BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 05 – District Wide chapters

CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

HEARING STREAM 05 – DISTRICT WIDE

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Countdown Properties (Northlands) Ltd v Dunedin City Council

High Court, Wellington AP 214/93
1-8 February; 7 March 1994
Barker J, presiding, Williamson and Fraser JJ.

District plan — Plan change — Private request for a plan change — Timing of s 32 report — Whether report should be available prior to public hearing of submissions on plan change — Distinction between privately requested plan changes and changes initiated by local authorities or Ministers — Robust and practical approach to whether substance of report complies with s 32 — Whether Tribunal capable of curing defects — Amendments to advertised plan change — Deferral of change until review of district plan — Use of zoning in transitional district plans — Applicability of both ss 290 and 293 — Resource Management Act 1991, ss 5, 9(1), 19, 32, 38, 39, 73(2), 76, 290, 293, 299, 311, 373(3), First Schedule.

These were appeals concerned with a request by M L Investments Co Ltd and Woolworths (NZ) Ltd (collectively referred to as Woolworths) to the Dunedin City Council (the council), seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. Woolworths intended to develop a "Big Fresh" supermarket in the block. The appellants, Transit New Zealand (Transit), Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively referred to as Countdown), and Foodstuffs (Otago/Southland) Ltd (Foodstuffs) were dissatisfied with the council's decision in favour of the plan change, and initiated references to the Planning Tribunal under cl 14 of the First Schedule to the Resource Management Act 1991 (the Act). They subsequently appealed from the Tribunal's decision to the High Court on numerous grounds.

The first three grounds concerned the council's duties under s 32 of the Act. Foodstuffs and Countdown argued that the Tribunal was wrong in law when it held that the council had fulfilled its obligations under s 32. Foodstuffs and Countdown claimed that s 32 required the council to prepare a s 32 report before advertising the plan change, or at the latest before the hearing of submissions regarding the plan change. The focus of their argument was on the effect of the words "before adopting" in s 32. It was submitted that s 32(3) clearly indicated that the words "before adopting" meant "prior to public notification". It was also argued that s 19 would produce an anomalous situation if any other interpretation was adopted. It was claimed that the

principles of natural justice required that a s 32 report be made available to people making submissions prior to a hearing. The adequacy of the council's s 32 report was also challenged, which raised the issue of whether the subsequent Tribunal hearing could have cured any defect in the council's s 32 report, should one have existed.

After hearing submissions on the plan change, the council ultimately adopted a plan change which differed from the plan change which had been advertised before the hearing. The appellants argued that the council's action in making the amendments had been ultra vires. At issue was the effect of cl 10 of the First Schedule to the Act, which states that after hearing submissions "the local authority concerned shall give its decision regarding the submissions and state its reasons for accepting or rejecting them".

The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled, because the forthcoming review of the whole district plan was a more appropriate way of dealing with the resource management issues involved. The appellants argued that it was preferable to pursue integrated management for all parts of the district and that the best time to do this was at the time of the review.

The appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. They claimed that the Act does not provide for zoning to restrict activities according to type or category, unless it can be shown that the effects associated with a particular category breach "effects-based" standards.

The appellants challenged the validity of rule 4 of the plan change on the basis that the rule purported to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they could proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 of the Act.

It was argued that the rules in the plan change contained a number of phrases which were vague and uncertain. The appellants claimed that the Tribunal had incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could have made it.

The appellants claimed that, by accepting the evidence of one of the respondent's witnesses on the economic effects of the plan change, the Tribunal had made a decision so unreasonable that no reasonable tribunal could have made such a decision. The appellants also claimed that the Tribunal had failed to consider the evidence presented by a number of the appellants' witnesses, and that the Tribunal had been unfairly selective in the evidence it relied upon.

It was argued that s 290 of the Act applied to the proceedings before the Tribunal, and that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32 analysis in the same way as the Council had. The Tribunal had held that s 290 did not apply, and that instead s 293 was applicable, and it received its powers from that section.

Transit had reached a settlement with the Council prior to the hearing of this appeal. The appellants claimed that the settlement should not be implemented in the manner suggested, and that the rules of the settlement should be remitted to the Tribunal for consideration before they were implemented.

Held (dismissing the appeals by Countdown and Foodstuffs):

(1) The Tribunal made the correct decision about the timing of the s 32 report. There is no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. It is not inconsistent with the procedure set out in cls 21 to 28 of the First Schedule to the Act a local authority to adopt changes after public notification, submissions and decisions on submissions.

(2) "Adopting" by a local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. When a private individual requests a plan change, it can be rejected only in limited circumstances. Once a request passes the threshold, a local authority might well feel the need to hear and consider submissions before it proceeds with the potentially onerous s 32 investigation. There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change. However the effect of s 32(3) is that where a plan change has been initiated by the local authority itself, or by another local authority or a Minister, a s 32 report must be made available at the time the plan change is advertised.

(3) There was no merit in the submission relating to natural justice. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion.

(4) The Tribunal had held that while the council's s 32 report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. The Tribunal was correct in the robust and practical approach that it took. Any defect of substance in the council's decision and s 32 analysis would have been capable of exploration, resolution and correction by the Planning Tribunal.

(5) To take a legalistic view that under cl 10 of the First Schedule a local authority may only accept or reject the relief sought in any given submission would be unreal. The local authority or Tribunal must consider whether any amendment made to a plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, the Tribunal did this here. It was difficult to see how anyone could have been prejudiced by the alterations in the council's finished version. Of all the changes made by the council, only the change to rule 4 could not have been justified by any of the submissions. The Tribunal was correct in holding that this omission was not fatal, and that there was a power to excise offending variations without imperilling the plan change as a whole.

(6) The Court rejected the appellants' claims that the plan change should

have been cancelled and dealt with in the forthcoming review of the whole district plan. The legislature had indicated in the Act that plan changes which had more than minimal planning worth should be considered on their merits, even though sponsored by private individuals, unless they were sought within a limited period before a review.

(7) Zoning is a method of resource management, albeit a rather blunt instrument in the Resource Management Act context. Here use of zoning represented a reasonable and practical accommodation of the new plan with the old scheme, and was acceptable for the remainder of the life of the transitional plan.

(8) Rule 4 in the plan change, which required resource consent applications for certain activities within the zone, was within the general scope of s 76(1) and was not ultra vires the council's powers. Even if this decision was incorrect, s 373(3) applies so that a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

(9) The Tribunal did not incorrectly apply the law, nor make an unreasonable decision, with regard to the certainty of certain phrases used in the plan change.

(10) The acceptance or rejection of the evidence of one of the respondent's witnesses was a question of fact for the Tribunal, and could not be appealed.

(11) The appellants' submission that the Tribunal was unfairly selective in its adoption of evidence had to be considered in the light of the Tribunal's expertise. The hearing was extremely thorough, and the Court was unable to hold that the Tribunal erred in law merely because it omitted to mention the appellants' witnesses by name.

(12) Both ss 290 and 293 applied to the proceedings before the Tribunal, as the hearing was in effect an appeal. Although the Tribunal did not recognise that s 293 applied, and that it therefore had a duty to carry out a s 32 analysis, the steps it would have taken in its deliberation and judgment had it recognised the applicability of s 293 would have been no different from those set out in detail in its decision. Therefore as a whole the Tribunal's approach was correct, and it did not err in law.

(13) The Court allowed Transit's appeal by consent and remitted to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement between the Council and Transit

Cases considered

Ashburton Borough v Clifford [1969] NZLR 927
Auckland City v Auckland Heritage Trust (1993) 1 NZRMA 69
Batchelor v Tauranga District (No 2) [1993] 2 NZLR 84; (1992) 2 NZRMA 137
Bitumix Ltd v Mt Wellington Borough [1979] 2 NZLR 57
Burr (AJ) Ltd v Blenheim Borough [1980] 2 NZLR 1
Calvin v Carr [1980] AC 574

Environmental Defence Society Inc v Mangonui County [1987] 2 NZLR 496; (1987) 12 NZTPA 349
Environmental Defence Society Inc v Mangonui County [1989] 3 NZLR 257; (1989) 13 NZTPA 197
Haslam v Selwyn District (1993) 2 NZRMA 628
K B Furniture Ltd v Tauranga District [1993] 3 NZLR 197; (1993) 2 NZRMA 291
Kirkham v Attenborough [1897] 1 QB 201
Love v Porirua City [1984] 2 NZLR 308
McLeod Holdings Ltd v Countdown Properties Ltd (1990) 14 NZTPA 362
Manukau City v Trustees of Mangere Lawn Cemetry (1991) 15 NZTPA 58
Meade v Wellington City (1978) 6 NZTPA 400
Morrow v Tauranga City (Decision A 46/80)
Nelson Pine Forest Ltd v Waimea County (1988) 13 NZTPA 69
Noel Leeming Ltd v North Shore City (No 2) (1993) 2 NZRMA 243
Northland Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530
Royal Forest and Bird Protection Society Inc v W A Habgood Ltd (1987) 12 NZTPA 76
Waimea Residents Association Inc v Chelsea Investments (High Court, Wellington M 616/81, 16 December 1981, Davison CJ)
Wainuiomata District v Local Government Commission (High Court, Wellington CP 546/89, 20 September 1989, Greig J)
Wellington City v Cowie [1971] NZLR 1089
Wellington International Airport v Air New Zealand [1993] 1 NZLR 671

Appeals under the Resource Management Act 1991.

R J Somerville and *R J M Sim* for Foodstuffs
T C Gould and *D G Bigio* for Woolworths
E D Wylie for Countdown
A J P More for Transit
N S Marquet for Dunedin City Council

Judgment of the Court. These appeals from a decision of the Planning Tribunal given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 (the RMA) — a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town and Country Planning Act 1977 (the TCPA) were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit New Zealand (Transit) that his client had reached a settlement with the first respondent, the Dunedin City Council (the council) and the second respondents, M L Investment Co Ltd and Woolworths (NZ) Ltd, (called collectively Woolworths). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively called Countdown); and Foodstuffs (Otago/Southland) Ltd (Foodstuffs).

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the greater Dunedin region, the council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the "city", as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the council's transitional district plan under the RMA. The task imposed by the RMA on the council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA lies in the ability of persons other than public bodies to request a council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the council seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 ha), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the "specified departure" procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business district. They lodged submissions in opposition to the plan change with the council and appeared at a hearing of submissions before a Committee of the council. Dissatisfied with the council's decision in favour of the plan change, they initiated references to the Tribunal under cl 14 of the First Schedule to the RMA (the First Schedule). The concept of a "reference" of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by s 299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties other than Countdown and Foodstuffs making submissions to the council were two who subsequently sought references of the proposed plan change to the Tribunal; ie Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access; two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under s 311 of the RMA:

- whether the council could change its transitional district plan; and
- whether the council could lawfully complete the evaluation and assessments required by s 32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was

subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard lasted 16 sitting days; its reserved decision occupies some 130 pages. [The decision is reported in part as *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497.] The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology

Woolworths' request, made pursuant to s 73(2) of the RMA, was received by the council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the council, acting under delegated authority, resolved to "agree to the request" in terms of cl 24(a) of the First Schedule. This resolution was made within 20 working days of receiving the request as required by cl 24. The council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations, and to request and commission all additional information as required by the RMA. There was consultation by the council with Woolworths as envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the council's expenses in undertaking the exercise.

