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

L J Newhook
Principal Environment Judge

B P Dwyer
Environment Judge

J E Borthwick
Environment Judge

Part 3 - Chapter G: General provisions

2.6 Framework Consents

Introduction

Framework consents are resource consents that authorise activities associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

The purpose of framework consents is to ~~ensure~~ enable the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.

The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:

- objectives and policies that articulate the development outcomes for the precinct or sub-precinct
- rules that give effect to those development outcomes
- mechanisms that incentivise the use of framework consents as a first stage process for land development
- assessment criteria that need to be addressed as part of applications for framework consents
- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

Applications for framework consents will generally be categorised as restricted discretionary activities that will be assessed without the need for public notification, unless special circumstances exist. The Auckland-wide provisions and rules, and any applicable overlay provisions, apply to applications for framework consents, unless otherwise specified in the identified precinct provisions.

Matters of discretion

1. Unless otherwise stated in the precinct rules, the Council will restrict its discretion to the following matters for applications for framework consents:
   - i. the location, physical extent and design of the transport network
   - ii. the location, physical extent and design of open space
   - iii. the location and capacity of infrastructure to service the land for its intended use
   - iv. integration of development with neighbouring areas, including integration of the transport network with the transport network of the wider area
   - v. earthworks and suitable land contours for development
   - vi. staging of development and the associated lapse period for applicable resource consents
   - vii. staging and funding of infrastructure and services

Assessment criteria

2. Unless otherwise specified in the identified precinct rules, applications for framework consents will be assessed against the following assessment criteria:

i. The location, physical extent and design of the transport network
   - The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.

ii. The location, physical extent and design of open space
   - Public open spaces are generally provided in the location(s) identified in the precinct plan to meet the needs of the local community. Where no location is identified, open space should be provided to and located to serve the future needs of the local community.

iii. The location and capacity of infrastructure to service the intended use of the land and, in particular, significant infrastructure
   - Adequate infrastructure is provided to service the proposed development of the land, including transport, stormwater, wastewater, water supply, electricity, gas and telecommunications.
   - Stormwater management methods that use low impact stormwater design principles and improved water quality systems are encouraged.

iv. Where applications for framework consents relate to particular sub-precincts, integration of the proposed development with neighbouring sub-precincts and the balance of the precinct generally, including integration of the transport network with the transport network of the wider area
   - Where applications for framework consents relate to a sub-precinct, the application should demonstrate how the proposed development achieves the overall objectives of the precinct, including the integration of the transport network, open spaces and other infrastructure that will serve the development.
   - Applications for framework consents should show how the results of an Integrated Transport Assessment have been taken into account.

v. Earthworks and land contours suitable for development
   - Earthworks, including bulk earthworks for the provision of infrastructure and the final contouring of land should be consistent with the scale of development.
   - The finished land contours and scale of the earthworks should be commensurate to the amenity anticipated in the precinct.
   - The assessment criteria set out in H4.3 Land Disturbance apply.

vi. Staging of development and the associated lapse period for the framework consent
   - Applications for framework consents should provide details of how the proposed development will be staged and how that staging coincides with provision and integration of infrastructure, bulk earthworks and services across the wider area. The council may impose conditions enabling a lapse period longer than five years.

vii. Staging and funding of infrastructure and services
   - Applications for framework consents should provide details and information that addresses how infrastructure and services will be staged and funded to support the proposed development. The timing of infrastructure should coincide and be coordinated with the expected staging of the proposed development to facilitate integrated transport and land use planning.

2.7.3 Framework consent applications

1. Unless otherwise stated in the identified precinct rules, applications for framework consents must be accompanied by the information listed in the general information requirements (clauses 2.7 – 2.7.9.2) as well as plans and supporting information which demonstrate the following:

a. the overall context of the application area, including a site development concept plan for the relevant precinct or sub-precinct area
b. existing infrastructure and street pattern
c. details of how the development on the application site will be staged
d. details of how the staging of the development coincides with provision of infrastructure and services in the wider area.

CHAPTER K – Precinct rules

[Precinct name]

The activities, controls and assessment criteria in the [specify underlying zones] and Auckland-wide rules apply to the [precinct name] precinct unless otherwise specified below.

Refer to planning maps for the location and extent of the precinct [and sub-precincts].

1. Activity table

1. The activities in the [underlying zone] apply in the [precinct name] precinct, unless otherwise specified in the activity table below.

Activity	Activity Status
Commerce/Accommodation/Industry	
[insert activities relevant to the specific precinct e.g. retail, retirement villages, offices]	[X]
Framework consents	
Applications for framework consents for land use consents for an entire precinct or sub-precinct complying with clause 3.1 below	RD
Development	
Minor cosmetic alterations to a building that does not change its external design and appearance	P
Buildings, and alterations and additions to buildings	RD
[List each activity associated with an application for a framework consent (as set out in Clause 3) as a separate activity, using the same terminology for the activities as appears elsewhere in the PAUP. ~~*For example:*~~ ~~*Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations.*~~ ~~*Roads*~~ ~~*Pedestrian linkages*~~ ~~*Water, wastewater and stormwater infrastructure*~~ ~~*Earthworks, landscaping and construction of parks infrastructure for the purpose*	RD ~~*RD*~~ ~~*RD*~~ ~~*RD*~~ ~~*RD*~~

~~*of establishing open space]*~~	
Subdivision	
Subdivision	RD

2. **Notification**

1. The council will consider applications for framework consents as a restricted discretionary activity without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

2. The council will consider applications for buildings, alterations and additions to buildings, on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

3. The council will consider applications for subdivision on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

4. The council will consider applications for buildings, alterations and additions to buildings, on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

5. The council will consider applications for subdivision on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

3. **Framework consents**

Purpose: to ~~ensure~~ enable the integrated development of land within identified precincts and to authorise the key enabling works necessary for that development to occur.

1. Applications for framework consents must seek land use consents for the following activities:

[Clauses a – e are provided by way of example only. The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site

characteristics and development outcomes and objectives for particular precincts, as will the provisions relevant to framework consents.]

~~*a. Roads*~~

~~*b. Pedestrian linkages*~~

~~*c. Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations*~~

~~*d. Water, wastewater and stormwater network infrastructure*~~

~~*e. Earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space*~~

4. Development Controls

1. The development controls in the [underlying zone] apply in the [precinct name] precinct unless otherwise specified below.

5. Control [X]

~~*[Insert relevant land use and development controls e.g. Building height, site intensity, building coverage etc. For example:*~~

~~*1. Buildings must not exceed the heights specified on precinct plan X, prior to the approval of a framework consent.*~~

~~*2. With an approved framework consent, buildings must not exceed the heights specified on precinct plan X.]*~~

6. Assessment – Restricted discretionary activities

6.1 Matters of discretion

For development that is a restricted discretionary activity in the [precinct name] precinct, the council will restrict its discretion to the following identified matters and the matters specified for the relevant restricted discretionary activities in the underlying zone:

1. Applications for framework consents
   a. The matters of discretion in clause 2.6.1 of the general provisions apply.
   b. The overall development layout, being the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
   c. *[Specify relevant matters of discretion in addition to clause 2.6.1 for the specific precinct]*
2. Buildings, alterations and additions to buildings

a. The matters of discretion in [clause X] of the underlying zone rules for new buildings and/or alterations and additions to buildings apply.
b. The location, bulk and scale of buildings relative to overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
c. Design, bulk and location of buildings.
d. The matters of discretion in clause 2.6.1 of the general provisions apply.

3. Subdivision
   a. The matters of discretion in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The proposed subdivision layout relative to the overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.

[Insert matters of discretion for other activities that are classified as restricted discretionary activities in the activity table, such as: roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example
x. Roads
xx. The location, physical extent and design of the transport network]

6.2 Assessment criteria

Unless otherwise specified below, for development that is a restricted discretionary activity, the following assessment criteria apply in addition to the criteria specified in the underlying zone rules:

1. Applications for framework consents
   a. The assessment criteria in clause 2.6.2 of the general provisions apply.
   b. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.
   c. *[Specify relevant assessment criteria for specific precinct]*

2. Buildings, alterations and additions to buildings
   a. The assessment criteria in *[clause X – include a cross reference to Part 2 of the Unitary Plan which provides the specific provisions]* of the underlying zone rules for buildings and/or alterations and additions to buildings apply.
   b. The proposed building, alteration or addition relative to the location of infrastructure servicing the area and open space should result in an integrated network that is adequate to meet the needs of the overall development area.

c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

3. Subdivision
   a. The assessment criteria in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The location of infrastructure servicing the area servicing the area, and open space, should result in an integrated network that is adequate to meet the needs of the overall development area.
   c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

[Insert assessment criteria for other activities that are classified as restricted discretionary activities in the activity table, such as roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example

d. Roads
   i. The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided for in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.
   ii. The physical extent and design of the transport network should be multimodal, providing for cycle and pedestrian movement.
   iii. Block layout and design should enable the creation of sites which can meet the development controls of the precinct and relevant underlying zone provisions.]

7. Special information requirements

1. Applications for framework consents must be accompanied by the following information:
   a. [Insert information requirements relevant to the specific precinct.]

[The following are provided by way of example only]
b. where changes to site contours are intended, the relationship of those site contours to existing and proposed streets, lanes, any adjacent coastal environment, and, where information is available, public open space
c. the location, width, design and function of proposed streets, cycle routes and pedestrian routes
d. the location, dimension, design and function of public open spaces
e. the location of stormwater, wastewater, and water supply, electricity, gas and telecommunications infrastructure
f. the landscaping concept for the application area
g. the location of any historic heritage or natural features

h. the location and volume of earthworks and intended final contours]

2. Buildings, and alterations and additions to buildings, and subdivision on sites that are not the subject of an approved framework consent must provide the following information:
   a. A compilation and assessment of approved resource consents relevant to the application site.

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 106

IN THE MATTER	of Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") and the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	of an appeal under s156(3) LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearings Panel ("Hearings Panel") on the proposed Auckland Unitary Plan ("Proposed Plan" or "PAUP:OiP")
BETWEEN	WALLACE GROUP LTD (ENV-2016-AKL-000241) Appellant
AND	AUCKLAND COUNCIL Respondent

Court: Principal Environment Judge LJ Newhook sitting alone under s 279 RMA

Appearances: J Brabant for Appellant
M Wakefield for the Respondent
C Kirman and A Devine for **Housing New Zealand Corporation** ("HNZ"), an intending party under s 274 RMA

Decision made on the papers

Date of Decision: 12 July 2017

Date of Issue: 12 July 2017

DECISION OF THE ENVIRONMENT COURT CONCERNING THE STATUS OF HNZ AS INTENDING PARTY UNDER S 274 RMA

A: HNZ does not have the right to become a party to this proceeding under section 274 RMA.

B: Costs reserved.

REASONS

The Issue

[1] On 7 April 2017, HNZ lodged a notice with the Court that it wishes to be a party in these proceedings lodged in September 2016 and then placed on hold pending decisions by the High Court concerning matters of scope.

[2] These proceedings having been re-activated as a result of a decision of the High Court, ***Albany North Landowners and Others v Auckland Council***[1]**,** the issue before this Court is presently whether HNZ has the right to become such party.

[3] The Respondent has advised it will abide the Court's decision; the Appellant opposes HNZ having status.

Introduction

[4] Upon the re-activation of the appeal and receipt of HNZ's notice, the Court directed that the then parties advise within a set short period:

(a) Whether or not there had been any submitters or further submitters on the Proposed Plan who would need to be advised of the High Court Ruling and that they might become parties to the appeal; and

(b) Whether or not the parties agreed with HNZ's claim to status as an interested party.

[5] As already indicated, opposition was brought by the Appellant.

[6] The Court called for submissions.

[7] The Council having indicated that it would abide the Court's decision on the issue, reiterated its earlier advice that only two submitters had specifically addressed the zoning of the site at the heart of the appeal, 55 Takanini School Road. It noted

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1 [2016] NZHC 138.

however that if the Court were to hold in favour of the HNZ claim to status, that it (the Council) would need to review its position about the identity of potential parties because in such eventuality there might be other submitters and further submitters who should be notified of the appeal and advised that they could join.

[8] The two submissions presently identified by the council are a primary submission by Takanini Central Residential Ltd and the further submission in opposition to that by the present Appellant giving rise to this appeal.

Factual Background

The submissions

[9] In the proposed plan as notified, the site was zoned Light Industry as to a northern portion, and Single House to the south, essentially a "split zoning". (The operative zoning for the site had been split between industrial over the north portion and residential over the south).

[10] TCL submitted opposing the proposed plan provisions, seeking retention of the split, but with the northern portion supporting a broader range of activity outcomes than provided for by Light Industry, and intensification of the southern residential zoning.

[11] The present Appellant lodged a further submission in opposition to the site-specific activity standard changes sought by TCL, but did not oppose Light Industry zoning.

[12] There was no other submission directly addressing the zoning of the northern portion of the site; and there was no submission seeking re-zoning of the entire site to Residential – Mixed Housing Suburban Zone.

[13] The appeal opposes the decision of Auckland Council to accept the recommendation of the Hearings Panel that the site be re-zoned Residential – Mixed Housing Suburban Zone. The basis upon which an appeal of that sort has been directed by the High Court to be considered by this Court, need not be discussed here.

HNZ's notice under s 274

[14] HNZ claims to be a person who "made primary and further submissions on the proposed plan about the subject matter of the proceedings, being the need for further re-zoning of land for residential purposes in the Region".

[15] It also claimed that it was a person with an interest in the proceedings greater than the general public, for reasons including that it is a major landowner in the region, and that the proposed plan sets the planning framework for enabling and managing future development, including residential development of the Auckland Region.

[16] The grounds for opposing relief in the appeal were stated in the s274 notice in very general terms, with no reference to any particular points in primary or further submissions relied on. HNZ claimed that if the appeal were to be allowed, the outcome would:

(i) be contrary to the sustainable management of natural and physical resources and be otherwise inconsistent with the purpose and principles of the RMA; and

(ii) in those circumstances impact on the ability of people and communities to provide for their social, economic and cultural wellbeing; and

(iii) not represent the efficient use and management of natural and physical resources.

The grounds of opposition by the Appellant

[17] As to the claim by HNZ that it had made "*primary and further submissions about the subject matter of the proceedings, being the need for further rezoning of land for residential purposes in the region*", the Appellant asserted:

(a) The subject of the appeal is not general intensification;

(b) HNZ made no submission directly relating to the site;

(c) To the extent HNZ made submissions seeking general intensification on property other than HNZ property in the region, those submissions sought up-zoning of notified residential zones;

(d) HNZ did not lodge submissions supporting general re-zoning of industrial land to residential; and

(e) Many of the submissions identified by HNZ in the course of its involvement

in the High Court proceedings as establishing scope for general intensification with the region were not submissions lodged by HNZ.

[18] As to the claim by HNZ that it has a greater interest than the general public, the Appellant asserted:

(a) HNZ is a large corporate landowner; it is not a public interest group;

(b) HNZ does not stand for a relevant aspect of the public interest in the context of this proceeding, the subject of which is a site-specific consideration of the appropriate zoning of a relatively small portion of land located at 55 Takanini School Road.

HNZ's claim: "interest greater than the general public"

[19] I will deal with the second HNZ ground first, as submissions to the Court on behalf of the parties on it referred to considerably more case law than for the other.

[20] In its Counsels' submissions, HNZ set out the relatively settled jurisprudence concerning subsection (1)(da) [now] of s 274 RMA – *"as a person who has an interest in the proceedings that is greater than the interest that the general public has".*

[21] Counsel for the Appellant indicated agreement with the HNZ description of the jurisprudence, and I have no difficulty accepting the submissions which I summarize in following paragraphs.

[22] The Courts have accepted that the circumstances in which an interest in proceedings might be greater than that of the public generally is not closed or prescribed; also that it is not necessarily restricted to the holding of a property right.[2]

[23] It has been held that the interest must be one of some advantage or disadvantage which is not remote.[3]

[24] An interest in property which would be affected by the proceedings, or in close

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2 See for instance *Meadow 3 Ltd v Queenstown-Lakes District Council (2008) ELRNZ 267 (HC)* and *Schippers Cleanfill Ltd v Auckland Council* [2011] NZEnvC 74, [2011] NZ RMA 305.

3 See *Purification Technologies Ltd v Taupo District Council* [1995] NZ RMA 197 at 204.

proximity to land affected by the dispute, is usually enough to establish standing,[4] and an interest in land is a good example of the kind of interest which might qualify.[5] However, in that regard the "mere fact of owning land in a district" is not sufficient interest to give the right to join pursuant to this part of s 274, that having been held as likely to defeat the purpose of the standing requirements set out in the section.[6] The case cited in support of that proposition concerned plan provisions proposed for regulation of GMOs, with the Court holding that while the s 274 claimants' notices suggested that their interest was generally in GMOs and the ability of Councils to regulate them, none of them suggested that they had any plans present or future to release GMOs that might be thwarted by the proposed instrument which could be said, in terms of the ***Purification Technology*** jurisprudence, an advantage or disadvantage.

[25] It is the relationship between the interest and the consequent effect of the proceedings on the interest, rather than the actual interest itself, which is important. Picking up once again on the key theme of *"some advantage or disadvantage",* such must be direct and not just emotional or intellectual.[7]

[26] A party with a specific interest which can be clearly defined and identified is more likely to qualify.[8]

[27] In recent decisions such as ***Sandspit Yacht Club Marina Society Inc v Auckland Council***[9] and ***Lindsay v Dunedin City Council,***[10] the Environment Court held that the appropriate test to be applied under s 274(1)(d) [as it was at that time], is whether the interest of the claimant for status is different from (as in greater than) that of the general public, and whether this interest is specific when compared to that of the general public.

[28] I now proceed to consider whether HNZ meets these standards or any of them.

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4 See *Gargiulo v Christchurch City Council*, Decision No C 47 by 1999, Environment Court.

5 See *Remarkables Park Ltd v Queenstown-Lakes District Council* Decision No C 26/2005, Environment Court.

6 See *Federated Farmers of New Zealand Hawkes Bay Province v Hastings District Council* [2016] NZEnvC 141 at [17].

7 See *Remarkables Park Ltd v Queenstown-Lakes District Council*, already cited.

8 See *Trustees of the Neville Crawford Family Trust v Far North District Council*, [2013] NZEnvC 141, where the Court held that the Russell Protection Society Inc had a specific interest in Russell and development in the area, and that its interest was greater than that which the general public had, whether as a cross section of New Zealand, or as general public living in the Russell area.

9 [2011] NZ RMA 300.

10 [2013] NZ EnvC 8.

[29] Its Counsel submitted (and perhaps this was not controversial and therefore not needing proof by affidavit) that the Corporation manages a portfolio of approximately 27,900 dwellings in the Auckland region, providing housing to over 94,300 people, approximately six percent of the population of the region. Its tenants were said to be people who faced barriers to housing in the wider rental and housing market.

[30] It was also submitted that the Corporation had lodged extensive submissions on the provisions in the proposed plan, including on provisions relating to residential zoning of land throughout the region.

[31] Counsel made extensive submissions about the importance to it of Unitary Plan provisions in terms of its "directive" of providing efficient and effective affordable and social housing for the most vulnerable members of society, requiring it to have the ability to construct and develop quality social housing and maintain this housing throughout the region. It wishes to reconfigure its portfolio and deliver additional housing. It asserted that the notified proposed plan provided HNZ with up to 19,000 additional dwellings to be developed; that its submissions on the plan sought that constraints be reduced, providing development capacity for up to 39,000 additional social and affordable dwellings on its land.

[32] Counsel described HNZ's active acquisition programme. It complained that it might face the prospect that land it owns might be compromised if challenges similar to the appeal were made to the appropriateness of residential zoned land located next to Light Industrial. It did not however, offer any evidence about this, whether concerning the neighbourhood of the land the subject of this appeal, or elsewhere. Indeed, it acknowledged through counsel that it does not have an ownership interest in the site, or in the "immediate vicinity" of the site. It did, however, claim that it has a proprietary interest in blocks of residentially zoned land with a combined area of 20.1 ha that are adjacent to industrial zoned land, and further blocks with a combined area of 37.2 ha not immediately adjacent to, but within 30 m of industrial zoned land. The Court was however provided with no evidence about this, and the submission did not identify even in general terms, the localities within the region the subject of its assertion.

[33] HNZ seemed to place some importance on the fact that it was a s 301 party in the related High Court proceedings. I cannot place any weight for present purposes on HNZ having given notice of intention to appear in the High Court and having actively

participated in the scope hearing.

[34] The Appellant submitted as follows:

- HNZ does not establish any interest of either advantage or disadvantage with respect to this site-specific matter;
- If the Court were to find that there was some advantage or disadvantage, then it must be remote;
- HNZ does not identify any clearly defined or identified specific interest of relevance;
- HNZ does not establish any interest in property which would be affected by the proceedings;
- HNZ does not establish any interest in property in "close proximity " to land affected by the dispute;
- HNZ does not establish any relevant relationship between an interest it has and the consequent effect of the proceedings on that interest; and
- In the context of the site-specific nature of these proceedings, HNZ does not have an interest which is different from (as in greater than) that of the general public.

[35] In more detail, the Appellant submitted that the HNZ submissions on the proposed plan relating to residential zoning of land did not generically seek up-zoning of land notified as Industrial, to Residential, nor did those submissions specifically address the location in question in this proceeding. There is no evidence before me to the contrary, and I find in favour of the Appellant on them.

[36] While acknowledging that HNZ's broad goals and objectives might distinguish it as a Corporation with particular goals in comparison to the general public, the Appellant submitted that such distinction is of no relevance in the context of this site-specific matter, because those broad directives and goals of HNZ are not engaged in any material way in this proceeding. I agree, and can find no relevant advantage or disadvantage, let alone one that is not remote, on the evidence (to the extent that it can be said there is any). Furthermore, HNZ has not established any relevant relationship between its high level directives and goals with any possible consequent effect of potential outcomes on them.

[37] The Appellant submitted that there is no evidence before the Court regarding

HNZ's "active acquisition programme", including in the area subject to the appeal; noting that the area subject to the appeal is limited to a site-specific location and land adjoining where there might interface issues. The Appellant, unsurprisingly, seized on the acknowledgement by HNZ that it currently does not have an ownership interest in the site or in the immediate vicinity. That much is abundantly clear from the record.

[38] The Appellant next addressed the proposition that HNZ "now faces the prospect that land it owns may be compromised if challenges similar to the appeal are made to the appropriateness of residentially zoned land located next to Light Industry". The Appellant complained that this was an assertion completely unsupported by facts in evidence before the Court, which again on the face of the record is undeniable.

[39] The Appellant submitted that the assertion was completely generic and seemed to be based upon some sort of precedent concern, then submitting that precedent issues are not relevant in the context of plan reviews, citing ***Canterbury Fields Management Ltd v Waimakariri District Council***[11], where the Court held:

> As the proposed rules and methods must implement the policies and in turn objectives of the District Plan, and must also give effect to the operative Regional Policy Statement, we do not see how this issue can arise on a Plan Change request.

I agree with the generality of that statement. I find that each and every district plan method, including mapping, will invariably derive from the hierarchy of instruments and provisions (regional and district) above it, and it is hard to conceive of any one circumstance not standing significantly on its own when assessed for appropriateness within the hierarchy. This must particularly be so under the PAUP:OiP, having regard to its complex structure including regional provisions and its 27 topic-specific Overlays in Chapter D.

[40] The Appellant reiterated that the proceeding is site-specific and relates to a specific factual matrix; that if any "challenge" were to arise, it would be determined on its merits; that the timeframe for lodgment of appeals in the context of the proposed Unitary Plan has expired, and therefore no additional challenges can be commenced in relation to that instrument. This must be correct in the context of my finding in the last paragraph.

