the ONL and did not give rise to adverse effects. The description of ONL4 (Lake Kereta) in the PAUP, for example, stated under "Aesthetic Values: Naturalness":

> **High**
>
> Very obvious interaction between the underlying dune landform, the actual lakes and their wetlands, and the remnant terrestrial vegetation overlying parts of this landscape.

[166] The Panel recommended the addition of a further paragraph:

> Parts of the Mahurangi Harbour contain marine (oyster) farms, but this does not compromise the harbour's current natural values overall.

[167] The Panel recommended similar changes to the description of ONL7, ONL40, ONL43, ONL44, ONL62, ONL79, ONL80 and ONL88.

[168] I do not consider there is any inconsistency between the statement by the Panel that "changes have also been made to the assessment tables and schedules identifying

that some activities exist within these sensitive areas, and that their presence does not cause adverse effects" and the Panel's final recommendations.

Amendments to ONL mapping

[169] All parties to the appeal agreed that the Panel had erred in its recommendations regarding the mapping of ONL78 and ONL87. Mr Brown in his rebuttal evidence to the Panel indicated that the Unitary Plan mapping should reflect the amendments made by the Environment Court in *Man O' War Station Ltd v Auckland Council*.[68] The Panel then recorded in its Topic 019 report:[69]

> The Panel notes that considerable effort was put into this topic by all parties to agree and resolve as many issues as possible, including the objectives, policies and rules, as well as the spatial identification of the areas. This was done by mediation sessions as well as direct discussions. The Panel is aware that discussions also took place outside of these forums between Mr Reaburn (Council's planning expert), Mr Jamieson (Council's geological expert) and Mr Brown (Council's landscape expert) and a number of submitters on site specific matters.
>
> Arising from those sessions, and as reported to the Panel at the hearing, the agreements reached were recorded in the Outcome of Direct Discussions – 17 April 2015 (see section 4.1 below). In making recommendations on these site-specific matters the Panel has relied on the Council to provide accurate, updated schedules and maps in accordance with its position at the time of its closing statement, reflecting any agreements reached with parties through mediation or any direct discussion processes, or at a later date if that was agreed by the Panel.
>
> …
>
> Changes have been made to the text of the schedules which identify and explain the values of the scheduled items and the maps which spatially identify them. Many of the changes were agreed prior to the hearings. These were either through mediation, direct discussion or addressed in the Council's evidence.

[170] Ms Dickey submitted that the Panel had not intended to approach the mapping exercise differently to what was proposed by the Council. It had relied on the Council to prepare mapping which reflected the changes agreed between the parties or put forward in evidence. Her submission was effectively that the Panel had made a mistake.

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68 *Man O'War Station Ltd v Auckland Council*, above n 2.

69 Topic 019 report, above n 18, at 6.

[171] I am satisfied that there is an appealable error in this aspect of the Panel's decision. That error could be characterised at least two different ways: as a failure to give reasons for rejecting the submissions of the Council and MOW regarding the mapping of ONL78 and ONL85, as required by s 144(8) of the LGATPA; or alternatively as a conclusion unsupported by evidence. I am satisfied that the mapping of ONL78 and ONL85 should be amended in accordance with the maps annexed to this judgment.

Conclusion

[172] The first question of law posed by MOW in this appeal is: must the Council amend the ONL mapping for ONLs 78 and 85 as determined by the Environment Court in *Man O'War Station Ltd v Auckland Council*?[70]

[173] The answer to this question is yes. The amended maps are annexed to this judgment.

[174] The second question of law posed by MOW in this appeal is: where it is assumed in a decision that farming activities are not adverse, and the relevant policies set in the same decision (on a planning instrument prepared under the RMA) do not require the avoidance of adverse effects, can rules rationally or reasonably be included in the planning instrument on the basis that they do have adverse effects which must be avoided?

[175] It is not possible to give a simple "yes" or "no" answer to this question, because the two fundamental assumptions underpinning the question are at odds with the facts of the present case. There was no assumption by the Panel in its decision that farming activities would not have adverse effects and the relevant policies recommended by the Panel, specifically policy D10.3(1)(a), did require the avoidance of adverse effects of inappropriate subdivision, use or development.

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70 *Man O'War Station Ltd v Auckland Council*, above n 2.

[176] In any case, however, the appellants have not succeeded in demonstrating that the decision to adopt rules governing new farm buildings, earthworks and forestry in ONLs was unreasonable or irrational:

(a) Farming activities in a rural environment can as a matter of law give rise to "adverse effects" and can be said as a matter of law to be "inappropriate subdivision, use, or development";

(b) The rules imposing restrictions on new farm buildings, earthworks and forestry in ONLs are not inconsistent with the objectives and policies of the RPS, and therefore do not contravene ss 75(3) and (4) of the RMA;

(c) There was a sufficient evidential basis for the Panel's recommendation that the Council impose restrictions on new farm buildings, earthworks and forestry, even in light of the revised objectives and policies in the RPS;

(d) The Panel was entitled to place weight upon the evidence of Mr Stephen Brown that a threshold of 50 m^2 in respect of new farm buildings would prevent the establishment of a "permitted baseline" for future residential development;

(e) The final recommendations of the Panel were consistent with statements in its Topic 019 Report that "basic farming activities" would be permitted under the rules and that changes had been made to the assessment tables and schedules identifying that some activities exist within ONL areas, and that their presence does not cause adverse effects.