Early in February 1992, the council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District". The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in s 32 of the RMA was presented to the Council Planning Hearings Committee by a Mr K Hovell, a consultant engaged by the council to advise it on the proposed change. It was found by the Tribunal, as fact, that the analysis

required by s 32 (to be discussed in some detail later) was not prepared by the council until after the hearing of submissions. Obviously therefore, no draft s 32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the committee to a draft s 32 analysis prepared by Mr Hovell; a final version was prepared by him at the committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the committee at this stage of its deliberations. On 11 August 1992, the committee, acting under delegated powers, decided that the change should be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the council's decision, a legal opinion from the council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel cooperated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern*

Milk Ltd [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

Grounds 1, 2 and 3

1 The Tribunal misconstrued the provisions of s 32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form.

2 The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by s 32.

3 The Tribunal misconstrued s 32 and s 39(1)(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's s 32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.

These grounds are concerned with the council's duty under s 32 of the RMA and can be dealt with together by a consideration of the following topics —

- Was the council correct in not fulfilling its duties under s 32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the council right to carry out the s 32 analysis after the public hearing of submissions but before it published its decision?
- Should the council have made a s 32 report available to persons making submissions on the plan change?
- Was the council's actual s 32 report an adequate response to its statutory responsibility?
- If the council was in error in its timing of the s 32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal, an independent judicial body before which all relevant matters were canvassed?

Section 32 of the Act at material times read as follows —

32. Duties to consider alternatives, assess benefits and costs, etc. — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —

(a) Have regard to —

(i) The extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and

(ii) Other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may

be used in achieving the purpose of this Act, including the provision or information, services, or incentives, and the levying of charges (including rates); and

(iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and

(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —

(i) Is necessary in achieving the purpose of this Act, and

(ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

(2) Subsection (1) applies to —

(a) The Minister, in relation to —

(i) The recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53:

(ii) The recommendation of the making of any regulations under section 43:

(b) The Minister of Conservation, in relation to —

(i) The preparation and recommendation of New Zealand coastal policy statements under section 57:

(ii) The approval of regional coastal plans in accordance with the First Schedule:

(c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.

(3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except —

(a) In a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or

(b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule.

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. Section 73(2) provides —

> Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in the First Schedule.

Clause 23 of the First Schedule requires a written request to the local authority to change a plan to define the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change. An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under cl 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to

the request" or "refuse to consider" it. The words "agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (ie agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in cl 24(b) or defer preparation or notification on the grounds stated in cl 25. The council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a "reference") to the Tribunal (cl 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within three months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). "Any person" is entitled to make submissions in writing; cl 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form. The Court of Appeal in *Wellington City Council v Cowie* [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in s 39 of the RMA; notably, no cross examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (cl 27 of the First Schedule). The council may make amendments, of a minor updating and/or "slip" variety before resolving to

approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in s 32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (cl 21), "prepared" (cl 28), "publicly notified" (cl 5), "considered" (cls 10 and 15), "amended" (cl 16), and "approved" (cls 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's s 32 duties can be summarised thus:

(a) Read in the context of s 32(2) the word "adopting" as used in s 32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.
(b) The duties imposed by s 32 are to be performed "before adopting", that is, before the change is made into an effective planning instrument.
(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.
(d) If Parliament had intended that in every case s 32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.
(e) A separate document of the local authority's conclusions on the various matters raised in s 32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.
(f) In relation to Change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision that the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that s 32 requires the council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under s 32 after that point.

Interpreting the provisions of s 32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. Section 32(2) describes the

persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A local authority is limited to "the setting" of objectives, policies and rules under Part V, which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the setting of objectives, policies and rules.

Under s 32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in cls 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the change its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under cl 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (cl 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher MR in *Kirkham v Attenborouqh* [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process. There can be no act or decision inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They

concerned, first, s 32(3) and, second, s 19. It was submitted that s 32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with s 32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under cl 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that s 32(3) was capable of giving that indication but concluded that, if Parliament had intended the s 32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether s 32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exclusion of privately requested changes in the words "change to a plan" in s 432(3)(a); (b) the use of the term "proposed plan" in the first phrase of s 32(3) does not preclude a challenge to the council's performance of its s 32 duties in a submission under cl 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with s 32 by the Council. They do not have to do so in their submission.

This approach to s 32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not "adopted" for the purposes of s 32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the s 32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of s 32(3). We hold that the "adopting" by the local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of s 32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s 32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is three months away or if the request is frivolous, vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous s 32 investigation. It may not have time to do so even within the three months required under cl 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to "adopt" it. It will have to consider the wider implications of a proposed plan change during a period limited by cl 28 to three months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a s 32 report being prepared. A local authority might not be therefore in a position to "adopt" the plan change until it had the s 32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a s 32 report because the Act in s 32(3) clearly envisages their having the right to comment on a s 32 report, the answer lies in the interpretation we have given to s 32(3). There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the council's decisions or submissions to the Tribunal can criticise the s 32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which s 32(3) applies; ie plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s 32 report would have to be available at the time the plan change is advertised because of the limitation contained in s 32(3) on the right to comment on the adequacy or otherwise of a s 32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a s 32 report should include as a precaution a statement that the s 32 report was inadequate; this was suggested in argument by counsel for the council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between "adopt" and "approval" is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the council or of a Tribunal direction on a reference may cause the local authority to find that its "adopting" of the change was erroneous.

However, with the plan change initiated privately, adopting comes at the time when the council decides after hearing all the submissions that it should adopt the change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to "adopt" a plan change.

In the case of a plan change requested by another authority or by the Minister to which s 32(3) applies, a council receiving the request will have to "adopt" the change prior to advertising the change and therefore complete its s 32 report by that stage. Again, the council may not ultimately "approve" the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a s 32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its s 32 evaluation of the proposal. If there were not time available within the three months, then there is power for the local authority under s 38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for "adopting" the plan change therefore in terms of s 32, is a "moveable feast" depending on whether or not the plan change is initiated by a private individual.

Section 19 of the RMA is as follows —

> **19. Change to plans which will allow activities —**
> Where —
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
> (b) The time for making or lodging submissions or appeals against the new rule or change has expired and —
> (i) No such submissions or appeals have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed —
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative.

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under s 32 must take place before the time for making or lodging submissions or appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to s 32.

The Tribunal did not place any weight on the argument under s 19. We have carefully considered the submissions and conclude that, while s 19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as s 32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under s 32(1)(a), (b) and (c). Certainly there are no words within s 19 which purport to affect the duty under s 32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. Section 9(1) of the RMA provides as follows:

> No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is —
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by section 10 (certain existing uses protected).

As noted "proposed district plan" includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. Section 19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the s 32 report; in the circumstances of this case, the report was properly "adopted" at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a s 32 report available to them prior to the hearing of submissions. Reference was made to s 39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under s 32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and

call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the first respondent is challenged in Ground 2. It was claimed that the council (a) had taken into account irrelevant considerations, namely, ss 6, 7 and 8 of the RMA; (b) had failed to take into account matters; and (c) had applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the council's s 32 analysis report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal incorrectly permitted an inadequate compliance by the council with its s 32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated [2 NZRMA 497, 521] —

> In our opinion failures to perform the s 32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act.

Earlier it stated [2 NZRMA 497, 521] —

> Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by s 32 can be condoned, compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required. If any deficiency that may be discovered from a punctilious scrutiny of a s 32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form.

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the s 32 exercise or the adequacy of the first respondent's s 32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the council's decision and s 32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced counsel. We are conscious of the approach described in *Calvin v Carr* [1980] AC 574, *A J Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1 and *Love v Porirua City Council* [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the council stage of hearing were cured by the thorough and professional hearing

accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

> **Ground 4.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision.

A revised and expanded version of the plan change as advertised emerged when the council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the council, that the council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing relevant segments of the change as advertised with the counterparts in the council's finished product.

Mr Marquet for the council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of counsel's submissions, which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups: (a) those sought in written submissions; (b) those that corresponded to grounds stated in submissions; (c) those that addressed cases presented at the hearing of submissions; (d) amendments to wording not altering meaning or fact; (e) other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A person making a submission is required by cl 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the council under cl 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the

proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned shall give its decision *regarding the submissions* and state its reasons for accepting or rejecting them". This is to be compared with reg 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall *allow or disallow each objection either wholly or in Part. . .*". (Emphasis added.)

Counsel for the appellants submitted that cl 10 was narrower in its scope than the TCP Regulations and did not permit the council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a council to either accepting a submission in its entirety or rejecting it".

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

Counsel relied on *Meade v Wellington City Council* (1978) 6 NZTPA 400 and *Morrow v Tauranga City Council* (Decision 46/80, 13 December 1979) which emphasised that a council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in *Nelson Pine Forest Ltd v Waimea County Council* (1988) 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the council and accordingly of the Tribunal, although no objector had expressly sought it. He said —

> . . . that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such

> applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.

The Tribunal noted and applied this test in *Noel Leeming Ltd v North Shore City (No 2)* (1993) 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of cls 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of (and by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the *Nelson Pine Forest* case, the Tribunal's decision in *Noel Leeming Ltd v North Shore City (No 2)* and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p 73):

> . . . it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement and ordinances in its plan. It follows that when an authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan have been previously advertised.

The same point was made by the Tribunal in *Noel Leeming Ltd v North Shore City (No 2)* at p 249 and the Tribunal in this case at p 59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628. The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based

upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the council. More importantly, it is hard to envisage that any person who had not participated in the council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate; because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then s 373(3) Of the RMA would apply; that subsection provides as follows —

> Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat

tenuous, it seems quite clear that at the extensive hearing before the council most of the matters were discussed. If they were not discussed before the council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

> **Ground 5.** The Tribunal erred in law when it determined the status of the written submission on plan change No 6 made by an employee of the first respondent Mr J Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision.

This ground was struck out by Barker ACJ at a preliminary hearing.

> **Ground 6.** The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.

> **Ground 7.** The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus 2 NZRMA 497, 532]:

> Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a

> three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons.

The Tribunal went on to point out that cl 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within three months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred and that the express provision for deferment in the First Schedule shows an intent by the legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

> **Ground 8.** The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued ss 5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

Under this ground, the appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural well-being (the words of s 5 of the RMA). Much was made of the difference between the RMA and the TCPA. Section 5 was said to be either or both "anthropocentric" and "eccentric".

Consideration of s 76 is required —

> **76. District rules** — (1) A territorial authority may, for the purpose of —
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan, —
> include in its district plan rules which prohibit, regulate, or allow activities.

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

(3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.

(4) A rule may —

(a) Apply throughout a district or a part of a district;

(b) Make different provision for—

(i) Different parts of the district; or

(ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons:

(d) Be specific or general in its application:

(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan.

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances .

We think that the Tribunal's approach was entirely correct. Section 76(3) enables a local authority to provide for permitted activities, controlled activities, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about s 5, the new philosophies of the RMA, and the need to abandon the mindset of TCPA procedures were given to the Full Court in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84; (1992) 2 NZRMA 137. That was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89; 142, quoting the Tribunal —

> Our conclusion on the competing submissions about the application of s 5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources.

As in *Batchelor's* case, reference was made in the appellants' submissions to the speech in *Hansard* of the Minister in charge introducing the RMA as a Bill. We find no occasion here to resort to our rather limited ability to use

statements in parliamentary debates in aid of statutory interpretation. *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to *Batchelor's* case is a decision of Thorp J in *K B Furniture Ltd v Tauranga District Council* [1993] 3 NZLR 197; (1993) 2 NZRMA 291. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the *Batchelor* and *KB Furniture* cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of s 5 of the RMA. In *Batchelor's* case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the *K B Furniture* case, Thorp J characterised *Batchelor's* case as pointing to —

> . . . the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court: and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process.

We agree with this statement entirely. This ground of appeal is also dismissed.

