

ORIGINAL

Decision No A 39/96

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of three references under clause
14 of the First Schedule

BETWEEN T J HIBBIT and others

(Appeal RMA 487/95)

FINANCIAL SYSTEMS
LIMITED

(Appeal RMA 793/95)

OCEANIC INVESTMENTS
LIMITED

(Appeal RMA 798/95)

Appellants

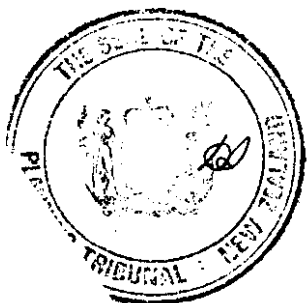
AND THE AUCKLAND CITY
COUNCIL

Respondent

BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr P A Catchpole
Mr F Easdale

HEARING at AUCKLAND on 17 and 18 April 1996 (Appeals RMA 793/95 and
798/95) and on 19 April 1996 (Appeal RMA 487/95)



COUNSEL

Mr T J Hibbit for the appellants in Appeal RMA 487/95
Mr B I J Cowper and Ms J C Campbell for the appellants
in Appeals RMA 793/95 and 798/95
Ms LCE Simpkin and Ms H J Ash for the respondent

DECISION

INTRODUCTION

These are three references to the Tribunal under clause 14 of the First Schedule to the Resource Management Act 1991 of provisions of the proposed Isthmus section of the Auckland City district plan about the zoning of blocks of land in College Hill and Herne Bay, and about offices in residential zones.

Appeal RMA 487/95 referred to the Tribunal the zoning as Residential 1 of properties fronting College Hill between England Street and Margaret Street, seeking that they be rezoned Residential 7a; and also allowing offices in buildings existing at 1 July 1993 (the date the proposed district plan was published) on those properties as a permitted activity; or providing for offices in not more than 50 per cent of the gross floor area of all buildings on those sites (other than garages or carports) as a permitted activity, and beyond that limit as a discretionary activity.

Appeal RMA 793/95 referred to the Tribunal the zoning as Residential 1 of five properties fronting the north side of Jervois Road, Herne Bay, between Lawrence Street and Sentinel Road, seeking that they be rezoned Residential 6b; and also the controls on activities allowed in buildings existing on 1 July 1993 fronting arterial roads generally, restricting or prohibiting offices, seeking that offices be allowed in those buildings.

Appeal RMA 798/95 referred to the Tribunal the controls on non-residential activities on properties in residential zones fronting arterial roads, and sought wider provision for them.



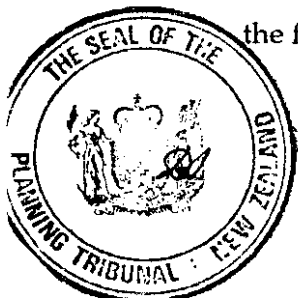
Before the hearing of the appeals, the appellants in Appeal RMA 487/95 and the respondent had reached agreement on the way in which that appeal might be determined; and they presented to the Tribunal a draft order by which the appeal would be allowed in part by directing provision for offices in up to 100 per cent of buildings existing at 1 July 1993 on sites fronting the south side of College Hill between Margaret Street and England Street in the positions those buildings occupied on that day as a discretionary activity, with additional assessment criteria.

Despite the agreement of the parties, the Tribunal did not immediately accept that it would be appropriate for it to make the proposed consent order. That appeal was stood down to enable the parties to present submissions and evidence in support of the proposed consent order. In the meanwhile the Tribunal heard the cases of the parties in the other two appeals, which were contested.

At the appeal hearing, the appellants in those two appeals limited the relief sought to the following:

1. That the sites zoned Residential 1 fronting Jervois Road between Sentinel Road and Lawrence Street be rezoned Residential 6b;
2. That the rules in all residential zones (except Residential 4) be amended to provide for offices as controlled activities in the whole of any buildings existing on 1 July 1993 on front sites having frontage to any strategic route, regional arterial, or district arterial route, to be assessed in accordance with rule 7.7.3.1.
3. Consequential amendments to the objectives, policies and explanations of the plan.

During the course of the appeal hearing, the amendment summarised in item 2 above was further clarified by counsel for those appellants, Mr Cowper, who explained that the proposal is to apply to buildings that front arterial routes, and to the front residential unit in a building containing multiple units.



PROPOSED DISTRICT PLAN

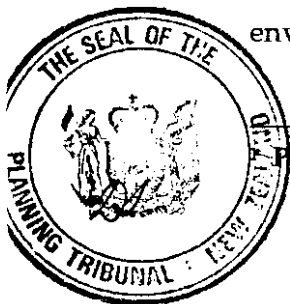
The Auckland City Council is preparing a district plan for its district in three sections: the Hauraki Gulf Islands section, the Isthmus section, and the Central Area section. Preparation of the Isthmus section provided an opportunity to review the residential capacity of that part of the district. The Auckland Regional Council's proposed regional policy statement contains policies of urban intensification within the regional metropolitan limits. Consistent with that, the City Council found that there was capacity for a considerable number of additional residential units in the isthmus, and adopted a strategy of restricting activities allowed in residential zones to preserve that land for residential activity. That was considered to respond to the duty of sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, as required by section 5(2)(a) of the Resource Management Act 1991, and to the duty of maintaining and enhancing amenity values of residential areas, as required by section 7(c) of that Act. So the residential strategy of the proposed district plan is to provide for residential activities, but not for commercial activities in residential zones unless they are supporting activities of benefit or service to the residential areas.

The proposed district plan contains a statement of the expected outcomes of the provisions of the plan for residential activity, including the following ¹:

There will be a level of control on residential activity that provides flexibility for development, while ensuring that the character and amenity of the district's many residential environments are protected. The protection provided for amenities within a residential site will safeguard amenities for future residents, and will result in benefits being derived for the community as a whole.

There are passages in the district plan in general terms which refer to the importance of opportunities for employment, and to opportunities for small scale businesses in residential areas, among others, while ensuring that certain levels of environmental quality and amenities are met.

Paragraph 7.4.5



There are also objectives about environmental quality, including the following:

- To conserve, protect and enhance the district's natural environment
- To conserve the district's resources in order to meet the present and ongoing needs of the community
- To protect the district's resources from significant adverse effects of activities and development

The objective for supporting activities in residential zones is stated thus ²—

To recognise the need for certain supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents.

The associated policy is ³—

By providing for non-residential activities in certain residential areas where they provide benefit or support for residential activity.

A range of non-residential uses are provided for in residential zones generally, including care centres, educational facilities, health care services, hospitals and places of assembly. In addition, offices are allowed in buildings located on four parts of major arterial roads (in up to 50 per cent of the gross floor area of those buildings).