[177] The sole question of law posed by Federated Farmers in this appeal is: whether the Council failed to take into account matters which it should have taken into account when it found, in deciding submissions on farming activities in ONLs, that some

forestry and buildings should be controlled as they may have adverse effects on landscape values.

[178] The answer to this question is no.

Result

[179] The appeals by MOW and Federated Farmers are dismissed.

Costs

[180] Costs are reserved.

[181] The parties should endeavour to reach agreement on costs. In the absence of agreement, counsel for the respondent and the Societies may file a memorandum within 20 working days of the date of this judgment. Counsel for MOW and Federated Farmers may file memoranda in response within a further 10 working days thereafter. Memoranda should not exceed 10 pages.

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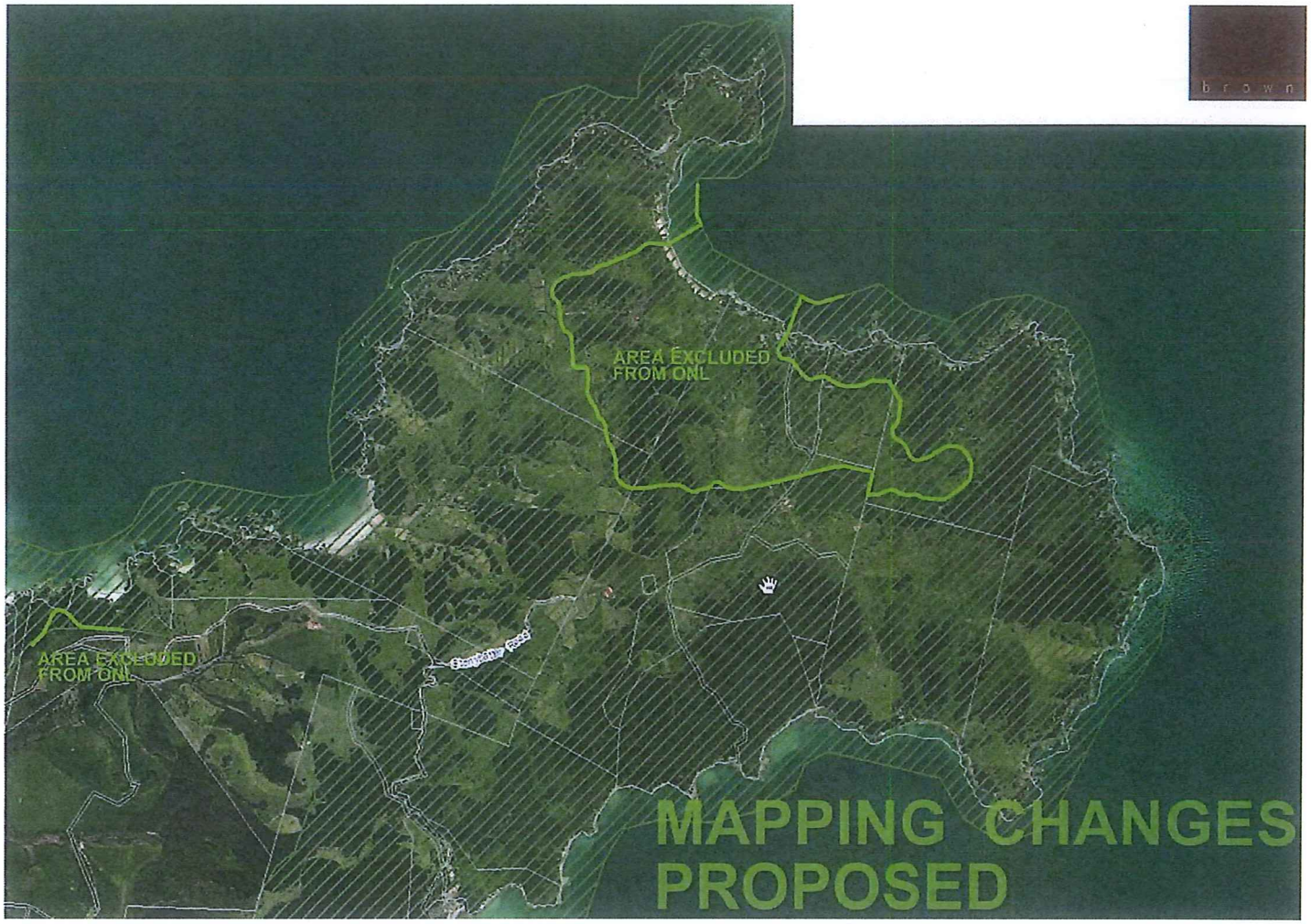
Gordon J

ANNEXURE



Re-alignment of ONL78 to accord with Environment Court Decision [2014] NZEnvC 167

Re-alignment of ONL85 to accord with Environment Court Decision [2014] NZEnvC 167