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11 [2011] NZEnvC 199 at para [94].

[41] The site-specific nature of the appeal is important in the present circumstances, but not absolutely determinative on its own. I acknowledge the importance of HNZ's broad goals and objectives; that it is a major landowner; and that it has particular responsibilities for the provision of social and affordable dwellings on its land. However, the lack of evidence of advantage or disadvantage in relation to the current proceedings, particularly of a non-remote kind, must in the result count against HNZ establishing its claim. I consider that the apparent need for HNZ to pray in aid a concern about precedent is to illustrate how long a bow it has had to draw in making the current claim. I also agree with the Appellant that in addition to the proceeding being very site-specific, any future challenge of the sort that concerns the Corporation would fall to be determined on its own merits.

[42] HNZ's first claim to participate in this case under s274 must fail.

HNZ's claim: "submissions about the subject matter of the proceedings"

[43] In contrast to their submissions under the last head, counsel for HNZ did not under this head discuss general jurisprudence, perhaps reflecting that the case law is somewhat less extensive than in relation to the other head. Likewise in the submissions on behalf of the Appellant. Instead, HNZ focused heavily on, and quoted extensively from the decision of the High Court that gave rise to reactivation of the present proceedings. I refrain from here quoting as extensively from the High Court decision because I do not think the passages quoted by HNZ assist it in establishing its present claim. What the quoted passages do signal[12] is something of a statement of the obvious, that HNZ submitted extensively on the proposed plan, seeking fairly significant changes, particularly provision for residential intensification. What they also do however, in a way that runs against the Corporation's claim to status under section 274(1)(e), is to show requests for comprehensive zoning changes throughout Auckland based on proximity criteria, together with requests for zoning changes to enable site-specific up-zoning of its land holdings,[13] samples of which Counsel quoted in submissions to this Court on the present aspect, which clearly illustrate the description

12 *Albany North Landowners* Decision, paragraphs [114], [115], [118], [167], [169], and [170].

13 Paragraph [169] of *Albany North Landowners.*

applied by the High Court Judge.

[44] Counsel's submissions also point to generic submissions on the proposed plan seeking significant greater residential intensification.

[45] Two paragraphs of the ***Albany North*** decision merit recording here, and analysis, to see if they support the present claim by HNZ. They are paragraphs [268] and [269]:

> [268] I agree with Mr Brabant that the generic submissions relied upon by the IHP, such as the HNZC submissions addressing residential zones, do not obviously signal the potential for residential up-zoning in locations such as the TCL site which were notified as Light Industrial. I also consider that Mr Brabant makes a cogent point that WCL had no reason to thoroughly review submissions seeking up-zoning of residential sites, but the TCL submission does raise the prospect of Mixed Use in an adjacent location. This would appear to confer jurisdictional scope on the basis that rezoning the whole site, instead of only part of it, is a reasonably foreseeable consequence of an integrated planning approach. But, the matters raised by Mr Brabant (though largely in reply) bring into play broader considerations of fairness, and in particular whether in the particular circumstances of the case, being the limited basis upon which TCL sought to up-zone the northern portion of its site, together with the TCL expert's primary expert evidence and position adopted by the Council Planning team, WGL was effectively misled into assuming that the northern portion of the site was never at risk of up-zoning to MHU. While not as stark as the SHL case, the disenabling effect of the recommended change, combined with the TCL submission and primary evidence raises natural justice considerations.
>
> [269] While, as counsel submits, this is not a "scope" case, I am nevertheless satisfied that it was not fair and reasonable in the specific circumstances of this test case to treat the extension of the Mixed Use Zoning to the northern portion of the TCL site as appropriate without affording WGL an opportunity to submit on the consequences of that up-zoning for its site.

[46] While Counsel for HNZ placed emphasis on paragraph [269] while also reciting [268] in its submissions to me, I consider that taken together, but particularly drawing on [268], there is a pointer to resolving the present issue against HNZ. In particular, in para [268], it is clear that the HNZ submissions addressing residential zones were generic, and indeed were described by the learned Judge as "not obviously signal[ling] the potential for residential up-zoning in locations such as the TCL site which were notified as Light Industrial". I also interpret the paragraph, and on this I am in agreement with the Judge, that it points to the TCL submission and WGL further

submission as being very site-specific. I consider that to be in strong contrast with what I now know of the submissions of HNZ on the proposed plan, and Counsel for HNZ has not quoted any of the submissions on the proposed plan for the purpose of demonstrating otherwise.

[47] I agree with Counsel for the Appellant that the pattern is that, to the extent HNZ made submissions seeking general intensification on property other than HNZ property in the region, those submissions sought "up-zoning" of notified residential zones. There is no indication that it lodged submissions seeking general re-zoning of industrial land to residential, whether or not it had property holdings in the vicinity.

[48] HNZ's second claim also fails.

Outcome

[49] Both of HNZ's claims seeking the right to participate under s274 fail.

[50] Costs are reserved. Any application is to be lodged within 15 working days of the release of this decision, with any response within a further 10 working days. Any claim will be resolved on the papers.

For the court:

L J Newhook
Principal Environment Judge

BEFORE THE ENVIRONMENT COURT

Decision [2017] NZEnvC 37
ENV-2016-WLG-000038

IN THE MATTER	of an application for declarations under sections 310 and 311 of the Resource Management Act 1991
BETWEEN	WELLINGTON FISH AND GAME COUNCIL
AND	ENVIRONMENTAL DEFENCE SOCIETY INC Applicants
AND	MANAWATU-WANGANUI REGIONAL COUNCIL Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner J R Mills
Hearing: at Wellington 13 - 14 February 2017
Counsel, representatives, and parties:
S J Ongley for Wellington Fish and Game Council
J A Burns & M Wright for Environmental Defence Society Inc
P T Beverley & T J Ryan for the Manawatu-Wanganui Regional Council
A E Day
B J Matheson for Fonterra Co-operative Group Ltd and for DairyNZ Ltd
P R Gardner for Federated Farmers of New Zealand
M W Black representing Mauri Protection Agency
T H Bennion for Water and Environmental Care Association Inc

DECISION ON APPLICATION FOR DECLARATIONS

Decision issued: 21 March 2017

Declarations made – see para [186]

Costs reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In an application dated 16 September 2016, as amended in November 2016 and further amended during the hearing and closings, the Wellington Fish and Game Council (Fish and Game) and the Environmental Defence Society Inc (EDS) jointly applied under s311 of the Resource Management Act 1991 (RMA) for declarations that (in summary) in various respects the Manawatu-Wanganui Regional Council (the Council) has been failing to correctly apply statutory requirements and provisions of the Manawatu-Wanganui Regional Policy Statement and Regional Plan (One Plan) which has been operative since December 2014. In particular, the Applicants seek declarations that the provisions relating to *restricted discretionary* activities under Rules 14.2 and 14.4 of Chapter 14 of the One Plan have not been properly applied for existing and new intensive farming activities, and that various provisions of the National Policy Statement for Freshwater Management (NPSFM) and the RMA have not been properly considered in respect of applications for *restricted discretionary* consents.

[2] The application was of course served upon the Council. It was also served upon other persons and organisations likely to have a relevant interest in the matters at issue. Mr Andrew Day, who is a farmer within the Manawatu-Wanganui Regional Council's area, has joined the proceedings as a s274 party, and supports the application, as do the Mauri Protection Agency, the Water Protection Society Inc and the Water and Environmental Care Association Inc. Fonterra Co-operative Group Limited (Fonterra) and DairyNZ Limited (DairyNZ), together with Federated Farmers of New Zealand (Federated Farmers) have also joined the proceeding as s274 parties, and they oppose, either wholly or to some extent, the making of the declarations sought.

[3] The full terms of the declarations, as now sought, are set out at Appendix 1, with a suggested rewording of declaration 5 at Appendix 1A. There are obviously interconnections between the declarations sought. Those extended to the adequacy of the application prepared by the applicant for a resource consent; the Council's consideration of the application; the reasons given for the Council's decision, and the duration and conditions of any consent granted. We shall consider each declaration separately in the course of this decision.

[4] Also, rather than clutter the text of the decision, except where it seems helpful to cite them in the body of the decision, we will set out the relevant Objectives and Policies of the One Plan in Appendix 2, and refer to them as necessary. Similarly, Table 14.2 and the relevant One Plan Rules, (which include Rules other than those directly referred to in the terms of the declarations sought) will be found in Appendix 3.

The Court's jurisdiction to make declarations

[5] This Court's general jurisdiction to make a declaration is stated in s310 RMA. Relevantly, it enables the Court to declare: ...

> (a) The existence or extent of any function, power, right, or duty under this Act ...
>
> (c) Whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act ...
>
> (h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act ...

Whether the Court will make a declaration in any given case will depend on it being satisfied that the necessary issues have been made out, and whether, as a matter of residual discretion, it is satisfied that an order should be made. Any declaration made must be based on an identifiable act or omission, or a function, power, right or duty arising under the RMA, and not on an issue arising under general law, or administrative law, such as a claim of inadequate consultation, bias, breaches of fiduciary duty, and the like. See, generally, *Hay and McNab v Waitaki DC* [2011] NZEnvC 160.

[6] Importantly, the Court is not here being asked to make declarations that will affect the rights of persons who are not parties to the proceeding. While particular resource consents and their application and consideration materials have been used as examples, there is no application to overturn any of those consents, or to amend their terms, conditions or duration. That avoids the sort of issue discussed in the decision in *Coalition of Residents Associations Inc v Wellington CC* W090/01.

[7] Having considered the materials presented, the Court has the powers set out in s313:

> After hearing the applicant, and any person served with notice of the application, and any other person who has the right to be represented at proceedings under section 274, who wishes to be heard, the court may—

(a) make the declaration sought by an application under section 311, with or without modification; or

(b) make any other declaration that it considers necessary or desirable; or

(c) decline to make a declaration

Restricted Discretionary Status

[8] A key issue was the *restricted discretionary* status of the kind of resource consents in question, and what that required and allowed in terms of the law. Accordingly we deal with that in general terms first, and return to it as necessary when dealing with the individual declarations.

[9] Categories of activities, for the purpose of setting requirements for resource consents approving the conduct of those activities, are set out in s87A RMA. It is common ground that the activities in question here are *restricted discretionary* activities, and the consequence of that classification is set out in s87A as: ...

(3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

[10] The general requirements imposed on a council considering any application for a resource consent are in s104: - ie it must, subject to Part 2, have regard to -

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application. ...

(3) A consent authority must not,— ...

(c) grant a resource consent contrary to—

(i) section 107, 107A, or 217: ...

(iii) any regulations: ...

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

[11] The set of s104 factors is qualified, in the case of a *restricted discretionary activity*, by s104C which provides:

... a consent authority must consider only those matters over which -

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

[12] Outside of the discretion restricted through national environmental standards or other regulations, such as the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007 (NESSHDW), and/or the matters to which it has restricted the exercise of its discretion in its Plan, it can be noted that under Rule 14-2 of the One Plan, for *existing* intensive farming land use activities which cannot comply with the requirements for a *controlled* activity, the decision maker's discretion is limited to the issues or matters set out in para [52] That is also the case for Rule 14-4, relating to new intensive farming activities.

[13] In summary, when considering an application for a resource consent for a *restricted discretionary* activity the requirements on a Council are, subject to the restrictions in s104C, these:

- It must *have regard to* the effects on the environment of allowing the activity. The term *effects* is defined fully in s3 and includes both positive

and adverse effects, effects that are past, present and future and ... *any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the effect.* The term *effect* also includes *any potential effect of high probability and any potential effect of low probability which has high potential impact.*

- It must *have regard to* any relevant provision of a National Environmental Standard or other Regulations, a National Policy Statement, a Regional Policy Statement and the relevant Regional or District Plan.
- It may *have regard to - ...any other matter* it considers relevant and reasonably necessary for the decision-making process. (emphasis added)

[14] The term *have regard to* has long been interpreted as meaning ... *the requirement for the decision-maker is to give genuine attention and thought to the matters set out in s104, but they must not necessarily be accepted.* See eg: *Foodstuffs (South Island) Ltd v Christchurch CC* [1999] NZRMA 482 (HC).

[15] A further restriction of the decision-making power exists in the case of discharge permits (a class of resource consent) required to authorise an activity that would otherwise contravene s15 (except in the case of a truly exceptional, or temporary, or other work required for maintenance, which do not apply here). Section 107 RMA specifies that a Council must not grant a discharge permit in certain circumstances, being: allowing the discharge of a contaminant (or water) into water; or a discharge of a contaminant onto or into land in circumstances which may result in that contaminant entering water if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same similar or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

- The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials.
- Any conspicuous change in the colour or visual clarity.
- Any emission of objectionable odour.
- The rendering of freshwater unsuitable for consumption by farm animals.
- Any significant adverse effects on aquatic life.

The Council's Resolution of 25 June 2013

[16] The Council's Resolution dated 25 June 2013, which in some senses was at the core of the application, was the adoption of this recommendation:

It is recommended that Council:

a. receives the information contained in Report No. 13-124 and Annexes.

b. confirms the nutrient management resource consent process is as follows:

i. a nutrient management plan is required with the consent application.

ii. where an activity meets the controlled activity table 13.2 cumulative nitrogen leaching numbers, a consent term of between 20 and 25 years will be granted.

iii. where an activity is considered as a restricted discretionary activity and the numbers in table 13.2 are no longer applicable then:

- An existing intensive farming activity that provides a trajectory of N reduction that is achievable on the farm or has low N loss or the farm operating system is economically and environmentally efficient (no low cost options are available) will be given a consent term of 15 to 20 years.
- An existing intensive farming activity where there is no willingness to reduce N loss but mitigation is both possible and efficient will be given a consent term of 3 to 5 years. Guidance will be provided by HRC to industry who will work with the farmer to assess mitigation options through the term of the consent, with a view to incorporating mitigation options at re-consenting time.
- A conversion to an intensive farming activity will be assessed against the policies in Chapter 13.

c. confirms the methods that will be used to support the resource consent process include:

i. Developing mitigation option guides with industry.

NB. The mitigation required for the four intensive farming activities[1] will need to be specifically tailored to that activity and will be developed in conjunction with the particular industry. Mitigation methods can continue to be developed over the life of a consent.

ii. Developing protocols with industry.

iii. Having memoranda of understanding regarding implementation with key stakeholders.

iv. Establishing an independent referral committee (comprising people external to Council). The terms of reference will be set by Council.

[1] Cropping, dairy, intensive sheep and beef, and commercial vegetable growing.

v. Providing planning and technical assistance to applicants well ahead of the dates the rules come in within the specific water management sub-zones (i.e. 1 July 2014, 2015 and 2016).

d. confirms Council will undertake monitoring, science and reporting on at least an annual basis to check, review and to inform future action.

e. directs the Chief Executive to:

i. Communicate the selected implementation option, through various mechanisms, to all interested parties.

ii. Provide regular updates to Council of how the implementation programme is progressing including: (a) obtaining confirmation of the terms of reference for the referral committee; (b) providing copies of implementation protocols and memoranda of understanding; (c) progress in working with the horticulture industry around implementing nutrient management rules.

iii. To provide annual report on policy effectiveness and implementation issues.

f. notes that Council has already determined to look to introduce a plan change should the programme for implementing nutrient management policies and rules, as provided for in the Proposed One Plan, suggest that managing the effects of nutrient leaching is not economically and environmentally sustainable for the community (i.e. the effects of managing nutrient leaching should be balanced between economic and environmental effects). (Emphasis added – see para [38])

[17] We record, in relation to point f of the Resolution, that the evidence and cross-examination made it clear that the Council has not looked at introducing a plan change. We shall shortly discuss the Council's recent revocation of the Resolution.

An overview of OVERSEER

[18] There will be mention of the term OVERSEER as we move through this decision. It may be convenient to record an understanding of this management tool now, and as a useful summary of what OVERSEER is and does, we cite this passage from the document Using OVERSEER® in Regulation – Technical resources and guidance for the appropriate and consistent use of OVERSEER by regional councils – published by an OVERSEER Guidance Project Board.

> OVERSEER® Nutrient Budgets (OVERSEER) is a computer software model that is being used to provide estimates of annual losses of nitrogen and phosphorus from a broad range of farm systems. OVERSEER models nutrient use and movement within a farm system. OVERSEER estimates the nutrient flows in a farming system and specifically includes estimates of nitrogen and phosphorus loss through leaching

and/or run-off. The core of OVERSEER is a nutrient budget, which includes the nutrient inputs and outputs of a farm system.

[19] It is to be noted that OVERSEER is under constant review and new versions are released from time to time. At the time when Table 14.2 of the One Plan was prepared, the current version was Version 5.4. In the development of the One Plan no parties took exception to the approach of the use of OVERSEER derived numbers to categorise activity class (Environment Court decision). The focus was on the actual numbers and whether there should be a progressive step-down over 20 years and what consent holders should be required to do. OVERSEER was agreed by all parties to be the best available tool at the time and parties were then aware that a new version was imminent.

[20] The version in use now is Version 6 which, it is agreed, significantly changes the estimates of nitrogen losses to water.

[21] One of the Council's reasons for taking its approach (which the examples Ms Marr produced helped illustrate) was said to arise from the current version of OVERSEER (version 6). The new version was giving higher leaching figures for nitrogen than those Table 14.2 was based on. Under Version 5.4 it was thought that about 80% of farmers in the region would be able to comply with Table 14.2 and qualify for a *controlled* activity consent. Under Version 6, (and combined with the banning of the use of DCD – see para [35]) – the Council's position was that this figure is closer to 20%, meaning of course that many more farmers will require a *restricted discretionary* consent.

[22] The basis of the Council's position is disputed by the applicants and supporters. The applicants allege that the basis on which the Council had concluded an 80:20 ratio for *restricted discretionary:controlled* activity status after OVERSEER version 6 came out was not robust, but based on a few Mangatainoka examples and some workshops. They suggest that the Mangatainoka examples are not typical of other parts of the region. The applicants also consider that the Council could have undertaken a recalibration exercise when OVERSEER version 6 came into use, but opted not to do that. A plan change could have dealt with any inconsistencies in the Table (and associated policy and rules) that the Council may have had a concern about. The applicants submit that in any case the new

OVERSEER version 6 indicated a need for a precautionary approach and possibly short-term consents.

The general positions of the parties

[23] Fish and Game and EDS presented a co-ordinated case supporting the making of the declarations sought. Essentially, their position was that the Council has, through the life of the One Plan (ie since it became operative in December 2014) failed to properly implement its provisions, and the provisions of the RMA, in dealing with resource consent applications for intensive farming activities. We will deal with the specifics of the asserted deficiencies as we deal with each of the declarations sought.

[24] Called by the applicants, Ms Helen Marr gave expert planning evidence relating to the correct decision-making process for applications for existing intensive farming as a *restricted discretionary* activity under Rule 14-2 of the One Plan. Ms Marr's analysis was confined to the process for resource consent applications for existing intensive farming under Rule 14-2. She did not specifically address the correct process for conversions to intensive farming under Rule 14-4, but she said that because these activities are subject to the same controls and planning framework, the assessment would also apply to them.

[25] Her analysis was primarily based on the Council's files for resource consent applications to which EDS was granted full access under the Local Government Official Information and Meetings Act 1987 (LGOIMA), being for 5 consents processed in 2015, and a further 5 in 2016. She understood that processes and documentation for nutrient management consents were *tightened up* between 2015 and 2016. She also reviewed 8 other consent examples from 2014 provided to Mr Day, under a separate LGOIMA request. She included only limited analysis of these, as the information she had access to was incomplete. She was not provided with OVERSEER files as these were withheld on the basis they hold commercially sensitive material (such as milk solids information).

[26] Amendments were made to the declarations in response to the Council's concern that the applications related to specific examples of individual consent applications. That issue was resolved and the parties agreed that the annexures containing those examples in Ms Marr's evidence could remain in evidence and be

referred to as examples. The examples were helpful (no one suggested that they were in any way atypical), and we refer to Ms Marr's analysis where necessary to illustrate what has been occurring in practice. Ms Marr also gave rebuttal evidence.

[27] Evidence was also called by the applicants from Mr Peter Taylor, a consultant with approximately 40 year's experience in various central and local government roles and in consultancy, and who was employed at the Manawatu-Wanganui Regional Council from August 2008 to October 2014. While his specialist area is the assessment and mitigation of farming impacts on the environment, he was not providing evidence as an expert witness. His evidence set out his understanding of the approach previously (and now) adopted by the Council in implementing the One Plan. He also gave rebuttal evidence.

[28] There were s274 parties supporting the making of the declarations - Mr Andrew Day, the Water and Environmental Care Association Inc, and the Mauri Protection Agency. Mr Day, who had been an appellant on the *Surface Water Quality* topic in the 2012 proceedings on the then Proposed One Plan, submitted that he believed the intensive land use provisions of the One Plan are not being implemented consistently with the Court's decision on the Plan. He considered, based on the consents materials he had obtained, that the Council has abandoned the *natural capital* approach to resource allocation in favour of an ... *ad-hoc preferential grandparenting of long term resource entitlements.* His concern was that either the lawful proprietorial interests of other land owners in the priority catchments are being removed by the current implementation processes, or that the water quality targets supported by the community are being abandoned. He gave evidence expanding on these points.

[29] The Water and Environmental Care Association Inc supported the amended declarations and made submissions on the context of the nitrogen limiting rules and activities unable to achieve the Table 14.2 limits, and assessment of effects for applications. Its general position was that the processing of relevant consents by the Council is not consistent with the provisions of the One Plan. Its particular concern is the discharges of nitrogen from farming activities, pointing out that it is the only contaminant specifically limited by number in Chapter 14 of the One Plan.

[30] Mr Maurice Black, who operates his own resource management consultancy named Mauri Protection Agency, reminded the Court of the general position Ngati Kahungunu Iwi had taken in the preparation of the One Plan, and of the fundamental importance of healthy natural water to Maori. He too is concerned that the processing of relevant resource consent applications by the Council is falling short of what is required in the Act and the One Plan. A particular concern is ... *the failure to address cumulative adverse effects from numerous similar activities, and the potential for consequential adverse effects on Kahungunu ki Tamaki freshwater values and relationships.*

[31] The Council opposed the making of any of the declarations for reasons that will be expanded on in the course of considering the individual declarations. It called evidence from the following:

- Dr Nicholas Peet, Group Manager Strategy and Regulation for the Council, a position he has held since 29 October 2012. His role includes oversight of policy development, monitoring and evaluation work, including in relation to the One Plan and NPSFM 2014 and oversight of regulatory functions in relation to the processing and monitoring of resource consents. While he holds a BSc (Hons) in ecology and a PhD he specifically noted that he was not intending to provide expert evidence on issues of environmental effects. Rather, he was providing evidence, based on his experience as a senior Council officer, on the One Plan and its implementation, including the processing of consent applications, by the Council.
- Gregory Bevin, Regulatory Manager for the Council with overall responsibility for the consent process and compliance monitoring functions. He has a BA in history and geography and a BSc(Hons) in physical geography and 19 years' experience in environmental and resource management. He has worked for the Council since December 2005, with a previous role as Team Leader – Consents Monitoring.

[32] Where any of the parties supporting or opposing the applications raised a distinct and influential issue, we will mention it in dealing with the particular declarations.

[33] Federated Farmers, and Fonterra and DairyNZ, generally opposed the applications. Federated Farmers generally supported the Council's position, taking the view that ... *the Council is operating within the law, and within the spirit of the law, in its approach to issuing resource consents for the activity of intensive farming land use* ... and called evidence from:

- Mr Sidney Riley, a farmer in the area south of Dannevirke.
- Ms Sandra Cordell, a farmer from the area north of Dannevirke.
- Ms Kristy McGregor, a Regional Policy Advisor with Federated Farmers, with a focus on the involvement of farmers and industry in the implementation of the One Plan and on commitment of farmers to improvement and environmental outcomes.