The Residential 1, 2, 3 and 4 zones reflect special characters of the areas to which they are applied, to the intent that they may survive to be appreciated by future generations. The Residential 1 zone is characterised by Victorian/Edwardian housing, with some modification and infill, and generally a lack of large trees. The Residential 5, 6 and 7 zones are standard residential zones, differentiated by the ability of the infrastructure to support low intensity, medium intensity or high intensity development.

The objective of the Residential 1 zone is ⁴—



² Paragraph 7.3.4
³ Paragraph 7.3.4
⁴ Paragraph 7.6.1.1

To promote the survival of the historic form and pattern of subdivision, buildings and streetscape in Auckland's early-established residential neighbourhoods.

As well as encouraging renovation and new construction in a manner which maintains the historic form and pattern of buildings and streetscape, the policies include ⁵:

... providing for activities to be conducted in existing buildings that can ensure the restoration and maintenance of the fabric of any building on the site where the building is of the characteristic historic period.

BASIS FOR DECISION

In references under the Resource Management Act of provisions of proposed district plans, no onus rests on the appellant to establish that the subject provision should be deleted, the proceedings being more in the nature of an inquiry into the merits in accordance with the statutory objectives and existing provisions of policy statements and plans; nor is there a presumption that the provisions of the proposed plan are correct or appropriate: see *KA Palmer Local Government in New Zealand* ⁶ adopted by the Planning Tribunal in *Leith v Auckland City Council*⁷. The provisions of the preceding district scheme under the Town and Country Planning Act 1977 are not significant, as the Resource Management Act 1991 is deliberately a reform measure and a territorial authority is required to start with a clean sheet and focus on the purpose stated in section 5: see *Leith v Auckland City Council* ⁸.

As stated in *Nugent Consultants v Auckland City Council*⁹, it is our understanding that a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most

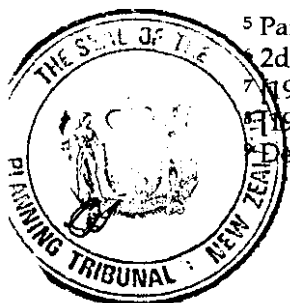
⁵ Paragraph 7.6.1.1

⁶ 2d ed 1993 at page 646.

⁷ [1995] NZRMA 400 at page 408.

⁸ [1995] NZRMA 400 at page 414.

⁹ Decision A 33/96.



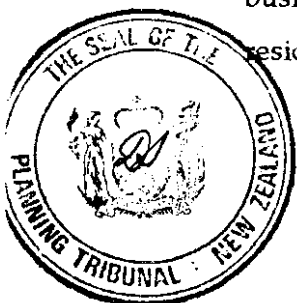
appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

These appeals concern controls on land-use activities. In respect of them, the starting point is that the Act provides a basis for control of land-use activities which differs from the basis for control of other activities. So, for subdivision of land (section 11), interferences with the coastal marine area (section 12), interferences with beds of lakes or rivers (section 13), taking, using, damming or diverting water (section 14), and discharges of contaminants (section 15), the basis of control is that in general those activities are prohibited unless expressly allowed by the appropriate instrument under the Act or by a resource consent. By comparison, section 9 only prohibits uses that contravene a rule in a district plan or proposed district plan. Exceptions are provided for existing uses and those authorised by resource consent.

So apart from what is authorised by those exceptions, land-use activities can only be controlled by district rules, and district rules can only control land use to the extent that the controls are necessary in achieving the sustainable management of natural and physical resources to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land; that the controls are the most appropriate means of exercising that function; and that they have a purpose of achieving the objectives and policies of the district plan.

ZONING OF 155-163 JERVOIS ROAD

The appellants sought rezoning of the five properties fronting the north side of Jervois Road between Lawrence Street and Sentinel Road. No 155 is occupied as a residence and as an office for a computer software business. No 157 is occupied as a residence; No 159 is occupied as a veterinary clinic; and Nos 161 and 163 are occupied by the appellant Financial Services Limited for its computer services business, and about one-third of the floor space of No 161 is occupied as a residence. Jervois Road is a district arterial road at this point and on the south side



opposite the properties in question there is a commercial centre with a mixture of shops and restaurants.

It was submitted that the properties fronting the north side of Jervois Road between Lawrence Street and Sentinel Road have been treated differently from all other properties along Jervois Road. Mr Cowper observed that all of the other properties situated opposite the blocks zoned Business 2 have been zoned Residential 6b; and the appellants sought similar treatment for the subject properties. He referred to the mixture of non-residential activities, and the pressure of constant traffic, as reasons why those houses are not now suited for family residences, and submitted that the land should be rezoned to allow redevelopment more suited to current conditions.

Mr P J Morrow, who lives at 155 Jervois Road, and Dr M G Snowden, whose business occupies 161 and 163 Jervois Road, and who had himself previously lived there, were called as witnesses for the appellants. It was their evidence that in addition to the noise and vibrations from heavy traffic on Jervois Road, there is disturbance from noise from a bar and from restaurants on the opposite side of the road, a combination of noise from boisterous patrons and loud music up to midnight or even 1:00 or 2:00 am on some mornings; lack of kerbside parking at evenings and weekends; early morning disturbances from deliveries and street cleaning; and noise and smells from a veterinary clinic; that the council has been ineffective in controlling the noise; and that because of the noise, the houses are not pleasant to live in, and unsuitable for family homes. The evidence on those matters was not challenged by the respondent.

The Residential 1 zoning for the subject block was challenged by the appellant Financial Services on the basis that an intent to encourage retention of the Victorian and Edwardian character of the area would have involved inclusion in the Residential 1 zone of other properties in the vicinity possessing that character, some of which are not compromised by commercial activity opposite them. It was also suggested that if realistic economic use of properties in the block is precluded, the existing Victorian/Edwardian villas there are likely to be removed and replaced by modern town houses, eliminating the character that was intended to be retained.



In addition it was argued that the Residential 1 zoning amounts to a selective wealth tax, depressing the value of the properties, to which would be added the very high cost of maintaining the villas.

For the appellants, Mr T D Nugent gave the opinions that the buildings on these five properties are a group so small that they neither constitute a neighbourhood nor make up a significant contribution to the streetscape, which he considered is dominated by the commercial premises opposite, by a large villa to the north and by modern buildings west of Wallace Street. He considered that the location on a district arterial suggests that a medium to high intensity residential zoning would be appropriate, being consistent with the zoning pattern generally applied in reasonably close proximity to the central city; and that as the sites overlook residential properties to the north, the lower height limit of the Residential 6b zone would be the most appropriate. Mr Nugent observed that the building-to-boundary provisions of that zone would be more protective of the adjacent residential amenities than would those for the Residential 7a zone.