> **Ground 9.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of s 76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act.

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities

expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of land-owners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA; in a planning context, this principle is demonstrated by such authorities as *Ashburton Borough v Clifford* [1969] NZLR 927, 943. Counsel submitted that s 9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by s 74(4)(e); that normal principles of statutory interpretation should properly have applied to the construction of s 76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act.

> We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in s 76(4) than deliberately excluded. The rule is clearly within the general scope of s 76(1) and we do not consider that it was ultra vires respondent's powers.

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the legislature intended, by providing expressly for such rules in the circumstances referred to in s 76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in *Auckland City Council v Auckland Heritage Trust* (1993) 1 NZRMA 69 where Judge Sheppard held that a reference anywhere in a plan to a particular activity was sufficient to preclude the application of s 373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the *Auckland Heritage Trust* decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that s 373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not

specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

> **Ground 10.** The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty.

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; ie whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in *Bitumix Ltd v Mt Wellington Borough* [1979] 2 NZLR 57, and McGechan J in *McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362. The Tribunal then said (p 81) —

> With those judgments to guide us, and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be "specified" we return to consider the phrases challenged . . .

Mr Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had

applied them alone and had not borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building . . .". were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could not stand. This ground of appeal is also dismissed.

> **Ground 11.** That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to.

This ground was withdrawn at the hearing and is therefore dismissed.

> **Ground 12.** That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 was so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision.

This ground relates to the evidence of a statistical retail consultant, Mr M G Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p 34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of a specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a

finding of fact by the Tribunal — which is not permitted by the RMA. We therefore reject this ground of appeal.

> **Ground 24.** The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following — Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds.

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of evidence and one which no reasonable tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p 86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown . . .". The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

> **Ground 13.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of s 31.

> **Ground 14.** The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977.

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

> **Ground 15.** That the Tribunal erred in law by holding that s 290 of the Act did not apply to the references in Plan Change No 6.
>
> **Ground 16.** That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in s 32(1).
>
> **Ground 17.** That the Tribunal misconstrued the Act when it held that it has the powers conferred by s 293, when considering a reference pursuant to clause 14.
>
> **Ground 18.** That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it.

The first step in the appellant's argument to the Tribunal on this part of the hearing was that s 290 of the RMA applied to the proceedings. That section reads:

> **Powers of Tribunal in regard to appeals and inquiries** — (1) The Planning Tribunal has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation.

The second step in the argument was that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32(1) analysis in the same way as the council had.

The Tribunal held that s 290 did not apply because the proceedings were not an appeal against the council's decision as such and that the Tribunal was not under the same duty as the council to carry out the duties listed in s 32(1). It went on to say [2 NZRMA 497, 541] —

> However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in s 32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references.

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a

matter of law in holding that s 290 did not apply and in determining that it was not itself required to discharge the s 32 duties.

The Tribunal also held that s 293 of the RMA, unlike s 290, was applicable and that it had the powers conferred thereby. Section 293 (in part) is as follows:

> **Tribunal may order change to policy statements and plans** — (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

Although s 293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for s 293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by s 293 in respect of a proposed change as well as those conferred by cl 15(2) of the First Schedule. That clause is as follows —

> (2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by s 293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that ss 290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in s 293 but instead on its jurisdiction under cl 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of s 32. He submitted that even if the Tribunal had the duties under s 32 of the council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to ss 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it

correctly determined that it had the powers conferred by s 293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to cl 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to s 290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect, an appeal, from the decision of the council. In addition, the provisions in cl 15(2) that a reference of the sort involved here is an "appeal" and a reference into a regional coastal plan pursuant to cl 15(3) is an "inquiry" link, by the terminology used, cl 15 in the First Schedule with s 290.

The general approach that the Tribunal has the same duties, powers and discretions as the council is not novel. Section 150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as s 290(1) and (2) of the RMA; in particular, s 150(1) provided that the Tribunal has the same "powers, duties, functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in *Waimea Residents Association Inc v Chelsea Investments Ltd* (High Court, Wellington M 616/81, 16 December 1981, Davison CJ). There was no provision in the TCPA corresponding to s 32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even though it had the same powers and duties as the council.

We accept Mr Gould's submission that even if the Tribunal had decided that s 290 applied and it had the same duties as the council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pp 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word "necessary" was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 and of Greig J in *Wainuiomata District Council v Local Government Commission* (High Court, Wellington CP 546/89, 20 September 1989).

The Tribunal considered that in s 32(1), "necessary" requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in s 32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential. We agree with that view and do not consider that the Tribunal was in error in law. We return now to the appellants' primary submission. It is true that the Tribunal said (at p 128) —

> On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change.

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. Section 32 is part only of the statutory framework; by s 74, a territorial authority is to prepare and change its district plan in accordance with its functions under s 31, the provisions of Part II, its duty under s 32 and any regulations. This was fully apprehended, and dealt with appropriately by the Tribunal. It said at p 127 —

> We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and areas; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achieve that purpose, and is in accordance with those functions under s 31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function.

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of s 32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the council to modify, delete or insert any provision which had been referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

> **Ground 19.** That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would result in adverse effects on the traffic environment.

Ground 20. In considering Plan Change No 6 in terms of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin District.

Ground 21. The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway.

Ground 22. In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect.

Ground 23. The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process.

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the council had not specifically stated the amendments sought and that was final because it had not been appealed. Reference was made to s 295 of the RMA, viz: "A decision of the Planning Tribunal . . . is final unless it is reheard under section 294 or appealed under section 299." It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure

adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under cl 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under s 293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in s 293(3).

On the penultimate page of its decision the Tribunal stated —

> The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N S Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address.

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under s 293 or cl 15(2) of the First Schedule.

In *Port Otago Limited v Dunedin City Council* (High Court, Dunedin AP 112/93) Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R 718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R 718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

Sections 300 to 307 of the RMA provide detailed procedure for the institution of appeals to this Court under s 299 and for the procedure up to the

date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court . We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in ss 300 to 307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the council are both entitled to costs. We shall receive memoranda from counsel if agreement can not be reached.

Solicitors for Foodstuffs: *Gallaway Haggitt Sinclair* (Dunedin)
for Countdown: *Duncan Cotterill* (Christchurch)
for Transit: *Timpany Walton* (Timaru)
for Woolworths: *Ellis Gould* (Auckland)
for Dunedin City Council: *Ross Dowling Marquet & Griffin* (Dunedin)

ORIGINAL

Decision No. C 45/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference under clause 14 of the First Schedule to the Act

BETWEEN NEW ZEALAND HEAVY HAULAGE ASSOCIATION INC
(RMA 497/00)
Appellant

AND THE CENTRAL OTAGO DISTRICT COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner C E Manning
Environment Commissioner O M Borlase

HEARING at Alexandra: 29 and 30 March 2004. Site visit 30 March 2004

COUNSEL:
P T Cavanagh QC and S J Ryan for the New Zealand Heavy Haulage Association Inc
J E Macdonald for the Central Otago District Council

DECISION

Introduction

[1] There has been a considerable history of the use of relocatable dwellings in the Central Otago District. That arose out of the need to provide relatively short-term accommodation for

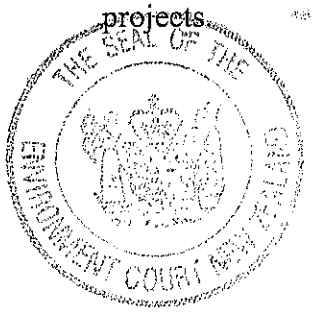
major power construction projects in the area. Those projects concluded in the very early 1990s. More recently, the use of such housing seems to have been at much the same level as elsewhere in the country, with some 27 consents issued for the placement of relocated dwellings over the 3 1/2 years ended December 2003. Of those, 25 were dealt with on a non-notified basis, with one being notified and one being dealt with under the post-2003 limited notification regime. We have come to think that it is the earlier history, rather than identifiable current issues, which lies behind the dispute in this case.

[2] The Central Otago District Council published its proposed plan in 1998 and a revised (decisions) version appeared in 2000. In brief, it makes relocatable dwellings a restricted discretionary activity in both the residential and rural zones; see Rules 7.3.3(iii) and 10.3.3(iii). The New Zealand Heavy Haulage Association referred those provisions to the Court, it having been unable to persuade the Council to adopt the view that such an activity should be a permitted activity or, at worst, a controlled activity in either zone.

[3] The Association mounted its attack on essentially two bases. First, that the Council had failed to undertake an adequate s32 analysis of benefits and costs, alternatives, etc. For that reason alone, the appellant argues, the Rules should be replaced.

[4] Secondly, even if the Rules survive the s32 argument, the appellant argues that they lack support from any identifiable issues, objectives or policies in the proposed plan and have no rational basis. That is said to be so, particularly when compared to the provisions governing the building of houses *'in situ'*.

[5] The Council's position is that it wishes to retain its control over relocatable dwellings at the level at which it could refuse consent in a sufficiently extreme case. It maintains the view that only a restricted discretionary status will give it a sufficient level of control. It argues that such a level of control is justified by its past experiences and the levels of community concern about potential impact on residential amenities of poorly done or uncompleted relocation projects.



Section 32 Analysis

[6] First, we should record that it is common ground that we are to deal with this matter on the law as it existed before the 1 August 2003 amendments to the RMA.

[7] The challenge to the relevant Rules on the basis of non-compliance under s.32(1) has been made in context of a reference under the First Schedule to the Act, and thus complies with s32(3).

[8] Mr Whitney, the Council's consultant planner, is of course correct in saying that the council is not required to produce any specific 'report' detailing its s32 inquiries and considerations. The pre-2003 sections 32(4) and (5) provided as follows:

> *"(4) Every person on whom duties are imposed by subsection (1) shall prepare a record, in such form as that person considers appropriate, of the action taken, and the documentation prepared, by that person in the discharge of those duties.*
>
> *"(5) The record prepared by a local authority under subsection (4) in relation to the discharge by that local authority of the duties imposed on it by subsection (1), in relation to any public notifications specified in subsection (2)(c)(i), shall be publicly available in accordance with section 35 as from the time of that public notification."*

[9] Those provisions make it self-evident that the record need not be contained in any one document, or be in any particular form. If confirmation of that is required, see *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481. But as a minimum the record should contain an adequate audit trail of the Council's considerations of all of the factors in s32(1)(a), leading to it being satisfied that the [in this case] Rule is, in terms of s32(1)(c), necessary in achieving the purpose of the Act and the most appropriate means of exercising the relevant function, having regard to the merits of other means of doing so. The requirement to follow s32 is made the plainer by the provisions of s74(1).

[10] The weight to be given to an inadequate [or the total absence of a] s32 analysis is a matter for the Court's judgement. It is the substantive and not the procedural effect of any inadequacy or absence that is important. It is the merits of the challenged plan provision that

are to be considered in the light of the s32 inadequacy; the provision itself cannot be declared invalid for that reason. See *Kirkland v Dunedin City Council* [2001] NZRMA 97.

[11] There is nothing in what was produced as the s32 record (Document 116 of the discovered documents) which gives a lead to the Council's thinking on this topic. It was not until the hearing of submissions by the Council that this appellant's name appears in the record. Even then the Council's reasons for adopting the relevant Rules are rather generic. In its decision, the Council appears simply to adopt the reason given for the Rules in the proposed plan as originally published. That stated:

> *"In the past Council has experienced difficulties and expressions of community concern with dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left on the site in an unfinished state. Consequently they have a significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a particular development is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule."*

On the 'record' produced to us, we cannot regard the s32 analysis on this topic as being adequate, and we look at the merits of the Rules in that light.