The general tenor of that evidence was in support of the position that farmers in the area were doing their best, and working with OVERSEER modelling to improve their contaminant leaching, within the realities imposed upon them by revenue from their produce.

[34] Mr Matheson, for DairyNZ and Fonterra, made submissions on Declarations 2(a)-(c), largely in support of the Council's position, with Mr Gerard Willis, a planner, giving evidence addressing the range of matters a consent authority is required to have regard to when considering resource consent applications, as well as the obligation on a council to provide reasons in a decision and the contents of an advice note relating to updates to OVERSEER and/or a Sustainable Management Plan.

[35] Mr Geoffrey Taylor gave evidence as an employee of DairyNZ and the project manager responsible for working with the Regional Council on the implementation programme for the One Plan. He gave evidence on the implication of changes to OVERSEER and the banning of DCD (*Dicyandiamide* – a nitrification inhibitor which slows the conversion of urea to nitrate, a leachable form of nitrogen) on the achievability of *controlled* activity consents and the approach to working with the Regional Council to develop a variable consenting pathway under the *restricted discretionary* activity status, and the steps undertaken to assist farmers to understand and comply with the obligations in the One Plan and to assist farmers with their resource consent applications. In order to assist with that process DairyNZ (in conjunction with the Regional Council) produced a document called

Dairy farming under the One Plan: Your guide to obtaining a land use consent for an existing dairy farm Horizons Regional Council and DairyNZ, 2014. We refer again to this document shortly.

[36] The Council submitted that the declarations are very wide-ranging (and therefore inappropriate) and the applicants say the reason for that is Ms Marr and legal counsel had identified a number of errors in the processing and issuing of these example consents, hence the need for a wide-ranging set of declarations. The Council also referred to the need for a forward-looking nature for the declarations (rather than backward -looking and reflecting on past decisions and actions).

[37] We turn now to consider the sought declarations individually:

Declaration 1

> That to have regard to the Manawatu-Wanganui Regional Council's (Council's) Resolution dated 25 June 2013, when making decisions on resource consents for restricted discretionary activities under Rule 14.2 of Chapter 14 Discharges (Land and Water) of the Manawatu Wanganui Regional Policy Statement and Regional Plan (One Plan), which provides that *inter alia.*
>
> *"(iii) Where an activity is considered as a restricted discretionary activity and the numbers in table 13.2 are no longer applicable then:*
>
> - *An existing intensive farming activity that provides a trajectory of N reduction that is achievable on the farm or has a low N loss or the farm operating system is economically and environmentally efficient (no low cost options are available) will be given a consent term of 15 to 20 years.*
> - *An existing intensive farming activity where is no willingness to reduce N loss but mitigation is both possible and efficient will be given a consent term of 3 to 5 years. ..."*
>
> was unlawful, invalid and in contravention of the Act.

[38] Ms Marr's affidavit showed that the Council had been assessing and granting consents in accordance with the Resolution. She identified consent examples where the justification for relying on the Resolution is stated to be that Policy 14-5(d) of the One Plan is "plainly at odds with" the *restricted discretionary* activity rule framework. In that regard, we note the predetermination in the emphasised wording of the Council's Resolution – see para [16]

[39] The applicants submitted that the Resolution should not form any part of the consideration of an application for a resource consent. We would have been much inclined to agree, and to have made a declaration to that effect. Given that the Resolution has now been revoked, we will not make a declaration specific to the Resolution, and we need not traverse the evidence and arguments in detail.

[40] It will suffice to say now that the applicants set out the background to their concerns about the Resolution and their approaches and unsuccessful attempts to have the Council remove the Resolution from its resource consent decision-making. After EDS raised concerns with the Council, its Chief Executive stated that it would "remove reference" to Council resolutions in its assessments of applications (2 March 2016 letter). However, the applicants stated that the Chief Executive's commitment left it entirely unclear whether the Resolution was no longer to be considered relevant by consent officers processing resource consent applications. Indeed, Dr Peet and Mr Bevin stated in their evidence that the Resolution was not the "sole" or "primary" consideration when processing consents, but it was still a consideration.

[41] The applicants' position at the hearing was that although there was (then) an expressed intention to request the Council to revoke the Resolution, they do not have confidence that the Council will not continue to act in accordance with the content of the Resolution.

[42] For the future, we should perhaps note that in cross-examination, Dr Peet agreed that the following matters in the Resolution were not relevant matters for consideration under Rules 14.2 and 14.4 of the One Plan, and the relevant sections of the RMA, and he agreed that, to the extent the Council has been considering those matters in decision-making, it has acted wrongly, viz:

- Whether an existing intensive farming activity provides a trajectory of N reduction that is achievable on the farm.
- Whether an existing intensive farm has a low N loss (beyond considering the extent of the mitigation).
- Whether the farm operating system is economically and environmentally efficient.
- Whether any low cost options are available.

- Whether there is a willingness on the part of the applicant farmer to reduce N loss.

[43] Mr Beverley, for the Council, acknowledged that the Council would be acting unlawfully under the RMA if it acted in accordance with the Resolution rather than under the RMA and the One Plan in dealing with resource consent applications. In addition, Dr Peet's evidence indicated that he would recommend that the Council revoke this Resolution at the next available opportunity, and we have since been informed that it did so, by resolution on 28 February 2017. There was an acknowledgement that such a step would also require amendment of the guidance material. That means of course that, assuming that the Resolution is not *revived* in some other way, its terms will not form part of the consideration process for future resource consents.

[44] While we should, and do, accept that the Council has, in good faith, seen the problems in the terms of the Resolution, and will not revert to it, we still see benefits in making the situation clear to would-be applicants, and in assisting the Council in having a clear legal basis for its future decision-making, in making a declaration, not specific to the former Resolution, but to the general effect sought on this topic. Such a declaration will, we trust, put it beyond doubt that it is unlawful, invalid and in contravention of the RMA to have regard to factors such as those in subpara (iii) of the former Resolution.

[45] We should add that we were also particularly referred to material in the draft template *Supporting Information for Consents* (SIC) provided to the applicants by Dr Peet, and the unamended DairyNZ/Horizons advice document *Dairy Farming under the One Plan: Your guide to obtaining a land use consent for an existing Dairy Farm,* which, at least at the time of hearing, was still on the Council's Website and which states that the Council has guaranteed the grant of resource consent. Mr Geoffrey Taylor, Programme Facilitator at DairyNZ, told us that this publication was developed consistently with the Resolution. Another reason for the applicants' position is that the declaration is required to ensure confidence in lawful decision-making in the future.

[46] The key elements of the approach that the Guide, precedent forms, and particularly the SIC, the basis of applications, will plainly require review in the light of

the withdrawal of the Resolution and the declarations later to be made in this decision.

[47] As a closing note on this topic, we record that Mr Gardner for Federated Farmers submitted that the Resolution could be (or could have been) considered as an *other matter* under s104(1)(c). This was contested by the applicants, who submitted that consideration of the Resolution is unlawful, and that such a contention supports the importance of making the declaration. Given the views we have expressed about the content of the Resolution and its standing, we plainly would not agree with the Federated Farmers position, but the point is now academic and we need not spend further time on it.

[48] For all of those reasons, we make Declaration 1 in the terms set out at para [186].

Declaration 2

[49] What is sought is this:

That in considering applications for resource consents for restricted discretionary activities under Rules 14.2 and 14.4 of the One Plan (existing and future intensive land use activities), pursuant to sections 104 and 104C of the Act, the Council has a duty to have regard to each of the following matters:

(a) all the matters over which discretion is reserved under Rules 14.2 and 14.4 respectively, including:
  (i) the extent of non-compliance with the cumulative nitrogen leaching maximum values set out in Table 14.2; and
  (ii) the environmental effects of that non-compliance including cumulative effects and a consideration of the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated).

(b) the objectives and policies of the One Plan in so far as they relate to matters over which discretion is reserved under Rules 14.2 and 14.4;

(c) the objectives and policies of the National Policy Statement for Freshwater Management 2014 (NPSFM) in so far as they relate to matters over which discretion is reserved under Rules 14.2 and 14.4;

(d) in relation to the discharge consent required under section 15 of the Act and under Rules 14.2 and 14.4:

(i) the nature of the discharge and the sensitivity of the receiving environment under section 105 of the Act; and
(ii) the requirements of section 107 of the Act.

[50] The Council submitted that this declaration is overly detailed and complex, and contains a prescriptive list of matters that the Council must always have regard to whenever it receives an application under Rules 14-2 or 14-4. Further, it submits that the applicants are asking the Court to declare that the Council has a "duty" to have regard to matters beyond those over which discretion is restricted.

[51] We now consider the individual subclauses of Declaration 2 in turn. *Subclause (a):*

(a) all the matters over which discretion is reserved under Rules 14.2 and 14.4 respectively, including:
(i) the extent of non-compliance with the cumulative nitrogen leaching maximum values set out in Table 14.2; and
(ii) the environmental effects of that non-compliance including cumulative effects and a consideration of the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated).

First, we note that this declaration (and this is also the case for those dealt with at later point of this decision should refer to *discretion as being restricted* not *reserved)*. That terminology is used in the case of a *controlled* activity.

[52] Discretion under Rule 14-2 is restricted to the following matters:

(a) preparation of and compliance with a *nutrient management plan* for the *land*
(b) the extent of non-compliance with the *cumulative nitrogen leaching maximum* specified in Table 14.2
(c) measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and sediment losses from the *land*
(d) measures to exclude cattle from *wetlands* and *lakes* that are a *rare habitat* or *threatened habitat*, and *rivers* that are permanently flowing or have an *active bed* width greater than 1m
(e) the bridging or culverting of *rivers* that are permanently flowing or have an *active bed** width greater than 1 m that are crossed by cattle

(f) the matters referred to in the *conditions* of Rules 14-5,14-6, 14-7, and 14-9

(g) the matters referred to in the *conditions* of Rule 14-11 and the matters of control in Rule 14-11

(h) avoiding, remedying or mitigating the effects of odour, dust, *fertiliser* drift or effluent drift

(i) provision of information including the annual *nutrient management plan*

(j) duration of consent

(k) review of consent *conditions*

(l) compliance monitoring

(m) the matters in Policy 14-9.

The matters of discretion in Rule 14-4 are the same.

[53] The first concern of the applicants, and a reason advanced in support of making the declaration, was the (in)adequacy of the assessment of the environmental effects, and particularly cumulative effects, of non-compliance with the cumulative nitrogen leaching maximum (CNLM) values in Table 14.2 in decision-making.

[54] The applicants adopted the definition of *cumulative effects* from the US Department of Commerce as being consistent with s3(d):

> *... the impact on the environment which results from the incremental effects of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.*

[55] In the current context, the suggestion by the Court of Appeal that *cumulative effects* are concerned with something that *will* occur, and effects which are going to happen as a result of the activity which is under consideration *(Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA)) is distinguishable. The relevance of *Dye* beyond the fact scenario of precedent effects caused by a land use consent has been placed in doubt in subsequent decisions.

[56] The fresh water environment is complex. Contaminants from a discharge such as nitrogen are physically mixed and the effects combine with those from other

sources. The applicants submitted that it is particularly important in this context to apply the common sense and plain meaning of *cumulative effect.* In addition, this is case is also distinguishable from *Dye* in that the policy framework against which the *restricted discretionary* consent applications are to be assessed in the One Plan indicates that a cumulative assessment must be undertaken. Even if there are difficulties undertaking cumulative effect assessments at the catchment level such an assessment can (and should) be undertaken.

[57] Mr Beverley initially questioned the requirement for the Council to assess the environmental effects of the extent of non-compliance with the CNLM values in Table 14.2, given that matter (a) under the *restricted discretionary* matters does not explicitly refer to *effects.* He did though acknowledge the possibility that it might properly be considered to be a natural extension of the extent of non-compliance. He also agreed that it is unduly narrow to say that having no mention of effects in the matters of discretion means that effects should not be assessed, given the emphasis in the One Plan and the RMA on effects (and indeed the fact that many of the matters in the One Plan *controlled* and *restricted discretionary* rules do not specifically include the word "effects"). However, he did confirm that the Council's position is that it should (and does) consider the effects of non-compliance with Table 14.2, a point made by Mr Bevin in evidence.

[58] Supported by Ms Marr's evidence on the point, the applicants submitted that consistent with clause 6 of Schedule 4 RMA, an assessment of environmental effects logically consists of 4 steps:

- Identify the receiving environment.
- Identify the actual and potential effects (including cumulative effects) on that environment.
- Assess the impact of those effects.
- Identify whether measures are available or necessary to avoid, remedy, or mitigate those effects.

The decision whether to grant or decline consents follows.

[59] The applicants submitted that the example decisions attached to Ms Marr's affidavit illustrate this assessment was not being done adequately and in particular that the Council's assessment of applications consists only of step 4 above: an assessment of proposed mitigations, and that very limited analysis is insufficient to

ensure compliance with the One Plan and the RMA. Adequacy and appropriateness of mitigations cannot, they argue, be assessed in isolation. If they are, then any application will be granted, provided mitigations are proposed. Sometimes the severity of effects will require imposition of future mitigations, greater N leaching reductions, or avoidance of effects by declining an application.

[60] In advance of the hearing, we had asked the Council to advise whether any consent applications under Rules 14-2 and 14-4 had been declined by the Council. We were advised that no such applications had been declined. That is consistent with the contents of the (now revoked) Council Resolution we have discussed, and other indications from the Council (eg in the joint Council/DairyNZ material) that applicants could be confident that a consent would be granted. We have no definitive overall numbers of consents by now granted, or applications in the pipeline, or yet to be applied for. But at the time the application for declarations was lodged in September 2016, the Court was informed that 27 such applications were before the Council for processing, and a further 82 applications were known to be in the course of preparation for lodging. Further information in a Memorandum from the applicants about timetables dated 31 October 2016 indicated that by then it was believed that some 160 consents had been processed and granted.

[61] Mr Bevin relied on Dr Peet's evidence that it is difficult to identify and assess the effects of an individual farm on water quality, and cumulative nitrogen leaching values and its non-compliance with maximum values. Both Dr Peet and Mr Bevin described the Council's approach as being to consider whether there are mitigation measures that are reasonable and practicable for the applicant to meet, and whether there are further mitigation measures that could be put in place to *close the gap* between the CNLM values in Table 14.2 and the actual level of nitrogen leaching. The thrust of Dr Peet's and Mr Bevin's evidence was that this approach requires individual farmers to take steps to reduce nutrient loss, leading to an overall reduction of nutrient loss in the catchment.

[62] The applicants submitted that to state that for existing farms a reduction from 2012-2013 base levels will have contributed to an improvement in the catchment is simply not an assessment of cumulative adverse effects. The 2016 consent decision examples illustrate this, stating: *The mitigations described* [above in the decision] *provide a reduction in the N leaching from the farming activities described*

and as such contribute to a cumulative reduction in N losses to surface and ground water on the catchment. In closing, the applicants submitted that it is not clear from the evidence of the Council's witnesses whether it is looking at individual effects at all, never mind cumulative effects. Under cross-examination Mr Bevin had stated that identifying individual effects is very difficult and is something the Council can move towards.

[63] The planning witnesses, in pre-hearing conferencing, agreed that instream effects; eg on the frequency or extent of periphyton blooms, cannot be 'predicted' for diffuse N-leaching from an individual farm. Ms Marr had suggested that an understanding of cumulative impacts must be gained by analysing the loads that would be discharged. Mr Willis agreed that this could be possible and practical depending on the state of a regional council's model.

[64] Modelling was available during the development of the One Plan, as illustrated in the evidence presented to the Court in hearing the appeals, but Dr Peet said that this was not suitable or available in all catchments to inform resource consent processing. Dr Peet's evidence was that the assumptions of the earlier modelling regarding attenuation and other matters need to be revisited. He did not give a timeframe for that. Nor did he give any definitive timeframe for the development and implementation of load modelling of cumulative effects for resource consent processing. He said that new nutrient load modelling work is required and is being done as part of the Council's NPSFM implementation programme.

[65] The applicants drew an analogy with the effect of emissions of greenhouse gases on climate change, as in the Board of Inquiry's recommendations and Minister's decision on the Stratford Combined Cycle Power Station. Further, the applicants submitted that the difficulties in modelling cumulative effects should not prevent providing the "best evidence" on that matter in a consent application, showing the extent of any margins of error, and allowing the decision-maker to thereby assess the potential adverse cumulative effects on the receiving environment(s) and whether there is adequate information to grant consent.

[66] The applicants submitted that if modelling is not available, then a precautionary approach should be taken. There is both scientific uncertainty and potentially significant adverse effects, for *over-allocated* catchments.

[67] We agree with the applicants that in those circumstances a precautionary approach might be justified, and Ms Marr's evidence confirms the immediacy of the issue. If multiple consents are granted over the CNLM levels, with no adequate and reliable assessment of environmental effects against the One Plan's water quality targets, the Council cannot possibly be confident that water quality is being maintained or improved.

[68] Further, the applicants submitted that Policy 14-6(c) provides, among other things, that where the exceptions in the Policy apply, *good management practices* (a term not defined in the One Plan) must be implemented to minimise the loss of nitrogen, phosphorus, faecal contamination and sediment. Dr Peet said that the approach is now to look at whether ... *the management strategies and mitigations identified to be implemented in this report (SIC report) can be reasonably undertaken by the consent applicant.* The applicants' concern is that there should be a systematic process for accepting or rejecting practices across farms. This is because the Council's approach has been that mitigations undertaken by a resource consent applicant should not have a significant impact on milk production, which is simply providing a reason for applicants to reject strategies put forward as a basis for the "target load" in consent applications. A further concern of the applicants is that there is no independent check on this matter. In cross-examination Mr Bevin suggested that the Council's Rural Advisor may have such a role, but the applicants pointed to the example decisions as not reflecting that.

[69] To address this issue Ms Marr would require that where the CNLM in Table 14-2 cannot be met, an assessment be made of:

> The extent to which nitrogen leaching can be minimised or reduced to the greatest extent possible, including an assessment of all feasible mitigation options and, where it is proposed that the intensive farm not be operated using all feasible mitigations, an assessment by a farm systems expert and including economic information that is accurate and verifiable.

Ms Marr's view is that this is required if the appropriate weighting is to be given to Policy 14-5, and the Policy 14-6 exceptions, as well as the second part of Policy 14-

6 that deals with addressing residual adverse effects (losses that *cannot be minimised*).

[70] For conversions of land to intensive farming, the position of the Council, as supported by Mr Willis, is to require no more than the adoption of good management practices (because there is no base year to step down from). While the focus of the applicants' case was on existing farming, the applicants emphasised the importance of there being a robust analysis and evaluation of new intensive farms proposals as part of the resource consent application process.

Schedule E targets

[71] The second concern of the applicants was the Schedule E targets, which they submitted are relevant to considering the extent of non-compliance with Table 14.2, and should form part of an assessment of environmental effects. Further, the Schedule E targets are environmental bottom lines for water quality in the region, and it was anticipated that reductions in N leaching by intensive farming activities (the basis of the Table 14.2 figures), along with other activities, would contribute to that outcome, although those targets would not be met solely by reductions in N leaching by intensive farming activities.

[72] In addition, the applicants raised Policy 5-4 of the One Plan - *Enhancement where water quality targets are not met* - as providing a quantifiable target in Schedule E and/or the relevant Schedule B Values and management objectives that the water quality target is designed to safeguard. Schedule E contains a target for SIN (Soluble Inorganic Nitrogen) that can differ for different Water Management Sub-zones (WMSZ's), and is linked to the Values in Schedule B.

[73] The Council did not agree that it should consider Schedule B values or Schedule E targets in its decision-making, on the basis that it is simply not supported by a reading of the matters of discretion as set out in the rules. For example, there is no matter of discretion for "the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated)." Mr Bevin's evidence was that, in light of this, the Council cannot and does not have a duty, or the discretion, to impose specific nitrogen leaching reductions on individual farming operations to provide for Schedule B values.

[74] In closing, the applicants submitted that if the CNLM and specific exceptions are to be diverged from, Policy 5-4 requires the Schedule B Values (and Schedule E targets) be considered. Policies 14-5 and 14-6 link through to Policy 5-4 - as set out in the evidence of Mr Willis. Policy 5-4 does not provide for some hypothetical or unspecified improvement, but improvements measured against objectives/values and are also quantified (in Schedule E) – a yardstick. The wording of Policy 5-4 includes "water quality within that sub zone must be managed in a manner that enhances existing water quality in order to meet ...". Further, under the One Plan where the CNLM would not be met, there are no factual situations where this analysis would not be required. We are much inclined to agree.

Overall conclusion on Declaration 2(a)

[75] We agree that it is important that the Council has regard to all the matters over which discretion is restricted under Rules 14-2 and 14-4 of the One Plan. We also consider that it is appropriate to specifically highlight those matters contained in declaration 2(a), particularly given that these are the foundation for the application of the objectives and policies of the One Plan, NPSFM, s107 and NESSHDW (the declarations we turn to next). The declaration sought is, we consider, required to ensure that environmental effects, including cumulative effects, of non-compliance with the CNLM values in Table 14.2 are properly and adequately considered in decision-making in respect of the matters over which discretion is restricted under Rules 14.2 and 14.4. That includes a consideration of the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated). The terms of the declaration are set out at para [186].

[76] The declaration sought in subclause 2(b) relates to: - *the objectives and policies of the One Plan in so far as they relate to matters over which discretion is [restricted] under Rules 14.2 and 14.4;*

[77] Ms Marr's evidence was that she had found that none of the applications she reviewed included any assessment of the proposed activity against any of the relevant objectives and policies. That is inconsistent with Form 9 and Schedule 4 RMA, which require applications to attach documents which assess the activity against the relevant policies and regulations. Furthermore, she considered the

reasons given in the Council's decisions to be inadequate and to demonstrate a lack of proper consideration of the relevant objectives, and particularly the relevant policies.

[78] The Council agreed that it is appropriate for it to consider relevant objectives and policies to inform its consideration of the matters over which discretion is restricted. It referred in particular to the evidence of Mr Bevin, (who explained that he is not a planner but has academic qualifications in physical geography and considerable experience in monitoring resource consents, and measuring effects in surface and groundwater). In cross-examination both Dr Peet and Mr Bevin referred to, and deferred to, the handling of applications by the planners, but we had no planning witness from the Council.

[79] Mr Bevin said the Council does consider policies 14-2, 14-5 and 14-6 and the particular matters within those policies that relate to the matters of discretion (e.g. measures to exclude stock from waterways (matter (d)), the bridging of waterways (matter (e)), avoiding, remedying or mitigating the adverse effects of odour, dust, fertiliser drift or effluent drift (matter h)). The list of examples appears to mean that the application of these policies could be very limited (as illustrated in the examples looked at by Mr Marr). Mr Bevin said that one could not import standards from policies and apply those as hard limits that must be met in order to grant resource consent, but we do not understand that to be what the applicants are proposing.

[80] Mr Bevin also said that in more recent decisions the Council has identified Objectives 5-1 and 5-2 of the RPS, which relate to managing surface water bodies and their beds in a manner that safeguards their life supporting capacity and recognises and provides for the Values in Schedule B (Objective 5-1). Surface water quality is managed to either maintain or enhance water quality, depending on the circumstances (Objective 5-2). His view is that identifying objectives and policies is one thing, but applying them to effects is another. Mr Bevin then went on to say that the Council assesses the nitrogen leaching reduction being achieved by the applicant, and whether this is reasonable. By requiring that nitrogen leaching is reduced, the Council believes the proposed activity is recognising and providing for the Values in Schedule B and represents an incremental (albeit unquantifiable) enhancement of water quality in the catchment.