It was the respondent's case that the appropriate zone for the properties in the block is Residential 1 in recognition of the coherency of the buildings as a legacy of the City's past; and that a change to Residential 6b zoning would provide the opportunity for redevelopment at a 1:300 square metre density to a height of 10 metres which would have a significant potential to alter the character of the properties and would deprive the council of the opportunity to influence retention of the existing buildings.

A consultant landscape architect who was called for the respondent, Mr S K Brown, gave the opinions that the Residential 1 zoning for the properties is justified, because of the character of the houses on them; and that Residential 6b zoning would be a surrender of key principles in the objectives and policies of the district plan. He regarded the heritage quality of those buildings as a finite resource which would not re-emerge in any redevelopment, that the change associated with redevelopment would be significant. The only consolidated block of



Victorian/Edwardian villas on Jervois Road, a heritage statement that has significant profile and exposure, would be lost.

Mr Cowper observed that Mr Brown's evidence was confined to the landscape issue alone, and that this is inadequate as a basis for zoning.

We have already quoted the objective of the Residential 1 zone. The objective of the Residential 6 zones is —

To provide for medium intensity residential neighbourhoods in appropriate locations.

Significant differences between the Residential 1 zoning applied to the five subject properties by the proposed district plan, and the Residential 6b zoning sought by the appellants, are that in the Residential 1 zone tourist complexes are non-complying activities and the maximum density is one residential unit per site; and in the Residential 6b zone tourist complexes are discretionary activities and the maximum density is one residential unit per 300 square metres of site area.

Having ourselves observed the subject properties, we adopt Mr Brown's opinion that the properties qualify for the Residential 1 zone in terms of its objective because the buildings are a survival of the historic form and pattern of subdivision, buildings and streetscape in an early established residential neighbourhood. We also accept that they are particularly important because of their visibility on an arterial route.

In general the convenience of access of properties fronting arterial routes can indicate suitability for more intensive redevelopment. However that is only one factor. In this case, the quality of the existing buildings provides opportunity to encourage continued use of existing buildings which contribute to valued character and amenity values.

There may be other buildings or even groups of buildings of similar character and quality elsewhere on Jervois Road that have not been zoned Residential 1. However that does not justify a claim that the subject properties have been singled



out in an unfair way. The zoning of those other properties is not the Tribunal's business in these proceedings. Nor is the Residential 6b and Residential 7a zoning of other properties fronting the north side of this stretch of Jervois Road.

We also accept the appellants' point that zoning should not be based on landscape aspects alone; and that the environment is unfavourable for single family homes, particularly because of the noise from traffic, from late night bars and restaurants, and from early morning disturbances. It is regrettable that the council has not been effective in controlling the noise from businesses so near residential areas. In the light of the Tribunal's recent decision in *Hamilton City Council v Bryant*¹⁰, a more determined approach to protecting the environment of residential areas might be expected of territorial authorities.

We understand the arguments raised for Financial Services Limited about depression of property values (using the rhetoric of selective wealth tax) and about the possibility of the existing buildings being removed and replaced by modern townhouses which would eliminate the character sought to be retained. Some restraint on development opportunities is inherent in any system of zoning, and it is a function of an appeal authority to see that the system serves the statutory purpose and that the restraint is not a disproportionate burden on individual property owners.

The system of zoning in the proposed district plan depends on district rules. As indicated earlier in this decision, district rules have to be necessary in achieving the purpose of the Act, and to assist the territorial authority in its function of control of actual and potential effects of the use and development of land for that purpose. The statutory purpose is explained in section 5(2) and is elaborated in succeeding sections of Part II.

The purpose includes managing use of resources in a way that enables people and communities to provide for their social, economic and cultural wellbeing; it is not confined to economic wellbeing alone. It also includes sustaining the potential of resources to meet the reasonably foreseeable needs of future generations; and



avoiding, remedying and mitigating any adverse effects of activities on the environment¹¹. Particular regard is to be had to the maintenance and enhancement of amenity values and the quality of the environment¹².

We find that the system of zoning adopted in the respondent's proposed district plan, which we outlined in an earlier section of this decision, is intended and is calculated to assist the respondent in its function of control of actual and potential effects of the use and development of land in order to achieve the purpose of the Act. Relevantly, zoning rules encouraging retention of the character of earlier settlement contribute to cultural wellbeing, to needs of future generations to be able to see tangible examples of their heritage, to the maintenance and enhancement of amenity values and the quality of the environment. In general those rules also assist in control of actual and potential effects of the use and development of land and avoiding, remedying and mitigating adverse effects of activities on the environment.

The particular rules of the Residential 1 zone do not allow activities (such as tourist complexes) or development as intense as are allowed by the Residential 6a zone. However the place of those rules in the district plan as a whole is for achieving the purpose of the Act and assisting the council's function in the respects outlined in the previous paragraph. The rules are necessary because, without such rules, the district plan would be incomplete in that it would not contain provisions responding to the interest in tangible examples of residential buildings and streetscape of a century ago for cultural wellbeing, for the needs of future generations, for maintenance and enhancement of amenity values and the quality of the environment. Plainly the rules also have a purpose of achieving the objectives and policies of the plan that were referred to earlier in this decision.

The Planning Tribunal is a judicial body with appellate jurisdiction. It is not itself a planning authority with executive functions. On a reference of this kind, it is not for the Tribunal to make independent investigations into other possible means by which a territorial authority's function might be performed. Rather, in considering

¹¹ Resource Management Act 1991, section 5(2).
¹² Resource Management Act 1991, section 7(c) and (f).



whether a rule is the most appropriate means of exercising a territorial authority's function, the Tribunal has to compare the rule with other rules advanced by parties to the proceedings.

In this case the only other means that was advanced by the appellants to be compared with the rules for the Residential 1 zoning was the rules for the Residential 6b zoning. Those rules would allow for more intense redevelopment, and would allow for tourist complexes. Application of them to the subject properties could enhance the ability of the people who have interests in those properties to provide for their economic wellbeing. However those properties are able to make a contribution to cultural wellbeing of the community, to the need of future generations referred to, and to the maintenance and enhancement of amenity values and the quality of the environment. Application to them of the rules for the Residential 6b zoning would encourage development that would reduce, or ultimately eliminate the contribution the properties can make in those respects to achieving the purpose of the Act. Zoned Residential 1, the properties are mutually supportive of their existing character. Development of one of them to the standards of Residential 6b zoning could destroy that support. Provided the restraint on potential economic wellbeing of those having interests in the properties is not disproportionate, we consider that the rules of the Residential 1 zoning are more appropriate for the subject properties than those of Residential 6b zoning.