[12] The reasons for decision go on to record as follows:

> *"Relocatable buildings (particularly dwellings) and their effects on the urban environment are a significant issue in the context of the Central Otago District. The amendment sought by the submitter is not necessary to achieve the purpose of the Act as stated in section 5, is inconsistent with the principles of the Act and the Council's function in terms of section 31 and is not the most appropriate means of exercising relevant functions in terms of section 32."*

General Rationale for Rules

[13] That there were problems 'in the past' was echoed in the evidence of Mr Whitney and Councillor N J Gillespie. We do not doubt that there may have been such problems in the past. But neither witness could point to any example of a relocated dwelling which had caused amenity concerns in the last several years. It is perhaps timely to mention our site

visit. The parties gave us a list of twenty examples of relocated dwellings in Clyde and Cromwell. [One in fact may not have been proceeded with]. We found and viewed virtually all of them. In one or two cases, it was possible to pick them as relocated, even without being told, because they were dwellings of a different period or style from those immediately around them. But in no case did they seem jarring or in any sense an offence to local amenities.

[14] When pressed to define any appreciable difference between relocated and in situ built houses, in terms of possible amenity effects, neither Council witness could point to anything we found at all convincing. Both acknowledged that a partly built in situ house, stalled because the owner had a funding problem, or because the builder had ceased operations, would be an equally unsightly and possibly intractable problem. Their view remained however that the potential for such problems was higher with relocatable houses, and they asserted that there was a public perception to that effect. We have no objective evidence against which to measure that assertion, or that reported perception. There are no identified issues, policies or objectives in the proposed plan itself which objectively support a restricted discretionary status.

[15] We should perhaps pause to observe also that we think there is merit in the appellant's submission that the reuse of dwellings in this way is a benefit to the environment generally. The materials in them would otherwise be burnt or occupy space in a landfill somewhere. The use of relocatable dwellings could be said to contribute to the sustainable management of physical and natural resources in terms of s5. It can also contribute to the s5 purpose by enabling people and communities to provide for their social and economic well-being, in the sense that we were told that a relocated dwelling, as a rough rule of thumb, is usually about one third cheaper than a comparable in situ built house.

[16] The fact that there have not been any identifiable problems with relocated houses for some years is, we acknowledge, open to two interpretations. The first is that there is not really a problem at all. The second is that the present restricted discretionary regime prevents problems arising. The Council inclines to the second, and points to it as a justification for continuing as it is. In that regard, the proposed Rules are, effectively, a roll-over of the provisions in the transitional [and pre-RMA] plans in the District.

[17] But the context has changed, post-RMA. The Council has at least an evidential burden of justifying its proposed Rules in terms of predictable and identifiable effects, rather than the prophylactic lists of authorised uses in earlier schemes.

[18] Here, we see nothing in terms of building safety that meaningfully differentiates relocatable from in situ built houses. All relevant issues can equally be dealt with under the Building Act 1991. Equally, now that the concentrated movement of big numbers of relocatable houses into, out of, and within the District has ceased, we have heard nothing that indicates there is a meaningful difference between the two categories in terms of identifiable effects on neighbourhood amenities. We note that the explanation to Policy 7.2.1 states that '...buildings themselves are of a varied design'. We incline to the view that the Council is struggling to support its position because it has somewhat over-focussed on an issue that is 'yesterday's problem'.

[19] We think it must follow from that conclusion that the proposed restricted discretionary Rule really cannot be justified on any of the relevant statutory criteria, summarised in *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481, 484 as requiring 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 appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan'.*

Appropriate activity status

[20] We are conscious of the desirability of letting local people decide, within the parameters of the law, what they wish to see in their local planning documents. That said, the statutory criteria must be satisfied, and there is advantage in a body such as the Court, with no preconceptions at all, being able to look afresh at an issue and to ask whether there really is a problem that needs attention. There is no evidence here that there is a problem with relocated houses that is different in kind from those which might arise with in situ built houses. That leads inevitably to the question of whether, therefore, there is any justification for giving them

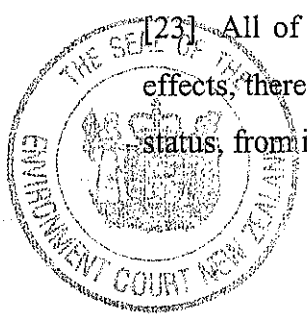
different planning status. Put another way, that leads to the conclusion that in terms of the *Nugent* tests, the proposed Rule is not necessary to achieve the purpose of the Act, does not assist the territorial authority to carry out its functions, and cannot be an appropriate means of carrying out that function. There is no visible link between the proposed Rule and the objectives and policies of the proposed plan. The only justification we can see for that is that possibly the problems of the two types of housing might be different in degree, to the extent that different standards, and possibly conditions, might be justifiable to manage any identifiably different effects.

[21] We can see no justification for conditions which control the finished appearance of the building. The Council's controls should be neutral about that aspect and, height, bulk and similar issues aside, there is no means of control of the appearance of an in situ built house. We do note that many new subdivision developments frequently impose covenants prohibiting the use of second-hand materials. That is a matter of private contract on which we offer no view. But local authority planners are not necessarily good arbiters of taste.

[22] Nor does the Council have ability to impose a bond for compliance with standards on the owner of an in situ built house. Of the 19 relocated houses on the site visit list which are definitely in place, all were reportedly subject to a bond. The amounts are noted as varying between $3,000 and $40,000. There is no explanation why the amounts varied so widely, but the information on the list is very cryptic and not intended as an explanation. A bond can only be imposed as a condition under s108 [or, post 1 August 2003, s108A] which would mean that the activity would have to have at least controlled status, and the building of a new house is a permitted activity. If there is no ability to impose a bond on a newly built project, there needs to be a reason, in effects management terms, to impose one on a relocation project. We have already indicated that we heard no coherent evidence pointing to such a reason. We conclude therefore that there can be no justification for imposing a bond on a relocation project, where there can be no similar requirement for a newly built project.

Result

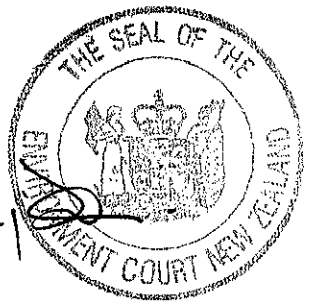
[23] All of which leads us to the view that, in the absence of identifiable differences in effects, there is no objective reason to treat relocatable housing differently, in terms of activity status, from in situ built housing. If in situ built housing is a permitted activity, then so should



be relocatable housing. We considered whether the logical consequence of this was to remove all reference to relocated housing from the plan. There are however somewhat different issues when it comes to considering appropriate standards, and the appellant did not press for the relief of complete removal originally sought. We have considered the draft standards proffered by Mr Constantine for the appellant, and have made some modifications to them. They are attached as an appendix. We have in mind the result that we should direct the Council to modify its plan to accord with what we have said, but we think it is appropriate to offer the parties the opportunity to comment on those draft standards which are of course intended to be additional to other standards applicable to housing in either zone. To that extent, this decision is an interim one.

[24] Will counsel please respond to the draft standards by 30 April 2004.

DATED at WELLINGTON this 15th day of April 2004



C J Thompson
Environment Judge

Proposed Rules: Residential Resource Area

Permitted Activity Status

1. Add a new Standard to Rule 7.3.6, as follows:

(xi) Relocatable Dwellings

(a) Any relocated building intended for use as a dwelling (excluding previously used garages and accessory buildings) must have previously been designed, built and used as a dwelling.

(b) A building inspection report shall accompany the application for a building consent. That report is to identify all reinstatement work required to the exterior of the building.

(c) All work required to reinstate the exterior of any relocated dwelling, including painting if required, shall be completed within six months of the building being delivered to the site. Reinstatement work is to include connections to all infrastructure services and closing in and ventilation of the foundations.

(d) The proposed owner of the relocated building must certify that the reinstatement work will be completed within the six month period.

Reason

Non-residential buildings in a residential area can have an adverse effect on amenity values.

Incompletely reinstated relocated buildings can have an adverse effect on the amenity values of residential areas.

Breach: discretionary (restricted) activity see Rule 7.3.3 (vii)

2. Amend Rule 7.3.3 (iii) to read as follows:

(iii) Relocatable Buildings

The relocation of a previously used building intended for use as a dwelling (excluding previously used accessory buildings or garages) that does not comply with the standards set out in Rule 7.3.6(xi) is a discretionary (restricted) activity.

Council shall restrict the exercise of its discretion to the following:

- The proposed timetable for completion of the work required to reinstate the exterior of the building and connections to services
- The design and appearance of the building following reinstatement.

Any application made under this rule will generally not be notified or served where the written approval of affected persons has been obtained.

Reason

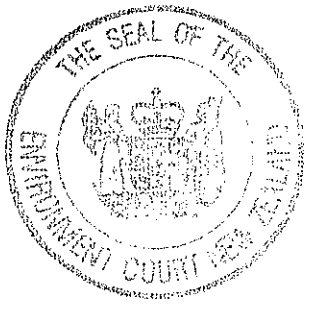
In the past Council has experienced difficulties with the completion of reinstatement works in respect of dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left on the site in an unfinished state. Consequently they can have significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a delay in completing the exterior reinstatement of a particular building is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule.

3. Add a new Rule 7.3.3 (vii) to read as follows:

(vii) Relocatable Buildings

The relocation of previously used buildings for any purpose, other than for use as a dwelling (excluding previously used accessory buildings or garages), is a discretionary (restricted) activity.

... (continue as per current rule 7.3.3(iii))



Proposed Rules: Rural Settlements Resource Area

Permitted Activity Status

1. Redraft Rule 10.3.6(i) as follows:

   (i) Residential amenity

   All activities shall comply with the standards applied also in the Residential Resource Area set out in Rule 7.3.6(iii), (iv), (v) (vii) and (xi) of this Plan.

2. Amend Rule 10.3.3(ii) to read as follows:

   (ii) Breach of Standards

   Any activity that fails to comply with any of the standards contained in Rule 10.3.6 (except for standard 7.3.6(xi), incorporated by Rule 10.3.6(i)) is a discretionary (restricted) activity.

   ...continue as per current Rule 10.3.3 (ii)

3. Amend Rule 10.3.3(iii) to read as follows:

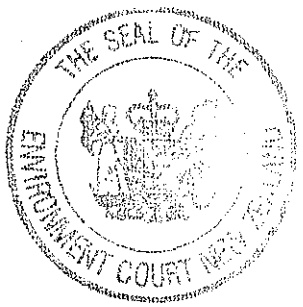
   (iii) Relocatable Buildings

   The relocation of a previously used building intended for use as a dwelling (excluding previously used accessory buildings or garages) that does not comply with standard 7.3.6(xi) (incorporated by Rule 10.3.6(i)) is a discretionary (restricted) activity.

   Council shall restrict the exercise of its discretion to the following:

   - The proposed timetable for completion of the work required to reinstate the exterior of the building and connections to services
   - The design and appearance of the building following reinstatement.

   Any application made under this rule will generally not be notified or served where the written approval of affected persons has been obtained.



Reason

In the past Council has experienced difficulties with the completion of reinstatement works in respect of dwellings relocated to new sites. These buildings sometimes require exterior upgrading and repair and may be left

on the site in an unfinished state. Consequently they can have significant adverse effect on local amenity values. Discretionary (restricted) activity status enables Council to consider whether a delay in completing the exterior reinstatement of a particular building is appropriate and impose conditions that will ensure amenity standards are maintained. Previously used accessory buildings and garages are not subject to this rule.