[81] We also asked Mr Bevin about the application of the consent term or duration policy, a matter specifically listed in the matters of discretion (even if it need not be). Chapter 12 General Objectives and Policies in the Regional Plan has Policy 12-5 on consent durations. Decisions in the examples we were given referred only to the common catchment approach (referred to in Policy 12-5(b)) but did not specifically address (c) - matters to be considered in determining a shorter consent duration than that requested - including:

> (ii) whether the activity has *effects* that are unpredictable and potentially serious for the locality where it is undertaken and a precautionary approach is needed; and
> (iii) the risks of long-term allocation of a resource whose availability changes over time in an unpredictable manner, requiring a precautionary approach.

Mr Bevin conceded that this policy would seem highly pertinent to the matters which are the subject of discretion.

[82] The declaration application does not ask us to specify particular objectives and policies. However, the planning witnesses considered what objectives and policies might relate to matters over which discretion is reserved under Rules 14.2 and 14.4.

[83] Both planners (ie Ms Marr and Mr Gerard Willis, called for Fonterra and DairyNZ) agreed:

- that to the extent the policies would extend the matters of discretion, they should not be considered.
- Regional Plan Policies 14-1 (consent decision-making for discharges to water) and 14-2 (consent decision-making for discharges to land) may provide guidance, for example discharges near sensitive receiving environments (Policy 14-2(c)).
- Regional Plan Policies 14-5 and 14-6 are relevant considerations for *restricted discretionary* activities.
- Policy A4 of the NPSFM incorporated into the One Plan as Policy 14-9 should be specifically addressed.

[84] We include Regional Plan Policies 14-5 and 14-6, given there is no disagreement of the planners that these policies are relevant considerations for *restricted discretionary* activities and were the focus of submissions made by the applicants:

Policy 14-5: Management of intensive farming *land* uses

In order to give effect to Policy 5-7 and Policy 5-8, intensive farming *land* use activities affecting groundwater and surface *water* quality must be managed in the following manner:

(a) The following land uses have been identified as intensive farming *land* uses:
  (i) *Dairy farming*
  (ii) *Commercial vegetable growing*
  (iii) *Cropping*
  (iv) *Intensive sheep and beef*

(b) The intensive farming *land* uses identified in (a) must be regulated where:
  (i) They are existing intensive farming *land* uses, in the targeted *Water Management Sub-zones* identified in Table 14.1.
  (ii) They are new (ie., established after the Plan has legal effect[2]) intensive farming *land* uses, in all *Water Management Sub-zones* in the Region.

(c) Nitrogen leaching maximums have been established in .14-2.

(d) Existing intensive farming *land* uses regulated in accordance with (b)(i) must be managed to ensure that the leaching of nitrogen from those *land* uses does not exceed the *cumulative nitrogen leaching maximum* values for each year contained in Table 14.2, unless the circumstances in Policy 14-6 apply.

(e) New intensive farming *land* uses regulated in accordance with (b)(ii) must be managed to ensure that the leaching of nitrogen from those *land* uses does not exceed the *cumulative nitrogen leaching maximum* values for each year contained in Table 14.2.

(f) Intensive farming *land* uses regulated in accordance with (b) must exclude cattle from:
  (i) A *wetland* or *lake* that is a *rare habitat, threatened habitat* or *at-risk habitat.*
  (ii) Any *river* that is permanently flowing or had an *active bed* width greater than 1 metre.

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

Policy 14-6: Resource consent decision-making for intensive farming *land* uses

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[2] The Plan has legal effect in the case of *dairy farming* from 24 August 2010 and for *commercial vegetable growing, cropping* and *intensive sheep and beef* it has legal effect from 9 May 2013.

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

(a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5.

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

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

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

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

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

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

(d) Ensure that cattle are excluded from surface water in accordance with Policy 14-5(f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus, faecal contamination and sediment are remedied or mitigated by other works or environmental compensation. Mitigation works may include (but are not limited to) creation of wetland and riparian planted zones.

[85] Decision examples provided by Ms Marr indicate that the Council largely dealt with these policies as follows:

> ... the applicant's projected N-leaching volumes exceed the limits set out in Table 14.2 of the One Plan however year one to year five the applicant is able to comply with the leaching limit specified in Table 14.2. This is inconsistent with policy 14-5 and 14-6 of the One Plan which requires the applicant to comply with the maximums outlined in Table 14.2, however the

> applicant has committed to a number of mitigation measures, therefore is consistent with [RPS] Policy 5-8.
>
> Policy 5-8(D) states that the Nitrogen leaching maximums must be established in the Regional Plan which are achievable on most farms using good management practices. In this instance, it is considered that the applicant has committed to implementing good management practices and they will achieve a reduction in N-leaching which ensures the cumulative effect of Nitrogen leaching is reduced over time in so far as is achievable in relation to this farm.
>
> Provided the application is undertaken in accordance with the application submitted and the conditions in the attached condition schedule, it is considered that the activity is consistent with the relevant objectives and policies of the combined RPS and Regional Plan with the exception of Policies 14-5(d) and 14-6 as the applicant cannot meet the leaching maximums as specified in Table 14.2.

In the decisions, in terms of the analysis of measures to avoid, remedy or mitigate nitrogen loss, there is a focus on RPS Chapter 5, Objectives 5-1 and 5-2 and Policies 5-4, 5-7 and 5-8.

[86] The planners stated that, ordinarily, because the Regional Plan is giving effect to the RPS, there would be no need to refer back to the water quality policies in Chapter 5 of the RPS. (In the light of the judgment in *R J Davidson Family Trust v Marlborough DC* [2017] NZHC 52, this is too absolute a statement. For example, *Davidson* recognises that there are circumstances where it cannot be assumed that documents lower down the hierarchy have given effect to the superior documents, such as the timing of an NPS). Mr Willis believed RPS water quality policies may be relevant because of the cross references to the RPS policies in Policy 14-5. Ms Marr considered that if following the direction in Policies 14-5 and 14-6 there is probably no need to go back to the RPS policies in Chapter 5.

[87] In relation to other One Plan objectives and policies beyond Chapters 5 and 14, such as the provisions relating to biodiversity, natural character or Te Ao Maori, the planners held differing points of view. Ms Marr thought that the matters of discretion include consideration of mitigations and that, in order to understand the appropriate mitigations, an understanding of the effects on the receiving environment is relevant. In her opinion, the extent that a policy may provide

guidance on the appropriate management of those effects, then the policy is relevant. Mr Willis disagreed, as in his view considering those matters would expand the matters of discretion beyond those listed, and required specific reference in the matters of discretion, otherwise it risks undermining the purpose of the *restricted discretionary* activity category of consent.

[88] The applicants submitted that it is crystal clear that at least Policies 14-5 and 14-6 must be had regard to because they relate specifically to cumulative leaching nitrogen maximums.

[89] The Plan's policy framework provides a comprehensive and directive framework which is outcomes focused for assessing N leaching over CNLMs. Moreover, consent applications should be subject to rigorous scrutiny in terms of that policy framework, which had not been the case as evidenced by the examples, and by the approach taken and explained by the Council witnesses. The applicants referred to the Council as granting consent, whatever the effects and adequacy of mitigation measures, and applying a grand-parenting approach with only a 1st year nominal reduction set. They say that there has been no consideration of the policy relating to, or indeed any requirement for, a step-down in nitrogen leaching over time, with the approach flat-lining after any initial reduction in leaching. There had been little consideration of short-term consents, but long-term consents without any requirement for a step down in nitrogen leaching over time had been granted - not in accordance with the policy, and relying on general review conditions. The applicants' submission is that the approach taken by the Council renders the framework and Schedule B and E bottom lines obsolete and irrelevant.

[90] Mr Day and the applicants also submitted that this approach is inequitable for holders of a *controlled activity* consent, which does have a step down requirement, as it rewards polluters and punishes sustainable and efficient operators. We agree with that view.

[91] In closing, the applicants submitted that the statement in Mr Willis's evidence that for *restricted discretionary* activities, objectives and policies must be directly relevant to the matter of discretion and ... *not open up … a fundamental assessment of whether the activity can be considered appropriate in a zone or catchment* ... is not supported by the Act. We concur. Nor is it supported by the One Plan. The

statement by Mr Willis reflects the *controlled* activity (which must be approved but can be subject to conditions) and not the *restricted discretionary* activity status, where a proposed activity may be declined consent.

[92] The Council agreed that it is appropriate for it to consider relevant objectives and policies to inform its understanding of the matters over which discretion is restricted. The applicants have not asked for specific objectives and policies to be included in the declaration, and the declaration recognises that these must relate to matters over which discretion is restricted. While the Council is critical of seeking (and making) a declaration that states no more than what the RMA requires, we accept the desirability (and even necessity) of making such a declaration in the light of the compelling evidence of the shortcomings of applications (perhaps partly a consequence of the material on the Council's website and its forms including the co-produced Guide), compounded by the Council's practice in processing existing farming consents - as evidenced by the analysis of the examples provided to us.

[93] However, the Council submitted that the applicants' appear to seek to extend the scope of the declaration, with different formulations as to the weight to be given to Policies 14.5 and 14-6 ("significant weight" or "when the directives [of the policies] are not met, there is a high threshold for considering individual and cumulative adverse effects"), and that it would be entirely inappropriate to make an expanded declaration. In addition, the applicants' legal submissions referred to *King Salmon*[3] and the Council's approach to its decision-making as inappropriately adopting the overall broad judgement, which the Council did not accept.

[94] There is no additional wording proposed. We take the applicants' submissions as being made to support the need for the declaration, rather than proposing a rewording of the declaration sought. We find that the declaration sought as 2(b) does provide the necessary direction to inform future resource consent preparation and processing.

[95] What is sought in Declaration 2(c) is: *... the objectives and policies of the National Policy Statement for Freshwater Management 2014 (NPSFM) in so far as they relate to matters over which discretion is [reserved] under Rules 14.2 and 14.4.*

[3] Sustain Our Sounds Inc v NZ King Salmon Co Ltd [2014] NZRMA 421 (SC)

[96] The case for the applicants was that in particular Objectives A1 and A2 of the NPSFM should be considered, drawing on evidence from Ms Marr, who states that there is no analysis of the NPSFM in any of the decisions.

[97] The NPSFM contains an interim policy that must be included in regional plans pending the setting of limits (where catchments are not over-allocated) or targets (where they are). The NPS (see its Policy A4 and direction under s55 RMA) did not specify how this Policy might be treated in terms of the rules, and appears to have left it up to Councils to decide what approach to take.

[98] Policy 14-9 of the One Plan reads:

> Policy 14-9: Consent decision making requirements from the National Policy Statement for Freshwater Management
>
> (a) This policy applies to any application for the following *discharges* (including a diffuse *discharge* by any person or animal):
>
> (i) a new *discharge*; or
>
> (ii) a change or increase in any *discharge* –
>
> of any *contaminant* into fresh *water*, or onto or into *land* in circumstances that may result in that *contaminant* (or, as a result of any natural process from the *discharge* of that *contaminant*, any other *contaminant*) entering fresh water.
>
> (b) When considering any application for a discharge the Regional Council must have regard to the following matters:
>
> (i) the extent to which the *discharge* would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh *water* including on any ecosystem associated with fresh *water*; and
>
> (ii) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh *water*, and on any ecosystem associated with fresh *water*, resulting from the *discharge* would be avoided. ...
>
> (c) When considering any application for a *discharge* the Regional Council must have regard to the following matters:
>
> (i) the extent to which the *discharge* would avoid contamination that will have an adverse effect on the health of people and communities as affected by their secondary contact with fresh *water*; and
>
> (ii) the extent to which it is feasible and dependable that any more than *minor* adverse effect on the health of people and communities as affected by their secondary contact with fresh *water* resulting from the discharge would be avoided. ...

(Clause (b) does not apply to applications for consent first lodged before the NPS for Freshwater Management 2011 took effect on 1 July 2011 and Clause (c) similarly from 4 July 2014 when the NPSFM 2014 took effect.)

[99] This was the interim policy the NPS required to be included without going through the Schedule 1 process. That was done by the Council in December 2015. The Council also included this Policy as a matter for discretion in Rules 14-2 and 14-4 through a plan change.

[100] The Council, DairyNZ and Federated Farmers submitted that the only provision that needed to be considered in terms of the *restricted discretionary* status was Policy 14-9, because of its explicit recognition in the matters of discretion. Mr Bevin's evidence was that the NPSFM could not be considered as it is not a matter of discretion listed in the rules, except insofar as the Council is required to consider Policy 14.9 (imported from the NPSFM). Ms Marr's evidence is that there is no consideration of Policy 14-9 (although it is included in the list of matters of discretion) for any of the 2016 decisions she reviewed.

[101] The applicants submitted that the NPSFM does not state that before it is given effect to, there is no need to have regard to other objectives and policies within it. It simply states that a specific policy must be included within the regional planning document. They argue that, in the absence of an express excluding statement in the NPSFM, s104(1)(b)(iii) would require regard to be had to it.

[102] Further, the applicants submitted that a reason for considering the Objectives could be found in the *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 where the Court considered that where documents higher in the hierarchy had not been given effect to, it could not be assumed, taking the *King Salmon* approach, that the regional planning document covered those matters. Therefore there had to be an analysis of the higher documents. So it is relevant that the NPSFM 2014 came into being after the finalisation of the One Plan.

[103] The planning witnesses disagreed on the relevance of the NPSFM. Ms Marr considers that Objectives A1 and A2 stand alone, and that the wording of Policy A4 does not cover all the same matters in the same way as Objectives A1 and A2, so it is necessary to separately consider those objectives and how they are being

achieved. Mr Willis' view is that Policy A4 is designed to apply prior to Objective A1 and A2 and Policies A1-A3 being given effect to, and that these require provisions in regional plans. However, both planning witnesses accepted that whether the NPSFM objectives apply or not is largely a question of law, and agree that from a planning practitioner's perspective, whichever interpretation is decided upon, Objectives A1 and A2 are relevant only to the extent that they do not extend the matters of discretion.

[104] The relevant objectives of the NPSFM state:

> A. Water quality
>
> Objective A1
>
> To safeguard:
>
> a) the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and
>
> b) the health of people and communities, at least as affected by secondary contact with fresh water;
>
> in sustainably managing the use and development of land, and of discharges of contaminants.
>
> Objective A2
>
> The overall quality of fresh water within a region is maintained or improved while:
>
> a) protecting the significant values of outstanding freshwater bodies;
>
> b) protecting the significant values of wetlands; and
>
> c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

[105] A counter argument, made by Mr Gardner for Federated Farmers, for only considering Policy 14-9 was that the Council had a programme of work on water quality and that it had until 2030, or 2035, to complete that programme in line with the NPSFM. It followed, he submitted, that the existence of that programme and the steps being taken by the Council and the timeframe provided to complete it, meant the Council was *giving effect* to the NPSFM 2014. We find that a somewhat disingenuous argument, and we do not accept it.

[106] We consider it important that Policy 14-9, included from the NPSFM, is had regard to; and earlier declarations on what is to be considered in terms of the policy and rule framework for *restricted discretionary* applications under Rules 14-2 and 14-4 clearly apply to it.

[107] We conclude that the provisions of a statute cannot be undermined by a national policy statement without very express language. Indeed the NPSFM 2014 itself does not expressly restrict consideration of its objectives to implementation through regional plans. Sections 104 and 104C require that the objectives and policies of the NPSFM 2014 are seen as relevant insofar as they relate to matters over which discretion has been restricted.

[108] We conclude that Objectives A1 and A2 of the NPSFM are objectives that require consideration on an application for resource consent under Rules 14-2 and 14-4 insofar as these are relevant to the matters subject to discretion. Neither are cast in a way that needs to be read narrowly and as requiring effect to be given to them only through provisions in regional plans. In addition, Policy 14-9 only deals with discharges of contaminants and not with land use; unlike Objective A1 which explicitly refers to the use and development of land.

[109] Declaration 2(d) requests that; *in relation to the discharge consent required under section 15 of the Act and under Rules 14.2 and 14.4:*

> *(i) the nature of the discharge and the sensitivity of the receiving environment under section 105 of the Act; and*
>
> *(ii) the requirements of section 107 of the Act.*

This relates to the requirements *of* sections 105 and 107. Section 105 has different wording to s107. Section 107 is highly specific about what a consent authority must not to do when consenting a discharge permit except in particular circumstances. Section 105 adds to the matters in s104(1) which the consent authority must have regard to when considering applications for a discharge permit.

[110] Ms Marr records that none of the applications or decisions she looked at include an examination of discharges in terms of s105 or s107. That is perhaps not surprising given she also gave evidence that none of the matters relating to discharges (under s15 of the RMA) were considered in those applications or decisions, perhaps because they were only explicitly applied for as land use consents.

[111] Mr Bevin gave evidence that the relationship between s104C and s105 is not entirely clear. The Council submitted that the wording of s104C meant the matters

in s105 could only be considered to the extent that they are matters over which discretion is restricted, given that the section requires those *matters* to be had regard to *in addition to the matters in s104(1)* and therefore overrides, or at least restricts, these matters through logical extension. The applicants submitted that this issue might be resolved in a similar way to the caselaw approach on what is relevant to *restricted discretionary* activity status.

[112] Section 105 brings in specific matters for discharge permit applications that the consent authority is to have regard to: the nature of the discharge and the sensitivity of the receiving environment to adverse effects; the applicant's reasons for the proposed choice, and any possible alternative methods of discharge, including discharge into any other receiving environment. It is clear that s105 is pertinent to the matters of discretion for Rules 14-2 and 14-4. For completeness we mention that Schedule 4 cl 6(1)(d)(i) and (ii) RMA reflects the wording in s105(1)(a) and (c), although with the exclusion of a specific reference to the applicant's reasons for the proposed choice, and s88 therefore requires an applicant to consider these matters in preparing an Assessment of Environmental Effects. However, there are other matters in Schedule 4 that signal at least an expectation of the applicant giving reasons for its proposed choice. There can be no doubt that s105, to the extent it is relevant, is to be considered.

[113] Ms Marr gave evidence that, based on her understanding of the impacts of discharges from intensive farming, s107 is relevant to:

- discharge of sediment which has a negative impact on aquatic life.
- discharge of sediment and resulting e-coli that may contaminate stock drinking water.
- discharge of nitrogen and phosphorus which can stimulate periphyton growth which in turn can impact on aquatic life. High concentrations of nitrates may also be directly toxic to aquatic life.

[114] The Council accepted that the restrictions on granting consent under s107 apply to applications under the two rules. For completeness we mention that the Council considered that if an assessment is required under s107, it is an obligation imposed on the Council, and not the applicants for resource consents, as there is no specific obligation under s88 or Schedule 4 of the RMA for them to do so. The applicants accepted that a s107 assessment is not required of applicants for

resource consents but pointed to the words... *by itself or in combination with the same, similar, or other contaminants* ... in s107 as another part of the Act referencing the need for the Council to consider cumulative effects.

[115] An associated issue relevant to the extent of the future consideration of ss 105 and 107 is whether nutrient discharges from animals are actually covered under the rules, and we look at this later. We note that the Council did accept the relevance of s107, and we entirely agree.

[116] Declaration 3 relates to the *Sources of Human Drinking Water) Regulations 2007.* The declaration sought under this heading is:

> That in considering and granting applications for resource consents under Rules 14.1 to 14.4 of the One Plan, the Council must not grant consents contrary to the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007.

[117] Ms Marr's evidence is that none of the example applications and sets of consent processing documentation she looked at referred to this mandatory consideration.

[118] The Council opposed this declaration as being simply a restatement of an obligation on the Council set out in the RMA, and pointed to Mr Bevin's opinion that the NES will have little effect on the consenting process for these types of applications.

[119] We find that there would be benefit in the legal position being made clear for the purposes of Rules 14-2 and 14-4. We agree with Ms Marr's rebuttal evidence. It cannot be assumed that because there have been few issues with human drinking water in the past, the NES will have little bearing on the consenting process for the *restricted discretionary* activity applications. We are also conscious of the purpose of the NES and the serious nature of contamination of sources of human drinking water. Its implication for the wider community is starkly evidenced by recent events in Havelock North and Hastings.

[120] *Declaration 4 – relates to Giving reasons in decisions.* The declaration sought here is:

That, when considering and granting resource consents under Rules 14.2 and 14.4 of the One Plan, the Council has a duty to give reasons for its decisions including reasons that address the matters in Policy 14-6(a) – (c) of the One Plan and paragraph 2(a)(i) and (ii) of this Application.

[121] To set out the law on this matter, we begin with s113 RMA:

> Decisions on applications to be in writing, etc
>
> (1) Every decision on an application for a resource consent that is notified shall be in writing and state-
>
> (a) the reasons for the decision; and
>
> (aa) the relevant statutory provisions that were considered by the consent authority; and
>
> (ab) any relevant provisions of the following that were considered by the consent authority:
>
> (i) a national environmental standard:
>
> (ia) a national policy statement: ...
>
> (iii) a regional policy statement: ...
>
> (v) a plan ....; and ...
>
> (ac) the principal issues that were in contention; and
>
> (ad) a summary of the evidence heard: and
>
> (ae) the main findings on the principal issues that were in contention; and
>
> (b) In a case where a resource consent is granted for a shorter duration than specified in the application, the reasons for deciding on the shorter duration.
>
> (2) Without limiting subsection (1), in a case where a resource consent is granted which, when exercised, is likely to allow any of the effects described in section 107(1)(c) to (g), the consent authority shall include in its decision the reasons for granting the consent.
>
> (3) A decision prepared under subsection (1) may, -
>
> (a) instead of repeating material, cross-refer to all or a part of -
>
> (i) the assessment of environmental effects provided by the applicant concerned:
>
> (ii) any report prepared under section 41C, 42A, or 92; or
>
> (b) adopt all or a part of the assessment or report, and cross-refer to the material accordingly.
>
> (4) Every decision on an application for a resource consent that is not notified must be in writing and state the reasons for the decision.

[122] The applicants submitted that the Act and caselaw contain minimum requirements for reasons for decisions, as stated in the declaration, and that the

declaration is necessary to provide for transparency and open justice in decision making under Rules 14.2 and 14.4. For applications under those rules, the considerations set out in Declaration 4 which relate to the CNLM should be the main reasons for a decision. Further, the applicants say that the principles expressed in *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 (CA), as applied in the RMA context in *Friends of Houghton Valley Inc v Wellington City Council* (2016) 19 ELRNZ 62, [2016] NZAR 524, and *Marche Limited v Auckland Council* [2016] NZRMA 139 (HC) apply in all applications for *restricted discretionary* consents under Rules 14.2 and 14.4. Mr Beverley sought to distinguish these decisions on the facts, but we find the principles still pertinent.

[123] The Council submitted that it does not contend for an unlimited discretion in giving reasons. It opposed this declaration as simply restating an obligation on the Council set out in the RMA and as unnecessarily fettering discretion as to what reasons to give. Section 113(1), for notified applications, sets out the detail required, and there is no need to expand on these. Section 113(4) deals with non-notified applications and gives a broad discretion. Further, the Council submitted that the applicants are seeking a declaration that goes well beyond the wording of s113.

[124] While Mr Bevin agreed that the Council must state its reasons for granting a non-notified consent as per s113(4), he considered that there is no specific duty to address the matters set out in the latter part of the proposed declaration. He said that given, to date, no applications have been notified, there has been no statutory requirement or duty for the Council, in making a decision, to address specific policies, or matters contained within any specific policies and that is, in his view, consistent with the wording of s113(4). He considered the level of detail so far provided in decisions to be appropriate.

[125] Mr Bevin said that the Council's current approach to decisions for intensive land use consents is generally to include certain information, viz:

- Description of application, generally including details as to farm location, relevant management zone and mitigation measures being adopted to reduce nitrogen loss.
- An assessment against each matter of discretion.