Later in this decision we consider the amendment sought to the Residential 1 zone rules to allow offices in existing buildings on the subject properties, and direct that the amendment be made. We take that amendment into account in addressing whether the application of the Residential 1 zoning rules to the subject properties imposes a disproportionate burden on those having interests in them.

Although even office uses of the existing buildings are affected by traffic noise, we find that the buildings are capable of being used effectively as offices. They are also capable of residential use, although noise and other disturbances render them less attractive particularly as family homes. (It is to be hoped that the respondent will take action to have noise disturbances reduced to protect the environment of this and other residential areas in the vicinity.) The owners are not required to retain



the existing buildings: some redevelopment is allowed, though not as intensive as in the Residential 6b zone.

In our judgment, the opportunities for use and development of the subject properties under the Residential 1 zoning (as directed by this decision to be amended) are adequate and do not impose a burden on those having interests in them which is disproportionate to the achieving of the purpose of the Act. Therefore we find that the Residential 1 zoning of the subject properties is appropriate and we decline to direct rezoning to Residential 6b as sought.

OFFICES IN RESIDENTIAL ZONES

General

We now turn to the proposal that offices be made controlled activities in the whole of any buildings existing on 1 July 1993 generally on front sites in all residential zones (other than Residential 4) having frontage to any strategic route, regional arterial, or district arterial route.

Part II

In support of his opinion that the proposal would promote the sustainable management of natural and physical resources, Mr Nugent addressed the limitations in paragraphs (a), (b) and (c) of section 5(2) of the Resource Management Act. He gave the opinion that the proposed provision would sustain the potential of the resources involved to meet the needs of future generations. The witness considered that the proposal would be neutral to safeguarding the life-supporting capacity referred to in section 5(2)(b). He examined at length whether offices in existing buildings on major roads would avoid, remedy or mitigate adverse effects on the environment. Mr Nugent concluded that provision for them would avoid adverse effects, being limited to the major traffic routes, being limited in scale by being restricted to existing buildings, and by having to comply with other rules which ensure effects no greater than those generated by other activities



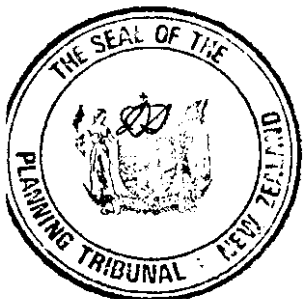
allowed in residential zones. He considered that adverse effects would be mitigated by imposition of conditions.

Demand for offices

It was the respondent's case that there is no evidence of demand for offices in residential zones that cannot be met in the central business district or in business zones. Ms Simpkin submitted that because necessity for a rule has to be shown (see section 32(1)(c)) a need for the liberalisation sought by the appellants would have to be established.

We hold that because there is no onus on the appellant, nor any presumption in favour of the proposed plan, the necessity test has to be applied to the rule that is challenged as well as to the amendment sought. In other words, we have to consider whether the existing rule, which does not allow for offices other than those of non-profit charitable organisations, is necessary for sustainable management of resources to the extent that it excludes offices that are not those of non-profit charitable organisations. We have also to consider whether the proposed amendment would result in a rule that is necessary for promoting the sustainable management of natural and physical resources.

However neither of those tests necessarily requires proof of demand. Section 9 only prohibits uses that contravene a district rule (and are not authorised as existing uses or by resource consent). So a zoning rule that limits the uses of land in a particular zone has to be justified. The amendment proposed by the appellants would relax the limitation imposed by the residential zoning rules. Therefore we think that it is not so much a matter of considering whether there is demand for the additional uses that would be allowed, but whether there is justification for excluding them. We accept that in practice there would not be much point in going to considerable trouble to devise appropriate controls to avoid adverse effects of uses if there is no prospect of them being exercised. However we cannot say that of the office uses which would be authorised by the proposed amendment.



Actual and potential effects

It was the respondent's case that the proposed amendment would potentially allow thousands of residential units to be converted to offices, displacing existing residents to other areas, where the infrastructure may have insufficient capacity; and leading to strip commercial development along arterials, and undermining the coherency of the residential zoning pattern, and the amenities of the areas affected. In particular, it was submitted that the Residential 1 zone is the only residential zone in which provision should be made for offices, in acknowledgment of the special heritage character in those zones; and otherwise leaving offices as non-complying activities in residential zones is a legitimate method of controlling the effects of office use on the natural and physical environment.

The case presented for the respondent identified the effects of offices in residential zones as effects on visual amenities; effects on the objectives and policies of the plan; loss of housing stock; displacement of workers to other residential zones; loss of front yards to parking; displacement of kerbside parking for residents; and long-term effects on residential character and amenity such as disappointment of the community expectation that residential zones are to be preserved for activities that support or benefit the neighbourhood, that like activities will be grouped with like, and incompatible or mixed use activities will be located elsewhere. We were informed that many strategic and arterial routes are strongly residential in character, and that widespread office activity on them would undermine the plan's provision for residential amenity, and the expected outcome (quoted earlier in this decision). In addition, access from many strategic routes to frontage properties is said to be very limited and not appropriate.

Ms Simpkin submitted that loss of housing stock would be an effect on social, economic and cultural conditions which affect the natural and physical resources of the district, amenity values and people and communities; and that the character and amenity of the residential area is the key issue, being covered by paragraph (a) of the definition of "environment". Counsel also contended that displacement of workers is an effect on the environment as people would have to move elsewhere



and are likely to go to areas targeted for repair work to the infrastructure which is hampering growth in the city.

Mr Nugent thought it unlikely that every qualifying building would be converted to offices, and gave the opinion that the loss of housing stock would be very minor and more than offset by development of residential units in business zones, zoning changes which would increase the potential housing stock, and increased development when the capacity of infrastructure services is increased.

The other activities allowed in residential zones that Mr Nugent used for comparison were care centres, community welfare facilities, educational facilities, health care centres, and places of assembly. In particular he noted that the provision for community welfare facilities extends to include "offices of charitable organisations where the facility is operated by a non-profit making organisation", and observed that the feature which distinguishes such offices from offices generally is their tax status, and that some particular offices of that class could have greater adverse effects on the environment than would many offices established under the provision proposed.

In cross-examination Mr Nugent deposed that he had examined many roads and found that a large part of the amenity is derived from existing buildings and landscaping, and that to allow offices in purpose-built structures which would probably be more utilitarian would reduce present amenity values. He acknowledged that the proposed amendment may lead to present housing being removed from the housing stock. However Mr Nugent did not accept that there would be increased pressure for on-street parking, because he did not expect that resource consent would be granted if an office proposal could not supply the required parking on site, and the district rules would not allow an adjoining site to be used for parking.

