BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 070

IN THE MATTER	of four appeals under Clause 14(1) of Schedule 1 of the Resource Management Act 1991 (**the Act**)
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED (ENV-2012-AKL000069)
	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED (ENV-2012-AKL000072)
	KAWHIA HARBOUR PROTECTION SOCIETY INCORPORATED (ENV-2012-AKL000073)
	GOWER & OTHERS (ENV-2012-AKL000076)
	Appellants
AND	OTOROHANGA DISTRICT COUNCIL
	Respondent

Court: Environment Judge DA Kirkpatrick (sitting alone under s279 Resource Management Act)

Date of Decision: 27 March 2014

DECISION ON JURISDICTION TO MAKE CONSENT ORDER

A. **The Otorohanga District Council as respondent is to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.**

B. **The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.**

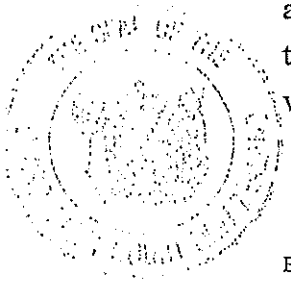
REASONS FOR DECISION

Introduction

[1] These four appeals relate to the treatment of natural landscape in the Otorohanga proposed District Plan ("**PDP**") and are being dealt with together. This decision addresses a contested jurisdictional issue concerning the scope of a draft consent order which has been submitted to the Court.

[2] The PDP records that the district of Otorohanga contains outstanding natural landscapes, outstanding natural features and high natural character areas. These are identified as "**Outstanding Landscapes**" on the planning maps. The objectives, policies and rules in the PDP seek to protect these from inappropriate subdivision, use and development, consistent with the obligations imposed by section 6(a) and (b) of the Act of the Otorohanga District Council ("**the Council**"). The Council recorded in the PDP that the district also contains a number of areas where the landscape elements and natural features combine to create "**Landscapes of High Amenity Value**" as identified on the planning maps. All these areas are contained within the Landscape Policy Area established in terms of section 2 of the Landscape chapter in the PDP.

[3] As a result of Court-assisted mediation on 25 November 2013 and a self-facilitated "without prejudice" meeting of the parties to these appeals on 28 November 2013, the parties reached an agreement as to a basis for amendments to certain provisions of the PDP, including both its text and its maps, on which all four appeals could be settled. A memorandum of consent to resolve the natural landscape topic in the PDP dated 20 December 2013, with a draft consent order, has been filed with the Court. All parties have signed that memorandum except for the appellant



Federated Farmers of New Zealand Incorporated ("**Federated Farmers**") and two parties under s274: Devune Enterprises and Te Koraha Farms Limited.

[4] Federated Farmers has raised a jurisdictional issue as to the scope of the agreement reached among the parties. As part of the process in reaching agreement to settle the appeals, the Council got its consultant planning expert and its landscape expert to do additional mapping. This mapping shows extensions of areas of Outstanding Landscapes and Landscapes of High Amenity Value onto parts of the district which were not mapped as such in the PDP either as publicly notified or as amended by the Council's decisions on submissions. Federated Farmers questions whether these amendments can properly be made. The Council contends that they can on the basis of the submission made by Federated Farmers on the PDP and the relief sought in its appeal.

[5] Both Federated Farmers and the Council have filed submissions in support of their respective positions. The other appellants in relation to this topic (Environmental Defence Society Inc, Kawhia Harbour Protection Society Inc and Gower & Ors) have stated that they support the Council's position. Devune Enterprises has stated that it supports the position of Federated Farmers. There has been no statement of position by or on behalf of Te Koraha Farms Ltd.

[6] Federated Farmers has also confirmed that, should the Court determine that the proposed settlement is within the scope of its submission and appeal, then Federated Farmers will confirm its support for the draft consent order, as lodged, to be made.

Relevant Law

[7] The central question to be determined is whether the proposed outcome agreed on by the parties to these appeals and expressed in the draft consent order is within the scope of the PDP as publicly notified or as sought to be amended by an appellant's submission on it. The jurisdictional issue that the parties have raised before the Court is an essential one in the process for preparing or changing a District Plan.

[8] The starting point is that a District Plan must be prepared by the relevant territorial authority "*in the manner set out in Schedule 1*"to the Act.[1] Schedule 1 is a code for this process,[2] although important glosses have been added by case law.

[1] Section 73(1) RMA.
[2] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (16).

[9] In accordance with Schedule 1: [3]

(a) a proposed plan must be evaluated in accordance with section 32 of the Act and publicly notified, with a copy of the public notice being sent to every ratepayer who is likely to be directly affected by the proposed plan (clause 5 (1) and (1A));

(b) any person (with certain restrictions on trade competitors) may make a submission on the publicly notified proposed plan which must be in the prescribed form (clause 6);

(c) the prescribed form requires a submitter to give details of the specific provisions of the proposed plan that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority (form 5, Schedule 1 to Resource Management (Forms, Fees, and Procedure) Regulations 2003);

(d) the local authority must prepare and give public notice of the availability of a summary of decisions requested by persons making submissions on a proposed plan (clause 7);

(e) any person representing a relevant aspect of the public interest, or any person that has an interest in the proposed plan greater than the interest that the general public has, or the local authority itself, may make a further submission in support or in opposition to any submission made under clause 6 (clause 8);

(f) the local authority must give decisions on the provisions and matters raised in submissions, which must include reasons and may include matters relating to any consequential alterations necessary to the proposed plan arising from the submissions (clause 10);

(g) a person who made a submission on a proposed plan may appeal to the Environment Court in respect of:

i. a provision included in the proposed plan; or

ii. a matter excluded from the proposed plan; or

[3] As it stands since the latest amendments which came into force on 1 October 2009, prior to notification of the PDP.

iii. a provision that the decision on submissions proposes to include in or exclude from a plan;

but only if the appellant referred to the provision or the matter in the appellant's submission on the proposed plan, and the appeal does not seek the withdrawal of the proposed plan as a whole (clause 14); and

(h) the Environment Court must hold a public hearing into any provision or matter referred to it (clause 15).

[10] The Environment Court has the same power, duty and discretion in regard to an appeal made under clause 14 in respect of the decision appealed against as the local authority had under clause 10, and may confirm, amend or cancel the decision to which the appeal relates.[4] Although not directly applicable to my present consideration of the jurisdiction to make a particular order by consent, it is pertinent to this review of the relevant legislation to refer to the Court's powers:

(a) In section 292 of the Act, to direct a local authority to amend a plan to which proceedings relate for the purpose of remedying any mistake, defect or uncertainty or giving full effect to the plan; and

(b) In section 293, to direct a local authority to prepare changes to a proposed plan to address any matters identified by the Court (such as, for example, that a proposed plan departs from a higher-order statutory planning document to which it must give effect or with which it is inconsistent).

[11] A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope.[5] Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but such further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of

[4] Section 290 RMA.
[5] See also the more extensive discussion of these provisions and their legislative history in ***Federated Farmers of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council*** Decision No. [2013] NZEnvC 257 at [24]-[51].

identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to it and make its own decision on that.

[12] The rigour of these constraints is tempered appropriately by considerations of fairness and reasonableness. In the leading case of ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[6] a full court of the High Court considered a number of issues arising out of the plan change process under the Act, including the decision-making process in relation to submissions.[7] The High Court confirmed that the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[8]

[13] In analysing such amendments, the High Court approved of the Planning Tribunal's categorisation[9] of them into five groups, the first four of which are permissible:

(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).

[14] The High Court rejected the submission that the scope of the local authority's decision-making under clause 10 is limited to no more than accepting or rejecting a submission, holding that the word "regarding" in clause 10 conveys no restriction on the kind of decision that could be given. The Court observed that councils need scope to deal with the realities of the situation where there may be multiple and often conflicting submissions prepared by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.[10]

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[6] [1994] NZRMA 145.
[7] *Ibid.* at 164-168.
[8] *Ibid.* at 166.
[9] ***Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*** (1993) 2 NZRMA 497 at 524-529.
[10] ***Countdown Properties (Northlands) Ltd (supra)***at 165.

[15] The High Court also considered other possible tests, including what an informed and reasonable owner of affected land should have appreciated might result from a decision on a submission. While not rejecting that approach, the Court held that it should not be elevated to an independent or isolated test, given the danger of substituting a test which relies solely on the Court endeavouring to ascertain the mind or appreciation of a hypothetical person.[11]

[16] While clause 10 has been amended several times since 1994 and no longer uses the word "regarding" in relation to decisions on submissions, the current language does not alter the substance of the provision or otherwise render inappropriate the High Court's approach in ***Countdown Properties (Northlands)*** to the application of this provision.

[17] In summary, as Panckhurst J observed in an oft-repeated dictum in Royal Forest & Bird Protection Society Inc v Southland District Council:[12]

> ... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

[18] A review of the relevant subsequent case law shows that the circumstances of particular cases have led to the identification of two fundamental principles:

(i) The Court cannot permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected;[13] and

(ii) Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the appeal are not subverted by an unduly narrow approach.[14]

[19] There is obvious potential for tension between these two principles. As observed by Fisher J in ***Westfield (NZ) Ltd v Hamilton City Council,***[15] the resolution

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[11] *Ibid.* at 166-167.
[12] [1997] NZRMA 408 at 413.
[13] ***Clearwater Resort Ltd v Christchurch City Council*** (unreported: High Court, Christchurch, AP34/02, 14 March 2003, William Young J) at para [66].
[14] ***Power v Whakatane District Council & Ors*** (unreported: High Court, Tauranga, CIV-2008-470-456, 30 October 2009, Allan J) at para [30].
[15] [2004] NZRMA 556 at 574-575.

of that tension depends on ensuring that the process for dealing with amendments is fair, not only to the parties but also to the public:

> [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 ss292 and 293 of the Act: see ***Applefields, Williams and Purvis,*** and ***Vivid.***[16]
>
> [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 ss292 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.

[20] The consideration of procedural fairness was discussed in some detail by the High Court in ***Palmerston North City Council v Motor Machinists Limited*** [2013] NZHC 1290. That case was principally concerned with the related issue of whether a submission was "on" a plan change, but Kós J examined that question in its context of the scope for amendments to plan changes as a result of submissions by reference to the bipartite approach taken in ***Clearwater***:[17]

(i) Whether the submission addresses the change to the status quo advanced by the proposed plan change; and

(ii) Whether 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.