- Identification and assessment against the relevant One Plan objectives and policies.
- An assessment and recommendation as to the appropriate term.
- A notification assessment.
- An assessment against Part 2 of the RMA (to the extent necessary to allow the application of the matters of discretion) and a schedule of consent conditions.

This did not assist us in considering whether the Council's approach had changed significantly, particularly given we had no recent example(s) to compare against the decisions analysed by Ms Marr.

[126] The examples looked at by Ms Marr identify relevant provisions of the Act and the One Plan; identify the base and target N leaching figure of the relevant property (and in some instances the percentage reduction in N loss a shift to the target will achieve); and identify the mitigations to be adopted. Even when reading the decisions as a whole, in terms of the approach taken in *Friends of Houghton Valley Inc v Wellington City Council* the assessments relied on in concluding that actual or potential adverse effects are no more than minor are unsupported. The examples do not identify and describe the receiving environment; assess the impact of the application activity on that environment; or explain why, because of the proposed mitigations, that impact is acceptable under the One Plan.

[127] We agree with the applicants' submission that the information provided in the decisions raises more questions than answers. Factors considered are identified, but how relevance was determined or what weight was given to each and why, are not.

[128] The Council also submitted that a general declaration was not appropriate and these matters were more appropriately examined through judicial review of, or appeal against, the reasons provided in specific decisions. The response by the applicants was that at this stage its approach of asking the Environment Court to make a ruling on this matter for future consent processing is a more benign approach, compared to judicial review of, or appeals against, individual decisions. We agree, for the reasons summarised at the conclusion of this decision.

[129] We agree too with the applicants that the Act and case law provide minimum requirements for giving reasons for decisions under the rules and these should deal with the primary matters to be had regard to, and as stated in the declaration. Without a reasoned decision the public (and indeed the Council in terms of its decision-making functions and responsibilities) cannot be sure that consents are being issued in a principled and lawful manner. We consider there is utility in the declaration, given the examples and analysis provided by Ms Marr highlighting the deficiencies in the Council's practice.

[130] *Declaration 5 – returning deficient applications under s88.* Declaration 5 is sought in these terms:

> That in considering and granting resource consents under Rules 14.2 and 14.4 of the One Plan, the Council has a duty to return applications under section 88 of the Act as being deficient or incomplete where the application documents do not include the matters set out in paragraph 165(a)(i) – (vi) of the affidavit of Ms Helen Marr in support of this Application.

[131] This Declaration seeks clarification of the requirements under s88, the Fourth Schedule and the associated Resource Management (Forms, Fees, and Procedure) Regulations 2003 (Form 9) and the substance of those requirements.

[132] Mr Bevin produced a letter on an incomplete resource consent application returned to the applicant dated 16 March 2016 and the additional information request for an application dated 9 November 2016.

[133] Ms Marr lists in her affidavit what she considers to be compulsory components of all applications and the applicants drew on this to suggest the declaration could be reworded as attached in Appendix 1A. The applicants did not file a formal amending application, considering it to be a subset of the declaration as currently worded.

[134] The Council submitted that given the level of detail sought, it is apparent that the applicants are, in practical terms, seeking to have the Court prescribe a detailed form for applications for resource consent, and submit this to be an inappropriate use of the Court's declaratory jurisdiction. Further, there is no need for the declaration as reworded, and that it involves a generalised and long list of matters

that would not necessarily apply to every consent. Moreover some elements are beyond *restricted discretionary* matters. While it is a long list, the applicants consider that should not prevent the Court from finding these to be minimum requirements.

[135] Mr Gardner, for Federated Farmers, suggested that it would be likely that much information required under s88 and Schedule 4, will already be held by a council, so it would not be necessary for those applying for resource consent to resupply such information. That view does not accord with the policy of the Act. We agree with the applicants that information held by a local authority, which may be difficult to access, differs from information presented in a resource application and forming the basis on which a particular consent is to be considered.

[136] We now look at the specific items proposed by Ms Marr.

- *An application form complying with Form 9 of the RMA (Forms, Fees and Procedure) Regulations 2003*

[137] The Council submits that this is self-evident, and merely restates the requirement of s88(2)(a). However, Ms Marr's evidence illustrates that the Council's application forms fall short of this even when there is a focus on *substance* rather than *form*.

- *Application for all discharges associated with the intensive land use activity*

[138] The Council contends that it is not an accurate formulation of the position. Applicants for consent may seek and be granted consent for any of the specific types of discharges listed in the rules. Other types of discharges, not specifically set out in the list, in each rule are not subject to the two rules. That means such a declaration needs to be qualified to make it clear that it applies to associated discharges specified in Rules 14-2(e) and 14-4(e).

- *Assessment of compliance against the NESSHDW*

[139] Clause 2(1)(g) of Schedule 4 requires applications to include an assessment of the activity against any relevant provisions of a document referred to in s 104(1)(b). Clause 2(2)(c) adds that this may include an assessment of the activity against any relevant requirements in a document ... *for example, in a national*

environmental standard or other regulations. We have already concluded (see para [119]) that this potentially is a matter of some importance and that an applicant should consider it.

- *An AEE that meets the criteria of Schedule 4 of the RMA and that has a minimum [various items]*

[140] The applicants state that applications for consent must include an AEE that meets the requirements of Schedule 4 of the RMA - which specifies in some detail the nature and level of information that must be included in an AEE. The Council submitted that there should be real caution in making any blanket declaration as to the specific matters that must be included in an AEE; particularly given that Clause 7(2) of Schedule 4 provides that the requirement to address a matter in an AEE is subject to the provisions of any plan, and must address only those matters relating to the restricted matters of discretion.

[141] We agree with the applicants that although the Council contends it is requesting sufficient information, it is not requiring applicants to provide an assessment of environmental effects. This is an essential part of any application and we make a declaration requiring an AEE that meets the requirements of Schedule 4 of the RMA. Without it the Council does not have the necessary information for decision-making. The Act does not provide for consent applications that contain no assessment of environmental effects.

[142] On reflection, we consider that the Council will need to rethink what it accepts in an AEE and have concluded that the direction in other parts of this declaration will be adequate without adding the items Ms Marr proposes *as a minimum* - with the exception of assessment against relevant objectives and policies, which we turn to next.

- *Assess the activity against the relevant objectives and policies of the One Plan [and in particular certain items]*

[143] There is clearly a need for this. None of the application examples referred to or included an assessment against the One Plan policy provisions. As with the approach to an AEE the Council will need to make it clear to applicants that Schedule 4 of the RMA requires that this be done - and it is not optional. We did not have evidence from other witnesses on the items proposed by Ms Marr and how

they relate to the objectives and policies of the One Plan. Accordingly we are not inclined to adopt her proposal. However, we do find it advisable to make it clear that for existing intensive land uses where there is non-compliance with the cumulative nitrogen leaching maximums contained in Table14.2 of the One Plan the proposed activity is to be assessed against Policy 14-6 (b) and (c) in addition to other relevant objectives and policies.

- *Assessment against the provisions of s105 RMA, to the extent they relate to the matters over which discretion is reserved*

[144] The Council submitted that while matters addressed in s105 might reasonably be covered in an AEE, there is no specific obligation on an applicant under s88 or Schedule 4 of the RMA to carry out a specific assessment of any application for resource consent against the provisions of s105. That is not the case, as we have already identified.

- *Assessment against s107 RMA*

[145] The Council's position is that if such an assessment is required, it is an obligation on the Council, rather than the applicants. There is no specific obligation under s88 or Schedule 4 of the RMA for applicants to do this. Fish and Game agree. This item will not be included in the declaration.

- *Precedent forms and guidance*

[146] Another concern of the applicants (not specifically the subject of the declaration, as we alluded to earlier) was what they described as the deficient nature of the Council's precedent forms. The applicants drew our attention to a discussion of the use of a template document for notification decisions in *Marche* as a helpful point. The Court said: *A template can be beneficial to good decision-making, but care must be taken to ensure that it is appropriate to the case at issue.*

[147] The applicants submitted that the Council's template omits fundamental matters that are required for all applications under the two rules. For example, the application forms, including the most recent SIC form, do not include any analysis of the receiving environment. Also, there is no AEE required with the revised consent templates.

- *Overall conclusion*

[148] We find there is a need for a Declaration on what must be included with applications under Rules 14-2 and 14-4 of the One Plan with the exception of s107 and the detail of objectives and policies, but subject to some rewording.

[149] We also conclude that it is not acceptable for the Council to *fill the gap* by resorting to s92 - *further information* - requests for fundamental elements of a consent application, such as those that should be addressed in an Assessment of Environmental Effects.

[150] Finally, we concur with the applicants that it is important that templates, forms or guidance material (or whatever they are called or could be categorised as) are correct and complete, as the public and consultants advising applicants are likely to rely on them, and expect the Council officers to do likewise, notwithstanding any disclaimers made by the Council. However, we make no declaration on this point. We note that the Council has indicated that it understands the need to make this a priority.

[151] *Declarations 6 and 7 - Consents and consent conditions – and advice notes.* We now turn to the declarations sought in relation to granting resource consents and imposing conditions under Rules 14.2 and 14.4 of the One Plan and with advice notes here because of their relationship, in principle, to conditions.

… adequately define the ambit and scope of the activity authorised

[152] Such an approach – viz that a consent is to be clear on its face - is not only good and widely accepted practice, but it is essential to ensure that a consent is enforceable. The evidence demonstrates that the consent examples looked at by Ms Marr do not adequately describe the activity, particularly in respect of the associated discharges.

… expressly authorise the activity of discharging contaminants …

[153] The Council's position was that that the specific discharges addressed in applications are implicitly authorised, but that it is best to explicitly state that consent is being granted for those discharges and it has changed its practice to do so. The examples looked at by Ms Marr had highlighted this as a shortcoming in the Council's practices.

[154] On that general topic, the applicants also submitted that where consents are granted under Rules 14-2 and 14-4, they may include authorisation for activities regulated by other rules including the:

- Discharge of fertiliser (Rule 14-5)
- Discharges from the use of a feedpad or the preparation, storage, use or transportation of stock feed on production land (Rule 14-6),
- Discharges of grade Aa biosolids and compost onto production land (Rule 14-7)
- Discharges of poultry farm litter or pig farm litter and associated stockpiling onto production land (Rule 14-9)
- Discharge of farm animal effluent including from dairy sheds, poultry farms and piggeries (Rule 14-11).

[155] All of these are items in the description of the *activity* applied for under Rules 14-2 and 14-4. The applicants also submit that the Council's evidence is that these matters are presently addressed through more practically measurable conditions such as requiring streams to be fenced and stock crossings to be phased out with bridges and culverts replacing them. The applicants say that these conditions are insufficient to define and delimit the scale and scope of the activity; allow consents to be granted beyond the scope of what is applied for and sideline a consideration of the standards in the permitted activity Rules 14-5 etc - which become matters of discretion under Rules 14-2 and 14-4. Some of those rules regulate contaminants other than nitrogen and the activities are not addressed through a requirement for a Sustainable Milk Plan or by keeping stock out of water. To fail to impose conditions on those activities, other than stock exclusion, leaves the scale and potential effects entirely unbounded.

[156] We concur that there are deficiencies in the Council's practice that need to be addressed and it is appropriate to make declarations to highlight what is required for the future.

[157] However, there is still dispute as to what discharge applications are required by Rules 14-2 and 14-4. The applicants raised concern that the Council does not consider diffuse discharges from animal effluent directly deposited onto pasture as a *discharge*, and as requiring consent under Rules 14-2 and 14-4 when that is clearly

the intention of the provision in those Rules (item (e) in the Activity Description). In their opening submissions they submitted that Declaration 2(d) should be made and, if there is any doubt whether animal effluent discharges should be included in such analysis, the Court was requested to provide further guidance. The Council filed submissions stating it does not accept that ... *all discharges of animal effluent onto or into production land* ... are subject to Rules 14-2 and 14-4, but that other specific discharges are subject to those Rules.

[158] There was also an issue as to whether there was scope to include animal effluent discharges in the declaration, with both the Council and Federated Farmers questioning it on the basis that it would significantly expand the declaration, and that it was raised too late for them to address it properly. The applicants responded that the precise wording of the declaration application raised the wider issue, and that the Court has discretion to consider and grant alternatively worded declarations under s313 of the Act.

[159] The applicants also submitted the matter is before the Court in the context of the One Plan and does not, as Federated Farmers and the Council submit, have implications for farming throughout the country. The argument revolves around the interpretation of those Rules of the One Plan and the application of the *ejusdem generis* rule to item (e). Also the applicants said the fact that the Council did not provide evidence on the matter does not determine whether it is within *scope*. We agree.

[160] Rule 14-2 contains this:

> ... and any of the following *discharges* pursuant to ss15(1) or 15(2A) RMA associated with intensive farming, that do not comply with one or more of the *conditions*, standards and terms of Rule 14-1:
>
> (e) the *discharge* of farm *animal effluent* onto or into *production land* (or upon e*xpiry or surrender* of any existing consent for that *discharge*) including:
>
> (i) effluent from dairy sheds and *feedpads*
>
> (ii) effluent received *from* piggeries
>
> (iii) sludge from farm effluent ponds
>
> (iv) poultry farm effluent ...
>
> *Animal effluent* is defined as:
>
> ... faeces and urine from animals other than humans, including associated process water, washdown water, contaminants and sludge, excluding *poultry farm litter* or *pig farm litter*.

Rule 14-4 contains similar provisions.

[161] The applicants refer to Policy A4 and the direction of the NPSFM now contained in the Regional Plan Policy 14-9 - Consent decision making requirements from the NPSFM - in support of their argument. Policy 14-9(a) states:

> This policy applies to the following *discharges* (**including a diffuse *discharge* by any person or animal**):
>
> (i) a new *discharge;* or
>
> (ii) a change or increase in any *discharge* –
>
> of any contaminant into fresh *water*, or onto or into land in circumstances that may result in that *contaminant* (or, as a result of any natural process from the discharge of that *contaminant*, any other *contaminant*) entering fresh *water*. (our emphasis)

However we conclude that the application of that Policy relies on a diffuse discharge by any animal being specifically identified in a regional plan rule.

[162] The counter-argument from the Council is that the *ejusdem generis* rule operates to exclude diffuse discharges from animal effluent deposited onto pasture under Rule 14-2 (and Rule 14-4).

[163] While we have some doubt that such might have been the intended outcome, in the absence of further evidence and argument, we presently agree with the Council and conclude that the *ejusdem generis* rule indicates that the discharges associated with intensive farming under Rules 14-2(e) and 14-4(e) of the One Plan do not extend to the diffuse excretion of effluent onto pasture by the farm animals themselves. The introduction to the Rule ... *any of the following discharges ...* rather supports that position.

[164] However, for completeness we mention that discharges (defined in the RMA to *include emit, deposit, and allow to escape*) under ss15(1)(a) – no person may discharge any contaminant or water into water - or more particularly under s15(1)(b) – no person may discharge any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant entering water) - require a resource consent unless the discharge is expressly allowed by a rule in the One Plan.

[165] No-one argued, and we are not in a position to consider, whether there may be discharges of contaminants from *production land* (as defined in the RMA and which *means any land and auxiliary buildings used for the production (but not processing) of primary products (including agricultural, pastoral, horticultural, and forestry products)*) that may contravene ss15(1)(a), or more particularly (b), and would require a resource consent unless the discharge is expressly allowed by a rule in the One Plan. (Production land is excluded from s15(1)(c) and (d) which deal with discharges of contaminants from industrial or trade premises into air or onto or into land but not s15(1)(a) (and (b)). If there are discharges that are not covered by Rules 14-2(e) and 14-4(e) and are not specified as *permitted* activities by other rules in the One Plan then there may be a need for resource consents for them.

Specific conditions

[166] The applicants seek consent conditions that set key parameters and refer to specific ones (Declaration 6(b) – maximum nitrogen leaching allowed over the terms of the consent, (c) – any Nutrient Management Plan, and (d) – other environmental or performance standards for phosphorus or sediment loss or for matters listed in Rules 14-5, 14-6, 14-7, 14-9 and 14-11 of the One Plan where they are applicable). In respect of the specified key parameters the Council opposes a declaration requiring it to, in all cases, impose those conditions. The Council submits that there is nothing inherent in Rules 14-2 and 14-4 that requires the Council to specify the scope of the consent being granted in these terms. The Council maintains its approach is to impose conditions that can realistically be enforced; are reasonable; provide certainty, and are appropriate in the circumstances in line with its discretionary power to do so under sections 108 and 104C(3).

[167] Regarding conditions or advice notes that purport to allow adjustments to leaching limits, Ms Marr gave evidence that if adjustments to leaching limits (whether up or down) are necessary, this should be done consistently for all farmers on a catchment-wide basis and preferably based on the analysis of the overall allocation and the impact that this has on the achievement of the One Plan's water quality improvement goals. In her view, this would amount to a re-allocation of the nitrogen loss rights and should not be achieved through ad hoc changes to individual consent conditions without associated methodology that is fair and equitable and, preferably, set through a planning document. She was critical of the

approach of using a condition or Advice Note in the examples she looked at to suggest that the nitrogen leaching limit could be *updated* for any purpose, and by an undefined methodology. Otherwise, as the applicants' counsel submitted, it would leave a key decision to a later date and allow the Regulatory Manager to operate as a decision maker, offending against the principles set out in *Turner v Allison* [1971] NZLR 833 (CA).

[168] On some conditions and advice notes, the Council submits that it no longer follows the practice taken in the examples looked at by Ms Marr. Advice Notes referred to in para 7 of the proposed declaration, (a) purporting to fetter enforcement action that can be taken by the Council in respect of farming practices and (c) specifying that annual records showing compliance with Nutrient Management Plans will only be required if there are *discrepancies with the Nutrient Budget*, are no longer included in consents. That may not be the current practice but we consider there is benefit in making it clear that advice notes (or what could only be inferred to be a condition) purporting to fetter enforcement are unlawful under the RMA. An advice note is also an unsuitable approach to dealing with a nutrient budget and is uncertain in nature and effect and is likely to present compliance and enforcement problems, as the Council has recognised.

[169] We were informed by Mr Beverley that the Council's current practice is:

- When granting resource consents, there is a condition requiring compliance with an Sustainable Milk Plan (SMP).
- The SMP is included with the consent at the time consent is granted.
- There is a note to the SMP making it clear the SMP will be updated to reflect new versions of OVERSEER.
- Council officers carry out that exercise in accordance with that advice note.

[170] The Council states that it now relies on condition 4 and the note embedded in the SMP itself to carry out updates to the SMP based on the latest version of OVERSEER. Since 2016 condition 2 has been a standard *in general accordance* condition and there is a condition 4:

> The consent holder must ensure that the nitrogen leached from the farm complies with the Planned Nitrogen Reduction Trajectory specified in the latest Sustainable Milk Plan (SMP) as certified by the Regulatory Manager.

There is a note contained in the standard form SMP document itself, attached to decisions to grant consent (and referred to in Condition 4 above). That note is as follows:

> When new versions of Overseer are released, Horizons will update the SMP to reflect the new leaching numbers under the new Overseer version.

[171] The Council considers that the note reflects its standard practice in applying the (frequent) updates to OVERSEER, to ensure that the actions required by SMPs reflect the latest available modelling. The process followed is that current information (i.e. input numbers such as cow numbers, crop types, land area etc) is added into the model. This then produces a new nitrogen leaching figure based on the revised OVERSEER model. This process does not rely on the subjective discretion or judgment of Council officers. It is asserted that this framework does not require, or allow, Council officers updating the SMP to act as a decision maker but rather to simply follow the framework put in place when granting consent, which allows for the updating of the SMP in line with OVERSEER updates in a formulaic way. The Council submits that this type of recognition, that management plans may be updated without the needless time and expense of the consent itself being amended, is commonplace and well aligned with the *Wood v West Coast Regional Council* [2000] NZRMA 193 situation.

[172] Proposed Declaration 7(c) seeks that consent conditions must require the activity to be operated in compliance with a Nutrient Management Plan. The applicants' position is that in this way, although the conditions of consent are required to regulate the amount of nitrogen leaching over the term of the consent, it is accepted that the methodology for achieving this can remain with the consent holder under a management plan condition. However that condition must be robust.

[173] The *preparation of and compliance with a nutrient management plan for the land* is a matter of discretion (a) under Rules 14-2 and 14-4. The One Plan defines the term *Nutrient Management Plan* as:

> ... a plan prepared annually in accordance with the Code of Practice for Nutrient Management (NZ Fertiliser Manufacturers' Research Association 2007) which records (including copies of the OVERSEER® input and output files used to prepare the plan) and takes into account all sources of nutrients for intensive farming and identifies all relevant nutrient management practices and mitigations, and which is prepared by a person who has both a Certificate of Completion in Sustainable Nutrient

Management in New Zealand Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University.

[174] We were informed that the Nutrient Management Plans have taken on different titles, including in the Mangatainoka catchment *Environmental Farm Plan,* and subsequently were re-branded by the Council as *Sustainable Milk Plans* when the content was simplified. The applicants submitted that if the Council is to use management plan methodology it is inappropriate to set requirements for management plans in its consent conditions that differ from the One Plan's explicit requirements.

[175] We agree with the applicants' position as follows:

- Although a management plan can provide information as to how the parameters can and will be met, it is inappropriate for the parameters themselves to be left to the management plan.
- The consent (through conditions) must set the maximum leaching allowed on the face of the consent document – it is inappropriate to leave that matter to a management plan. We agree that the maximum nitrogen leaching (over time) is a fundamental parameter and as such it should be imposed on the face of the consent, and not left to a management plan.
- It is acceptable for a management plan to be used to set out *how* the maximum leaching allowance is to be achieved, but if this approach is taken the management plan used should be that provided for in the One Plan in the definition of *Nutrient Management Plan*;

[176] In closing, the applicants submitted:

> The Council has referred to enforcement challenges and the need to update N-leaching when Overseer is updated. The Council's position on the need to make changes (updates) to N-leaching numbers where Overseer changes is entrenched. But a finding that it is more difficult to operate on the farm to achieve the same N-leaching value (following an Overseer change) does not necessitate that value being updated if the N-leaching value is to form a critical parameter of the consent. If the 'inputs' to Overseer (i.e. the practices on farm) are to be the critical parameter, then similarly they cannot be changed in an unspecified process. (These inputs involve many matters other than stock-crossings, which is the input Mr Bevin focused on under cross-examination). A far more robust analysis would be required as illustrated

in *Bellfield Land Company Ltd v Canterbury Regional Council* [2015] NZEnvC 88 (Determination of the Court on conditions).

[177] We agree with the applicants that there should be no implication in the wording of the conditions (or any advice note) that the nitrogen leaching limit could be *updated* for any purpose, and by an undefined methodology. Otherwise it would leave a key decision to a later date (or dates) and allow the Regulatory Manager to operate as a decision maker, offending against the principles set out in *Turner v Allison* [1971] NZLR 833. The implications of such updates may be significant across a catchment in terms of the cumulative effects on water quality (as well as for allocation between consent holders). The use and status of advice notes rather than specific conditions for this purpose also adds to the uncertainty.

[178] We also note that the application material we looked at separately identifies other nitrogen good management practices that will affect N leaching not reflected in OVERSEER (or we assume at least the current version of it given its continued development). The Council decisions refer to two examples as fencing off waterways or installing a lined effluent pond. Consent conditions require farms to exclude cattle from waterways that are permanently flowing or have an active bed width greater than 1 metre (with a bridge or culvert for a cattle crossing for these rivers) and wetlands and lakes that are rare or threatened habitats. It is not clear whether the Council intends practices specified in the application documents, such as the lining of effluent ponds, to be caught by condition 2 requiring the consent holder to undertake the activity in general accordance with the consent application and its plans and documents.