On the effect on the residential stock, it was established that there are of the order of 118,000 residential units on the isthmus now, and the proposed district plan would provide for an additional 57,979 residential units, being about 19,000 more residential units than the regional policy requires. In addition there is quite a lot of



residential development in commercial and business zones. In cross-examination the respondent's planner, Ms K A Bell, conceded that the point about loss of housing stock is an oversimplification. She held to the opinion that there is justification in holding to the objectives and policies, but acknowledged that where the Residential 1 zoning is an imposition on the owners, opportunity for offices is a compensation.

The appellants contended that the only effects on the environment of offices would be parking in front of buildings to the extent that parking spaces may be provided there outside the front yard as defined, and without contravening the maximum permeable surface requirement. Mr Cowper contended that the other effects raised by the respondent are not effects on the environment as defined; that the phrase "people and communities" in the definition of the term "environment" is to make clear that they are part of an ecosystem; but that they do not come within the definition of amenity values. Counsel submitted that paragraph (d) of the definition is carefully framed so that the conditions referred to are only to be addressed to the extent that they affect matters in paragraphs (a) to (c), or are affected by them.

We address that submission first. Section 76(3) requires that in making a rule, a territorial authority is to have regard to the actual or potential effect of activities *on the environment*. Likewise, section 5(2)(c) provides for avoiding, remedying, or mitigating any adverse effects of activities *on the environment*.

However the function of a territorial authority under section 31(b) is the control of any actual or potential effects of the use, development, or protection of land. That function is not limited to effects on the environment. Section 32(1) requires that in achieving the purpose of the Act, before adopting a rule in relation to any function a person making an instrument is to be satisfied that the rule is necessary in achieving the purpose of this Act and is the most appropriate means of exercising the function. So that critical test is not conditioned on effects *on the environment*.

We conclude that although the meaning to be given to the term "sustainable management" is a process of management of resources which, among other things,



avoids, remedies and mitigates adverse effects *on the environment*, and in making a district rule a territorial authority is to have regard to actual or potential effects *on the environment*, the test imposed by section 32(1) is not to be satisfied that the rule is necessary to avoid adverse effects *on the environment*. That test is linked to the territorial authority's function, the relevant provision of which is not limited to actual or potential effects of the use or development of land *on the environment*. Therefore we do not accept Mr Cowper's submission, and hold that the test is whether the existing rules, or incorporation of the amendment sought, would assist the respondent to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act.

We understand Mr Nugent's rhetorical point about the difficulty in distinguishing between effects of use of land zoned residential for offices for non-profit charitable organisations and for offices generally. However we are not concerned with whether non-profit charitable offices should be provided for in the residential zones. As we understand the position, that provision is beyond challenge. The issue here is whether offices generally should be provided for in the manner sought.

The evidence in this case focused on the three specific areas addressed later in this decision. We have very little evidence about the various neighbourhoods in which general offices are not currently allowed but would be permitted by the amendment. We accept that any effects of offices *on the environment* would largely be avoided or mitigated by existing rules and by conditions of consent.

A possible exception to that arises from signs for offices. Because the proposed district plan does not provide control of signage, leaving that topic to bylaw control, we could not feel confident that adverse effects of office signs on visual amenities of residential areas would be avoided, remedied or mitigated.

We accept that the pattern of zoning is intended to serve other values incorporated in the concept of sustainable management of natural and physical resources, including protection of the character and amenities of residential neighbourhoods.



The district plan objective and policy for non-residential activities in residential areas have to be balanced against those values.

We are not persuaded on the evidence that the amendment would have significant effect on the housing stock of the isthmus. Nor do we consider that any residents displaced by conversion to offices would necessarily move to areas where the infrastructure services have insufficient capacity to provide for them.

Even so, on the evidence before us we are not confident that the amendment would not result in adverse effects from which it is protected to some extent by the present rule.

Necessity for sustainable management of resources

Mr Nugent acknowledged that making offices a non-complying activity in residential zones recognises that some offices can have adverse effects in a residential environment. He gave the opinion that exclusion of offices (other than those allowed in those zones including offices of non-profit making charitable organisations) does not recognise that some other offices would not generate greater effects than those which are allowed. He concluded that the proposal is reasonably necessary.

In response Ms Simpkin maintained that evidence of noise related mainly to cafe noise from across the road from the Jervois Road properties, not traffic noise from the road; and the cafe noise being site-specific to a particular part of Jervois Road, it does not support a case that a rule allowing for non-residential activities on arterial roads generally is necessary to achieve sustainable management of resources.

The respondent acknowledged that in the Residential 1 zone noise can pose particular problems in that noise protection options available in other zones cannot be adopted for heritage buildings without impairing the special character that the zoning seeks to retain. However Ms Simpkin observed that the appellants are seeking amendments by which thousands of homes in other residential zones could give way to offices without any expert examination of present or future noise



impacts from traffic. Counsel submitted that apart from the particular sites identified by the appellants, the amendment is not justified in terms of section 32 as necessary in achieving the purpose of the Act or the most appropriate method of exercising the function. Ms Simpkin also reminded us that both Mr Hojsgaard (of Oceanic Investments) and Dr Snowden (of Financial Services) had testified that traffic noise interfered with offices in their respective buildings.

This issue is not straightforward, but requires a qualitative judgment. The basis for the district plan's distinction between offices of non-profit charitable organisations and offices generally is difficult to understand.

However our conclusion is that because offices may have adverse effects, particularly of an intangible kind such as on the character and amenities of residential neighbourhoods, a rule which controls them in residential zones is necessary in achieving the purpose of the Act and to assist the council in its function of control of any actual or potential effects of the use, development, or protection of land. By comparison, a rule which makes offices generally on the subject sites a controlled activity is not necessary in achieving either of those purposes. An appropriate office, on a suitable site, with effects limited to be no more than minor and not conflicting with the objectives and policies of the plan, might well be consented to as a non-complying activity.

Other means

We have also to consider whether the proposal would result in a rule that is the most appropriate means of exercising the function of control of actual and potential effects of the use, development and protection of land in order to achieve the purpose of the Act.

Mr Nugent suggested that other means of exercising the function would be making offices in buildings existing on 1 July 1993 fronting arterial roads a permitted activity, or making them a discretionary activity. He rejected permitted activity status because the council needs to have control over visual impacts a particular office may have on residential and street amenities. Considering discretionary



activity status, Mr Nugent expressed the view that there is no need for the council to have control over which sites are used for offices, because intensity would be controlled by rule 7.8.11 limiting intensity, and rule 12.8.1 on parking standards; and any proposal which did not comply with them would have to be considered as a discretionary activity anyway. The witness averred that making offices a non-complying activity would impose a high burden on applicants for something which accords with the purpose of the Act. He concluded that the proposal that offices be a controlled activity limited to major roads presents the most positive relationship between benefits and costs and that the environment would be adequately protected from adverse effects and generally enhanced.