[21] Laying stress on the procedures under the Act for the notification of proposals to directly affected people, and the requirement in s32 for a substantive assessment of the effects or merits of a proposal, Kós J observed that the Schedule 1 process lacks those safeguards for changes to proposed plans as sought in submissions. The lack of

[16] ***Applefields Ltd v Christchurch City Council*** [2003] NZRMA 1; ***Williams and Purvis v Dunedin City Council*** (Environment Court, CO22/C002, 21 February 2002, Judge Smith); and ***Re Vivid Holdings Ltd*** [1999] NZRMA 467.
[17] *Supra*, fn 13.

formal notification of submissions to affected persons means that their participatory rights are dependent on seeing the summary of submissions, apprehending the significance of a submission that may affect their land, and lodging a further submission within the prescribed timeframe.

[22] In particular, his Honour noted that a core purpose of the statutory plan change process is to ensure that persons potentially affected by the proposed plan change are adequately informed of what is proposed. He observed:[18]

> 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 clause 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.

The present case

[23] In the present case, the Council notified the PDP including planning maps which identified outstanding landscapes and landscapes of high amenity value.

[24] Federated Farmers lodged a substantial submission in relation to numerous provisions in the PDP. The first provision it addressed was "*Identification of outstanding landscapes*". Because of its central importance to the present issue, I set out the whole of the relevant part of the submission by Federated Farmers:

> Federated Farmers supports the Otorohanga District Council's approach of identifying outstanding landscapes on the planning maps. Their identification of outstanding landscapes provides resource users with certainty as to where the provisions will apply, and does not extend unnecessary protection to landscapes that are not considered outstanding.
>
> Federated Farmers considers that the proposed District Plan needs to be consistent with terminology used in the RMA. Section 6(b) of the RMA discusses *Outstanding Natural Features and Landscapes*, and that only landscapes and features that are considered to have a high level of naturalness and outstanding qualities are to be protected. The terminology used in the proposed District Plan needs to be changed from outstanding landscapes, to outstanding natural landscapes.
>
> The methods for identifying, assessing and classifying landscape types at a territorial level are well defined in case law. During an assessment of the District's landscapes the Federation encourages the use of existing methods in order to provide certainty and clarity. In addition, the Federation strongly urges Council to consult with landowners, both collectively and individually, on this matter.

[18] At [77].

> Federated Farmers considers that it is vital that only landscapes with true outstanding qualities and naturalness are identified, so that land used for primary production and normal farming activities do not become unreasonably captured by the provisions.
>
> **Relief sought**
>
> - That only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped;
> - That correct RMA terminology is used throughout the Plan, and that the term Outstanding Landscapes is replaced with Outstanding Natural Landscapes.

[25] The second item in Federated Farmers' submission related to landscapes of high amenity value, and sought that areas identified as such be deleted from the planning maps and that any rules pertaining to those areas be deleted from the PDP. Similar relief was sought by Gower and others in their appeal.

[26] The draft consent order filed by the parties would alter the text of the PDP in relation to both outstanding landscapes and landscapes of high amenity value. It would not delete the provisions relating to the latter, but would split the areas of landscape of high amenity value in the district into two: hinterland and coastal, with different provisions in relation to each. There would be some consequential amendments to the controls on earthworks. There does not appear to be any issue as to the Court's jurisdiction to make those changes to the text of the PDP.

[27] Also lodged with the draft consent order is a map of the whole district stated to be at a scale of 1:125,000 at A1, but provided to me at A3 and so effectively 1:250,000, or 1cm = 2.5 km. It shows a line to denote the "Coastal/Hinterland Divide" and has various areas shown in different colours to identify:

(a) "Landscape of High Amenity Value (Coastal)" in green;

(b) "Landscape of High Amenity Value (Hinterland)" in yellow;

(c) "Outstanding Natural Features" in orange;

(d) "Outstanding Natural Landscapes" in red; and

(e) "LHAV Removed through Mediation" in blue.

[28] This map also shows some of these areas with a hatched shading to denote "New ONFL/LHAVS (Outside Decisions Version)." The presently contested issue arises in relation to the shaded areas of Outstanding Landscapes. There is no issue in

relation to the shaded areas of Landscapes with High Amenity Value because the Council acknowledges in the memorandum of consent to resolve the landscape topic dated 20 December 2013 that "*[t]hose entirely new areas of LHAV which are cross-hatched* (sic) *on the map attached . . . and which had no Landscape Policy Area overlay in either the notified or the decisions version . . . are not within scope of the appeals on the topic of Natural Landscape*".

[29] In relation to the new shaded areas of Outstanding Landscapes, the Council relies on the content of the notice of appeal by Federated Farmers to establish jurisdiction for the changes sought to the planning maps. The relevant relief sought in Federated Farmers' notice of appeal is set out in the memorandum of consent to resolve the landscape topic dated 20 December 2013. I do not need to repeat it here, as in all material respects it accurately reflects the content of Federated Farmers' original submission quoted above. As identified above in the discussion of the relevant statutory provisions relating to the jurisdiction of the Environment Court, the ultimate source of jurisdiction for resolving appeals before the Court is either the content of the PDP as notified or the content of a submission seeking to amend it, or somewhere in between.[19]

[30] The memorandum dated 20 December 2013 also refers to the relief sought by other appellants, but other than an appellant in the Gower & Ors appeal named Chick, who seeks removal in its entirety of the landscape policy area overlay from the Chick properties, all of the other appeals appear to be focussed on the text of the PDP rather than its maps. None of the four appeals in relation to the landscape topic expressly seek the inclusion of additional areas identified as Outstanding Landscapes.

Federated Farmers' argument

[31] Federated Farmers submits that there is no jurisdiction for further areas of outstanding natural landscape now to be included in the planning maps of the PDP, for they were not so mapped in the notified version of the PDP. The position in relation to these Outstanding Landscapes is, it argues, the same as for the new areas of Landscapes of High Amenity Value, which were identified outside the scope of any Outstanding Landscapes or Landscapes of High Amenity Value identified in the PDP as notified. Federated Farmers and Gower & Ors sought in their appeals that these Landscapes of High Amenity Value all be removed, and in the memorandum dated 20 December 2013 the Council accepts that any Landscapes of High Amenity Value

[19] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (19)

which is entirely new would require either a variation to the PDP or a future plan change in order to be included.

[32] Having traversed the relevant clauses of Schedule 1 and the relevant case law, Federated Farmers says that its submission and notice of appeal were limited to outstanding landscapes as already identified in the PDP as notified. However, counsel acknowledges that the documents do not include any particular limitation on scope, so that if "taken at face value" they might apply to areas not previously identified in the PDP as notified.

[33] Emphasis is laid on the principle identified in ***Countdown Properties (Northland)***[20] that the Council cannot grant relief beyond the scope of the submission lodged in relation to the PDP, and the focus must be on the submission rather than on the notice of appeal. Federated Farmers submits that there is a danger in going too far, as identified in ***Clearwater***.[21]

[34] Federated Farmers also submits that it would be unreasonable to read its submission as extending areas of protection for landscapes because that is not normally the position taken by it in these matters. I do not think I can rely on this point as having much determinative value. As observed by the High Court in ***Countdown Properties (Northland)***[22], there is a danger in endeavouring to ascertain the mind or appreciation of a hypothetical person. While Federated Farmers is far from hypothetical, I would prefer to discern any relevant intention of a person from the text of their submission rather than from the person's reputation or some inference drawn from knowledge of past events. Assumptions based on impressions of that sort are likely to lead the Court into error.

Otorohanga District Council's argument

[35] At the outset, the Council seems to place some weight on the fact that Federated Farmers entered into mediation and an agreement arising out of mediation. In my view, any such agreement is not relevant to the issue before the Court. The jurisdiction of the Court to make an order authorising changes to a statutory planning document cannot be conferred by agreement. The Court's jurisdiction is established by the Act, and the boundaries of that jurisdiction are established by the relevant

[20] *Supra*, fn 11.
[21] *Supra*, fn 13.
[22] *Supra*, fn 11

statutory provisions referred to above. No agreement reached between the parties can confer additional jurisdiction and nor can it overcome any lack of jurisdiction in a matter such as this.

[36] The Council bases its argument that there is scope to include additional areas of Outstanding Landscapes on the submission by Federated Farmers set out at [21] above. The Council notes that the submission is broadly framed and did not specify any areas of Outstanding Landscapes (as distinct from Landscapes of High Amenity Value) to be removed. In making such a submission on the PDP, the Council submits that Federated Farmers left open the possibility that other areas may be mapped if the new landscape assessment methodology required it.

[37] The Council stresses the issue of workability in dealing with the process of reassessment of landscapes undertaken by the Council as part of its mediation and negotiations with the appellants. It notes the real possibility in that process that the Outstanding Landscapes would change, including the identification of additional areas. It argues that to expect only a reduction in the areas of Outstanding Landscapes would be to impose a "sinking lid" approach which was not sought by Federated Farmers and cannot be implied from its submission.

Further argument

[38] In reply, Federated Farmers expresses some concern about the disclosure of a mediated agreement, but it does not appear necessary for the Court to enter into that issue to resolve the question of jurisdiction. In any event, as noted above, Federated Farmers confirms that it will support the negotiated draft consent order if the making of such an order is within the scope of its appeal.

[39] Federated Farmers denies that it is pursuing a "sinking lid" approach, and submits that any additional ONL areas should proceed through the Schedule 1 process rather than be added at this stage.

[40] No additional matters are raised by the other appellants.

Discussion

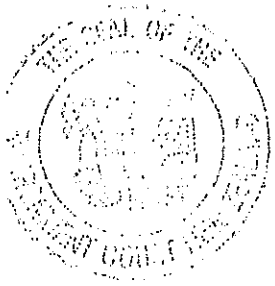
[41] The material before the Court includes a map of the district attached to the draft consent order showing the agreed mediated outcome for the landscape policy

area. The new Outstanding Landscapes and Landscapes of High Amenity Value which are outside the decisions' version of the PDP are shown on the map with hatched shading. At the scale of the map, I can do little more than observe that there are some substantial areas of Outstanding Landscapes that have been added. I do not know anything about those particular areas, including who may own or occupy them, or what they may be used for. I have not been presented with any information about the direct effects on persons with an interest in those areas or whether those persons may support or oppose the identification of their land on the map as Outstanding Landscapes. But it may not matter greatly that I do not have such information.