[179] The example resource consent decisions have a focus on the cumulative effect of N-leaching arising from existing intensive dairy farming operations within a catchment on the basis this is the biggest contributing factor to effects on surface and groundwater quality. A review of the recent examples of resource consent applications provided to us by Ms Marr indicated that for phosphorous there were predictions of loss to water per kg/ha/yr and generally a bald comment that this is within an acceptable range but with no detail of what and why that this. Phosphorous and ediment losses may also need specific consent conditions.

Guidance material

[180] Finally, and understandably, we were not asked to make declarations on the guidance material and application and supporting information (SIC) forms on the Council's website, including the joint DairyNZ Guide. However, it is clear that important parts of this material are not consistent with, or a long way short of or even contrary to, the declarations we consider should be made.

[181] Applicants and their advisers, and council officers involved in consent processing, rely on so-called guidance material provided by Councils and organisations like DairyNZ, and it is therefore particularly important that such material is accurate and complete. While we have not been asked to make a formal declaration that the DairyNZ Publication should be withdrawn, or that the Council should remove or take specific steps with respect to its guidance and SIC forms etc, we reinforce the importance of the Council taking immediate steps to withdraw this material or to rectify problems with it. We also note that DairyNZ indicated its willingness to review and fix any problems with material it was associated with.

Conclusions

[182] To conclude, and much summarised, we have considered it appropriate to make the declarations for the following reasons:

First, so the Council is clearly aware of both the requirements of, and the limits to, its decision-making powers in considering applications for these kinds of resource consents.

Secondly, so the public generally, and intending applicants for resource consents in particular, are aware of the information required to support an application, the matters that must, and must not, be considered in deciding whether or not to grant them, and the limits that may, and should, be placed on the terms, conditions and duration of such consents.

Thirdly, the interpretation and application of resource management plans is a question of law, thus amenable to declarations on lawfulness. The Council's view expressed in the course of the hearing that judicial review of individual consents is more appropriate is surprising. Judicial review would impact on a single landowner (or landowners) because of a dispute over Council process that the Court is being asked to address. The declarations were amended to avoid impacts on individual consent holders and are made with

the same intent – so that the requirements for an application, and for the consideration of it, are clear to all. The examples used in evidence provide context only.

Fourthly, the purpose of these proceedings is not to see every future consent application declined, or to overturn those already granted. It is to ensure lawful and transparent processing of consents going forward. The applicants accept that proper implementation of the One Plan may have economic consequences and are sympathetic to the impact on individuals. However, economic consequences for private individuals are an inevitable corollary of regulation in the public interest. That is not a reason to manipulate or pervert plan implementation. In fact, it emphasises the importance of consistent and transparent plan implementation to ensure those consequences are evenly and fairly distributed.

Fifthly, the potential environmental impact of the activities in question is very significant. We do not have definitive and current numbers for consent applications granted, or in the pipeline, but even the figures noted at para [60] show that significant numbers are involved.

Sixthly, we accept that the applicants have a genuine concern that the processes being followed risked a decline in water quality. It is clear that members of the community considered those processes to be inequitable (particularly because of the failure to include N leaching reduction trajectory on *restricted discretionary* consents, resulting in *grand-parenting* after a single initial step down). The declarations are required to protect the integrity of the One Plan and the community's confidence in Council decision-making.

[183] Many of the Council's submissions were based on the themes that the Council now recognised that its earlier decision-making was not lawful (or good practice); that action was being taken to rectify past approaches; that many of the declarations sought were no more than obvious restatements of (an obligation to comply with) the terms of the RMA and relevant planning documents; or were trite and self-evident, and would fetter the Council's discretions. In some senses, the point that the issues should be self-evident may be right, but we cannot ignore the fact that, for instance, the Resolution earlier discussed was in place for more than three and a half years. During that time, the applicants attempted to work with the Council to correct many of the issues involved in the declarations. Bringing the action in Court was perhaps partly borne out of frustration with the lack of

responsiveness of the Council. A public and unequivocal statement from the Court that such an attitude on the part of a law-making and law-administering body is not acceptable is more than justified.

[184] We also note that over this time the Council proceeded to effectively guarantee and to grant resource consents for periods extending up to 20 years under Rule 14-2 for existing intensive farming activities. Even though the Act provides for longer consent durations, given the 10 year timeframe in which a plan review is expected that could be more than *permitted* activity status might allow. Moreover the content and requirements of the 2011 and its successor, the 2014 National Policy Statements on Freshwater, were a clear signal that the Council should exercise caution in granting long term consents. These circumstances also call into question whether there has been responsible exercise of the Council's resource management functions, and justify the making of these declarations.

[185] We could add that if the Council has a concern or second thoughts about the policy and rule frameworks of any part of the One Plan, the appropriate response is to propose plan changes rather than to adopt an implementation approach that does not accord with the RMA or its Plan.

Result

[186] The following Declarations are made:

1. That to have regard to any purported fettering of the council's ability to freely consider the objectives, policies, rules and other requirements of any planning document set out in s104(1)(b) of the Act; or of the council's ability to decline an application for resource consent and to freely consider the appropriate duration and conditions of a consent, would be unlawful.

2. That in considering applications for resource consents for *restricted discretionary* activities under Rules 14-2 and 14-4 of the One Plan (existing and future intensive land use activities), pursuant to sections 104 and 104C of the Act, the Council has a duty to have regard to each of the following matters:

(a) all the matters over which discretion is restricted under Rules 14-2 and 14-4, including:

i. the extent of non-compliance with the cumulative nitrogen leaching maximum values set out in Table 14.2; and

ii. the environmental effects of that non-compliance including cumulative effects and a consideration of the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated).

(b) the objectives and policies of the One Plan in so far as they relate to matters over which discretion is restricted under Rules 14-2 and 14-4.

(c) the objectives and policies of the National Policy Statement for Freshwater Management 2014 (NPSFM) in so far as they relate to matters over which discretion is restricted under Rules 14-2 and 14-4.

(d) in relation to the discharge consent required under section 15 of the Act and under Rules 14-2 and 14-4:

i. the nature of the discharge and the sensitivity of the receiving environment under section 105 of the Act; and

ii. the requirements of section 107 of the Act.

3.That in considering and granting applications for resource consents under Rules 14-1 to 14-4 of the One Plan, the Council must not grant consents contrary to the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007.

4.That, when considering and granting resource consents under Rules 14-2 and 14-4 of the One Plan, the Council has a duty to give reasons for its decisions including reasons that address the matters in Policy 14-6(a) – (c) of the One Plan and Declarations 2(a)(i) and 2(a)(ii).

5. In accordance with section 88 and the Fourth Schedule of the Act, and the Resource Management (Forms, Fees, and Procedure) Regulations 2003, applications for resource consent under Rules 14-2 and 14-4 of the One Plan, must include:

(i) An application form complying with Form 9 of the Resource Management Act (Forms, Fees and Procedure) Regulations 2003;

(ii) Application for all discharges associated with the intensive land use activity;

(iii) Assessment of compliance against the NESSHDW;

(iv) An AEE that meets the requirements of Schedule 4 of the RMA;

(v) An AEE that assesses the activity against the relevant Objectives and Policies of the One Plan for existing intensive land uses if there is non-compliance with the requirements of Table 14.2 of the One Plan – that is to include assessment against Policy 14-6(b) and (c).

(vi) Assessment against the provisions of s105 RMA, to the extent they relate to the matters over which discretion is restricted.

6.That, in granting resource consents under Rules 14.2 and 14.4 of the One Plan the Council must adequately define the ambit and scope of the activity authorised, including through consents and consent conditions that:

i. expressly authorise the activity of the associated discharge of contaminants to land in circumstances where those contaminants may enter water, as well as the use of land for intensive farming, for activities expressly requiring consent under Rules 14-2 and 14-4;

ii. set the maximum nitrogen leaching allowed over the term of the consents;

iii. require the activity to be operated in compliance with a Nutrient Management Plan to be prepared by a person who has both a Certificate of Completion in Sustainable Nutrient Management in NZ Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University, showing that the activity is complying with the nitrogen leaching maximums allowed by the consent; and

iv. require environmental or performance standards for phosphorus or sediment loss, or for the matters listed in Rules 14-5, 14-6, 14-7, 14-9 and 14-11 of the One Plan where they are applicable.

7. That Conditions or Advice Notes stating, or to the effect, that:

i. it is not intended that there will be enforcement of any specific management practices;

ii. "updates" to targeted nitrogen leaching or a Sustainable Management Plan or associated OVERSEER files may be approved by the Regulatory Manager from time to time; and

iii. annual records showing compliance with Nutrient Management Plans will only be required if there are "discrepancies with the Nutrient Budget"

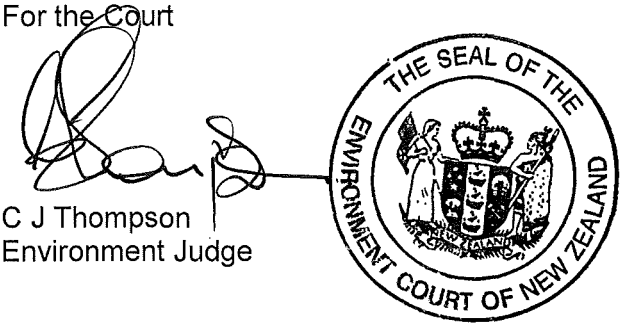
are unlawful, invalid and in contravention of the Act.

Costs

[187] We reserve any issue of costs. If there is to be an application, it should be lodged within 15 working days of the issuing of this decision, and any response is to be lodged within a further 10 working days.

Dated at Wellington the 21ST day of March 2017

For the Court



C J Thompson
Environment Judge

Appendix 1 – Full text of declarations sought (including amendments)

1. That to have regard to the Manawatu-Wanganui Regional Council's (Council's) Resolution dated 25 June 2013, when making decisions on resource consents for restricted discretionary activities under Rule 14.2 of Chapter 14 Discharges (Land and Water) of the Manawatu Wanganui Regional Policy Statement and Regional Plan (One Plan), which provides that *inter alia.*

   "(iii) Where an activity is considered as a restricted discretionary activity and the numbers in table 13.2 are no longer applicable then:

   - *An existing intensive farming activity that provides a trajectory of N reduction that is achievable on the farm or has a low N loss or the farm operating system is economically and environmentally efficient (no low cost options are available) will be given a consent term of 15 to 20 years.*
   - *An existing intensive farming activity where is no willingness to reduce N loss but mitigation is both possible and efficient will be given a consent term of 3 to 5 years. ..."*

   was unlawful, invalid and in contravention of the Act.

2. That in considering applications for resource consents for restricted discretionary activities under Rules 14.2 and 14.4 of the One Plan (existing and future intensive land use activities), pursuant to sections 104 and 104C of the Act, the Council has a duty to have regard to each of the following matters:

   (a) all the matters over which discretion is reserved under Rules 14.2 and 14.4 respectively, including:

   iii. the extent of non-compliance with the cumulative nitrogen leaching maximum values set out in Table 14.2; and

   iv. the environmental effects of that non-compliance including cumulative effects and a consideration of the required reductions of nitrogen in the relevant water management zone or subzone in order to provide for the Schedule B values (for zones or subzones that are over-allocated).

   (b) the objectives and policies of the One Plan in so far as they relate to matters over which discretion is reserved under Rules 14.2 and 14.4;

   (c) the objectives and policies of the National Policy Statement for Freshwater Management 2014 (NPSFM) in so far as they relate to matters over which discretion is reserved under Rules 14.2 and 14.4;

   (d) in relation to the discharge consent required under section 15 of the Act and under Rules 14.2 and 14.4:

(i) the nature of the discharge and the sensitivity of the receiving environment under section 105 of the Act; and

(ii) the requirements of section 107 of the Act.

3. That in considering and granting applications for resource consents under Rules 14.1 to 14.4 of the One Plan, the Council must not grant consents contrary to the Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007.
4. That, when considering and granting resource consents under Rules 14.2 and 14.4 of the One Plan, the Council has a duty to give reasons for its decisions including reasons that address the matters in Policy 14-6(a) – (c) of the One Plan and paragraph 2(a)(i) and (ii) of this Application.
5. That in considering and granting resource consents under Rules 14.2 and 14.4 of the One Plan, the Council has a duty to return applications under section 88 of the Act as being deficient or incomplete where the application documents do not include the matters set out in paragraph 165(a)(i) – (vi) of the affidavit of Ms Helen Marr in support of this Application. NOTE Appendix 1A for further suggested modifications
6. That, in granting resource consents under Rules 14.2 and 14.4 of the One Plan the Council must adequately define the ambit and scope of the activity authorised, including through consents and consent conditions that:
   (a) expressly authorise the activity of discharging contaminants to land in circumstances where those contaminants may enter water (under section 15 of the Act) as well as the use of land for intensive farming;
   (b) set the maximum nitrogen leaching allowed over the term of the consents;
   (c) require the activity to be operated in compliance with a Nutrient Management Plan to be prepared by a person who has both a Certificate of Completion in Sustainable Nutrient Management in NZ Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University, showing that the activity is complying with the nitrogen leaching maximums allowed by the consent; and
   (d) require environmental or performance standards for phosphorus or sediment loss, or for the matters listed in Rules 14.5, 14.6, 14.7, 14.9 and 14.11 of the One Plan where they are applicable.
7. That Advice Notes stating or to the effect that:
   (a) it is not intended that there will be enforcement of any specific management practices;
   (b) "updates" to targeted nitrogen leaching or a Sustainable Management Plan or associated OVERSEER files may be approved by the Regulatory Manager from time to time; and
   (c) annual records showing compliance with Nutrient Management Plans will only be required if there are "discrepancies with the Nutrient Budget"

are unlawful, invalid and in contravention of the Act.

Appendix 1 A

Full text of declaration five, as proposed by Ms Marr

In accordance with section 88 and the Fourth Schedule of the Act, and the Resource Management (Forms, Fees, and Procedure) Regulations 2003, applications under Rules 14-2 and 14-4 of the One Plan, must include:

(i) An application form complying with Form 9 of the Resource Management Act (Forms, Fees and Procedure) Regulations 2003;

(ii) Application for all discharges associated with the intensive land use activity;

(iii) Assessment of compliance against the NESSHDW;

(iv) An AEE that meets the criteria of Schedule 4 of the RMA and that as a minimum:

(1) Identifies any surface waterbodies affected by the activity;

(2) Identifies the Values of surface waterbodies affected by the activity, as set out in Schedule B to the One Plan;

(3) Consider the potential adverse effects on the Schedule B values, including cumulative effects;

(4) Includes a map identifying LUC classes and soil types for the property, the location of specific operational activities and sensitive features (being all surface water bodies, stock crossings, culverts, bridges, rare/threatened/at-risk habitats, bores, historic heritage areas, effluent storage and disposal areas, areas where biosolids/compost/poultry farm litter is discharged. Neighbouring properties/dwellings/public places/amenity/education facilities and the location of feedpads and feed storage areas);

(5) Assess the activity against the relevant objectives and policies of the Horizons One Plan and in particular:

A. Identifies the extent to which the nitrogen leaching limits applied for diverge from the cumulative nitrogen leaching maximums contained in Table 14.2 of the One Plan, and for existing intensive land uses, if there is non-compliance as assessment of whether the exclusions identified in Policy 14-6(b) and (c) of the One Plan apply;

B. For existing uses where cumulative nitrogen leaching maximums in Table 14.2 cannot be met, an assessment of the extent to which nitrogen leaching can be minimised or reduced to the greatest extent

possible, including an assessment of all feasible mitigation options and, where it is proposed that the intensive farm not be operated using feasible mitigation options, an assessment of the reasons they are not chosen, accompanied by an assessment by a farm systems expert and including economic information that is accurate and verifiable;

C. For existing and new intensive land uses where cumulative nitrogen maximums in Table 14.2 cannot be met, an assessment of the types of mitigation or remedies proposed for nutrient leaching, including creation of wetland or riparian planted zones or other enhancement works;

D. An assessment of the sources of phosphorous, sediment and faecal contamination on the intensive farm that may enter water and how these sources will be managed, including how to avoid any contaminants entering water, and if avoidance is not feasible, a comprehensive assessment of the types of mitigations or remedies proposed for nutrient leaching, faecal contamination and sediment losses, including creation of wetland or riparian zones or other enhancement works;

(v) Assessment against the provisions of s105 RMA, the extent they relate to the matters over which discretion is reserved; and

(vi) Assessment against 107 RMA.

Appendix 2 – One Plan Objectives and Policies

14 Discharges to Land and Water

14.1 Objectives

Objective 14-1: Management of *discharges* to *land* and *water* and *land* uses affecting groundwater and surface water quality

The management of *discharges* onto or into *land* (including those that enter *water*) or directly into *water* and *land* use activities affecting groundwater and surface *water* quality in a manner that:

(a) safeguards the life supporting capacity of water and recognises and provides for the Values and management objectives in Schedule B,

(b) provides for the objectives and policies of Chapter 5 as they relate to surface *water* and groundwater quality, and

(c) where a *discharge* is onto or into *land,* avoids, remedies or mitigates adverse *effects* on surface *water* or groundwater.

14.2 Policies

Policy 14-1: Consent decision-making for *discharges* to *water*

When making decisions on *resource consent* applications, and setting consent *conditions,* for *discharges* of *water* or *contaminants* into *water,* the Regional Council must specifically consider:

(a) the objectives and Policies 5-1 to 5-5 and 5-9 of Chapter 5, and have regard to:

(b) avoiding *discharges* which contain any persistent *contaminants* that are likely to accumulate in a *water body* or its *bed,*

(c) the appropriateness of adopting the *best practicable option* to prevent or minimise adverse *effects* in circumstances where:

(i) it is difficult to establish *discharge* parameters for a particular *discharge* that give effect to the management approaches for *water* quality and *discharges* set out in Chapter 5, or

(ii) the potential adverse *effects* are likely to be minor, and the costs associated with adopting the *best practicable option* are small in comparison to the costs of investigating the likely *effects* on *land* and *water,* and

(d) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the *discharge.*

Policy 14-2: Consent decision-making for *discharges* to *land*

When making decisions on *resource consent* applications, and setting consent *conditions,* for *discharges* of *contaminants* onto or into *land* the Regional Council must have regard to:

(a) the objectives and policies of Chapter 5 regarding the management of groundwater quality and *discharges,*

(b) where the *discharge* may enter surface *water* or have an adverse *effect* on surface *water* quality, the degree of compliance with the approach for managing surface *water* quality set out in Chapter 5,

(c) avoiding as far as reasonably practicable any adverse *effects* on any sensitive receiving *environment* or potentially incompatible *land* uses, in particular any residential buildings, educational facilities, churches, marae, public areas, *infrastructure* and other physical resources of regional or national importance identified in Policy 3-1, *wetlands*, surface *water bodies* and the *coastal marine area,*

(d) the appropriateness of adopting the *best practicable option* to prevent or minimise

adverse *effects* in circumstances where:

(i) it is difficult to establish *discharge* parameters for a particular *discharge* that give effect to the management approaches for *water* quality and *discharges* set out in Chapter 5,

(ii) the potential adverse *effects* are likely to be minor, and the costs associated with adopting the *best practicable option* are small in comparison to the costs of investigating the likely *effects*^ on *land*^ and *water*^,

(e) avoiding *discharges*^ which contain any persistent *contaminants*^ that are likely to accumulate in the soil or groundwater, and

(f) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the *discharge*^.

Policy 14-3: Industry-based standards

The Regional Council will examine on an on-going basis relevant industry-based standards (including guidelines and codes of practice), recognising that such

industry based standards generally represent current best practice, and may accept compliance with those standards as being adequate to avoid, remedy or mitigate adverse *effects*^ to the extent that those standards address the matters in Policies 14-1, 14-2, 14-4 and 14-5.

Policy 14-4: Options for *discharges*^ to surface *water*^ and *land*^

When applying for consents and making decisions on consent applications for *discharges*^ of *contaminants*^ into *water*^ or onto or into *land*^, the opportunity to utilise alternative *discharge*^ options, or a mix of *discharge*^ regimes, for the purpose of mitigating adverse *effects*^, applying the best practicable option, must be considered, including but not limited to:

(a) discharging *contaminants*^ onto or into *land*^ as an alternative to discharging *contaminants*^ into *water*^,

(b) withholding from discharging *contaminants*^ into surface *water*^ at times of low flow, and

(c) adopting different treatment and *discharge*^ options for different receiving *environments*^ or at different times (including different flow regimes or levels in surface *water bodies*^).

Policy 14-5: Management of intensive farming *land*^ uses

In order to give effect to Policy 5-7 and Policy 5-8, intensive farming *land*^ use activities affecting groundwater and surface *water*^ quality must be managed in the following manner:

(h) The following land uses have been identified as intensive farming *land*^ uses:

  (v) *Dairy farming**

  (vi) *Commercial vegetable growing**

  (vii) *Cropping**

  (viii) *Intensive sheep and beef**

(i) The intensive farming *land*^ uses identified in (a) must be regulated where:

  (iii) They are existing intensive farming *land*^ uses, in the targeted *Water Management Sub-zones** identified in Table 14.1.

(iv) They are new (ie., established after the Plan has legal effect[4]) intensive farming *land*^ uses, in all *Water Management Sub-zones** in the Region.

(j) Nitrogen leaching maximums have been established in Table 14.2.

(k) Existing intensive farming *land*^ uses regulated in accordance with (b)(i) must be managed to ensure that the leaching of nitrogen from those *land*^ uses does not exceed the *cumulative nitrogen leaching maximum** values for each year contained in Table 14.2, unless the circumstances in Policy 14-6 apply.

(l) New intensive farming *land*^ uses regulated in accordance with (b)(ii) must be managed to ensure that the leaching of nitrogen from those *land*^ uses does not exceed the *cumulative nitrogen leaching maximum** values for each year contained in Table 14.2.

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

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

(iv) Any *river*^ that is permanently flowing or had an *active bed** width greater than 1 metre.

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

Policy 14-6: Resource consent decision-making for intensive farming *land*^ uses

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

(e) Ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5.

(f) An exception must be made to (a) for existing intensive farming *land*^ uses in the following circumstances:

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

[4] The Plan has legal effect in the case of *dairy farming* from 24 August 2010 and for *commercial vegetable growing, cropping* and *intensive sheep and beef* it has legal effect from 9 May 2013.

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

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

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

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

(h) Ensure that cattle are excluded from surface water in accordance with Policy 14-5(f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus, faecal contamination and sediment are remedied or mitigated by other works or environmental compensation. Mitigation works may include (but are not limited to) creation of wetland and riparian planted zones.

Policy 14-7: Management of *discharges*^ of *domestic wastewater**

When making decisions on *resource consent*^ applications, and setting consent *conditions*^, for on-site *discharges*^ of *domestic wastewater**, the Regional Council must generally ensure that the *discharge*^ is in accordance with the Manual for On-site Wastewater Systems Design and Management (Horizons Regional Council 2010).

For *discharges*^ that are not in accordance with the Manual for On-site Wastewater Systems Design and Management (Horizons Regional Council 2010) the Regional Council must make decisions on *resource consent*^ applications, and set consent *conditions*^, for on-site *discharges*^ of *domestic wastewater**, to ensure that:

(a) the *site** is suitable for the intended on-site wastewater management system,

(b) the *discharge*^ does not result in actual or potential contamination of:

(i) groundwater at any point of abstraction utilised for irrigation, stock or domestic drinking *water^*,

(ii) surface *water bodies^*

(iii) stormwater drains,

(iv) *artificial watercourses**, or

(v) neighbouring *properties**,

(c) the *discharge^* does not constitute a public health threat,

(d) the *discharge^* does not cause any offensive or objectionable odour beyond the *property** boundary, and

(e) a sufficient area of *land^* is set aside as a reserve disposal area.