3. Add Rule 10.3.3 (v) to read as follows:

(v) Relocatable Buildings

The relocation of previously used buildings for any purpose, other than for use as a dwelling (excluding previously used accessory buildings or garages), is a discretionary (restricted) activity.

... (continue as per current rule 10.3.3(iii))

Palmerston North City Council v Motor Machinists Ltd

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

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

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

Held: (allowing the appeal)

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

Westfield (New Zealand) Ltd v Hamilton City Council

High Court Hamilton CIV-2003-485-000953-54 & 56
17 March 2004
Fisher J

Resource consent — Threshold for imposing more stringent district plan controls — Appeal on a question of law — Broad value judgment required — Ultimate issue matter for evaluation — No requirement to consider effects afresh — Absent specific issues Court can rely on local authority evidence — Whether conditions precedent negate the grant of resource consent — Balancing competing considerations a matter of judgment — Challenge to conditions more appropriate during resource consent process — Scope of appeals to the Environment Court — Resource Management Act 1991, ss 3, 5, 31, 32, 74, 75(1), 76, 105, 292, 293, 299.

Westfield, Kiwi and Wengate lodged appeals pursuant to s 299 of the Resource Management Act 1991 ("the RMA") against the decision of the Environment Court regarding appeals from the Hamilton City Council relating to the proposed district plan and the zoning of land in the commercial services and industrial zones which provided for intensive retail shopping malls as controlled activities.

Westfield and Kiwi alleged that the decision was wrong in law because it: (a) overestimated the legal threshold required under s 32 of the RMA before a restrictive rule could be justified; (b) failed to conduct its own inquiry into adverse effects; (c) failed to take into account the desirability of public participation in the resource consent process; and (d) misused the type of activity (ie controlled activities) as a means of controlling adverse traffic effects. They argued that retail activities in the commercial services and industrial zones should be restricted, and that unrestricted retail activity would have adverse traffic and consequential effects. They considered that provision should be made for intensive retail shopping malls as discretionary activities.

Wengate alleged that the Environment Court had no jurisdiction to reinstate a buffer zone to manage reverse sensitivity between land zoned for commercial services and neighbouring industrial properties when reinstating the commercial services zoning of the subject land, because those changes fell outside the scope of the original appeal.

Held (dismissing the appeals):

(1) When considering whether more stringent controls should be imposed on retail activities in the commercial services and industrial zones the Environment Court had to be satisfied that such a rule would be "necessary" to achieve the purpose of the RMA. While "necessary" was a relatively strong word, a broad value judgment wasrequired when applying the test under s 32 of the RMA. When assessing whether any adverse effects of providing for retail activities justified imposing more stringent controls the Court was required to consider the likelihood of such effects arising (ie as a question of degree) in the particular case before it, and was entitled to approach the matter in robust terms. The ultimate issue for the Court to determine (ie the level of likelihood of adverse effects arising in practice) was a matter of evaluation rather than being subject to a specific evidential burden or standard (see para [34].

(2) The Environment Court was under a duty to undertake a broad-based survey of the relevant activities under ss 32 and 76 of the RMA when determining whether a rule in a proposed plan would promote the sustainable management of natural and physical resources, but absent specific issues being raised by the appellants it was not required to conduct the inquiry afresh and was entitled to rely on evidence of the investigations and conclusions of the local authority (see para [40].

(3) Striking the balance between public participation in the resource consent process and avoiding the delay and expense inherent in enabling competitors to contest resource consent applications was a matter of judgment for the Environment Court when considering whether adopting a particular rule was the most appropriate means of controlling the effects of development. The Court had considered this issue and had not ignored other competing considerations which it was required to take into account under s 32(1)(c)(ii) of the RMA. Accordingly, the decision to provide for retail activity within the relevant zones as a controlled activity did not involve any point of law (see para [45]).

(4) It would normally be premature to challenge provisions in a proposed district plan on the basis that invalid conditions would result from the adoption of such provisions. Any challenge to conditions should more appropriately be made during the resource consent process. The rules in the proposed district plan enabled the local authority to include conditions of the grant of resource consent to control the effects of development on the external roading network. As a result there was nothing objectionable in a condition precedent being included on the grant of consent to address matters that would otherwise be outside the applicant's control, therefore including such conditions in relation to controlled activities would not "negate the consent" and would not as a matter of general principle be invalid. Similarly, the impact of such conditions on development by making it too expensive or uneconomic to give effect to would not render a condition invalid (see para [53]).

(5) When requested to reconsider the zoning of land on appeal, the Environment Court's jurisdiction was not limited to the specific terms of the relief sought by the notice of appeal, but extended also to the inclusion of other rules in the proposed district plan (eg the buffer zone) which

could be foreseen as being associated with such rezoning. As a result reinstatement by the Court of the buffer zone between the Wengate site and neighbouring industrial properties to manage reverse sensitivity that could otherwise adversely affect the site was not unsurprising when determining that zoning of the site should revert to commercial services, as the buffer zone had originally been included in the proposed district plan as publicly notified. Accordingly, no procedural unfairness resulted to Wengate or any other person as reinstatement of the buffer zone would have been within the reasonable contemplation of those persons who were aware of the scope of the appeal (see paras [73], [75], [76].

Cases referred to in judgment

Applefields Ltd v Christchurch City Council [2003] NZRMA 1

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

Environmental Defence Society Inc v Mangonui County Council (1987) 12 NZTPA 349

Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257 (CA)

Grampian Regional Council v City of Aberdeen (1983) P & CR 633 (HL)

Housing New Zealand Ltd v Waitakere City Council [2001] NZRMA 202 (CA)

Newbury District Council v Secretary of State for the Environment [1981] AC 578

Ngati Maru Iwi Authority v Auckland City Council (High Court, Auckland AP 18/02, 7 June 2002, Doogue J)

North Holdings Ltd v Rodney District Council (High Court, Auckland CIV 2002-404-002402, M1260-PL02, 11 September 2003, Venning J)

Northland Regional Council, Re (Environment Court, Auckland 12/99, 10 Februaery 1999, Judge Sheppard)

NZ Suncern Construction Ltd v Auckland City Council [1997] NZRMA 419

Ravensdown Growing Media Ltd v Southland Regional Council (Environment Court, Christchurch C 194/000, 5 December 2000, Judge Smith)

Residential Management Ltd v Papatoetoe City Council (Planning Tribunal , Auckland A 62/86, 29 July 1986, Judge Sheppard)

S and D McGregor v Rodney District Council (High Court, Auckland CIV 2003-485-1040, Harrison J)

Vivid Holdings Ltd, Re [1999] NZRMA 467

Williams and Purvis v Dunedin City Council (Environment Court, Christchurch C 22/02 Judge Smith)

Appeal

This was an appeal by Westfield (New Zealand) Ltd, Kiwi Property Management Ltd and Wengate Holdings Ltd, the appellants, on questions of law under s 299 of the RMA against the decision of the Environment Court which confirmed (in part) the decision of the Hamilton City

Council, the respondent, on submissions made on its proposed district plan.

C Whata and *M Baskett* for Westfield (New Zealand) Ltd
D Allan for Kiwi Property Management Ltd
S Menzies for Wengate Holdings Ltd
P Lang for the Hamilton City Council
D R Clay for National Trading Co Ltd
J Milne for Tainui Developments Ltd

FISHER J.

Introduction

[1] Most of Hamilton's retail activities are conducted in either the commercial centre or five smaller centres in the suburbs. The Hamilton City Council's proposed district plan provides for additional retail activity in the commercial services and industrial zones. The present appeals are directed to the additional retail activity proposed. The appeals are brought against a decision of the Environment Court of 27 March 2003 (A 45/03) upholding those aspects of the proposed plan.

Factual background

[2] Resource management in the city of Hamilton is currently governed by transitional and proposed district plans. The proposed district plan was notified in October 1999 and amended by council decisions in October 2001. It was then the subject of further council decisions of 29 January 2002. From the proposed plan as amended, the appellants took references to the Environment Court. With minor qualifications the Environment Court endorsed the proposed plan as amended. From the Environment Court decision the appellants have appealed to this Court alleging legal error on the Environment Court's part.

[3] Under the proposed plan, retailing is contemplated in four zones– central city, suburban centre, commercial services and industrial. Retailing is also possible in new growth areas. In contention in the present appeals are the commercial services and industrial zones.

[4] Commercial services zones are found on the fringe of the central city and in several locations elsewhere. Retailing there is intended to involve primarily vehicle-orientated activities including large-format shops, traffic-orientated services and outdoor retailing. With minor exceptions the zone restricts retailing to a gross leasable floor area of not less than 400 m^2. Any retail activity with an individual occupancy less than 400 m^2 is a controlled activity where it is part of an integrated development with a gross floor area greater than 5000 m^2 and where any occupancy of less than 400 m^2 faces onto an internal pedestrian or parking area and not onto a road. Any retail activity that generates traffic over a certain threshold becomes a controlled activity. The significance of designating a retail activity a controlled activity is that it provides the council with the power to impose conditions upon retail use of the land even though not permitting outright prohibition of such activity.

[5] In an industrial zone retail activities are restricted to a gross leasable floor area of less than 150 m^2 or greater than 1000 m^2, one retail

activity per site, and a minimum net site area of 1000 m^2. As with the commercial services zone, traffic consequences are controlled by making retail activities that generate traffic over a certain threshold controlled activities.

[6] Kiwi Property Management Ltd ("Kiwi") and Westfield (New Zealand) Ltd ("Westfield") argue that provision for retail activity in the commercial services and industrial zones ought to be curtailed in order to protect the viability of existing shopping centres in the city centre and Chartwell areas. They further argue that unrestricted retail activity in those zones would have adverse traffic effects. A particular focus was that in those zones, intensive retail shopping malls should be "discretionary activities", not "controlled activities".

Legislative background

[7] Section 74 of the Resource Management Act 1991 required the Hamilton City Council to prepare a district plan in accordance with ss 31 and 32 and Part II of the Act. Section 31 prescribes the council's functions in giving effect to the Act in the district plan. The functions include two of particular significance (all statutory references as they stood prior to an amendment in 2003):

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
> (b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances.

[8] Of the provisions contained in Part II, s 5 needs to be quoted in full:

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[9] Finally, s 32 (1) sets out the council's duty in the following terms:

> **32. Duties to consider alternatives, assess benefits and costs, etc** — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —

(a) Have regard to —
  (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
(b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —
  (i) Is necessary in achieving the purpose of this Act; and
  (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

Environment Court decision

[10] As mentioned, on appeal from the Hamilton City Council decisions Kiwi and Westfield argued that in commercial services and industrial zones intensive retail shopping malls should be discretionary as opposed to controlled. Two grounds were advanced. One was that such activity would have adverse effects on the transport infrastructure of Hamilton. The other was that there would be consequential redistribution effects upon existing retail activities elsewhere in the city.

[11] As to the transport infrastructure, a traffic expert called for the appellants, Mr Tuohey, considered that developments generating traffic movement beyond a certain threshold ought to be a discretionary activity in the commercial services zone. Contrary evidence was given by equivalent experts called by the council and Tainui Developments Ltd ("Tainui"). After traversing the merits of this evidence the Environment Court concluded that it preferred the latter witnesses. It considered that the potential for adverse traffic effects could be adequately controlled by making developments of this nature a controlled activity. The Court did not agree that imposing conditions adequate to control the potential for adverse traffic effects would invalidate any consent given.

[12] The second issue concerned consequential redistribution effects. The Court noted that s 74(3) precluded paying regard to trade competition per se but accepted that it could have regard to consequential social and economic effects. On the other hand, the Court considered that in the light of s 32 (1)(c) a rule or restriction could not be justified unless it was "necessary" in order to achieve the purposes of the Act.