[42] The essential issue that I must determine is whether those hatched areas are within the scope of the submission by Federated Farmers on the PDP. Fundamentally, in determining a matter of jurisdiction, this is an objective assessment based on the text of the relevant documents rather than on the personalities of any participant or the circumstances of tenure or use of the land. While it might be thought possible to seek the agreement of affected persons at a later stage to address the issue of effects, such an *ad hoc* approach would not respond to the jurisdictional issue of the scope of amendments to a proposed plan which are permitted under Schedule 1.

[43] An objective approach, however, must yet allow a degree of latitude in its application so as to be realistic and workable rather than a matter of legal nicety. If it were obviously the case that the additional areas were of a scale and extent that could reasonably be considered to be incidental and consequential extensions, not requiring further substantial analysis of their likely effects or comparative merits, then that could be within the scope of amendments permissible in terms of the tests identified in ***Countdown Properties (Northland)*** and ***Clearwater*** and referred to above at [12] and [20].

[44] I do not consider it useful to assess this in terms of whether it is a "sinking lid" approach, with the apparent pejorative connotation attached to those words. Even with the latitude identified in relevant case law for the purpose of realistic workability, the Act imposes limits which have the effect of containing how far amendments may be made to a statutory planning document while it proceeds through the Schedule 1 process. If the result of that containment may be characterised as a "sinking lid", then it is a consequence of the boundaries set by the law rather than the approach of any party to these proceedings.



[45] As for the timing of the raising of this issue, while one may understand the sense of frustration that could develop when a jurisdictional point is raised at a late stage in proceedings which appear to be on course for settlement, that is irrelevant to the Court's consideration. Even if the point had not been raised by one of the parties, it could well have been raised by the Court itself in its review of the draft consent order to ensure, notwithstanding the agreement of the parties, that the order may properly be made in accordance with all relevant legal requirements and for the purpose of the Act. All officers of the Court have a duty to act in accordance with the law, including within the jurisdiction set by the law, at all times.

[46] So against that background, the question is whether the submission by Federated Farmers seeks, or otherwise creates scope for, the inclusion of additional Outstanding Landscapes in the landscape policy area of the Otorohanga PDP?

[47] I have set out the relevant text of the submission in full above at [21]. It is clearly a submission on the provisions of the PDP in relation to issues concerning landscape, so that no issue arises in terms of the first limb of the test as expressed in ***Clearwater***.[23] The submission commences by supporting the Council's approach of identifying outstanding landscapes on its planning maps, noting that clear identification provides users with certainty. The submission supports methods for identifying landscape types which are well defined in order to provide certainty and clarity. The submission also supports consultation with landowners. The relief sought is "*that only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped.*"

[48] It is notable that the text of the submission supports a methodology in terms of the whole district and does not refer to any particular areas or locations. The principal concern expressed in the submission is to achieve the clear and certain identification, by mapping, of natural landscapes and natural areas that are demonstrably outstanding. In abstract terms it is clearly possible that a submission that seeks an amended or new method for dealing with a resource management issue in a proposed plan could consequentially require other changes to the proposed plan resulting from the application of that method to the circumstances in the district. Where such consequential changes are foreseeable to the parties and do not extend to affect those who may have no notice of them, the case law discussed above indicates that incidental extensions are permissible. But on the face of the material before me, the extensions sought in this case are not within those limited bounds.

[23] *Supra*, fn 13.

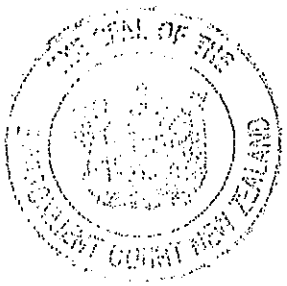
[49] It is not apparent that the submission by Federated Farmers required a full reassessment of the landscapes of the entire district, with all areas able to be considered for inclusion in what was to be identified on the maps as "outstanding." In terms of the relief sought, the use of the word "only" indicates a submission that the maps as notified may have included areas that did not warrant such identification rather than that there were areas that should have been so identified and were not. While the reassessment of the landscape within the district could obviously result in additional areas being identified, it is not explicit and, in my opinion, nor is it implicit that the submission sought to have any such areas included in the planning maps. The emphasis laid on consultation with landowners, at least, indicates that the submission sought a further process before additional areas could be included on the planning maps as Outstanding Landscapes.

[50] In my opinion, adding areas of outstanding landscapes that have not previously been shown either on the planning maps as notified nor identified or otherwise referred to in submissions is not within the scope of the submission by Federated Farmers. The approach taken by the Council to the treatment of the entirely new areas now mapped as Landscapes of High Amenity Value, being to require a variation to the PDP or a plan change once the PDP is made operational, is the correct approach and must also apply in relation to areas now identified as Outstanding Landscapes.

[51] For those reasons, I conclude that the Court does not have jurisdiction to approve any consent order seeking to include new areas of outstanding natural landscapes or outstanding natural features beyond those shown on the planning maps in the decisions version of the Otorohanga proposed District Plan.

Directions

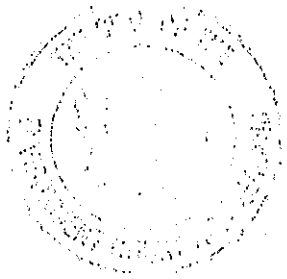
[52] I direct the Otorohanga District Council as respondent to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.



[53] The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.

SIGNED at AUCKLAND this 27th day of March 2014

DA Kirkpatrick
Environment Judge



IN THE COURT OF APPEAL OF NEW ZEALAND

CA705/2011
[2013] NZCA 221

BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	CARRINGTON FARMS LIMITED Second Respondent
AND	CARRINGTON ESTATE LIMITED Third Respondent
AND	CARRINGTON RESORT LIMITED Fourth Respondent

CA706/2011

AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
AND	CARRINGTON ESTATE LIMITED Second Appellant
AND	CARRINGTON RESORT LIMITED Third Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	FAR NORTH DISTRICT COUNCIL Second Respondent

CA54/2012

AND BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant

	AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
	AND	CARRINGTON FARMS LIMITED Second Respondent

CA56/2012

	AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
	AND	TE RUNANGA-A-IWI O NGATI KAHU First Respondent
	AND	FAR NORTH DISTRICT COUNCIL Second Respondent

Hearing:	26 and 27 March 2013
Court:	O'Regan P, Harrison and French JJ
Counsel:	J S Baguley and J G A Day for Far North District Council J D Gardner-Hopkins and M Wikaira for Te Runanga-a-Iwi o Ngati Kahu R A Brabant, I M Gault and A M Glenie for Carrington Farms Ltd, Carrington Estate Ltd and Carrington Resoort Ltd
Judgment:	11 June 2013 at 2.30 pm
Reissued:	19 July 2013: see minute of 19 July 2013
Effective date of Judgment:	11 July 2013

JUDGMENT OF THE COURT

CA705/2011 and CA706/2011

A The appeals by Far North District Council (FNDC or Council) and Carrington are allowed against the High Court:

(a) declaration that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land

including the site which is the subject of its amended land use application dated 30 September 2008;

(b) order quashing FNDC's decision relating to the land use consent, and direction referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) order for costs.

B The judgment of the High Court is set aside and the land use consent is reinstated.

C Ngāti Kahu is to pay one set of costs each to Carrington and FNDC for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

D The appeals by FNDC and Carrington are allowed against the judgment of the High Court setting aside the decision of the Environment Court.

E The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

REASONS OF THE COURT

(Given by Harrison J)

Table of Contents

Introduction

[1] Carrington Farms Ltd owns a large tract of what was originally farm land on the Karikari Peninsula in Northland within an area of considerable natural beauty and cultural importance to the local rūnanga, Te Rūnanga-ā-Iwi o Ngāti Kahu.

[2] Carrington has already developed part of its land. About 10 years ago, the local authority, the Far North District Council (FNDC or Council), granted the company resource consents under the Resource Management Act 1991 (the RMA) to develop a golf course, country club and winery complex. Ngāti Kahu challenged the lawfulness of the consent process by seeking judicial review in the High Court. The proceeding was later settled and the development project was completed.

[3] More recently, Carrington decided to develop another part of its land as a residential complex. The company applied sequentially for resource consents – initially, a dwelling or land use consent for 12 residential units and later a subdivision consent for the same land. Council publicly notified the latter but not the former before separately granting both consents.

[4] The two appeals before this Court arise from the separate consents. In chronological sequence, Ngāti Kahu first appealed unsuccessfully to the Environment Court against the subdivision consent[1] and then to the High Court. In the interim, the Rūnanga challenged the lawfulness of the land use consent in an application for judicial review in the High Court. White J heard Ngāti Kahu's appeal against the Environment Court's decision and its judicial review application together. In the result both the appeal and the application were allowed. In judgments issued separately on 29 September 2011 White J quashed the land use[2] and subdivision[3] consents.

[5] Carrington and FNDC appeal against both judgments. For ease of reference our decisions on the two appeals will be included in a composite judgment, starting with the judicial review proceeding.

Facts

[6] The undisputed facts are set out in comprehensive detail in the Environment Court's decision and in both of White J's judgments. We are able to summarise the facts relevant to these appeals more briefly as follows.

[7] Carrington owns between 800 and 1000 hectares of land on the Karikari Peninsula either bordering or in close proximity to Karikari Beach – a long, open and crescent shaped foreshore facing the Pacific Ocean and backed by semi-consolidated sand dunes. Incorporated within this judgment is a map showing the boundaries of Carrington's property, its configuration and the separate areas of the golf course, country club and residential developments.

[8] In March 1999 Carrington applied to FNDC for three resource consents: (a) a land use consent for the country club development consisting of 384 proposed accommodation units and a lodge/golf club complex; (b) a subdivision consent for the same development to create 384 separate titles; and (c) a land use consent to establish a vineyard. FNDC processed all three applications on a non-notified basis

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1 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* [2010] NZEnvC 372 [Environment Court decision].

2 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Carrington Farms Ltd* (2011) 16 ELRNZ 664 (HC).