Policy 14-8: Monitoring requirements for consent holders

Point source *discharges^* of *contaminants^* to *water^* must generally be subject to the following monitoring requirements:

(a) the regular monitoring of *discharge^* volumes on *discharges^* smaller than 100 m^3/day and making the records available to the Regional Council on request,

(b) the installation of a pulse-count capable meter in order to monitor the volume *discharged^* for *discharges^* of 100 m^3/day or greater,

(c) the installation of a Regional Council compatible telemetry system on *discharges^* of 300 m^3/day or greater, and

(d) monitoring and reporting on the quality of the *discharge^* at the point of *discharge^* before it enters surface *water^* and the quality of the receiving *water^* upstream and downstream of the point of *discharge^* (after *reasonable mixing**) may also be required. This must align with the Regional Council's environmental monitoring programme where reasonably practicable to enable cumulative impacts to be measured.

Policy 14-9: Consent decision making requirements from the National Policy Statement for Freshwater Management

(a) This policy applies to any application for the following *discharges^* (including a diffuse *discharge^* by any person or animal):

(i) a new *discharge^;* or

(ii) a change or increase in any *discharge^* -

of any *contaminant^* into fresh *water^*, or onto or into *land^* in circumstances that may result in that *contaminant^* (or, as a result of any natural process

from the *discharge*^ of that *contaminant*^, any other *contaminant*^) entering fresh *water*^.

(b) When considering any application for a *discharge*^ the Regional Council must have regard to the following matters:

(i) the extent to which the *discharge*^ would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh *water*^ including on any ecosystem associated with fresh *water*^; and

(ii) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh *water*^, and on any ecosystem associated with fresh *water*^, resulting from the *discharge*^ would be avoided.

This clause of the policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2011 took effect on 1 July 2011.

(c) When considering any application for a *discharge*^ the Regional Council must have regard to the following matters:

(i) the extent to which the *discharge*^ would avoid contamination that will have an adverse effect on the health of people and communities as affected by their secondary contact with fresh *water*^; and

(ii) the extent to which it is feasible and dependable that any more than minor adverse effect on the health of people and communities as affected by their secondary contact with fresh *water*^ resulting from the *discharge*^ would be avoided.

This clause of the policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2014 took effect on 4 July 2014.

Objective 5-1: *Water* management Values

Surface *water bodies* and their *beds* are managed in a manner which safe guards their life supporting capacity and recognises and provides for the Values in Schedule B[5].

[5] Schedule B is not a component of Part 1 – the Regional Policy Statement. It is a component of Part II – the Regional Plan.

Objective 5-2: *Water* quality

(a) Surface *water* quality is managed to ensure that:

(i) *water* quality is maintained in those *rivers* and *lakes* where the existing *water* quality is at a level sufficient to support the Values in Schedule B

(ii) *water* quality is enhanced in those *rivers* and *lakes* where the existing *water* quality is not at a level sufficient to support the Values in Schedule B

(iii) accelerated eutrophication and sedimentation of *lakes* in the Region is prevented or minimised

(iv) the special values of *rivers* protected by water *conservation orders* are maintained.

(b) Groundwater quality is managed to ensure that existing groundwater quality is maintained or where it is degraded/over allocated as a result of human activity, groundwater quality is enhanced.

Policy 5-4: Enhancement where *water quality targets* are not met

(a) Where the existing *water* quality does not meet the relevant Schedule E *water quality targets* within a *Water Management Sub-zone, water* quality within that sub-zone must be managed in a manner that enhances existing *water* quality in order to meet:

(i) the *water quality target* for the *Water Management Zone* in Schedule E, and/or

(ii) the relevant Schedule B Values and management objectives that the *water quality target* is designed to safeguard.

(b) For the avoidance of doubt:

(i) in circumstances where the existing *water* quality of a *Water Management Sub-zone* does not meet all of the *water quality targets* for the *Sub-zone*, (a) applies to every *water quality target* for the Sub-zone

(ii) in circumstances where the existing *water* quality of a *Water Management Sub-zone* does not meet some of the *water quality targets* for the *Sub-zone,* (a) applies only to those *water quality targets* not met.

Discharges and *Land* use Activities Affecting *Water* Quality

Policy 5-7: *Land* use activities affecting groundwater and surface *water* quality

The management of *land* use activities affecting groundwater and surface *water* must give effect to the strategy for surface *water* quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6, by managing diffuse *discharges* of contaminants in the following manner:

(a) identifying in the regional plan targeted *Water Management Sub-zones.* Targeted *Water Management Sub-zones* are those subzones where, collectively, *land* use activities are significant contributors to elevated contaminant levels in groundwater or surface *water*

(b) identifying in the regional plan intensive farming *land* use activities. Intensive farming *land* use activities are rural *land* use activities that (either individually or collectively) make a significant contribution to elevated contaminant levels in the targeted *Water Management Sub-zones* identified in (a) above

(c) actively managing the intensive farming *land* use activities identified in (b) including through regulation in the regional plan, in the manner specified in Policy 5-8

(d) The Regional Council must continue to monitor ground and surface *water* quality in *Water Management Sub-zones* not identified in (a) and rural *land* uses not identified in (b). Where monitoring shows the thresholds in (a) and (b) are met then the regional plan must be amended so that those further *Water Management Sub-zones* and rural *land* uses are included in the management regime set out in (c).

Policy 5-8: Regulation of intensive farming *land* use activities affecting groundwater and surface *water* quality

(a) Nutrients

  (i) Nitrogen leaching maximums must be established in the regional plan which:

    (A) take into account all the non-point sources of nitrogen in the catchment

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

    (C) recognise the productive capability of *land* in the *Water Management Sub-zone*

(D) are achievable on most farms using good management practices

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

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

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

(b) Faecal contamination

(i) Those persons carrying out existing intensive farming *land* use activities in the targeted *Water Management Sub-zones* listed in Table 14.1 or new conversions to intensive farming *land* use activities anywhere in the Region must be required, amongst other things, to:

(A) prevent cattle access to some surface *water bodies* and their *beds*

(B) mitigate faecal contamination of surface *water* from other entry points (eg., race run-off)

(C) establish programmes for implementing any required changes.

(c) Sediment

(i) In those *Water Management Sub-zones* where agricultural *land* use activities are the predominant cause of elevated sediment levels in surface *water,* the Regional Council will promote the preparation of voluntary management plans under the Council's Sustainable Land Use Initiative or Whanganui Catchment Strategy for the purpose of reducing the risk of *accelerated erosion,* as described in Chapter 4.

Appendix 3 – Table 14.2 and One Plan Rules referred to:

Table 14.2 sets out the *cumulative nitrogen leaching maximum* for the *land* used for intensive farming *land* use activities within each specified *land use capability class*

Period (from the year that the rule has legal effect[6]	*LUC**I	*LUC**II	*LUC**III	*LUC**IV	*LUC**V	*LUC**VI	*LUC**VII	*LUC**VIII
Year 1	30	27	24	18	16	15	8	2
Year 5	27	25	21	16	13	10	6	2
Year 10	26	22	19	14	13	10	6	2
Year 20	25	21	18	13	12	10	6	2

Rule 14-1 Existing intensive farming *land* use activities

Activity

The use of *land* pursuant to s9(2) RMA for any of the following types of intensive farming:

(i) *dairy farming*
(ii) *commercial vegetable growing*
(iii) *cropping*
(iv) *intensive sheep and beef farming*

that was existing in the *Water Management Sub-zones* listed in and from the dates specified in Table 14.1 and any of the following *discharges* pursuant to ss15(1) or 15(2A) RMA associated with that intensive farming:

(a) the *discharge* of *fertiliser* onto or into *land*
(b) the *discharge* of *contaminants* onto or into *land* from
    (i) the preparation, storage, use or transportation of stock feed on *production land*
    (ii) the use of a *feedpad*
(c) the *discharge* of *grade Aa biosolids* or *compost* onto or into *production land*
(d) the *discharge* of *poultry farm litter* onto or into *production land*
(e) the *discharge* of farm *animal effluent* onto or into *production land* (or upon expiry or surrender of any existing consent for that *discharge*) including:
    (i) effluent from dairy sheds and *feedpads**
    (ii) effluent received from piggeries
    (iii) sludge from farm effluent ponds

[6] The Plan has legal effect in the case of *dairy farming* from 24 August 2010 and for *commercial vegetable growing, cropping* and *intensive sheep and beef* it has legal effect from 9 May 2013.

(iv) poultry farm effluent

and *any* ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA.

Where the existing intensive farming *land* use is located partly on land within one or more of the *water management sub-zones* listed in Table 14.1 and partly on other land, this rule only applies:

(a) if at least 20% of the existing intensive farming *land* use is located on land within the listed *water management sub-zones;* and

(b) to the portion of the existing intensive farming *land* use that is located within the listed *water management sub-zones.*

Rule 14-2 Existing intensive farming *land* use activities not complying with Rule 14-1 Activity

The use of *land* pursuant to s(9)(2) RMA for any of the following intensive farming:

(i) *dairy farming*

(ii) *commercial vegetable growing*

(iii) *cropping*

(iv) *intensive sheep and beef farming*

that was existing in the *Water Management Sub-zones* listed in and from the dates specified in Table 14.1, and any of the following *discharges* pursuant to ss15(1) or 15(2A) RMA associated with intensive farming, that do not comply with one or more of the *conditions,* standards and terms of Rule 14-1:

(a) the *discharge of fertiliser** onto or into *land*

(b) the *discharge* of *contaminants* onto or into *land* from

  (i) the preparation, storage, use or transportation of stock feed on *production land*

  (ii) the use of a *feedpad*

(c) the *discharge* of *grade Aa biosolids* or *compost* onto or into *production land*

(d) the *discharge* of *poultry farm litter* onto or into *production land*

(e) the *discharge* of farm *animal effluent* onto or into *production land* (or upon expiry or surrender of any existing consent for that *discharge*) including:

  (i) effluent from dairy sheds and *feedpads*

  (ii) effluent received from piggeries

  (iii) sludge from farm effluent ponds

  (iv) poultry farm effluent

and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA.

Control/Discretion

Non-Notification

Discretion is restricted to:

(n) preparation of and compliance with a *nutrient management plan* for the *land*

(o) the extent of non-compliance with the *cumulative nitrogen leaching maximum* specified in Table 14-2

(p) measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and sediment losses from the *land*

(q) measures to exclude cattle from *wetlands* and *lakes* that are a *rare habitat* or *threatened habitat*, and *rivers* that are permanently flowing or have an *active bed* width greater than 1m

(r) the bridging or culverting of *rivers* that are permanently flowing or have and *active bed** width greater than 1 m that are crossed by cattle

(s) the matters referred to in the *conditions* of Rules 14-5,14-6, 14-7, and 14-9

(t) the matters referred to in the *conditions* of Rule 14-11 and the matters of control in Rule 14-11

(u) avoiding, remedying or mitigating the effects of odour, dust, *fertiliser* drift or effluent drift

(v) provision of information including the annual *nutrient management plan*

(w) duration of consent

(x) review of consent *conditions*

(y) compliance monitoring

(z) the matters in Policy 14-9.

(For clarification, there are no non-notification provisions in the Rule). ???

Rule 14-3 New intensive farming *land use activities*

The use of *land* pursuant to s9(2) RMA for any conversion to any of the following intensive farming:

(i) *dairy farming*

(ii) *commercial vegetable growing*

(iii) *cropping*

(iv) *intensive sheep and beef farming*

that occurs from the date this rule has legal effect[7] anywhere within the Region and any of the following *discharges* pursuant to ss15(1) or 15(2A) RMA associated with that intensive farming:

(a) the *discharge* of *fertiliser* onto or into *land*

(b) the *discharge* of *contaminants* onto or into *land* from

  (i) the preparation, storage, use or transportation of stock feed on *production land*

  (ii) the use of a *feedpad**

(c) the *discharge* of *grade Aa biosolids, or compost* onto or into *production land*

(d) the *discharge* of *poultry farm litter* onto or into *production land*

(e) the *discharge* of farm *animal effluent* onto or into *production land* including:

  (i) effluent from dairy sheds and *feedpads*

  (ii) effluent received from piggeries

  (iii) sludge from farm effluent ponds

  (iv) poultry farm effluent

and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA.

Rule 14 -4 Provides:

> 14-4 New intensive farming *land* use activities not complying with Rule 14-3
>
> The use of *land* pursuant to s9(2) RMA for any of the following intensive farming
>
> (i) *dairy farming*
>
> (ii) *commercial vegetable growing*
>
> (iii) *cropping*
>
> (iv) *intensive sheep and beef farming*
>
> that occurs from the date this rule has legal effect[8] anywhere within the Region, and any of the following *discharges* pursuant to ss15(1) or 15(2A) RMA associated with intensive farming, that do not comply with one or more of the *conditions*^, standards and terms of Rule 14-3:
>
> (a) the *discharge*^ of fertiliser* onto or into *land*

[7] The rule has legal effect in the case of *dairy farming* from 24 August 2010 and for *commercial vegetable growing, cropping* and *intensive sheep and beef* it has legal effect from 9 May 2013.

[8] The rule has legal effect in the case of *dairy farming* from 24 August 2010 and for *commercial vegetable growing, cropping* and *intensive sheep and beef* it has legal effect from 9 May 2013.

(b) the *discharge* of *contaminants* onto or into *land* from

(i) the preparation, storage, use or transportation of stock feed on *production land*

(ii) the use of a *feedpad**

(c) the *discharge* of *grade Aa biosolids* or *compost* onto or into *production land*

(d) the *discharge* of *poultry farm litter* onto or into *production land* including:

(e) the *discharge* of farm *animal effluent* onto or into *production land* including:

(i) effluent from dairy sheds and *feedpads*

(ii) effluent received from piggeries

(iii) sludge from farm effluent ponds

(iv) poultry farm effluent

and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA.

Rule 14-5 Fertiliser

The *discharge* of *fertiliser* onto or into *land* pursuant to ss15(1) or 15(2A) RMA and any ancillary *discharge of contaminants* into air pursuant to ss15(1) or 15(2A) RMA, except where the *discharge* is undertaken in association with a use of *land* controlled by Rules 14-1 to 14-4.

Rule 14-6 Stock feed including *feedpads*

The *discharge* of *contaminants* onto or into *land* pursuant to ss15(1) or 15(2A) RMA from:

(a) the preparation, storage, use or transportation of stock feed on *production land, or*

(b) the use of a *feedpad*

and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA, except where the *discharge* is undertaken in association with a use of *land* controlled by Rule 14-1 to 14-4.

14-9 *Discharges* of *poultry farm litter* or *pig farm litter* and associated temporary stockpiling

The *discharge* of *poultry farm litter* or *pig farm litter* and associated stockpiling onto or into *production land* pursuant to ss15(1) or 15(2A) RMA and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA, except where the *discharge* is undertaken in association with a use of *land* controlled by Rules 14-1 to 14-4.

14-11 Farm *animal effluent* including effluent from dairy sheds, poultry farms and piggeries

The *discharge* of farm *animal effluent* onto or into *production land* pursuant to ss15(1) or 15(2A) RMA including:

(a) effluent from dairy sheds and *feedpads*

(b) effluent from piggeries

(c) sludge from farm effluent ponds

(d) poultry farm effluent

and any ancillary *discharge* of *contaminants* into air pursuant to ss15(1) or 15(2A) RMA, except where the *discharge* is undertaken in association with a use of *land* controlled by Rules 14-1 to 14-4.

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2011-425-000262
[2012] NZHC 735

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under s 299 of the Act
BETWEEN	AYRBURN FARM ESTATES LIMITED J HADLEY AND R LUCAS AS TRUSTEES OF THE MILLHOUSE TRUST G & G DAVIS K EDWARDS S FIGENSHOW NORMAN GRAY D MCARTHUR M MCCLEERY E PARKIN J & M TAYLOR Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 12 and 13 March 2012
(Heard at Christchurch)

Appearances: JDK Gardner-Hopkins and E L Matheson for Appellants
M A Ray for Respondent
P Cavanagh QC and R Ibbotson for Roman Catholic Bishop of the Diocese of Dunedin

Judgment: 20 April 2012

RESERVED JUDGMENT OF HON JUSTICE FRENCH

Introduction

[1] Several residents of Speargrass Flat Road, near Arrowtown, are strongly opposed to a school being established in their neighbourhood. The Queenstown Lakes District Council, however, granted the school a resource consent, and that consent was upheld on appeal by the Environment Court.[1]

[2] The residents now seek to appeal the decision of the Environment Court under s 299 of the Resource Management Act 1991.

[3] Unlike the appeal to the Environment Court, an appeal to this Court under s 299 does not involve a rehearing of the merits of the school's application. It has a much more narrow focus. In order to succeed, the residents must satisfy me that the decision of the Environment Court contains material error(s) of law.

[4] The key issue raised by the appeal is whether the Environment Court failed to have regard to relevant matters within its discretion.

Factual background

[5] St Joseph's Primary School currently operates from a site in Queenstown. The school has outgrown its Queenstown site, and for several years has been looking to find another site on which to establish a satellite campus.

[6] In early 2006, the Roman Catholic Bishop of the Diocese of Dunedin, who has oversight of the school, purchased a 2.5945 hectare property at 478 Speargrass Flat Road. The property comprised land and a lodge which the church authorities proposed converting into a campus for 60 pupils.

[7] The lodge was, however, destroyed by fire in July 2006.

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1 *Ayrburn Farm Estate Ltd v Queenstown Lakes District Council* [2011] NZEnvC 98.

[8] This resulted in the school redesigning its proposal. The salient features of the redesigned proposal were as follows:

i) 112-pupil school.

ii) To include a 480 sq m classroom block and a 220 sq m administration block.

iii) 43 carparks to be provided, together with playing fields and a hard court area.

iv) St Joseph's School to remain as one entity, but operate from two sites.

v) Speargrass campus to provide for Years 1 to 6 pupils from Arrowtown, Lake Hayes and the outer Wakatipu basin. Years 1 to 6 pupils from Queenstown and all Years 7 to 8 pupils continuing to attend the Queenstown site.

[9] Under the Queenstown Lakes District Plan, the site is zoned Rural Residential, with a visitor accommodation overlay. It adjoins the Rural General zone to the north and south, with the Rural Residential zone to the east and west.

[10] The existing development in the area is predominantly rural residential sized properties with residential buildings and associated lifestyle activity. The property at issue is one of the few larger sized sites remaining in the zone. Outside of the Rural Residential zones, more extensive pastural farming occurs in the Rural General zone.

[11] Section 8.2 of Volume 1A of the Plan states that the purpose of the Rural Residential zone is to provide for low density residential opportunities as an alternative to the suburban living areas in the district. It goes on to state that the Rural Residential zone is anticipated to be characterised by low density residential areas with ample open space, landscaping and with minimal adverse environmental effects experienced by residents. Rural activities are said to be not likely to remain a

major use of land in the Rural Residential zone, or a necessary part of the rural residential environment.

[12] In s 8.1, which contains "issues, objectives and policies", amenity and environmental values in Rural Zones are identified as including privacy, rural outlook, spaciousness, ease of access, clean air and, at times, quietness.

[13] The Bishop's application for a resource consent for the redesigned proposal attracted significant opposition from local residents. They were concerned at the introduction of a non-rural, non-residential use into their neighbourhood, and believed a school of that size was not compatible with the rural residential environment they valued. The primary concerns were loss of privacy, noise and traffic issues.

[14] Following a hearing before Council Hearing Commissioners, the consent was however granted. The residents then appealed to the Environment Court. There was a second hearing, which lasted seven days.

The decision of the Environment Court

[15] One of the key issues at the hearing was the correct classification of the proposed activity.

[16] The Plan classifies activities according to their status under the Act. The status classifications are permitted, controlled, restricted-discretionary, discretionary, non-complying and prohibited.

[17] The scheme of the rural living area rules under the Plan is that any activity which complies with the relevant Zone and Site Standards and is not listed as controlled, discretionary, non-complying or prohibited, is a permitted activity. If an unlisted activity fails to meet all the relevant Zone Standards, it is to be classified as a non-complying activity. If the activity complies with all the Zone Standards but breaches one or more of the Site Standards, its classification is restricted-discretionary.

[18] In the Rural Residential zone there is a very limited range of permitted activities. Generally, construction of buildings including residential units is a controlled activity.

[19] As for schools, there is no specific mention of schools in the Rural Residential zone. Accordingly, the activity status of the proposed St Joseph's School fell to be determined by reference to the relevant Site and Zone Standards.

[20] The residents contended that the proposed school did not comply with the Zone Standards. This was rejected by the Court. However, while finding there was compliance with all the Zone Standards, the Court also found that the proposal failed to comply with two of the relevant Site Standards. That meant the correct classification was restricted-discretionary.

[21] The two Site Standards which the proposal was found to breach were:

- Rule 8.2.4.1(v) "Nature and Scale of Activities": – which limits non-residential activities in the zone to a maximum gross floor area of $40m^2$; and

- Rule 8.2.4.1(x) "Earthworks" – which imposes a limit of $100m^3$ per site per 12 month period, and a maximum area of bare soil exposure (where the average depth is greater than O.5m) to $200m^2$ per 12 month period.

[22] Having found that the correct activity status was restricted-discretionary, the Environment Court then turned to consider and evaluate the restricted-discretionary assessment matters listed in the Plan relating to earthworks and "nature and scale of activities". The Court structured its analysis under the headings 'Scale of Buildings and Activities', 'Noise', 'Landscape and Visual Impact' and 'Traffic', its key findings being that:

- The scale of the proposed buildings was compatible with the surrounding area.

- The design, scale and external appearance of the buildings and associated works were appropriate.

- The privacy of the immediate neighbours would not be adversely affected.

- The noise effects would be no more than minor.

- The proposed earth mounds would not have an adverse effect on the amenity of the surrounding sites.

- The adverse traffic effects arising from the proposal were able to be mitigated sufficiently.

[23] The Court concluded:

> [120] We have found that a school, along with a wide range of community-type activities, are provided for in the Rural Residential zone as restricted-discretionary activities. A key assessment matter set out in the Plan relates to the extent to which the scale of the activity associated with the proposed school differs from the scale of activities in the surrounding area. We recognise that the proposed school will result in an activity that is different from the existing use of the subject site and to existing development in the surrounding area, which at present comprises single household units on small lifestyle properties. It was clear that many of the neighbours do not want any change to the existing situation... However our assessment requires a consideration of the effects of the proposal in terms of the Plan and not just by comparison with the existing development. To a degree, the neighbours currently have an artificially low level of activity in their environment because this large site has been vacant since the previous lodge was burnt down in 2006.
>
> [121] In assessing the matter of scale we accept that there will be a larger number of people at the school than at the previous lodge, and also more than is likely to be associated with six residential dwellings. However we consider that the relatively large size of the site is significant in that the proposal is able to accommodate all of the functional requirements of the school and also adequate mitigation including noise attenuation and landscaping. We also consider that the activity patterns and fluctuations which are part of a school mean that the higher activity levels will occur during the daytime and then this will be limited to the school term periods. The longer summer holidays, when people are more likely to be at home and

> outside, will have very little activity. We consider that these are relevant factors to be taken into account when comparing different activities.
>
> [122] Based on our analysis of the effects of the scale of the proposed activity, we are satisfied that it is compatible with the scale of activities in the surrounding area, having regard to the Plan and existing development. Overall, our conclusion is that the proposal satisfies the relevant assessment matters set out in the Plan.

[24] The Court then went on to consider Part 2 of the Resource Management Act and had regard to the benefits to the applicants if they were granted consent. It found that the proposed school would "assist in enabling people and the community to provide for access to education, and to associated social and cultural well-being".