[13] As to consequential effects, there was a similar conflict of evidence. The Court was critical of the evidence of Mr Tansley and

Mr Akehurst who predicted major adverse impacts on existing centres if new developments proceeded elsewhere. The Court preferred the contrary evidence of Messrs Donnelly, Speer, Keane and Warren. In particular, the Court found that the retail premises permitted by the proposed plan "may have some impact on trade at the existing centres but . . . the impact will not be sufficient to generate flow-on consequential effects" (para [148]). The Court accepted the evidence of Mr Speer that a "Chartwell-type development", ie an intensive retail shopping mall, in the commercial services or industrial zones was "more theoretical than real". The Court went on to say at para [150]:

> Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by Westfield and Kiwi and to a lesser extent Wengate, are not necessary to achieve sustainable management.

[14] On a separate issue, the Court noted that when the proposed plan had originally provided for a commercial services zone covering the Wengate Holdings Ltd ("Wengate") site it had required a buffer strip to manage reverse sensitivity. Consequent upon a council decision to rezone that area industrial, the special buffer had been deleted. In its 2002 resolutions the council agreed to support reversion to commercial services zoning for the site but made no overt reference to the buffer. A council witness before the Environment Court suggested that the buffer be reinstated. The Environment Court agreed with that suggestion and reimposed the buffer.

[15] From those decisions Kiwi, Westfield and Wengate now appeal.

Appeal principles

[16] Pursuant to s 299 of the Act, a party to proceedings before the Environment Court may appeal to the High Court only "on a point of law". The unsuccessful attempts of appellants to enlarge the jurisdiction has often been commented upon: see, for example, *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419; and *S and D McGregor v Rodney District Council* (High Court, Auckland, CIV-2003-485-1040, 24 February 2004, Harrison J) at para [1].

[17] Conventional points of law are relatively easy to identify. More complex is the relationship between law and fact. The only possible challenge to the original Court's finding as to a primary fact is that there had been no evidence to support it before the Court. The only possible challenge with respect to inferences is that on the primary facts found or accepted by the Court at first instance, the inference urged by the appellant was the only reasonably possible one. In these matters the Environment Court should be treated with special respect in its approach to matters lying within its particular areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 at p 353. As Harrison J recently pointed out in *McGregor v Rodney District Council*, Parliament has circumscribed rights of appeal from the Environment Court for the obvious reason that the Judges of that Court

are better equipped to address the merits of their determinations on subjects within their particular sphere of expertise.

Kiwi and Westfield appeals

[18] In this Court Kiwi and Westfield allege essentially four errors of law. They submit that the Environment Court:

(a) Overestimated the legal threshold required before a restrictive rule can be justified;
(b) Failed to conduct its own overarching inquiry into adverse effects;
(c) Failed to take into account the desirability of public participation; and
(d) Misused the controlled activity status as a means of controlling adverse traffic effects.

[19] In addition Mr Allan argued that the Environment Court "failed to take into consideration when assessing the potential for flow-on consequential effects to arise . . . the full range of activities provided for under the zoning provisions being promoted by the council including in particular the potential for a more intensive retail development than large format retail (characterised . . . as a 'Chartwell-type development')". I could not regard this as a question of law, quite apart from the fact that it was open to the Court to express, as it did, agreement with the evidence that "a Chartwell type development is more theoretical than real". Other issues originally flagged by the appellants, such as failure to consider whether controlled activity status was the most appropriate means, were not pursued at the hearing in this Court.

[20] The appeal was opposed by the Hamilton City Council as respondent along with two interested parties with land potentially affected by any change to the proposed plan, Tainui and National Trading Co Ltd ("National Trading").

[21] It will be convenient to proceed through the four identified legal issues in turn.

(a) Legal threshold required before a restrictive rule is justified

[22] Before the Environment Court Mr Whata submitted that his client merely had to show, on the balance of probabilities, that the retail impacts flowing from the liberal zoning proposed *may* be of such a scale as to adversely affect the function of existing centres, and that it was for the council and other supporting parties to show that impacts sufficient to generate adverse effects would never occur or were so remote as to be fanciful or so small as to be acceptable. He submitted that it was not sufficient for the council to simply assert that, on the balance of probabilities, adverse effects were unlikely to occur.

[23] The Environment Court did not accept that submission. It held that in accordance with s 32(1)(c) the council and the Court had to be satisfied that any rule was *necessary* in order to achieve the purpose of the Act before a restriction would be justified. The Court concluded:

> [83] We are required, among other things, under section 32(1)(a)(i) of the Act to have regard to the extent to which any plan provision is necessary in achieving the purpose of the Act. In our view, therefore, we are required to consider carefully the provisions of section 5 and the relevant provisions of Part II of the Act as they apply to the circumstances of this case. We are then, in accordance with section 32(1)(c)(i) and (ii) to determine on the evidence whether the restrictive provisions proposed are:
>
> (i) necessary in achieving the purpose of the Act; and
> (ii) the most appropriate means, having regard to efficiency and effectiveness relative to other means.
>
> [84] We are required to make a judgment in accordance with the wording of the statute. Whether regulatory control is necessary, will depend on the circumstances of each and every case. To impose on ourselves a rigid prescriptive rule, in addition to the statutory directions, would contain [sic] flexibility in the exercise of our judgment. What is required is a factually realistic appraisal in accordance with the Act, not to be circumscribed by unnecessary refinements.

[24] The Court described the word "necessary" as used in s 32(1) as "a relatively strong word" defined in the *Concise Oxford Dictionary* as "requiring to be done, achieved, etc; requisite; essential". It referred to statements from various authorities suggesting that the threshold is a high one:

- . . . evidence may show such a large adverse effect on people and communities that they are disabled from providing for themselves. [*Baker Boys v Christchurch City Council* [1998] NZRMA 433].
- we do accept that the decisions cited by counsel for Westfield support a general proposition that potentially high adverse effects on people and communities, or evidence of unacceptable externalities, should be taken into account in settling the provisions of district plans about new retailing activities. [*St Lukes Group Ltd v Auckland City Council* (Environment Court, Auckland A 132/01, 3 December 2001, Judge Sheppard).]
- The proposal would have "a serious and irreversible detrimental effect on the Upper Hutt CBD" which would be "gutted" with curtain rising on a "tumble weed street scene" [*Westfield (NZ) Ltd v Upper Hutt City Council* (Environment Court, Wellington W 44/01, 23 May 2001, Judge Treadwell).]

[25] In this Court the appellants submitted that in deciding whether more restrictive controls over retail activity were justified, the Environment Court had set the threshold too high. The first argument in support was that the dictionary definition of "necessary" adopted by the Environment Court set too stringent a standard. The appellants rightly pointed out by reference to authority that in s 32 "necessary" is not meant to indicate essential in any absolute sense but rather involves a value judgment. As was said by Cooke P in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at p 260 in this context, "'necessary' is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".

[26] Clearly there would have been an error of law if the Environment Court had refused to consider more stringent controls over

retailing in the affected zones unless unavoidable in an absolute sense. However, I do not read the judgment as indicating that any such approach was taken. As s 5 of the Act makes clear, choosing the regime that will best secure the optimum use of land is inescapably an exercise in very broad value judgments. These range across such intangible considerations as safety, health, and the social, economic, and cultural welfare of present and future generations. On a full reading of the Environment Court's decision there could be no suggestion that it approached its task in any other way. There is not the slightest suggestion that the Court would have refused more stringent controls unless shown to be necessary in the sense that oxygen is essential for the creation of water.

[27] It is true that at one point the Court referred to the *Concise Oxford Dictionary* definition "requiring to be done, achieved, etc; requisite; essential" but in my view the matter is not to be approached by dissecting individual words or phrases in isolation from the rest of the judgment. The judgment is replete with other expressions and assessments demonstrating that the necessity for more stringent controls was approached as a matter of broad degree. The Court described the word "necessary" as merely a "relatively" strong word. It also cited passages from authorities clearly pointing to broad value judgments, for example "a large adverse effect on people" and "potentially high adverse effects". At no point does the Court's evaluation of evidence suggest that the appellants were required to show that more stringent controls were "necessary" in any absolute sense.

[28] A related submission was that the Court erred legally in its finding that "Having found that the proposed provisions as now supported by the Council are unlikely to give rise to adverse traffic or adverse consequential effects, it follows that in our view, the changes to the proposed plan as advocated for by [the appellant] are not necessary to achieve sustainable management". The appellants contended that the Court ought to have turned its mind to the possibility that, even though unlikely, the possibility of adverse traffic effects or adverse consequential effects still warranted greater control. Mr Allan pointed out that pursuant to s 75(1), a district plan is to make provision for certain matters set out in Part II of the Second Schedule to the Act. Clause 1 of Part II requires that provision be made for any matter relating to the use of land including the control of "Any actual or potential effects of any use of land . . . " (cl 1(a)).

[29] Clearly Mr Allan was right to say that potential effects are to be taken into account as well as actual effects. That is inherent in the prospective nature of a district plan. Furthermore, "effect" is defined in s 3 of the Act to include not only potential effects of high probability but "any potential effect of low probability which has a high potential impact". The Environment Court concluded that the proposed provisions were unlikely to give rise to adverse traffic or consequential effects (para [150]). Mr Allan argued that it was illogical to proceed from that conclusion to the further conclusion that the changes to the proposed plan advocated by Westfield and Kiwi were unnecessary.

[30] I agree that a conclusion that adverse effects were unlikely did not lead inexorably to the conclusion that more stringent controls were unjustified. There remained an evaluative step between the two. The Court had to decide whether the level of likelihood, necessarily a question of degree, warranted more stringent controls.

[31] Three sentences before referring to the conclusion that adverse effects were "unlikely" the Court had said at para [148]:

> We therefore find that the retail premises of the plan as now supported by Council may have some impact on trade at the existing centres but that the impact will not be sufficient to generate flow-on consequential effects.

That in turn must be read in the context of the Court's earlier recognition that pursuant to s 74(3) the Court was not to have regard to trade competition (para [72]). Consequential effects were limited to flow-on effects as a result of adverse effects on trade competition.

[32] Reading paras [148] and [150] together, therefore, it becomes clear that the Court regarded the possibility of relevant adverse effects as minimal, if not negligible. Paragraph [148] is expressed as an unqualified negative. Para [150] changes the language to "unlikely". In relation to traffic, the Court had already accepted the conclusion of Mr Bielby that the Hamilton city roading network "will be able to safely and efficiently cope with the volumes and patterns of traffic that will result from additional commercial development in North Te Rapa and in industrial areas" (paras [62] and [63]). So it was after expressing unqualified negatives in relation to both traffic and consequential effects that the Court went on to refer to such effects as "unlikely" and its conclusion that the changes advocated for by the appellants were unnecessary.

[33] On appeal there is always a temptation to pick upon each word and phrase in the judgment appealed from and subject it to microscopic examination. What really matters is the underlying reasoning. Given the time which the Court devoted to the reasons for its ultimate conclusion that there would not be adverse effects, and the different wording used elsewhere, I can attach no significance to the use of the word "unlikely" in para [150].

[34] A final point is that when predicting future events in an area as complex as urban resource management, ultimate conclusions could never be anything more than opinions. When speaking of the future, the distinction between an absolute negative and the conclusion that something is "unlikely" is somewhat arbitrary. It is difficult to exclude most future events in a theoretical sense, at least events of the kind now under consideration. Of course the appellants are entitled to argue that provision ought to be made for potential effects, particularly those which have a high potential impact. But the Court was entitled to approach the matter in robust terms by effectively concluding that adverse consequences were so unlikely that further controls were not necessary. In my view that is what it did.