3 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* (2011) 16 ELRNZ 708 (HC).

– that is, notice was not given to the general public. All consents were granted in May 1999.

[9] In February 2000 Ngāti Kahu applied to the High Court for orders judicially reviewing FNDC's decision not to notify Carrington's consent applications. Carrington was also joined as a party. On 5 March 2001 the parties signed a written agreement to settle the application for judicial review (the settlement agreement). As a result of the settlement, Carrington's development was able to proceed.[4]

[10] In April 2000 Council publicly notified its proposed district plan. In July 2000 Carrington lodged a submission seeking to include a zone known as the Carrington Estate Special Zone: its boundaries were roughly aligned to and bordered the proposed development site. A consent order made in the Environment Court in August 2004 incorporated the zone into the district plan.

[11] In June 2008 Carrington applied for a land use consent to construct 12 single residential units within a relatively small section of a 490 hectare area in the north eastern part of its property, physically separate from the country club development. The land was within the Rural Production Zone in FNDC's Operative District Plan. Ms Baguley advises that the zone is relatively permissive. Its boundaries and the mix of zoning of coastal and rural activities were determined through a public process. The Department of Conservation and the Environmental Defence Society (the EDS) had appealed against the zone's original inclusion in the draft district plan but Ngāti Kahu did not. In November 2006 the zone's boundaries were settled by a consent order made in the Environment Court after the appeals were withdrawn.

[12] Construction of residential units on the sites proposed by Carrington is a permitted activity within the Rural Production Zone. However, the company's proposal exceeded two permitted activity standards. One governed traffic intensity levels; the other regulated the number of lots permissibly served by a single access way. Carrington's proposal was thus a restricted discretionary activity under the

[4] On 16 May 2002, the parties signed an amendment to the settlement agreement but its terms do not bear upon the discrete issue of construction which we must decide.

Operative District Plan. In December 2008 Council decided that Carrington's land use application did not require public notification and granted a resource consent.

[13] In March 2009 Carrington applied for a subdivision consent to create 12 separate allotments for the 12 residential units for which the land use consent was granted together with three additional lots (which are not at issue). Consent was required because the proposed subdivision was a non-complying activity within the Rural Production Zone in that the 12 lots did not meet the minimum lot size specification in the district plan. On this occasion Council publicly notified Carrington's application. In October 2009, against Ngāti Kahu's objection, Council granted consent.

[14] Ngāti Kahu immediately appealed to the Environment Court against FNDC's grant of the subdivision consent. The appeal was dismissed in an extensive interim decision given on 3 November 2010.[5]

CA705/2011 and CA706/2011

Land use consent: judicial review

(a) Settlement agreement

(i) High Court

[15] Ngāti Kahu's application for judicial review of Council's decision to grant the land use consent sought two different remedies. The first remedy was a declaration that by cl 4 of the settlement agreement Carrington had agreed not to expand its accommodation on its land – including the site which was the subject of its land use consent application – to construct 12 single residential units. Carrington challenges the Judge's finding that cl 4 had that meaning and effect when granting the Rūnanga's application. Counsel agree that the question of whether the Judge erred is the threshold issue for determination on this appeal.

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5 Environment Court decision, above n 1.

[16] White J set out the terms of the settlement agreement in full.[6] Those which are directly relevant to Carrington's appeal are as follows:

> 1. Carrington Farms agrees to consult in good faith with EDS and Te Rūnanga concerning resource management matters of mutual interest relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future. This commitment is to be incorporated, on a prospective basis, into the conditions of the consent granted by the FNDC.
>
> 2. Furthermore, Carrington Farms agrees not to develop the beach (including the dunes) and wetland areas of its property as identified on the attached plan, and to use its best endeavours to preserve and enhance those areas for the purpose of restoring the natural state of the wetland. The parties agree that this commitment is to be incorporated, on a prospective basis, into the conditions of consent granted by the FNDC.
>
> ...
>
> 4. Carrington Farms agrees not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation), subject to any "as of right" development that may be able to take place without the need for a resource consent at the time of this agreement and any re-siting of elements within the development site. Such re-siting shall not without the consent of the plaintiffs:
>
> (a) involve the relocation of any building covered by the consents to a position closer to the coast than the nearest building permitted in terms of the resource consents which are the subject of this proceeding; and
>
> (b) have any adverse effects on the environment having regard to what is contemplated by those resource consents.
>
> Carrington Farms agrees that Te Rūnanga and EDS would be affected parties for the purposes of section 94(2) of the RMA in respect of any further development of the site subject to these proceedings.
>
> ...
>
> 6. Without limiting its statutory duties and obligations the FNDC agrees that Te Rūnanga and EDS would be affected parties for the purposes of s 94(2) of the Resource Management Act in respect of any further development of the site subject to these proceedings.
>
> ...
>
> 8. The FNDC acknowledges the particular interest of EDS in significant developments affecting the coast and of Te Rūnanga and local marae in significant developments affecting the coast within the rohe of Ngāti Kahu.

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6 At [16].

...

12. The parties will issue a joint media statement in which the parties indicate a win-win settlement using a tone of co-operation with the stated objective of achieving a culturally and environmentally sensitive development. The agreed statement shall include a statement attributed to Dr Mutu to the effect that Te Rūnanga was acting on behalf of Te Whanau Moana of Karikari. The parties agree that no other public statement will be made which is inconsistent with the spirit of the agreed statement, or if no agreed statement is reached, which is inconsistent with this agreement.

13. The parties will use best endeavours to agree to the terms of the joint media statement for issue within 14 days of concluding this agreement.

Conclusion

14. All parties to this Settlement Agreement confirm that they shall in implementing the terms of this Settlement Agreement in all respects act in good faith including using best endeavours to achieve the alteration to the conditions of consent contemplated by this agreement within a reasonable time.

15. The parties agree that this Settlement Agreement settles all issues, concerns and disputes however arising out of the grant or exercise of all existing resource consents obtained for the development provided such exercise is in accordance with the conditions of the consents, including the conditions referred to in this agreement.

[17] The settlement agreement annexed a plan, as referred to in cl 2, identifying "... the beach (including the dunes) and wetland areas" of Carrington's property. All areas were within the "Outstanding Natural Landscape" zone in the Council's plan.

[18] Clause 4 is at the heart of this dispute. White J was in no doubt as to its meaning and effect, expressing his conclusion succinctly in these terms:

> [66] ... Carrington's agreement in clause 4 of the settlement agreement "not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation)" was clear and, subject to the express exceptions, was unequivocal. Carrington had agreed not to expand its accommodation on the Karikari Peninsula at all unless one of the exceptions applied.

[19] The Judge then examined whether Carrington's land use application fell within either of the exceptions provided by cl 4,[7] concluding that:

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[7] At [67]–[69].

> [70] On this basis neither exception to Carrington's non-expansion agreement in clause 4 of the settlement agreement applied. As there was no dispute that Carrington's 12 residential dwellings were within the expression "any other form of accommodation" in clause 4, Carrington was seeking to expand its accommodation contrary to its non-expansion agreement in clause 4 of the settlement agreement.

[20] White J was satisfied also that the plain and contextual meanings were consistent in that (a) Ngāti Kahu had an acknowledged interest in and concern for the cultural significance of the whole of the Karikari Peninsula including Carrington's land; (b) the agreement was executed in settlement of a proceeding which challenged the validity of the three consents, and Carrington's agreement not to expand any form of accommodation on any of its property was in apparent consideration for Ngāti Kahu's agreement to the existing consents; (c) the proceeding raised issues about whether Council had taken proper regard of matters of national importance as required by the RMA but the effect of the settlement was that that critical issue was not determined by the Court; and (d) subject to amendments made to their terms, the three consents were accepted as valid.

(ii) Decision

[21] The question is whether White J was correct that by cl 4 of the settlement agreement Carrington agreed in 2001 not to expand its provision of accommodation on its Karikari property at any future time unless one of the two stated exceptions applied. While cl 4 lacks precision, its terms were designed to settle Ngāti Kahu's application to review FNDC's decision to grant consent for the proposed country club development on a non-notified basis. The plan incorporated within the agreement delineated the area of the development, referred to throughout the document as "the development site".

[22] In exchange for the Rūnanga's withdrawal of its opposition, Carrington accepted in the settlement agreement two express restrictions on its rights as owner. One restriction (cl 2) was an absolute prohibition on Carrington's right to develop a large and obviously valuable part of its land outside the development site – the beach and wetland areas – coupled with a positive undertaking to preserve and enhance the areas.

[23] The other restriction (cl 4) was an agreement "... not to *seek to expand the currently consented provision for accommodation* ..." (emphasis added). Carrington's then current consent for accommodation allowed construction of 384 units and ancillary buildings within the country club development together with travellers' accommodation and a manager's unit within the winery complex. The operative part of cl 4 was the only contractual limitation imposed on the company's consent rights; the parties plainly contemplated, for example in the concluding sentence of cl 4, that components of the development site might be further developed.

[24] The meaning of "expand" where used in cl 4 is of central importance. The word means "to increase in size or bulk or importance".[8] Something can only be expanded or increased in size if it is already in existence. In terms of cl 4, what was in existence was the currently consented land use for accommodation granted in May 1999. Clause 4 could not be construed to apply to a "provision for accommodation" which was not then in existence and was not then by definition capable of expansion. As Mr Gault observes, without this express restriction Carrington could have applied at any time to vary the existing consent by increasing, for example, the number of hotel rooms within the development or the size of rooms, possibly without notice.

[25] Carrington had no statutory or contractual right to use the existing consent as a legal platform for developing another part of its property for residential purposes. The company's future pursuit of that objective would always require a new application on different terms for a new consent. We are satisfied that, when considered in light of this context, Carrington's agreement not to seek to expand its existing consent for accommodation was limited to a prohibition on increasing the size of what was permitted according to the 1999 consent. This restriction cannot be construed to prohibit the company from applying at any time in the future for a land use consent to develop another part of its property for residential purposes.

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[8] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005).

[26] Also, as Mr Gault points out, if cl 4 bore the contrary meaning, cl 2 for example would be superfluous.