We agree with Mr Nugent's rejection of permitted activity status, but we do not agree with his attitude to discretionary activity status. It is not only the suitability of a particular site that would need to be considered. The way and extent to which a particular office proposal would fit that site and its neighbourhood, would need to be considered too. In short, we accept that discretionary activity status would be another means of providing for offices generally in existing buildings on residential properties on arterial routes. However being a judicial body, not a planning authority with executive functions, we are not in a position to explore the implications of that option more fully, nor to devise consequential amendments to the plan.

We compare the options. One is allowing only offices of non-profit charitable organisations, and leaving offices generally as non-complying activities. The other is making the latter discretionary activities. In our judgment the former is more appropriate having regard to its efficiency and effectiveness relative to other means.

Regional policies

Section 74 requires that regard be had to the provisions of the proposed regional policy statement when preparing a district plan. The proposed Auckland regional policy statement contains a statement of strategic direction which promotes intensification of urban development within established urban limits¹³. Mr Nugent



¹³ Proposed Auckland regional policy statement paragraph 2.6.1.2

observed that the statement does not direct how intensification is to occur, but it does suggest that employment opportunities should be distributed more widely than at present.

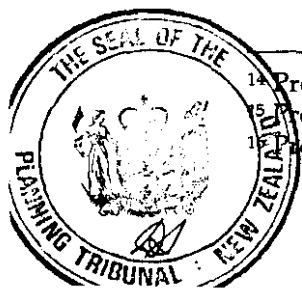
The proposed regional policy statement promotes integration of land use and transport planning, and suggests that district plans should encourage “land use changes so that persons can work and obtain goods and services within local areas”¹⁴. The air quality section of the proposed regional policy statement supports patterns of land use activities which minimise the need to travel¹⁵.

Mr Nugent gave the opinion that the proposal for offices would be consistent with those regional policies as it would allow services (providing employment) to be provided closer to residential areas. That may be so. However the amendment proposed would not necessarily implement the policies for intensification of urban activities¹⁶. On balance, we doubt whether the amendment would have any significant implications for the regional policies.

District objectives and policies

The respondent contended that the effects of allowing offices as proposed would undermine the residential zone strategy in the district plan, because the criteria for assessment of controlled activities in residential zones have not been designed as locational criteria for office activities; and that the effects of non-residential activities are generally incompatible. It also contended that the only justification for offices in the Residential 1 zone is to assist the retention of existing buildings which provide the special character which is the distinguishing feature of that zone, but that is not relevant in other zones which do not have that character.

Ms Bell gave the opinion that the amendment would conflict with objectives of the plan about conserving the district’s resources to meet present and ongoing needs of the community, and protecting those resources from significant adverse effects of activities.



¹⁴ Proposed Auckland regional policy statement Paragraph 4.4.2-1.

¹⁵ Proposed Auckland regional policy statement Paragraph 10.4.4.(i).

¹⁶ Proposed Auckland regional policy statement paragraph 2.6.1.2.

Conclusion on general provision

In most respects the proposed amendment would be consistent with the purpose of the Act. However we are not satisfied that the amendment would not result in adverse effects on the environment, on the character and amenities of residential neighbourhoods, and on the objectives and policies of the district plan from which they are protected to some extent by the present rule. A rule which controls offices in residential zones is necessary in achieving the purpose of the Act and to assist the council in its function of control of any actual or potential effects of the use, development, or protection of land. By comparison, a rule which makes offices generally on the subject sites a controlled activity is not necessary in achieving either of those purposes. Allowing only offices of non-profit charitable organisations and leaving offices generally as non-complying activities, is more appropriate having regard to its efficiency and effectiveness relative to other means.

We do not consider that the amendment would have any significant implication for regional policies, but we accept that it would not be consistent with objectives of the plan about conserving the district's resources to meet present and ongoing needs of the community, and protecting those resources from significant adverse effects of activities.

Taking all those factors together, it is our judgment, on balance, that the amendment sought would not be appropriate, and we decline to direct it.

College Hill

Properties fronting the south side of College Hill, between Margaret Street and England Street, are zoned Residential 1 and are the subject of Appeal 487/95. The appellants in that appeal and the respondent had reached agreement that the appeal could be resolved by amending the rules to allow offices in buildings existing on the sites on 1 July 1993 as a discretionary activity, and by additional assessment criteria.



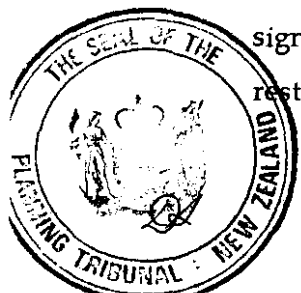
It was acknowledged that most of those buildings have a long history of use as offices, and that the provision for offices would assist in retention of the special character of the area.

The evidence adduced for the respondent was that providing for offices in the way proposed would result in efficient use of the buildings while being sensitive to the amenity and heritage values contained in the objectives and policies for the Residential 1 zone. The possibility of office activity would provide opportunities for retention and enhancement of the character buildings, and sustainable management of them for future generations. The acknowledged departure from the overall strategy of retaining land zoned residential for residential use was justified in that way for the limited number of properties that already are not in residential use.

We visited this area and observed that, save in one respect, the existing office uses there do not have adverse visual effects, nor do they appear to affect the character of the residential area. That is assisted by the topography, and the existence of a lane behind some of the buildings fronting College Hill, separating them from residences beyond.

The exception is that while most of the offices in the frontage buildings have appropriate signs identifying them, one has a large, bold sign that could be described as an advertising sign rather than an identification sign. That sign is not appropriate in a residential zone, and has an adverse visual effect. It may be the result of the respondent's policy of controlling signs by bylaw, rather than under the Resource Management Act, as it is difficult to reconcile allowing that sign with the purpose of the Act.

The parties consent to our directing the respondent to amend the district plan to provide for offices in up to 100 per cent of buildings existing on 1 July 1993 on those properties as a discretionary activity. We do so, but with the qualification that there be a condition prohibiting more than one sign for an office; stipulating that no sign for an office there is to be more than is required to identify the business; and restricting the area of any such sign to not more than 0.3 square metres.