[35] On the same topic the appellants criticised the way in which the Court had approached the onus of proof. Mr Allan submitted that "the issue before the Environment Court was whether *on the balance of probabilities* implementation of the Council's proposed provisions *could*

give rise to consequential effects of significance" (emphasis added). In my view there are two difficulties in this argument. One is that it is a contradiction in terms to say that the Court was required to determine "on the balance of probabilities" whether provisions "could" give rise to consequential effects. The possibility that something "could" happen is clearly a lower threshold than the probability that it will occur. The tests are mutually exclusive.

[36] But more importantly it involves a confusion between two different concepts. Doogue J referred to this in the different context of applications under s 105 in *Ngati Maru Iwi Authority v Auckland City Council* (High Court, Auckland AP 18/02, 7 June 2002). In all applications under the Resource Management Act 1991 a distinction is to be drawn between a burden of proof relating to the facts on the one hand and ultimate issues as a matter of evaluation in accordance with the law on the other.

[37] I agree with Mr Whata that in the present context the two questions are "is there a risk?" and "does it need to be controlled?". What was required of the appellants was sufficient by way of evidence or argument to make the possibility of an adverse effect a live issue. Once there was a foundation for considering that possibility, it was for the Court to determine the level of likelihood as a question of fact and then, in the light of such conclusions, whether particular provisions were justified in the plan. But I can see no indication that the Environment Court did anything else.

[38] Mr Allan further submitted that it is not a requirement for a rule to be "necessary" for the purposes of s 32(1)(c) if the rule is supportable by reference to other resource management criteria. He pointed out that pursuant to s 75(1)(d) the district plan is to state "The methods . . . to be used to implement the policies, including any rules" which he took to indicate that rules would be required whether or not the "necessary" test is satisfied. In my view the word "any" in this context envisages the possibility that there will be no rules unless the rule is necessary in terms of s 32(1)(c)(i). Similarly, I accept that in making a rule a territorial authority is required by s 76(3) to have regard to actual or potential effects and that rules may provide for permitted activities as well as other forms of activities. But I do not take it from those provisions that all activities are prohibited unless a rule can be found to justify them. In our country citizens are free to do whatever they like so long as there is no law prohibiting it. Rules in district plans are no different in that respect. That is the reason for the principle established in s 32(1)(c)(i) that there is to be no rule unless it is *necessary* in achieving the purpose of the Act. Long may it continue.

(b) Failure to conduct own inquiry

[39] The appellants submitted that the Environment Court erred in considering only the question whether more restrictive rules were "necessary" for the purposes of s 32(1)(c)(i). In their submission the Court ought to have gone on to have regard to all the other factors adverted to in s 32(1)(a) and, for this purpose, to carry out the evaluation required under s 32(1)(b).

[40] I agree that in accordance with its duties under ss 32 and 76 the Court was required to conduct a broadly based survey of considerations relevant to the proposed retailing activities. It is also true that hearings in the Environment Court are rehearings conducted de novo. However the Court does not have to ignore the fact that council officers and the council had already covered the same ground. The evidence the council broadly conveyed to the Court regarding the council's own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.

(c) Failure to consider desirability of public participation

[41] Mr Whata submitted that the ability of competitors to oppose development by means of contesting applications for resource consent was a relevant factor for the purposes of s 32(1)(c)(ii) and that this had been overlooked by the Environment Court. By allowing the extended retail activities as a controlled activity the council was denying other members of the public the opportunity to participate. Others could have mounted an opposition if such activities had been made discretionary and therefore subject to public notification.

[42] The Environment Court had itself observed at para [152]) that the proposed plan would enable retail development unrestrained from the ability of competitors to oppose by contesting applications for resource consent. The Court pointed out that by this means the considerable delay and expense to which parties and the council would be involved could be avoided. The Court considered that a factor which fell within s 32(1)(c)(ii).

[43] Mr Whata contrasted this with the view expressed in the High Court in *North Holdings Ltd v Rodney District Council* (High Court, Auckland CIV-2002-404-002402 M1260-PL02, 11 September 2003, Venning J) at paras [25], [35] and [36] that in general the resource management process is to be public and participatory and that at least in the case before Venning J, the public interest in achieving sound resource management decisions was of greater importance than the prompt processing of applications.

[44] I respectfully agree that as a matter of general policy the resource management process is intended to be public and participatory. I see no reason to question the priority which that consideration was given over expedition in the *North Holdings* case. Of course, principles of this nature involve a value judgment to be exercised in relation to the content of each district plan in each case. Otherwise there would never be permitted or controlled activities in district plans.

[45] In the present case the council and the Environment Court considered that making intensive retail activity a controlled activity in the zones in question strikes the right balance between public participation and other resource management values. That was clearly a judgment for the council and Environment Court to make. In my view it does not

involve any point of law. The Environment Court did not ignore the many competing considerations which impact upon a decision of this nature. In para [152] the Court pointed to:

> extensive consultation and the commissioning of reports, both from Council officers and consultants. Following that process, the Council considered that to impose restrictions was not necessary for the control of consequential effects. It would have instead had the effect of inhibiting trade competition. The plan provisions as now espoused by Council enable retail development within the city of Hamilton unrestrained from the ability of competitors to oppose development by means of contesting applications for resource consents. A practice, the evidence showed, that in the past caused considerable delays, at expense not only to the parties involved, but also to Council.

[46] Clearly the Environment Court has considered the issue of public opposition. In this case it preferred the equally valid and competing consideration that the rule should be the most appropriate means of exercising the rule-making function having regard to its efficiency and effectiveness relative to other means (s 32(1)(c)(ii)). That was a choice the Court was entitled to make.

(d) Misuse of controlled activity status as the means of controlling adverse traffic effects

[47] The fourth ground of appeal to this Court was that the power to impose conditions pursuant to the classification of retail activities as controlled activities was not a valid means of avoiding adverse traffic effects in that the conditions which would need to be imposed would nullify the consents ostensibly given. The argument rests on the assumption that the conditions would be either so onerous as to remove the substance of the consent or would be dependent upon the activities of third parties over whom the applicant for consent would have no control.

[48] The performance outcomes for the relevant activities are set out in rule 4.4.5(c) of the proposed district plan in relation to commercial services zones and rule 4.5.5(c) in relation to industrial zones. In both cases the council can impose conditions when consenting to a controlled activity. The conditions can relate to traffic requirements within the applicant's immediate control in that they relate to car parking, access to and from the adjacent road network, access to major arterial roads and internal vehicular layout. But equally the rules provide for the conditions to relate to the impact upon the external roading network with respect to access, traffic volumes and traffic capacity (see traffic engineering study required under rules 4.4.3(e) or (f) and 4.5.3(f) or (g)).

[49] Rules 4.4.3(f) and 4.5.3(g) also provide that where any activity requires preparation of a traffic impact study the provisions of rule 6.4.5 relating to roading contributions is to apply. Rule 6.4.5(a)(iii) provides that in exercising any discretion available under rule 6.1.4(e) (no doubt intending to refer to (d), the council may require the provision of new roads, the upgrading of existing roads, or the payment of a levy as a condition. Rule 6.1.4(d)(ii) authorises the imposition of such conditions in

a number of circumstances including a commercial development where the value of the work exceeds $250,000.

[50] A distinctive characteristic of a controlled activity is, of course, that the council may not decline consent to a proposed activity; it can merely impose appropriate conditions. The appellant's argument is that the control necessary to avoid unacceptable adverse traffic effects requires that the council be given powers which extend beyond the mere imposition of conditions upon a consent that must be given.

[51] The Environment Court dealt with this issue in the following way:

> [64] It was suggested by some counsel that consent conditions imposed under controlled activity status may well, from a legal point of view, negate the consent and accordingly be illegal. In particular, counsel for Kiwi and Wengate submitted that some conditions, which might otherwise be thought desirable and necessary, might not be able to be imposed on a controlled activity because to do so, would result in an applicant being required to carry out work of such a scale that the consent could not be realistically exercised.
> [65] It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an appellant has to pay for implementing a resource consent in certain circumstances.
> [66] It was further argued, that any condition arising out of the controlled activity status on traffic matters, may well require a third party, such as Transit New Zealand, to be involved. This may well be so. However we do not consider a condition precedent to any retail activity commencing, and involving a third party such as Transit New Zealand Limited to be invalid.
> [67] Counsel also raised the issue, of the ability of the Council to impose conditions on one developer effectively to take account of cumulative traffic effects arising from a series of developments. However, in our view, this does not give rise to any legal difficulty either. Any developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. A developer will be required to ensure that the traffic impacts of the proposed development are able to be appropriately accommodated by the roading network. Both Mr Bielby and Mr Winter were satisfied that the roading network, given the provisions in the proposed plan as espoused by the Council's latest position, could adequately cope with future development.
> [68] As pointed out by Mr Cooper the concerns raised by Kiwi and Westfield on traffic issues would be met by making retailing activities, restricted discretionary activities, with the matters over which the Council's discretion is reserved being restricted to traffic related matters. However, having regard to the evidence of Mr Bielby, and Mr Winter, which we prefer to the evidence of Mr Tuohey, and where it conflicts, with Mr Harries' testimony, we do not consider it necessary to amend the provisions to restricted discretionary activity status.

[52] As a preliminary point Mr Allan argued that although the rules clearly provided for conditions relating to internal features of the development site, it was not clear that the council would have the power to impose conditions relating to impact on traffic flows exterior to the

appellants's site. Mr Allan submitted that although the exterior matters were clearly included in the "traffic impact study" required in such circumstances, it did not follow that the council had the power to impose conditions relating to such matters. I accept the response of Mr Lang and Mr Milne that the rules do contain the power to impose positive conditions arising out of the needs demonstrated in the traffic impact study. By virtue of the power to require "roading contributions" in terms of rule 6.4.5, the council gains access to the incidental powers to require the provision of new roads, or the upgrading of existing roads, as alternatives to the payment of levies simpliciter.

[53] The appellants' principal argument, however, was that any conditions imposed in that respect would or might be legally invalid since the appellants would be powerless to bring about the requisite changes in roads on property beyond their own control. This lack of power was said to "negate the consent". The appellants further pointed out that the approval of the roading authorities, whether the council or Transit New Zealand, would place compliance with the condition beyond the control of the appellants.

[54] I agree that the power to impose conditions for resource management consent is not unfettered. The conditions must be for a resource management purpose, relate to the development in question, and not be so unreasonable that Parliament could not have had them within contemplation: see, for example, *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[55] Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance. A classic example was consent to erect additional dwellings subject to a condition requiring access via a 4.8 m wide strip when access to the applicant's property was in fact possible only through an existing strip with a width of only 3.7 m: *Residential Management Ltd v Papatoetoe City Council* (Planning Tribunal, Auckland A 62/86, 29 July 1986, Judge Sheppard); and see further *Ravensdown Growing Media Ltd v Southland Regional Council* (Environment Court, Christchurch C 194/00, 5 December 2000, Judge Smith).

[56] On the other hand, a condition precedent which defers the opportunity for the applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: *Grampian Regional Council v City of Aberdeen* (1983) P & CR 633 at 636 (HL).