[27] Other provisions in the settlement agreement support this conclusion, in particular:

(a) Carrington's agreement to consult in good faith with Ngāti Kahu and the EDS was expressly limited to matters of mutual interest "relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future ...". This reference is consistent with the parties' limitation on the scope of the agreement to the development site – that is, a country club, golf course, lodge and associated accommodation units and vineyards (cl 1).

(b) The exceptions to Carrington's right to develop the accommodation area again related to "the development site" with an acknowledgement that "this site" may be the subject of applications for consent for further development in which case Ngāti Kahu and the EDS were to be notified (cls 4 and 6).

(c) The agreement was specifically in settlement of all issues, concerns and disputes "arising out of the grant or exercise of all existing resource consents obtained for the development ..." (cl 15).

[28] In our judgment White J erred in declaring that cl 4 of the settlement agreement operated as a contractual bar to Carrington's application in 2008 for a land use consent.

(b) Non-notification of resource consents

(i) Ngāti Kahu's application

[29] The second remedy sought by Ngāti Kahu was an order quashing Council's decision to grant Carrington's application for a land use consent on terms requiring

its reconsideration, with a direction that the application should proceed on a notified basis to be considered contemporaneously with the application for subdivision consent on the same site. White J's decision to grant this remedy is challenged by both Council and Carrington.

[30] The primary issues to emerge in argument in the High Court, and as identified on appeal, are whether the Judge was wrong to conclude that (a) special circumstances existed which required public notification of Carrington's application and (b) as a consequence Council's decision not to notify was unreasonable.[9]

(ii) Statutory provisions

[31] Sections 93–94D and 104 of the RMA then in force governed Council's notification obligations when processing Carrington's land use consent. Those provisions relevantly stated:

> **93 When public notification of consent applications is required**
>
> (1) A consent authority must notify an application for a resource consent unless—
>
> (a) the application is for a controlled activity; or
>
> (b) *the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.*
>
> ...
>
> **94 When public notification of consent applications is not required**
>
> (1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.
>
> (2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.

[9] At [83]–[84].

94A Forming opinion as to whether adverse effects are minor or more than minor

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

(a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and

(b) *for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity; and*

(c) must disregard any effect on a person who has given written approval to the application.

94B Forming opinion as to who may be adversely affected

(1) Subsections (2) to (4) apply when a consent authority is forming an opinion, for the purpose of section 94(1), as to who may be adversely affected by the activity.

(2) The consent authority must have regard to every relevant statutory acknowledgement, within the meaning of an Act specified in Schedule 11, made in accordance with the provisions of that Act.

(3) A person—

(a) may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the plan permits an activity with that effect; or

(b) in relation to a controlled or restricted discretionary activity, must not be treated as being adversely affected if the adverse effects of the activity on the environment do not relate to a matter specified in the plan or proposed plan as a matter for which—

(i) control is reserved for the activity; or

(ii) discretion is restricted for the activity; or

(c) must not be treated as being adversely affected if it is unreasonable in the circumstances to seek the written approval of that person.

...

94C Public notification if applicant requests or if special circumstances exist

(1) If an applicant requests, a consent authority must notify an application for a resource consent by—

(a) publicly notifying it in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

(2) *If a consent authority considers that special circumstances exist, a consent authority may notify an application* for a resource consent by—

(a) *publicly notifying it* in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

94D When public notification and service requirements may be varied

(1) Despite section 93(1)(a), a consent authority must notify an application for a resource consent for a controlled activity in accordance with section 93(2) if a rule in a plan or proposed plan expressly provides that such an application must be notified.

(2) *Despite section 93(1)(b), a consent authority is not required to notify an application for a resource consent for a restricted discretionary activity if a rule in a plan or proposed plan expressly provides that such an application does not need to be notified.*

(3) Despite section 94(1), a consent authority is not required to serve notice of an application for a resource consent for a controlled or restricted discretionary activity if a rule in a plan or proposed plan expressly provides that notice of such applications does not need to be served.

…

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

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

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

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

(iv) a plan or proposed plan; and

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

…

(Our emphasis.)

[32] These provisions when read together constituted a discrete regime for determining whether Council was obliged to publicly notify Carrington's application for a land use consent. That was for a restricted discretionary activity. As Ms Baguley emphasises, s 94D(2) applied because the Operative District Plan provided that such an application would not be notified where Council was satisfied that the adverse effects on the environment were minor. By contrast, while the same plan rule provided that controlled activity applications would not be notified, that provision was expressly subject to s 94C(2).

(iii) Carrington's application

[33] It is common ground that Carrington's application for a land use consent fell within the scope of s 93(1)(b); and that Council had a discretion on whether to notify. White J set out fully the terms of Council's decision to proceed on a non-notified basis.[10] He was satisfied that it correctly (a) inquired into and found that Carrington's application for the land use consent did not have any adverse effects when considered against the relevant criteria in the district plan; (b) noted its obligation under s 94A to disregard any adverse effects which did not relate to the matters specified in the plan for which the discretion had been restricted; and (c) concluded accordingly that its statutory discretion was limited solely to traffic intensity and access issues.

[34] Council also noted there were no affected persons within the meaning of s 94B and concluded: "The proposal does not offend the matters over which Council has reserved its discretion and as such merits approval."

[35] On their face, the remaining provisions of ss 93 and 94 were not engaged. In terms of s 94A Ngāti Kahu accepted that it could not challenge FNDC's decision that

[10] At [37].

the adverse effects of the application – that is exceeding traffic and access way intensity standards – were minor. Similarly, s 94B was not engaged.

(iv) Special circumstances

[36] The only question then was whether "special circumstances exist[ed]" in terms of s 94C(2) sufficient to invoke Council's discretion on whether to notify Carrington's application.[11] A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique.[12] A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification.[13] As Elias J noted in *Murray v Whakatane District Council*:[14]

> ... the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.

[37] In order to invoke s 94C(2), the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application. We repeat that Carrington's application to construct and use dwelling houses was, as White J accepted, a permitted activity in the Rural Production Zone. FNDC's discretion when determining the application was accordingly restricted by s 94B to those aspects of the activity which specifically remained for its consideration – compliance with the traffic intensity and vehicle access standards.

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11 At [84].

12 At [104] applying *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) at 536.

13 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 310; aff'd [1999] 3 NZLR 325 (CA).

14 At 310–311.

(v) High Court

[38] White J held that "special circumstances" existed, sufficient to take Council's decision out of the ordinary relating to notification of decision making.[15] He found that Council erred in reaching a contrary conclusion. The grounds for the Judge's conclusion are interlinked and can be addressed together. In summary, they are that:

(a) Carrington's land use application was unlikely to be able to be implemented without a subdivision application as well, and in terms of s 91 Council should have considered whether Carrington was required to make applications for both consents;

(b) Carrington intended when lodging the land use application to make a subdivision application as well and its decision to make two different applications, with the land use preceding the subdivision application, was contrary to principles of good resource management practice;

(c) Carrington's application to subdivide was non-complying and contrary to the overall thrust of the relevant objectives and policies of the district plan and in particular the site was within both the "coastal environment" and was "an outstanding natural ... landscape" in terms of s 6(a) and (b) of the RMA;

(d) Carrington was acting in breach of its agreement not to expand its application for consent to use its land for accommodation purposes and contrary to its good faith consultation obligation; and

(e) Council had itself acknowledged under cl 8 of the settlement agreement Ngāti Kahu's "particular interest" in significant developments affecting the coast within Ngāti Kahu's rohe.

[39] White J was satisfied that FNDC knew or ought to have known of these "special circumstances" when making its non-notification decision in

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15 At [115].

December 2008.[16] In particular, he relied on a passage from the Environment Court's decision on the subdivision consent issued in November 2010.[17] He was satisfied that there was no evidence Council made the enquiry of Carrington which it ought to have made. Nor was there any evidence that it turned its mind to the "special circumstances" of the case taking it out of the ordinary and making notification desirable. As a result FNDC had failed to exercise properly its discretion under s 94C(2).[18] For the same reasons, its decision was unreasonable in administrative law terms, and its narrow approach to the issue of notification was unjustified.[19]

(vi) Decision

[40] The first two grounds relied on by the Judge suggest that he gave primary weight to the effect of s 91. That section relevantly provides:

> (1) A consent authority *may determine not to proceed with the notification or hearing* of an application for a resource consent if it considers on reasonable grounds that –
>
> (a) other resource consents under this Act will also be *required in respect of the proposal* to which the application relates; and
>
> (b) it is appropriate *for the purpose of better understanding the nature of the proposal*, that applications for any 1 or more of those other resource consents be made before proceeding further.
>
> (Emphasis added.)

[41] The Judge's reliance on s 91 presents problems. Ngāti Kahu never pleaded that Council's decision not to notify was reviewable for failing to comply with s 91 or that Carrington's conduct in lodging a land use application for consent with the prospect or likelihood that an application for subdivision consent would follow itself constituted a special circumstance justifying public notification. Thus, the application of s 91 was not identified by the pleadings as a contestable issue on review and no evidence was led on it in the High Court.

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16 At [116].
17 Environment Court decision, above n 1, at [139].
18 At [117].
19 At [118].

[42] Also, as Mr Gardner-Hopkins accepts, White J erred in placing primary reliance on what he understood was a finding by the Environment Court[20] that Carrington's land use consent was unlikely to be implemented without a subdivision consent as well. In fact, the Court found to the contrary.[21] The Judge made a consequential finding, again in reliance on the Court's decision, that Council should have considered whether Carrington was required to make applications for both consents together. However, with respect, the Environment Court's observations made in its decision on an appeal against granting a subdivision consent, some years after the land use consent was granted, were not relevant to the validity of the land use consent. The latter consent was not directly in issue before the Environment Court.

[43] In support of White J's conclusion, Mr Gardner-Hopkins submits that in terms of s 91 (a) Carrington's proposal was in reality to develop freehold residential lots in a location close to the beach; (b) given the potential for the subdivision application to follow the land use application Council could reasonably have been expected to make further inquiry; (c) further inquiry would have yielded an affirmative answer from Carrington that a subdivision application would follow; (d) the subdivision application was non-complying and all relevant considerations would arise (not limited to the land use discretion); and (e) the separation or unbundling of the two consent applications was therefore contrary to the concept of integrated resource management and good practice – that is, according to the rule derived from the Planning Tribunal's decision in *Affco New Zealand Ltd v Far North District Council (No 2),*[22] that all resource consents for a project should be carefully identified from the outset and made together so they can be considered jointly. Mr Gardner-Hopkins refers to the company's obligation to lay its "cards on the table", emphasising that the subdivision consent was partially notified.