155-163 Jervois Road

The appellant in Appeal RMA 793/95, Financial Services Limited, sought as alternative relief that if the Tribunal is not prepared to direct provision for offices on buildings fronting arterial roads throughout the residential zones, that such provision be made in respect of the five buildings on the properties fronting the north side of Jervois Road between Lawrence Street and Sentinel Road, by analogy with the relief agreed to on Appeal RMA 487/95 in respect of the properties fronting the south side of College Hill.

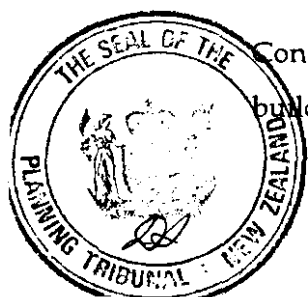
The respondent maintained that the existing buildings on these properties are a good example of how remnants of the City's heritage can be renovated as a result of use as offices, while remaining available for residential use in the future.

We accept that these five properties are in an analogous position, and that a similar concession can properly be made as an encouragement for retention of the existing buildings which contribute positively in the ways described earlier in this decision.

Controlled or discretionary activity

It was the appellants' case that office use in those buildings should be a controlled activity rather than a discretionary activity. Making office use a controlled activity would allow the council to consider the appearance of buildings, and to impose conditions on access, parking and general appearance according to assessment provisions already in the plan (rule 7.7.3.1). We were reminded that a controlled activity has to comply with all development controls in the plan, including provision of parking spaces, otherwise it has to be considered as a discretionary activity pursuant to rule 4.3.1.2B. It was urged that if office use is made a discretionary activity, the development standards would not necessarily have to be met, but would be guides for assessment.

Controlled activity consent is required for alterations or removal of the existing buildings in the Residential 1 zone.



For the respondent it was argued that it would not be possible for it to require preservation of the special character unless it could require retention of the existing villas, but that conditions to that effect could not be imposed on controlled activity consents.

However we bear in mind that what is intended is a special exception to the uses normally allowed in the Residential 1 zone. Offices are not expected in that zone. There may be specific proposals on particular sites that could have effects that are not susceptible of control by conditions on design and appearance and the like. Cumulative effects on the character of the residential neighbourhood could possibly indicate refusal of consent. In our judgment these properties should be dealt with in the same way as the College Hill properties, and offices should be a discretionary activity not a controlled activity.

Parnell Road

The appellant in Appeal RMA 798/95, Oceanic Investments Limited, sought as alternative relief that if the Tribunal is not prepared to direct provision for offices on buildings fronting arterial roads throughout the residential zones, that such provision be made in respect of the front buildings existing on 1 July 1993 on the properties zoned residential fronting Parnell Road between Birdwood Crescent (on the west side) and Cathedral Place (on the east side) and Newmarket. It was contended that there is a history of office uses in buildings along that frontage, uses that had been established in accordance with previous district schemes.

The evidence established that along the western side of Parnell Road from Birdwood Crescent to Domain Drive there is a block of offices and apartments, a house (No 463) occupied by an interior decorating consultant who works from her home and uses one room as an office and display room; a 3-storey building (No 465-467, formerly the Parnell Fire Station) used partly for offices and partly for residential purposes; a doctor's residence (where he formerly had professional rooms before retiring from practice); houses used for hairdressers; an antique shop; an accountant's office; a clothes shop; language school; and a photographer. One



house may be used solely for residential purposes. On the eastern side of Parnell Road going south from Cathedral Place there is a string of one-storey town houses; an office building; and Kinder House (a heritage building). Beyond Ayr Street and Domain Drive to Newmarket are exclusively commercial activities.

The evidence also established that the occupiers of 465-467 Parnell Road experience considerable noise from traffic on Parnell Road, making it difficult to use the front rooms with doors and windows open.

The properties from Birdwood Crescent and Cathedral Place to Domain Drive and Ayr Street (apart from Kinder House), are in the Residential 7b zone. In cross-examination Ms Bell accepted that the character of the buildings on the western side is such that this precinct qualifies for Residential 1 zoning, and she supported provision for offices there as a controlled activity because the cumulative effect of offices there could potentially be adverse. She went on to say that the council might want to decline consent in some cases, from which we took it that in her previous answer she had meant to support offices on those properties as a discretionary activity.

Although that character has not been recognised by Residential 1 zoning, we should consider the properties as we found them. They are much more varied in style than those in the stretches of College Hill and Jervois Road considered earlier in this decision. However the frontages of most of the front buildings on the western side from Birdwood Crescent to Domain Drive are already occupied by offices or other non-retail businesses. That has been achieved without substantially detracting from the appearance of buildings originally intended as dwellings for the most part. We accept that the concession for offices as discretionary activities in existing buildings fronting the parts of College Hill and Jervois Road already described would be appropriate for the buildings on the front of the properties on that stretch of Parnell Road as well, as an encouragement for maintaining the present character.

However a considerable part of the frontage on the eastern side from Cathedral Place to Ayr Street is occupied by an office building; and the town houses between



the office building and Cathedral Place have a different character. There is no basis for extending the concession to them.

CONSEQUENTIAL MODIFICATIONS

The appellants proposed a number of amendments to the proposed district plan consequential on the principal amendments sought by them.

Paragraph 7.2

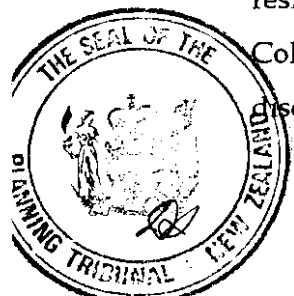
This paragraph identifies resource management issues that the plan needs to address. One of them is:

The need to provide for supporting activities where they complement the residential environment.

The appellants' planning witness, Mr Nugent, gave the opinion that this point falsely suggests that need is a significant element in the location of non-residential activities in residential areas, and proposed a revised wording. However we do not accept that the issue quoted involves any such suggestion. We consider that Mr Nugent may have misunderstood the point of the paragraph, which is not to prescribe circumstances in which supporting activities are to be provided, but to identify resource management issues that are to be addressed. We have not been persuaded that paragraph 7.2 requires amendment.

Rule 7.7.4.3J

This rule prescribes criteria for considering applications for offices in the Residential 1 zone. Mr Nugent gave the opinion that the council only needs to impose conditions to ensure amenity enhancement by building renovation and/or landscaping, and the mitigation of adverse effects by controlling parking and access layout. However, we have concluded that offices should only be allowed in residential zones in existing buildings on properties fronting the stretches of College Hill, Jervois Road and Parnell Road already described; and only as discretionary activities. Therefore, although some amendments to rule 7.7.4.3J will



be needed consequential on the directions being given in this decision, the rule itself is necessary and should stand.