[57] In the present case the Appellants' main argument appears to be that the district plan contains invalid or unacceptable rules in that adverse traffic effects could be addressed only by imposing invalid conditions. Mr Allan submitted that "the Court has conflated the general validity of the content of a resource consent condition and whether or not, in the context of a particular proposal, that condition practically negates the

consent, is impractical to fulfil, or frustrates the consent". Mr Whata acknowledged that, as in the case of *Grampian Regional Council*, "it may be appropriate to impose a condition that requirps significant works to be undertaken prior to the commencement of the consented activity" but went on to submit that "This is no more than a statement about the validity of conditions precedent to carrying out an activity . . . it is quite another matter to adopt as a method in a district plan, control of all traffic effects by a way of controlled activity status and the imposition of conditions precedent that may blight an otherwise legitimate development".

[58] Wherever there is power to impose conditions there must be the potential for the territorial authority in question to impose invalid conditions. In the normal course any challenge to the conditions must await the specific case in question. It would normally be premature to challenge the district plan itself on the basis that the imposition of invalid conditions under it can be foreseen as a possibility.

[59] Of course it would be different if it could be postulated that consents could not be given to certain permitted activities without the imposition of invalid conditions. But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the appellants, it would be impossible for the Hamilton City Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in *Grampian*, namely that until a nearby arterial route was increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the appellants to contribute to the off-site roading development.

[60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed– see *Grampian* at p 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the council will have the power to impose valid conditions of the kind in question in this case.

[61] Mr Allan went on to submit that whether the potential for adverse traffic effects could be met by an appropriate condition, with the associated possibility that the further work or contribution required might make the development too expensive, would be a matter of fact and degree to be determined in each particular case. He submitted:

> It will be in part a function of the relationship between the scale of the work and expense required by a condition and the scale and nature of the activity for which consent has been sought. An activity which is of a relatively modest scale but which involves the generation of additional (cumulative) traffic effects that, given the traffic conditions at the time, require significant

works on the roading network, may in practice be rendered uneconomic by those works and effectively be rendered incapable of being carried out.

[62] I would not have thought that the imposition of a condition that would make a development uneconomic could normally qualify as incapable of performance for invalidity purposes. But even if that were so, the invalidity would attach to the particular condition in question, not to the district plan itself. It cannot be postulated that merely because a power could be used in an invalid manner, creation of the power itself is invalid.

[63] The last argument was developed by both Mr Allan and Mr Whata in relation to the hapless small developer who finds that, due to large developments which have already used up the remaining capacity of the surrounding roading network, the small developer's proposal requires a roading upgrade which is beyond the economic capacity of the smaller developer. Mr Whata coupled that with the need for opportunity for public opposition to the developments that had preceded it.

[64] I agree with the Environment Court that a developer has to tailor his or her development to the environment as it exists at the time consent for the development is sought. This applies to developments and activities in many contexts other than traffic effects. I can see its relevance as an argument in support of public notification as one of the relevant values. But it could not be elevated to the notion that any condition required at any given time in relation to any particular development might be invalid simply because the developer in question happens to take adverse traffic effects over a threshold beyond which an expensive upgrade is required.

[65] I have already referred to the opportunity for public participation as merely a number of the competing values which impact upon the way in which the district plan was drafted. The choice between those competing values was eminently one for the Environment Court. Similarly the question whether controlled activity status for retail activities of this sort was the best way of addressing the potential for adverse traffic effects is not a question of law. It was a resource management question for the Environment Court alone.

[66] My conclusion is that the fourth and final argument on the appeals by Kiwi and Westfield fails.

The Wengate appeal

[67] The Wengate site was zoned commercial services under the proposed plan as originally notified. In rule 4.4.3 (g) the plan provided for a special buffer zone between buildings on the Wengate site and adjacent industrial properties. The buffer was imposed to manage reverse sensitivity which might otherwise have impacted upon the Wengate site.

[68] When the Wengate site was rezoned industrial by the council decision of October 2001, the special buffer zone relating to the Wengate site was deleted. In its subsequent 2002 decision the council agreed to support reversion to the original commiercial services zoning for the Wengate site but without overt reference to the associated buffer zone. The Environment Court reinstated the buffer zone. It did so on evidence from the council which the Court described in the following terms:

> [160] Mr Harkness also pointed out that the proposed plan as notified contained rule 4.4.3(g)– Special Buffer– Te Kowhai– to manage reverse sensitivity concerns for the Wengate site. This rule was deleted by Council when the site was to be zoned as Industrial. He suggested it be reinstated– a suggestion we agree with.

[69] On appeal to this Court, Mr Menzies submitted for Wengate that the Environment Court lacked the jurisdiction to reinstate the buffer zone. He submitted that the question of a buffer zone was not the subject of any reference before the Environment Court, and that to rule on an issue not referred to the Environment Court was an error of law.

[70] Mr Menzies pointed to a number of decisions in which the Environment Court accepted that it could not make changes to a plan where those changes were outside the scope of the reference to it and could not fit within the criteria in ss 292 and 293 of the Act. They included *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1; *Williams and Purvis v Dunedin City Council* (Environment Court, Christchurch C22/02, 21 February 2002, Judge Smith); *Re an application by Northland Regional Council* (Environment Court, Auckland A 12/99, 10 February 1999, Judge Sheppard); and *Re Vivid Holdings Ltd* [1999] NZRMA 467.

[71] Wengate's challenge to the Environment Court imposition of the buffer zone is based solely upon lack of jurisdiction. Mr Menzies submitted that the Environment Court was limited in its jurisdiction to the specific references before the Environment Court. The only reference before the Environment Court relevantly touching upon the Wengate land was the reference emanating from Wengate itself. Before the Environment Court Wengate merely sought the endorsement of the council's latest position that the commercial services zone should extend to the Wengate site. It did not ask that in confirming a commercial services zoning for the Wengate site the Environment Court should reinstate the original buffer zone. Mr Menzies submitted that since the Environment Court's jurisdiction was limited to the matters specifically brought before it, the Court had acted beyond its jurisdiction. He submitted that this constituted an appealable error of law.

[72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams* and *Purvis*, and *Vivid*.

[73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

[74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed

changes would *not* have been within the reasonable contemplation of those who saw the scope of the original reference.

[75] In the present case, it is reasonable to infer that the buffer zone was originally introduced to address environmental effects between industrial zone land and commercial services zone land. That was relevant at a time when the Wengate site, with a commercial services zoning, was across the road from industrially zoned land. The concept of a buffer zone to address interactions between industrial and commercial services zones became redundant when the zoning of the Wengate site was changed to industrial. This changed back again, however, when Wengate successfully pursued a reversion to commercial services zoning. It is unsurprising that on accepting the Wengate position that its land should have the commercial services zoning reinstated, the Environment Court would reinstate the buffer zone that had originally been associated with that form of zoning.

[76] I cannot see that it was not reasonably foreseeable that in reinstating the original commercial services zoning the Environment Court would also reinstate the buffer zone that had been associated with it. It would be odd if an appellant could gain the zoning it sought without the restrictions which one would naturally tend to associate with zoning of that nature. As Mr Lang pointed out, Wengate's reference might have sought to omit not only rule 4.4.3(g), which imposed a buffer zone, but other rules governing activities within the commercial services zone. Taken to its logical extreme, if Wengate's argument regarding the jurisdictional limitations stemming from the scope of the reference were correct, the jurisdiction of the Environment Court would have been limited to reinstatement of the zoning without any of those associated rules.

[77] In my view the Environment Court must be taken to have had the jurisdiction to agree to the requested zoning subject to imposition of other rules foreseeably associated with such zoning. A buffer zone was in that category. It follows that the Environment Court had jurisdiction to reinstate the buffer zone.

[78] The point of law brought before this Court by Wengate was limited to the question whether the Environment Court erred in law in its assumption of jurisdiction to reinstate rule 4.4.3(g) relating to the buffer zone. I have already decided that question against Wengate. However, I note in passing that the only evidence before the Environment Court on that subject was that of Mr Harkness. The dimensions of the buffer zone suggested in his evidence were more modest than those imposed. He suggested that 5 m may well have been sufficient for the width of the buffer zone as distinct from the 10 m specified in the original buffer zone and reinstated by the Environment Court. Further discussion between Wengate and the council may result in some voluntary modification of the dimensions involved but it is clearly outside the scope of this appeal.

Result

[79] All appeals are dismissed.

[80] It was agreed by counsel at the hearing that costs would follow the event on a scale 2B basis. It follows that the three appellants,

Westfield, Kiwi and Wengate, must pay costs to the respondent, the Hamilton City Council, according to scale 2B.

[81] No oral submissions were made with respect to the costs liability of the appellants to Tainui and National Trading. I would hope that these could be resolved by agreement. If necessary they will need to be the subject of written memoranda and a ruling by another Judge. To deal with that eventuality, and also any disagreement between the appellants and the respondent as to costs details, I direct that: (a) within three weeks of the delivery of this judgment all parties claiming costs must file and serve memoranda setting out the terms of their claims; (b) the appellants will have a further two weeks within which to file memoranda in opposition; and (c) the claimants will have a further ten days within which to file any memoranda in reply.

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

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

Other cases mentioned in judgment

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

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

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

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

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

Appeal

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

JW Maasen for the appellant.

B Ax in person for the respondent.

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

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

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

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

Background

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

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

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

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

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

MML's site

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

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

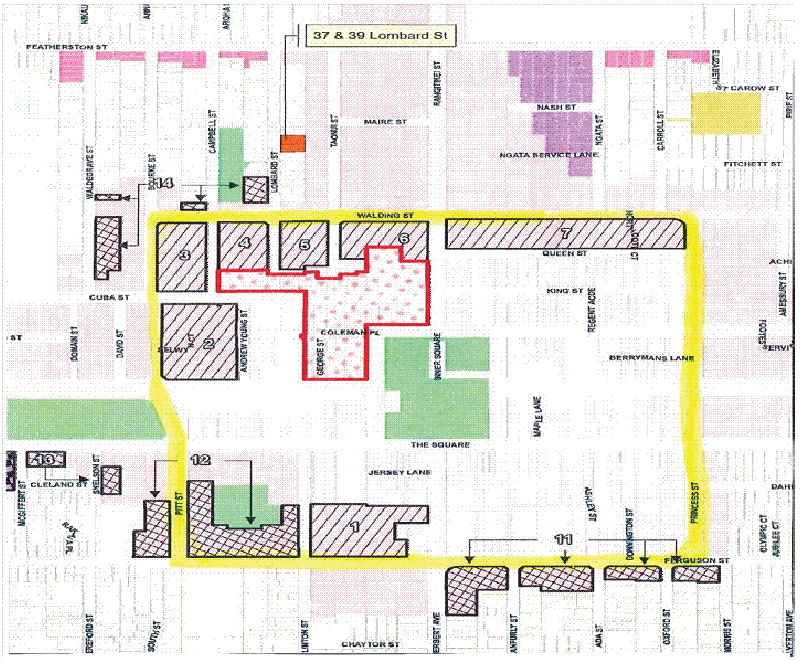
[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied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

Plan change

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

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

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



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

MML's submission

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

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

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

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

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

Council's decision

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

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

Decision appealed from

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

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

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

MML's argument

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

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

Statutory framework

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

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

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

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

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

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

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

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

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

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

7 Section 32(6).

8 Schedule 1, cl 3(2).

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

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

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

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

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

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

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

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

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

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

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

> **Certain persons may make further submissions**(1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
> (a) any person representing a relevant aspect of the public interest; and
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under cl 6.

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

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

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

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11 See at [25] above.

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

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

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

> **Form of request**

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

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

Issues

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

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

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

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

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

Clearwater

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Halswater

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Option 5

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

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

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

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

Naturally Best

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Summary

[91] To sum up:

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

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

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

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

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

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

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

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

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

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

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

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

Result

[92] The appeal is allowed.

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

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

Reported by: Carolyn Heaton, *Barrister and Solicitor*