[44] In answer Mr Gault and Ms Baguley emphasise the distinction between Carrington's two applications and the principle of good resource management practice relied on by Mr Gardner-Hopkins. Counsel point out that each of

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20 At [115](a).
21 Environment Court decision, at [114].
22 *Affco New Zealand Ltd v Far North District Council (No 2)* [1994] NZRMA 224.

Carrington's applications were of a stand alone nature whereas in *Affco* further consents were required to effect the proposal (in that case to establish an abattoir). We agree with this distinction. Section 91 applies where "other resource consents ... will also be required in respect of the proposal". An example is where one local authority is satisfied that an application for subdivision consents will require an additional consent for stormwater discharge from another authority before the proposal can be implemented.[23]

[45] By contrast, Carrington's proposal was for a land use consent to construct 12 dwellings. The RMA creates separate regimes for imposing conditions on land use and subdivision consents although there can be a degree of overlap.[24] This proposal was stand alone and no further consents were necessary to allow its implementation by constructing 12 residential units. Mr Brabant advised us that the only reason why the units had not been constructed was the existence of Ngāti Kahu's application for judicial review and the High Court's decision to quash the consent.

[46] Moreover, in order for s 91 to apply Council had to be satisfied that any other applications be made if appropriate to better understand "the nature of *the proposal*". It could not have lawfully relied on s 91 to defer notification or hearing of Carrington's land use application where the only issue was whether it should exercise its discretion relating to the two activity standards. Council's contemporaneous consideration of a subdivision application would not have assisted it in that respect.

[47] In our judgment Mr Gardner-Hopkins' submission faces a more fundamental hurdle. While it is common ground that Council did not consider s 91 when deciding not to notify Carrington's land use consent, we are satisfied that the provision does not apply in any event. Section 91 is an enabling provision of negative effect; it

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23 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC).

24 *Meadow 3 Ltd v Van Brandenburg* HC Christchurch CIV-2007-409-1695, 30 May 2008.

simply empowers a consent authority "not to proceed with a notification or hearing" if it is satisfied on reasonable grounds that two express factors concurrently exist.[25] These words suggest that the power allows a local authority to defer notification where it has made an underlying decision to notify. The power cannot arise for consideration where in a case like this Council has made a decision not to notify.

[48] A decision by FNDC on whether to exercise the s 91 power could only have related to the separate act of hearing Carrington's application. However, its decision to hear and determine the application was never at issue in this proceeding. The subsidiary question of whether the company followed good resource management practice by filing sequential rather than conjoint applications could only have fallen for consideration in that context, if at all. Public notification of the land use application on the ground that a subdivision application would follow could not have assisted Council in exercising a discretion which related solely to the non-complying aspects of the application. Compliance or otherwise with s 91 or good resource management practice could not have constituted a special circumstance in terms of s 94C(2).

[49] The third ground for White J's decision was that Carrington's subdivision application was non-complying and contrary to the district plan as well as the objectives of the RMA. In this regard also the Judge relied on the Environment Court's findings. However, with respect, this factor was not material. As Mr Gault submits, the contingent status of a possible future application by Carrington relating to the same development was an irrelevant factor for FNDC when considering whether to publicly notify the land use application.

[50] In any event the underlying activity – using the land for residential purposes – was permitted when Carrington made its land use application. Only the traffic and access aspects of its proposal allowed Council to exercise a degree of discretion. Provided Council was satisfied that the effects of both were minor, as Ngāti Kahu accepts, the land use consent would necessarily follow. Public notification could not have changed the result.

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[25] Section 142 of the Resource Management Act 1991 (in force at the relevant time and contained in the part of the Act which deals with decisions on proposals of national significance) contains a cross-reference to s 91 and uses the same language.

[51] The fourth and fifth grounds for White J's decision related to findings of breach of the settlement agreement. As explained, we differ from the Judge on his finding of breach by Carrington. Also, with respect, we disagree with the Judge that FNDC's acknowledgement in cl 8 of the agreement that Ngāti Kahu had a "particular interest" in significant developments affecting the coast was relevant to notification.

[52] Here the Rūnanga had disclaimed any interest in the non-complying aspects of the application. As Mr Gardner-Hopkins accepts, FNDC only agreed under cl 6 that Ngāti Kahu was an affected person for discretionary and non-complying activities. And we agree with Mr Gault that on its plain meaning cl 6 applied only to the site of the original development, not to a proposal to develop elsewhere. In these circumstances cl 8, to which the Judge briefly referred, could not constitute a special circumstance justifying notification.

[53] Counsel also addressed argument before us on the issue of whether White J applied the correct legal approach to judicial review of Council's non-notification decision. That was because of the Judge's emphasis[26] upon Blanchard J's statement in *Discount Brands Ltd v Westfield (New Zealand) Ltd* that:[27]

> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[54] Both Mr Gault and Ms Baguley criticise the Judge's reliance on Blanchard J's judgment in *Discount Brands*, pointing to this passage from the judgment of Elias CJ in the same case:

> [22] Non-complying and discretionary activities are subject to the same test for non-notification: the consent authority must be "satisfied" that the adverse effects on the environment are minor; and must obtain written approval from every person whom the consent authority is satisfied may be adversely affected (unless obtaining such consent in the circumstances is unreasonable). These requirements are to be compared with those provided for controlled and limited discretionary activities. In the case of controlled and limited discretionary activities the express provisions of the district plan

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[26] At [102]–[103].

[27] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

> have established the scope of what is acceptable after a public process, subject to appeal opportunities. By contrast, applications for discretionary activities where the discretion is not a restricted one and non-complying activities have to be discretely weighed against the general policies and standards of the district plan. They have the potential to undermine expectations based on it.

Keith J made comments to the same effect.[28]

[55] It is unclear whether and to what extent White J ultimately relied on Blanchard J's statement in *Discount Brands*. However, we reject Mr Gardner-Hopkins' submission that in this context the statement can be construed as supporting what has been labelled the "hard look" approach to judicial review and this non-notification decision in particular.

[56] In our judgment the aims and purposes of the RMA cannot be construed as justifying a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers.[29] The judicial inquiry is required to determine whether the decision maker has complied with its statutory powers or duties. The construction or application of the relevant provisions remain objectively constant, and there can be no justification for adopting a sliding scale of review of decisions under the RMA according to a judicial perception of relative importance based upon subject matter.[30]

[57] We are satisfied that Blanchard J was doing no more than noting that in the then statutory context and the circumstances prevailing in *Discount Brands* – where the application was for a non-complying discretionary activity – the High Court on review must carefully scrutinise all the material submitted in support where Council's decision not to notify is challenged. In *Palmerston North City Council v Dury*,[31] cited by Mr Gardner-Hopkins, this Court affirmed Blanchard J's "careful scrutiny" observation when upholding a local authority's decision not to notify an

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28 At [48].

29 *Gordon v Auckland City Council* HC Auckland CIV-2006-404-4417, 29 November 2006 at [11]; *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535 (HC) at [41]–[43]; and *Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC) at [28]–[29].

30 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379].

31 *Palmerston North City Council v Dury* [2007] NZCA 521, [2008] NZRMA 519 at [53]–[54].

application for consent to a restricted discretionary activity where the adequacy of supporting information was in issue. However, Ngāti Kahu did not question the adequacy or otherwise of the information supplied by Carrington to FNDC in support of the land use consent relating to the two activity standards at issue. The distinction in approach towards notification drawn by Elias CJ in *Discount Brands* between non-complying activities on the one hand and restricted discretionary activities on the other – where the district plan has already established by a public process what is acceptable – is directly apposite.

(c) Result

[58] In the result, we allow the appeals by Council and Carrington against:

(a) the declaration made in the High Court that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land including the site which is the subject of its amended land use application dated 30 September 2008;

(b) the orders and directions made in the High Court quashing Council's decision relating to the land use consent, referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) the order for costs made in the High Court.

[59] The judgment of the High Court is set aside and the land use consent is reinstated.

[60] Costs must follow the event. Ngāti Kahu brought its proceeding separately against Carrington and Council. Each had separate interests which justified separate appearances in this Court. Ngāti Kahu is to pay one set of costs to Carrington and one set of costs to Council for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

Subdivision consent

(a) Environment Court

[61] Ngāti Kahu's challenge to Council's decision to grant Carrington a subdivision resource consent was based upon the Rūnanga's belief that the development would have an adverse effect on its relationship with a waahi tapu known as Te Ana o Taite/Taitehe, a burial cave situated on Carrington's land.

[62] The Environment Court was not satisfied on the evidence that the burial cave Te Ana extended underneath the subdivision site. Even if it had found otherwise, the Court was satisfied that any adverse affects on Te Ana or the wider environment would be caused by Carrington giving effect to its existing land use consent and related permitted activity works. In reaching that conclusion the Court adopted this test:

> [98] We consider that it is clear from *Hawthorn*[32] that we are required to make a factual determination as to whether or not it is *likely* that effect will be given to an unimplemented resource consent [the land use consent]. If we determine that it is likely then the environment against which we assess the effects of a proposal will include the environment as it might be modified by implementation of the unimplemented resource consent in question. We do not consider that we have a discretion to ignore that factual finding as to the future state of the environment.

[63] The Environment Court found that Carrington was likely to give effect to the land use consent. Thus the residential unit construction and related authorised works would form part of the future environment against which it must assess the potential effects of the subdivision proposal. In the result the Court was not satisfied that the adverse effects on the environment would be more than minor.

[64] However, the Environment Court recorded that but for that threshold factual finding it would have allowed the appeal if the application for subdivision consent had been considered on its own in the context of the existing environment without the prospective addition of 12 residential units. In that event the proposal would

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[32] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

have been contrary to the relevant statutory objectives and policies.[33] But, once the future environment was considered with the additional 12 residential units, a different result followed.

[65] It is thus clear that the Environment Court's decision was shaped by its formulation and adoption of the relevant legal test, and Ngāti Kahu's appeal to the High Court was based upon it.