Supporting activities

The appellant Oceanic Investments sought deletion of the term *supporting activities* from Part 7. The reason given was that some classes of activity, allowed in residential zones are not necessary activities in support of use of a residential unit for residential purposes. Examples given were activities of a residential character not being residential units, such as homes for the aged; camping grounds, non-permanent accommodation, and tourist complexes. Reference was also made to activities of a non-residential nature, such as care centres, community welfare centres, dairies, educational facilities, horticulture, hospitals, health care centres, offices and places of assembly.

Ms Simpkin responded that references to supporting activities should be read as referring to any non-complying activity as well as other listed activities; and that paragraph 7.4 provides guidance on the sort of non-complying activities that are considered appropriate under the residential strategy to control the effects of use and development in residential zones. We were informed that this concept is relied on by the respondent in respect of resource consent applications for service stations in residential zones, where the level of benefit or service to the community is to be weighed or offset against adverse amenity effects.

These appeals do not concern service stations in residential zones, and nothing in this decision should be taken as indicating any view of the provisions of the proposed district plan in that respect.

The Tribunal does not encourage appeals about semantics in instruments. However district rules have the force of law, and other contents of district plans sometimes have to be used to understand the meaning of rules. The application of district rules can have important consequences for people. District plans should use language which expresses clearly what is intended.



References to *supporting activities* do not meet that standard if it is not clear what is to be supported. An intention to use the phrase *supporting activity* to refer, among others, to activities that are not supporting anything, does not meet the standard either. We consider that the appellant has raised a valid point. We prefer not to undertake the drafting involved in addressing the point. We will leave it to counsel for the parties to do that, and jointly present us with a schedule of amendments. If they are unable to reach agreement, we will of course receive separate submissions and issue a determination.

Paragraph 7.5.1.2

Criticism was also made of the expression of paragraph 7.5.1.2 about a wide range of activities permitted in the higher density residential zones where provision is made for ancillary activities. Mr Nugent gave the opinion that this is not an accurate reflection of the rules, and creates a misimpression.

We understand Mr Nugent's point. However the paragraph in question is explanatory material, and is subsidiary to the rules themselves, which are what has legal force. It was not suggested that the rules themselves are ambiguous in this respect. We have concluded that even though it might be possible to improve the clarity of the paragraph in question, there is no point of sufficient importance to deserve a direction from the Tribunal to the respondent.

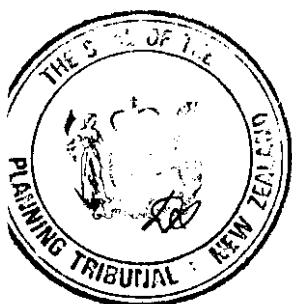
Objective 7.3.4

The appellant Oceanic Investments sought replacement of this objective. To avoid the need to refer back to the quotation of it earlier in this decision, we quote it, and the first policy related to it, again. The objective is —

To recognise the need for certain supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents.

The associated policy is —

By providing for non-residential activities in certain residential areas where they provide benefit or support for residential activity.



Mr Nugent expressed the view that they are inconsistent with the purpose of the Act, and with the provision for offices in the Residential 1 zone. He stated that the Resource Management Act does not have the promotion of the economic and general welfare and convenience of people as its purpose, nor are they within the functions of the council. He considered that the policy is misdirected in that it gives preference to supposed benefits, while ignoring potential adverse effects.

Mr Nugent proposed the following replacement objective—

To recognise that certain non-residential activities can be located in residential areas in a way which maintains and enhances the amenities of the area and enables people to provide for their social, economic and cultural wellbeing, and for their health and safety.

and policy—

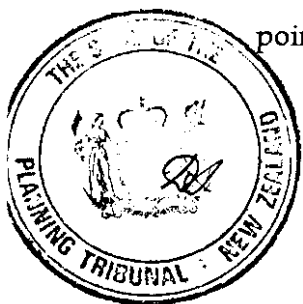
By providing for non-residential activities in certain residential areas where the activities are not disruptive of residential amenities.

Ms Simpkin submitted that the balancing of effects contemplated by the objective and policy are not contrary to the Act. Counsel contended that the word *mitigate* in section 5(2)(c) contemplates that not all adverse effects can be completely remedied or avoided, and she referred us to some Tribunal decisions in which weighing of positive and adverse effects had been made in deciding resource consent applications.

Mr Cowper responded that on an appeal against provisions of a proposed district plan which prevent certain activities, the Tribunal has to make a judgment, but not a balancing of beneficial effects against adverse effects.

The previous section of this decision considered paragraph 7.5.1.2, which is explanatory material. By contrast, objectives and policies such as the subject of this section, are given considerable significance by the Act. It is important that they be related to the language of the Act.

Having considered the submissions, we have concluded that Mr Nugent has a valid point, and that the replacement objective and policy proposed by him are to be



preferred because they follow more closely the language of the Act and the rules actually made in the plan. We will direct amendment accordingly.

Paragraph 7.6.6.2

In this paragraph, which explains the strategy for the Residential 6 (medium intensity) zones, the passage challenged is—

Provision is made for a range of activities to operate within this zone. In general the activities provided for will be expected to include a residential component or to be of benefit to the community.

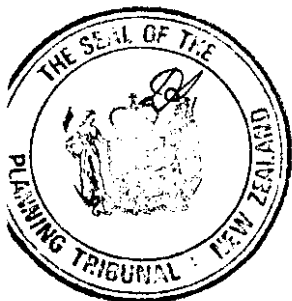
Mr Nugent observed that the only additional activities allowed in the Residential 6 zones are camping grounds and tourist complexes, which are provided for in all residential zones except Residential 4 and 5. He claimed that the statement is not a fair and honest reflection of the rules, and that the sentence is to some extent meaningless in that every activity has some benefit to the community.

It is desirable that all contents of a district plan are clearly expressed, and that the whole instrument is coherent and internally consistent. However, we do not consider that explanatory passages in a district plan need to be subjected to the same rigorous scrutiny and analysis as rules, objectives and policies. It is important that the expression of those parts of a plan is clear. If it is, then the Tribunal need not be so concerned with any inelegancies of expression in the explanatory passages.

We consider that Mr Nugent's point about the passage quoted is not of sufficient significance to deserve a direction by the Tribunal.

DETERMINATIONS

For the reasons given, the Tribunal will direct the respondent to make modifications to its proposed district plan to give effect to this decision.



We invite counsel to prepare a joint schedule of the modifications and submit it to the Tribunal. If agreement cannot be reached, each party may submit separate submissions.

In accordance with the Tribunal's practice on appeals about the contents of instruments we make no order for payment of costs on these appeals.

DATED at AUCKLAND this *2nd* day of May 1996.



DFG Sheppard
Planning Judge

[Hibbit.doc]