[25] The application was accordingly granted, with extensive conditions. In considering the imposition of conditions, the Court recorded that it had considered those matters in the Plan relating to the restricted-discretionary activity analysis for the two Site Standards not complied with, and also the controlled activity provisions for the building component of the activity. This was consistent with 8.3.1(v), which stipulates:

> Where an activity is a *Discretionary Activity* because it does not comply with one or more relevant Site Standards, but is also specified as a *Controlled Activity* in respect of other matter(s), the Council shall also apply the relevant assessment matters for the Controlled Activity when considering the imposition of conditions on any consent to the discretionary activity.

Grounds of appeal

[26] On appeal, the residents do not challenge the finding that the application was for a restricted-discretionary activity. Nor do the residents contest the Environment Court's consideration of the earthworks Site Standard. Their appeal is confined to the Court's approach to the "nature and scale of activities" Standard and the Court's approach to Part 2 of the Act.

[27] In particular, the residents contend that the Environment Court's decision contains the following errors of law:

i) In assessing the proposal, the Environment Court wrongly limited its discretion to the assessment criteria contained in the Plan.

ii) Made a finding, namely that matters relating to rural activities and resources were not seriously at issue, when that finding was not supported by any evidence.

iii) Failed to address two of the relevant assessment matters listed in the Plan.

iv) Failed to have regard to and apply the specific wording of assessment matter 8.3.2(x)(a).

v) Erred in its treatment of Part 2 matters and failed to recognise the significance of rural amenity values.

[28] These errors are said to have resulted in the Court failing to correctly assess the effects of the proposal on the amenity values of the area.

Preliminary procedural point

[29] The residents sought to include three written briefs of evidence from the Environment Court hearing in the common bundle.

[30] Mr Cavanagh objected to the briefs being included and submitted that if any evidence was to be included it should be the whole transcript and not selected portions.

[31] I decided to admit the evidence on a provisional basis, noting the objection and with a view to making a ruling as part of my substantive decision.

[32] As a general principle of fairness, Mr Cavanagh's point is well made. However, the purposes for which the evidence was being included in the bundle were very limited. First, it was to test the accuracy of a reference by the Environment Court to one of the briefs at issue, and secondly, to establish the existence of evidence which the Environment Court is said to have overlooked. I am satisfied it was appropriate for the evidence to form part of the record for the appeal and that it was not necessary for me to view the entire transcript.

Scope of an appeal under s 299

[33] An appeal to this Court under s 299 is an appeal limited to questions of law.

[34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:[2]

i) applied a wrong legal test; or,

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

iii) taken into account matters which it should not have taken into account; or,

iv) failed to take into account matters which it should have taken into account.

[35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.[3]

[36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.[4]

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2 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
3 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

[37] Mindful of these general principles, I turn now to consider each of the alleged errors of law.

Did the Environment Court wrongly limit its discretion to the assessment matters contained in the Plan and ignore other relevant matters?

[38] The Plan lists certain assessment matters which the consent authority must take into account when considering whether to grant consent.

[39] It was common ground that in the case of a restricted-discretionary activity, only those assessment matters which relate to the particular Site Standard at issue are relevant. This follows from the Plan and the Act which, in its pre-2009 amendment form, stated at s 104C:

> **104C Particular restrictions for restricted discretionary activities**
>
> (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority—
>
> (a) must consider only those matters specified in the plan or proposed plan to which it has restricted the exercise of its discretion; and
>
> (b) may grant or refuse the application; and
>
> (c) if it grants the application, may impose conditions under section 108 only for those matters specified in the plan or proposed plan over which it has restricted the exercise of its discretion

[40] It was also common ground that the assessment matters in the Plan were guidelines and not tests.[5]

[41] As I have already mentioned, there were two Site Standards at issue in this case, namely "nature and scale of activities" and earthworks. The residents, however, only challenge the Environment Court's treatment of the former, and accordingly there is no need for me to discuss earthworks.

[42] The Site Standard system is explained in the Plan as follows:[6]

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4 *Countdown Properties (Northlands) Ltd v Dunedin City Council.*

5 No issue was taken with the language of the Court's decision, which in some passages speaks of "satisfying the assessment matters".

> **Site standards** are specified in relation to matters which tend to impact on the use of the particular site or adjacent areas. While these standards are important, they are not considered fundamental to the integrity of an area as a whole and so are specified in a way that if development does not comply with these standards the Council will consider the matter of non-compliance by way of a resource consent for a discretionary activity. This enables the Council to consider the implications of non-compliance on the use and enjoyment of the site involved and on neighbouring sites.

[43] Under the Plan, there are eight assessment matters to be taken into account when considering site standard 8.2.4.1(v), "Nature and Scale of Activities":[7]

> (a) The extent to which the scale of the activity and the proposed use of buildings will be compatible with the scale of other buildings and activities in the surrounding area.
>
> (b) The extent to which materials or equipment associated with an activity need to be stored outside the building, and the extent to which all manufacturing, altering, repairing, dismantling or processing of any goods or articles associated with the activity need to be carried outside a building, taking account of:
>
> (i) The nature, coverage area and height of materials or equipment associated with the activity.
>
> (ii) The extent to which provisions would be needed for:
>
> - security
> - control of litter and vermin
> - prevention or containment of fire hazard.
>
> (c) The extent of noise or visual impact, and the degree to which materials or equipment associated with an activity are visible from any public road or place.
>
> (d) The extent to which the activities on the site remain dominated by rural activities, rather than by activities, which are not associated with, or incidental to rural activities.
>
> (e) The extent to which the activity requires a rural location in terms of scale, use of or relationship to rural resources, effluent disposal requirements, or potential adverse effects on an urban environment.
>
> (f) The effect of the activity on the life-supporting capacity of soils.
>
> (g) Any adverse effects of traffic generation from the activity in terms of:

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6 Queenstown Lakes District Plan, s 1.4.

7 Queenstown Lakes District Plan, s 8.3.2(x).

(i) Noise, vibration and glare from vehicles entering and leaving the site of adjoining road.

(ii) Levels of traffic congestion or reduction in levels of traffic safety which are inconsistent with the classification of the adjoining road.

(iii) Any cumulative effect of traffic generation.

(h) The ability to mitigate any adverse effects of the additional traffic generation such as through the location and design of vehicle crossings, parking and loading areas or through the provision of screening and other factors which may reduce the effects of the additional traffic generation

[44] It is clear from the Environment Court decision that the Court did consider itself limited to consideration of the eight assessment matters and those assessment matters only, albeit within the wider context of the Plan and the existing development.

[45] Mr Ray, for the Council, submitted that the Court was right to take that approach. To the best of Mr Ray's knowledge, the approach adopted by the Court is also followed in practice by the Council itself.

[46] Whether the approach of the Environment Court was correct turns largely on the interaction of the following provisions in the Plan, namely:

8.3.1 General

i The following Assessment Matters are methods or matters included in the District Plan, in order to enable the Council to implement the Plan's policies and fulfil its functions and duties under the Act.

ii In considering resource consents for land use activities, in addition to the applicable provisions of the Act, the Council shall apply the relevant *Assessment Matters* set out in Clause 8.3.2 below.

iii In the case of *Controlled and Discretionary Activities*, where the exercise of the Council's discretion is restricted to the matter(s) specified in a particular standard(s) only, the assessment matters taken into account shall only be those relevant to that/these standard(s).

...

8.3.2 Assessment Matters

> In considering whether or not to grant consent or impose conditions, the Council shall have regard to, but not be limited by, the following assessment matters:...

[47] There appear to be three possible interpretations:

i) The consent authority is limited in its consideration of a restricted-discretionary activity to the specified assessment matters and the applicable provisions of the Act. This is essentially the approach taken by the Environment Court, but within the wider context of the Plan.

ii) The specified assessment matters and the applicable provisions of the Act, while mandatory, are not exhaustive. The consent authority is also entitled to have regard to any other matter provided it is an effect of the breach of the particular Site Standard at issue.

iii) The specified assessment matters relating to the particular Site Standard and the applicable provisions of the Act are mandatory, but not exhaustive. A breach of the Site Standard, in particular such a wide-ranging one as the "scale and nature of activities", is a trigger for a full evaluation of the merits.

[48] The third possible interpretation need only be stated to be rejected, because a completely unfettered discretion would be inconsistent with the concept of restricted-discretionary.

[49] Of the two remaining interpretations, I prefer the second because it accords with the natural, ordinary meaning of the words, and in particular gives meaning to the phrase in s 8.3.2, "shall have regard to, but not be limited by".

[50] In my view, the second interpretation is entirely consistent with the concept of restricted-discretionary. Under the second interpretation, it is still only matters which relate to the particular Site Standard that may be considered. The second interpretation is also entirely consistent with s 8.3.1(iii). All s 8.3.1(iii) does is

identify which of the listed assessment matters is to be taken into account. It would have been an easy thing for the draftsperson to have gone on and added that "no other factors whatsoever were to be considered other than the applicable provisions of the Act" if that was the intention, but the draftsperson has not done that.

[51] It follows from all of the above that, in my view, the Court appears to have misinterpreted the Plan by confining itself to the eight assessment matters. That amounts to an error of law.

[52] However, in order to warrant appellate intervention the error must have been a material one.

[53] Mr Gardner-Hopkins acknowledges that the most relevant matters are likely to be contained in the Plan's assessment matters anyway, but says that not only did the Court never turn its mind to whether there were any other relevant matters, it actively excluded matters. In support of that submission, Mr Gardner-Hopkins relies on a passage in the decision where the Court expressly records:[8]

> ... that parts of the submissions and of the evidence, particularly that of the planners and landscape architects, related to a much wider range of matters and provisions in the District Plan and the Act than we are empowered to consider when dealing with a restricted-discretionary activity.

[54] Mr Gardner-Hopkins submits that if evidence has been excluded as a result of the error, then by definition that must be material.

[55] However, the Court does not specify which parts of the submissions and evidence it excluded from consideration, or why. Given the context, the Court may well have been referring to evidence that was based on the activity being wrongly classified as non-complying, in which case the exclusion has not arisen from any error of law. It is also possible the Court was simply referring to evidence which did not relate to the two Site Standards at issue (earthworks and "nature and scale of activities"), in which case again the exclusion has not arisen from any error of law.

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8 At [88].

[56] Faced with this difficulty, I asked Mr Gardner-Hopkins to specify what evidence had been ignored as a result of the Court wrongly confining itself to the eight assessment matters. Mr Gardner-Hopkins was only able to identify two items of evidence, and although he described these as "examples", he was not able to point to any others.

[57] The first item was evidence given by a landscape architect and landscape planner, Dr Steven, about the lack of social connection between the proposed school and the residents. Dr Steven testified that the proposed school will impact upon the sense of community experienced by residents through the imposition of a facility within their midst that has few, if any, connections with the local community and which will not be perceived as an integral part of the local community, unlike other rural schools.

[58] Dr Steven's assertion was based on the assumption that pupils will generally not be from the local community. This assumption was apparently disputed at the hearing, but even if it were factually correct, I do not accept that the lack of social connection is an effect arising from the "scale and nature of activity". It arises from the composition of the particular student body, a different thing. If this was the evidence excluded by the Court, then they were right to exclude it.

[59] The second item of evidence which it is said was a matter outside the eight assessment matters but nevertheless relevant to the Site Standard breached, was evidence given by a planning consultant about the Plan's policy on location of schools. The consultant, Mr Brown, gave evidence about various provisions of the Plan, including the existence of other zones which specifically provide for the location of educational facilities. His opinion was that schools are not expected in the Rural Residential zone.

[60] Mr Gardner-Hopkins acknowledged that this evidence relates to the fact of the proposed activity being a school, rather than the proposed size of the school buildings. What Mr Brown said would be true of any school. Nevertheless, Mr Gardner-Hopkins submits the evidence does still relate to the Site Standard because it would be impossible to have a school with a floor area less than 40 sq m.

[61] The argument is ingenious. However, if the Court had taken evidence about other zones into account, that would in my view have been contrary to the stated purpose of Site Standards, and therefore not relevant. The Plan specifically provides that the purpose of having site standards is to enable the consent authority "to consider the implications of non-compliance on the use and enjoyment of the site involved and on neighbouring sites."[9]

[62] The residents have not identified any other evidence or matter wrongly excluded as a result of the Court's interpretation error. I am therefore not satisfied that the error was a material error.

Did the Environment Court make a finding that was not supported by any evidence?

Did the Court erroneously fail to have regard to two of the relevant assessment matters listed in the Plan?

[63] The focus of these two related grounds of appeal is assessment matters 8.3.2(x)(d) and 8.3.2(x)(e).

[64] Assessment matter (d) states:

> The extent to which the activities on the site remain dominated by rural activities, rather than by activities, which are not associated with, or incidental to rural activities.

[65] Assessment matter (e) states:

> The extent to which the activity requires a rural location in terms of scale, use of or relationship to rural resources, effluent disposal requirements, or potential adverse effects on an urban environment.

[66] In its decision, the Court listed the eight assessment matters, including (d) and (e), and said:

> [91] Although the expert witnesses addressed all of these assessment matters, the primary concerns of the appellants and s274 parties related to scale of the activity, noise, visual impact, traffic, and amenity. Matters relating to outdoor storage, rural activities and resources, and soils were not seriously at issue.[49] Accordingly, although we have considered all of the

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9 Queenstown Lakes District Plan, s 1.4.

assessment matters, we concentrate our assessment on the contested matters which are contained in criteria 8.3.2(x)(a),(c),(g) and (h).

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[49] Mr Anderson, Rebuttal at [4], [5] and [6].

[67] The footnote reference in that paragraph is to the rebuttal statement of Mr Anderson, the planner called by the school.

[68] However, Mr Anderson's rebuttal statement does not completely support the statement in the text of the Court's decision. That is because his rebuttal statement only says there was general agreement as to the scale and nature of the buildings, outdoor storage of materials and equipment and the life-supporting capacity of the soil. Mr Anderson's rebuttal statement says nothing about there being any general agreement as to assessment matters (d) and (e), rural activities and resources. Those matters were put into issue by Mr Brown, the planner called for the residents.

[69] Accordingly, the residents argue that the Court made a finding (about matters relating to rural activities and resources not being seriously at issue) that was not available to it on the evidence.

[70] The error is said to have been a material error because, according to the residents, it resulted in the Court failing to have regard or any real regard to assessment matters (d) and (e).

[71] As I have already indicated, I accept that the footnote reference is not accurate and does not completely support the proposition for which it is cited. On the other hand, while Mr Brown's evidence certainly mentions (d) and (e), it is only in passing. He only devotes two or three paragraphs to them in a 32-page witness statement.

[72] Furthermore, Mr Ray says that the Council's planner agreed with Mr Brown's conclusions regarding (d) and (e), and although Mr Anderson does not address (d) and (e), his silence in a rebuttal statement suggests he does not dispute Mr Brown on those points either. Accordingly, to that extent, there was agreement amongst the experts.

[73] That is hardly surprising, because in my view the application of both (d) and (e) to the facts were self-evident. In that sense, it can fairly be said that both were not seriously at issue. It was obvious that once the school was established, the site would not be dominated by rural activities. It in fact had a history of visitor accommodation and was zoned Rural Residential with a visitor accommodation overlay. Equally obviously, schools do not require a rural location. It could not be seriously argued otherwise.[10]

[74] Notwithstanding the Court's incorrect footnote reference, I therefore do not agree that its finding about (d) and (e) not being seriously at issue was necessarily made in error.

[75] The more fundamental question is whether the Court did in fact disregard the two assessment matters, regardless of how or why it came to do that.

[76] Both were factors favouring the residents' opposition, and I accept that even if they were not seriously at issue, they should still have been taken into account.

[77] Mr Gardner-Hopkins says that other than the reference to the two assessment matters not being seriously at issue, they are not mentioned again in the decision. In particular, they do not feature at all in the Court's evaluation.

[78] The difficulty for the residents is that the Court expressly states that it has considered all the assessment matters, including those it regarded as not being seriously at issue. It made sense for the Court to concentrate on the contested matters. It may not have expressly mentioned (d) and (e) again, but in my view, in the circumstances, it would be wrong for me to infer that (d) and (e) were ignored when the Court expressly states that it has taken them into account. That is particularly so when they were matters on which the Court would in any event have been entitled to place little weight, because of the provision in the Plan that "Rural activities are not likely to remain a major use of land in the Rural Residential Zone or a necessary part of the rural residential environment."[11]

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[10] Counsel advise that there was evidence about unsuccessful attempts to find an alternative urban location. However, in my view, that is not what is meant by assessment matter (e).

[11] Queenstown Lakes District Plan s 8.2.

Did the Court fail to have regard to and apply the specific wording of assessment matter 8.3.2(x)(a)?

[79] Assessment matter (a) is :

> The extent to which the scale of the activity and the proposed use of buildings will be compatible with the scale of other buildings and activities in the surrounding area.

[80] The Court structured its discussion of assessment matter (a) in a way which Mr Gardner-Hopkins described as thematic. Mr Gardner-Hopkins conceded this was an acceptable approach, but submitted that it resulted in the Court overlooking the specific wording of assessment (a). In particular, it resulted in the Court focusing exclusively on the "scale of the activity" and failing to pay genuine attention and thought to the word "use".

[81] I agree the Court does not expressly employ the word "use" in its discussion. However, when I asked Mr Gardner-Hopkins to identify any evidence about the proposed use of the buildings which had been ignored, he was unable to point to any.

[82] In my view, this argument is a purely semantic one and without merit. There has been no error, and certainly not a material error.

Did the Environment Court err in stating that a school was "provided for" in the zone?

[83] The "Conclusions" section of the Court's decision begins with the statement:

> [120] We have found that a school, along with a wide range of community-type activities, are provided for in the Rural Residential zone as restricted-discretionary activities.

[84] Earlier in its decision, the Court had found that "within the Rural Residential zone, a wide range of community activities are provided for such as health services, community centres, halls, churches, day care facilities, schools, and educational facilities."[12]

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[12] At [99].

[85] Mr Gardner-Hopkins submitted the Court may have erred in law if its use of the phrase "provided for" was intended to convey "encouraged or anticipated" in the zone.

[86] However, in my view, it would be wrong to ascribe any connotation of encouragement. The sentence is simply a correct statement of the activity classification status of the proposal under the Plan.

Did the Court err in its consideration of Part 2 matters by looking to Part 2 solely for additional benefits of granting consent?

[87] Part 2 of the Act is designed to govern the exercise of every function and power under the Act.[13] It consists of a statement of the purpose of the Act and relevant principles.

[88] In this case, the Court did not expressly refer to Part 2 when evaluating the proposal against the assessment matters. It only considered Part 2 after it had concluded its evaluation, and then solely for the purpose of looking at benefits to the school if consent were granted.

[89] The Court said it was taking that approach in reliance on the High Court decision of *Auckland City Council v John Woolley Trust.*[14]

[90] However, Mr Gardner-Hopkins submits the Court has misinterpreted *Woolley* and taken it out of context.

[91] I agree.

[92] *Woolley* concerned an appeal from an Environment Court decision. The Environment Court had granted consent to the applicant to remove a large tree from its residential property for reasons relating to the health and wellbeing of the occupants. Under the relevant District Plan, the application for consent was required to be by way of an application for a restricted-discretionary activity. The plan did

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13 *Te Runanga-A-Iwi O Ngati Kahu v Far North District Council* HC Whangarei CIV-2010-488-000766, 29 September 2011 at [74].

14 *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

not contain any assessment criteria relating to health and safety matters, and there was accordingly no support for the application when assessed against that criteria. The Environment Court, however, held that it was entitled to take into account health and safety matters under Part 2, and that these outweighed the conservation issues under the Plan.

[93] On appeal, the High Court upheld the Environment Court's decision, finding that Part 2 does apply to applications for consent for restricted-discretionary activities.

[94] However, the Court also held that because of s 77B(3)(c), a consent authority could not take Part 2 matters into account as additional grounds for declining a consent as opposed to granting it. The pre-2009 version of s 77B(3)(c) provided that the power of a consent authority to decline an application for a restricted-discretionary activity is limited to the matters in which it has restricted its discretion in the plan.[15] To permit Part 2 matters to be taken into account as additional grounds to decline consent for a restricted-discretionary activity would be inimical to the very nature of such an activity and the strictly confined powers available to the consent authority.

[95] The Court went on to say:[16]

> But, subject to this proviso, the provisions of Part 2 may be taken into account by virtue of s 104(1) in deciding to grant the application.

[96] There is thus no question that for the purposes of applying Part 2, *Woolley* does draw a distinction between granting a consent and declining it.

[97] However, the High Court made that distinction in the context of a situation where the particular Part 2 matters being relied upon raised different or additional issues to the matters reserved in the Plan.

[98] What *Woolley* prohibits is the use of a Part 2 matter as an *additional* ground to decline consent, ie additional to the matters for discretion. To put it another way,

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15 *Woolley* at [44].
16 At [45].

Part 2 cannot extend the range of grounds for declining a consent beyond those specified in the Plan. It cannot bring additional matters into play, except when it comes to granting a consent.

[99] That is in my view a very different thing from saying the consent authority is prevented from looking at Part 2 to assist in its interpretation of the matters reserved for discretion and guide its evaluation of those matters. *Woolley* is not authority for such an absolute proposition. *Woolley* did not say the only use that could ever be made of Part 2 in the restricted-discretionary context was for the purpose of identifying the benefits of granting the consent. On the contrary, *Woolley* notes:[17]

> Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

[100] It follows that in this case the Environment Court was obliged to have regard to any Part 2 matters which related to the matters over which the council had reserved its discretion. Its view that Part 2 was relevant for the sole purpose of identifying benefit was erroneous and based on a misinterpretation of *Woolley*.

[101] Mr Gardner-Hopkins submitted the error was material because Part 2 includes s 7(c) and (f):

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (c) The maintenance and enhancement of amenity values:
>
> ...
>
> (f) Maintenance and enhancement of the quality of the environment:

[102] In Mr Gardner-Hopkins' submission, had the Court considered s 7(c) and (f) it would have specifically turned its mind to the key issue of maintaining and enhancing amenity values and the effects of the proposed school on those values arising out of the breach of the 40 sq m floor area Site Standard.

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17 At [47].

[103] Elsewhere in his submissions, Mr Gardner-Hopkins characterised the result of the error as being that the Court failed to take into account the effects on the amenities of the area from a grant of consent, and failed to take into account the emphasis placed on amenity values by Part 2.

[104] I do not accept that submission because, although the Court did not expressly refer to Part 2, its consideration of the assessment matters was made within the wider context of the Plan. Significantly, the Court specifically considered the issues, objectives and policies for the rural living areas, including the importance of protecting amenity and environmental values such as privacy, rural outlook, spaciousness, clean air and, at times, quietness.[18] Its discussion is specifically structured around adverse effects on amenity,[19] and its general discussion of the issues indicates a recognition of the need for maintenance and enhancement of amenity values. What the Court found, in effect, was that the residents were overstating the adverse effects on amenity values.

[105] In those circumstances, I am satisfied that while the framework might change if the Court were directed to reconsider its decision by including consideration of Part 2, the substantive analysis would not change, and nor would the outcome.

Result

[106] As will be readily apparent, Mr Gardner-Hopkins has said all that could possibly be said on behalf of the residents, and he has said it well.

[107] However, while the residents have persuaded me that the decision of the Environment Court contains two errors of law, I am not persuaded that, viewed individually or collectively, they were material errors.

[108] The appeal is therefore dismissed.

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18 At [96].
19 At [93].

Costs

[109] As regards costs, my expectation is that these should be the subject of agreement, without the need to involve the Court. If, however, agreement is not possible and I am required to make an award then Mr Cavanagh and Mr Ray are to file submissions within 15 working days, with submissions from Mr Gardner-Hopkins 10 working days thereafter.

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