[66] Before examining whether the Environment Court did err materially in law, it is appropriate to give a little more factual context to Carrington's application. The company applied to subdivide within the Rural Production Zone[34] lots on which construction of residential units was a permitted activity.[35] As Ms Baguley and Mr Brabant point out, the application to subdivide met all the permitted standards except for the lot dimensions. The proposal exceeded a residential intensity rule requiring development of one lot to every 12 hectares of land. The lots would have been permitted if each had at least 3000 square metres for surrounding exclusive use plus a minimum of 11.7 hectares elsewhere. But for the fact that they were clustered together rather than divided into lots of equal sizes, subdivision would have been a controlled activity.

[67] Also, as the Environment Court acknowledged, the subdivision simply enabled the issue of freehold titles to reflect what was already approved and likely to be implemented under the land use consent.[36]

(b) Statutory provisions

[68] Carrington's obligation to obtain a subdivision resource consent was governed by s 77B of the RMA which provided:

> **77B Types of activities**
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> ...

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33 Environment Court decision, above n 1, at [157]–[158].
34 At [11] above.
35 At [12] above.
36 At [146].

(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity,—

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.

(6) Particular restrictions for non-complying activities are in section 104D.

...

[69] The application fell for determination according to ss 104, 104B and 104D of the RMA,[37] which in March 2009 provided:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

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

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

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

(iv) a plan or proposed plan; and

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

(2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.*

...

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

...

[37] *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council*, above n 3, at [71].

104B Determination of applications for discretionary or non-complying activities

After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.

...

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Our emphasis.)

(c) High Court

[70] White J emphasised that the High Court's jurisdiction on appeal was limited to determinations of questions of law;[38] and that his answers to the four questions then identified had to be given in the light of the Environment Court's findings of fact, which were not open to challenge on appeal.[39] In particular the Court had found that (a) Carrington was likely to implement the land use consent regardless of whether the subdivision consent was granted; (b) the area of Carrington's proposed

[38] At [56].
[39] At [57].

subdivision was not situated above Te Ana; and (c) the land to be subdivided was within both "the coastal environment" and was an "outstanding natural ... landscape" in terms of s 6(a) and (b).

[71] In setting aside the decisions to grant the subdivision consent, White J correctly noted that his contemporaneous decision in the judicial review proceeding to quash the land use consent had the effect of removing the factual basis for the Environment Court's decision.[40] However, as the Judge also recognised, that decision was not material to his decision to allow Ngāti Kahu's appeal. That was because he was independently satisfied that the Environment Court erred in law.[41]

[72] White J noted that:

> [56] In the present case the parties agreed that in terms of ss 299 and 305 of the RMA the four questions of law raised by the two appeals were:
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> 1. Was the Environment Court obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in s 6(a) and (b) of the RMA?
>
> 2. Even if the Court was obliged to include the consented units in the future environment, was the Environment Court able to decline to grant consent?
>
> 3. Was the Environment Court in error when considering whether subdivision consent should be refused by reference to s 6(a) and (b) of the RMA to take into account only the environment including the 12 residential units already consented under RC 2080553, but have no regard to the permitted baseline in relation to the potential for development of seven residential units on the subdivision site as a permitted activity?
>
> 4. In relation to the proposed revised conditions of subdivision consent, was the Environment Court within its powers in directing a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 has been completed?

[73] White J was satisfied that the first two questions were related or sequential. The third is of academic importance. And the fourth, relating to a condition imposed by the Environment Court on Carrington's subdivision consent, was determined in

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[40] At [155].
[41] At [112].

the company's favour and is not the subject of a cross-appeal. In granting leave to appeal on 13 December 2011 White J did not identify a question or questions of law for our determination.[42]

[74] Our decision focuses on the Judge's answers to the first two questions, recognising that this Court's jurisdiction on appeal from the High Court is also confined to questions of law.[43] In advance of the hearing in this Court counsel filed a list of five discrete issues. However, their argument focussed primarily on the first two questions determined by White J, which are of decisive importance to this appeal.

[75] On the first question, White J determined that:

> [110] In light of the preceding analysis of the decisions of the Court of Appeal in *Arrigato*[44] and *Hawthorn* and the 2003 amendments, it is apparent that:
>
> (a) In terms of the "permitted baseline" concept, which applied to the subject site, the Council and the Environment Court had a discretion whether to take into account and give weight to the unimplemented construction consent (RC 2080553) when considering the effects of Carrington's application for the subdivision consent, a non-complying activity contrary to both ss 6(a) and (b) of the RMA and the provisions of the District Plan.
>
> (b) Unimplemented RC 2080553, which related to the subject site, was not a relevant consideration when the Council and the Environment Court were considering the future state of the environment beyond the subject site.
>
> (c) The Environment Court therefore erred in deciding otherwise and in not exercising the required discretion (although it is clear that it would otherwise have declined the application).

[76] On the second question, the Judge determined that the Environment Court erred in failing to exercise its discretionary power to decline consent even if it was obliged to include the unimplemented land use consent in the future environment.[45]

[77] We shall address each of these two determinations in the same sequence.

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42 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* HC Whangarei CIV-2010-488-766, 13 December 2011 (Minute No 2).

43 Resource Management Act, s 308.

44 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

45 At [115]–[127].

(d) Decision

(i) Environment

[78] The first question is whether the Environment Court erred in law by holding that it was bound to include Carrington's unimplemented resource consent in the environment against which the effects of the subdivision proposal was to be assessed if it was satisfied that the consent would in fact be implemented.[46]

[79] For this purpose, it is appropriate to summarise more fully the essential steps in the Environment Court's reasoning. After its disputed conclusion on the legal test, the Court followed this approach:

(a) An assessment of the future state of the environment is a determination of the form it might take having regard to activities that are permitted by district or regional plans (s 104(2)) or, as in this case, if the existing resource consents are implemented.[47]

(b) This assessment requires a factual determination as to whether it is likely that effect will be given to the land use consent.[48]

(c) It had no discretion to ignore its factual finding as to the future state of the environment.[49]

(d) It was satisfied, as a matter of fact, that the future environment would include construction of the 12 consented dwellings.[50]

(e) In considering the merits in the context of the future environment including 12 residential units the subdivision consent was not contrary to the district plan's objectives or policies (s 104D(1)(b)(i)).[51]

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46 At [98].
47 At [95].
48 At [96] and [98].
49 At [98].
50 At [114], [130] and [131].
51 At [158].

(f) Any adverse effects of Carrington's development would be a consequence of implementing the land use consent arising out of its development of the 12 unit residential development and its associated earthworks, infrastructure works and vegetation clearance and not the subdivision consent.[52]

[80] The Environment Court's construction of the words "the environment" where used in s 104(1)(a) was central to its decision. "The environment" is not a static concept in RMA terms, as its broad definition in s 2 illustrates.[53] It is constantly changing, often as a result of implementation of resource consents for other activities in and around the site and cannot be viewed in isolation from all operative extraneous factors. As this Court noted in *Queenstown Lakes District Council v Hawthorn Estate Ltd*[54] the consent authority will frequently be aware that the environment existing on the date a consent is granted is likely to be significantly affected by another event before its implementation. In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. The consent authority is required to consider the state of the environment at the time when it may reasonably expect the activity – that is, the subdivision – will be completed.[55]

[81] The question then is whether the Environment Court's construction of s 104(1)(a) to the effect that it was bound to take into account the effect of an unimplemented resource consent if satisfied that it would be implemented is consistent with this Court's decision in *Hawthorn.*[56] In *Hawthorn* an application was made for subdivision and land use consents to develop 32 residential units on 34 hectares of land near Queenstown. The activity was non-complying under the operative district scheme but discretionary under the proposed district scheme. The

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52 At [174] and [183].

53 Section 2 of the Resource Management Act provides: **environment** includes:
(a) Ecosystems and their constituent parts, including people and communities; and
(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

54 *Hawthorn*, above n 32, at [52]–[56].

55 *Hawthorn*, above n 32, at [52]–[56].

56 *Hawthorn*, above n 32.

area was within a wider triangle of land of 166 hectares where 24 houses had already been erected with unimplemented consents to construct another 28.

[82] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) the Court in *Hawthorn* identified the central question as:

> [11] ... whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not implemented, were implemented in the future. ...

[83] In answering that question affirmatively this Court conducted a careful and informed survey of the relevant statutory provisions[57] before concluding:

> [57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[84] Later, in a passage cited by White J,[58] this Court said in *Hawthorn*, that:

> [84] … It [the environment] also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. …

[85] White J summarised his analysis of the effect of *Hawthorn* and this Court's decision in *Arrigato*[59] as follows:

> [103] From this analysis of the decision of the Court of Appeal in *Hawthorn*, it is apparent that the Court was making it clear that when a consent authority is having regard to "any actual and potential effects on the environment of allowing the activity" it was permissible and desirable or even necessary for the consent authority to consider the future state of the environment on which such effects would occur and that in doing so resource consents, both implemented and likely to be implemented, **beyond the subject site** were part of the future environment. The Court of Appeal did not, however, "overrule" its earlier decision in *Arrigato*. In *Hawthorn* the Court of Appeal accepted that the "permitted baseline", which recognised both implemented and likely to be implemented consents **for the subject site**, remained relevant for the purpose of assessing the significance of effects of a particular resource application in the context of s 105(2A)(a), the predecessor to s 104D(1)(a) of the RMA.

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57 At [39]–[56].
58 At [101].
59 *Arrigato*, above n 44.

(White J's emphasis.)

[86] The Judge distinguished *Hawthorn* on the ground that the Environment Court's decision in this case was not concerned with the implementation of resource consents beyond the subject site.[60] As a result, the "permitted baseline" test embodied in s 104(2) was relevant to the Environment Court's consideration of Carrington's application.[61] The Judge held that the Court was thus required to exercise its judgment[62] and was not required to consider the unimplemented consent for the subject site when considering the receiving environment beyond it.[63]

[87] White J particularly emphasised the distinction drawn in *Hawthorn* between developments on the site on one hand and beyond the site on the other. He imported the permitted baseline test to justify this distinction. Mr Gardner-Hopkins did likewise. In the former case, he says, the local authority had a discretion to take into account the permitted plan baseline (as codified by s 104(2)); by contrast, in the latter case it was mandatory to take account of activities permitted by the plan or unimplemented consents where they are likely to be implemented.

[88] We do not accept this distinction. The qualification noted by this Court in *Hawthorn* was in the context of pointing out the limitation of the permitted baseline test to the site itself where the appellant had attempted to give it a more expansive application. What is decisive is the exclusionary nature of the permitted baseline test. In essence, as this Court observed in *Arrigato*:[64]

> [29] Thus the permitted baseline ... is the existing environment overlaid with such relevant activity ... as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

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60 At [103] and [105](a).
61 At [105](b).
62 At [105], applying *Arrigato*, above n 44, at [35].
63 At [105](b).
64 *Arrigato*, above n 44.

[89] As Mr Brabant submits, the permitted baseline was irrelevant to the Environment Court's decision. The current codification of the concept[65] in s 104(2) allows a consent authority when forming its threshold opinion under s 104(1)(a) to "... disregard an adverse effect of the activity on the environment if the *plan* permits an activity with that effect" (emphasis added). The statutory purpose is to vest a consent authority with a discretion to ignore the permitted baseline where previously it had been a mandatory consideration.

[90] The Environment Court was alive to the existence of this discretionary power.[66] That was because Ngāti Kahu's counsel had contended before it, as Mr Gardner-Hopkins did in the High Court, that the consent authority had a discretion as to whether it considered the unimplemented land use consent to be part of the permitted baseline or existing environment.[67] However, as the Environment Court pointed out, Ngāti Kahu's argument conflated the concepts of the permitted baseline and the environment as recognised in ss 104(2) and 104(1)(a) respectively. In *Hawthorn* this Court was satisfied that the appellant made the same error although in a different context.[68]

[91] In the RMA context, the environment and the permitted baseline concepts are critically different. Both are discrete statutory considerations. The environment refers to a state of affairs which a consent authority must determine and take into account when assessing the effects of allowing an activity; by contrast, the permitted baseline provides the authority with an optional means of measuring – or more appropriately excluding – adverse effects of that activity which would otherwise be inherent in the proposal.

[92] As this Court pointed out in *Hawthorn*:[69]

> [27] ... the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

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65 In the Resource Management Amendment Act 2003, which came into effect after the consent under consideration in *Hawthorn*, above n 32.

66 At [94].

67 At [92].

68 At [90].

69 *Hawthorn*, above n 32.

[93] In this case the Environment Court was not required to undertake a comparative enquiry of the type contemplated by the permitted baseline test. That was because Carrington did not seek to invoke the test in its favour to argue that the district plan permitted an activity having an adverse effect on the environment of the same nature as the proposed subdivision. The Court's enquiry was not into whether the plan permitted an activity with the same or similar adverse effect on the environment as would arise from the subdivision proposal. Its enquiry was focussed instead on the meaning of the "environment", taking proper account of its future state if it found as a fact that Carrington's land use consent would be implemented. Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent.

[94] In this respect we note this Court's statement in *Hawthorn*[70] to the effect that it is permissible and will often be desirable or even necessary for the consent authority to consider the future state of the environment. However, that observation does not affect our conclusion. The Court was simply recognising that a consent authority will not always be required to consider the future state of the environment. But, as the Court expressly recognised, it would be contrary to s 104(1)(a) for the consent authority not to take account of the future state of the environment where it is satisfied that other resource consents will be put into effect.[71] This is such a case.

[95] It follows that we must respectfully disagree with White J. In our judgment the Environment Court did not err in determining that it was required to take into account the likely future state of the environment as including the unimplemented land use consent for the purposes of s 104(1)(a) if it was satisfied that Carrington was likely to give effect to that consent.

(ii) Discretion

[96] The second question is whether the Environment Court erred in failing to consider whether to exercise its statutory discretion to decline Carrington's

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70 At [57], cited above at [83].
71 *Hawthorn*, at [54].

application even if it was obliged to include the unimplemented land use consent in the future environment.

[97] In summary White J found that the Environment Court erred because:

(a) The statutory scheme establishes that the decision on whether to grant an application is essentially discretionary in character.[72]

(b) Despite the fact that the land use consent had already been granted to Carrington, the Environment Court was entitled to take into account such factors as national importance, that subdivision was not a permitted activity under the district plan, its view of good resource management factors and its reservations about Carrington proceeding with the construction without obtaining freehold titles.[73]

(c) The fact that the second gateway test was met (s 104D(1)(b)(i)) did not of itself extinguish the need for the Environment Court to consider whether to exercise a discretion.[74]

(d) The Environment Court had an overriding discretion to take account of other relevant factors including that Carrington followed a deliberate strategy prior to maximising what was called "the permitted baseline/existing environment" prior to seeking subdivision consent which failed to meet the requirement of integrated resource management embodied in the RMA and Council's corresponding failure to enquire of Carrington whether it anticipated that subdivision would follow the land use application and whether it was required as part of the overall consent package.[75] In this respect, the Judge gave weight to the provisions of s 91.[76]

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72 At [116].
73 At [117].
74 At [118]–[119].
75 At [121].
76 At [126]–[126].

[98] As a result, White J was satisfied that the Environment Court erred in its reliance on *Hawthorn* in determining that the state of the future environment excluded from account other relevant factors and failed to carry out the required weighing or balancing exercise at all.[77]

[99] We accept that the Environment Court had an overall discretion in determining whether the resource consent should be granted.[78] But that discretion had to be exercised by reference to the relevant statutory criteria. Because this application was for consent to a non-complying activity, the Court first had to find that either of what are known as the gateway tests provided by s 104D was satisfied. This was the starting point for its enquiry into the merits. After consideration, the Court concluded that the application satisfied the second of the gateway tests – that is, it was for an activity that will not be contrary to the objectives and policies of the relevant plan.[79]

[100] However, the Court's enquiry did not end there; it did not treat satisfaction of the gateway test as determining its decision. Instead, the Court concluded after consideration of the evidence that any adverse effects on the environment would have been brought about by Carrington's implementation of the land use consent, not by the subdivision proposal.[80] As noted, the Court was satisfied that the company would build the residential units even if subdivision consent was not granted. This critical evaluative finding inevitably shaped the Court's exercise of its discretion, which had to be related to the merits of the application for subdivision consent. In this respect the Court noted that its decision was based not just on its factual findings but on its consideration of the relevant statutory provisions – ss 104 and 104D.

[101] With respect, we are unable to agree with White J that the Environment Court should have taken into account the factors he identified within its overall discretionary power. It appears that the Judge gave particular weight to the Court's trenchant criticism of Carrington for filing successive consent applications: the Court

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77 At [122].
78 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5], see also ss 77B(5)(b) and 104B(a).
79 At [158].
80 At [181] and [213].

observed at one stage that it must have been "blindingly obvious" to FNDC when the land use consent was filed that a subdivision consent application would follow.[81]

[102] It is difficult to follow the statutory basis for the Environment Court's criticism. On appeal counsel addressed detailed argument on what was called the bundling or hybrid planning status of applications when considering whether the consents ought to have been determined together or separately on the merits. We have determined a similar argument in our related decision on the judicial review appeal.

[103] Citing *Bayley v Manukau City Council*,[82] Mr Gardner-Hopkins reverts to his central line of argument that when determining whether bundling should occur the question is whether the relevant consent lies at the heart of the proposal;[83] and that this proposal was to secure freehold residential lots in a location close to the beach to which subdivision was integral. Therefore the most restrictive consent category, being non-complying status for the subdivision consent, should have been applied to both applications (if Carrington had applied for both contemporaneously as the High Court concluded). In this argument, as on the judicial review appeal he relies on s 91.

[104] However, Mr Gardner-Hopkins submissions are beyond the scope of this appeal. The Environment Court did not consider s 91. Instead, it made a decisive factual finding: after criticising Carrington's practice of filing successive applications and Council's alleged failure to act, it enquired into whether these acts or omissions had any material affect. The Court concluded that what it called the "the issue of environmental creep"[84] was not determinative given that the decisive

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81 At [139].

82 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580.

83 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [31].

84 As defined by this Court in *Hawthorn* (and cited in the Environment Court decision, above n 1, at [134]):

> [77] This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(b).

step in terms of environmental effects was Council's decision to grant the land use consent.[85]

[105] In any event, as Mr Brabant points out, the concept of "environmental creep" could not have had relevance here. That is because the concept is limited to cases where a party obtains one resource consent and then applies for another on the same site but for a more intensive activity.[86] In this case, the subdivision consent did not enable a more intensive use of the site than is allowed by the land use consent. It simply enabled titles to be issued for the 12 units which Carrington has a right to construct.

[106] Furthermore, for the reasons which we have given in the judicial review appeal, Council would have had no option but to determine the subdivision consent discretely. It could not have refused, in reliance on s 91 or a precept of good resource management practice, to deal with the subdivision application because a land use consent had been granted previously. With respect, White J's conclusion to the contrary,[87] cannot be sustained because even if Carrington had filed both applications together, FNDC was bound to deal with each separately on its merits. *Bayley* is distinguishable for that reason. In that case the consent authority was considering multiple consent applications: the issue was whether it correctly dispensed with notification of one of those applications.

[107] In any event, the question of whether Carrington followed a deliberate strategy of filing sequential applications could not have been relevant to a decision on whether the subdivision consent was lawfully granted. The company had not acted unlawfully and its conduct could never constitute a disqualifying factor. With respect, we disagree with White J's endorsement of Mr Gardner-Hopkins' submission that by allowing Carrington's application the Environment Court was permitting the company to take advantage of its own wrong doing.[88] Similarly, FNDC's alleged failure at an earlier date when determining the land use consent to

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85 Environment Court decision, at [146].
86 *Hawthorn*, at [79].
87 At [125]–[127].
88 At [124].

identify that a subdivision consent would be required was irrelevant to the merits of the subdivision application itself.

[108] It follows that we disagree with White J's conclusion that the Environment Court simply failed to carry out the requisite weighing exercise at all. In the context of this application its discretion was of a residual or limited character, tightly confined by the statutory criteria and the factual finding that Carrington was likely to implement the land use consent. We do not consider the Environment Court was bound, or even entitled, to take into account the factors identified by the Judge. Accordingly, we are satisfied that the High Court incorrectly found that the Environment Court erred in law when dismissing Ngāti Kahu's appeal against Council's decision to grant Carrington's application for a subdivision consent.

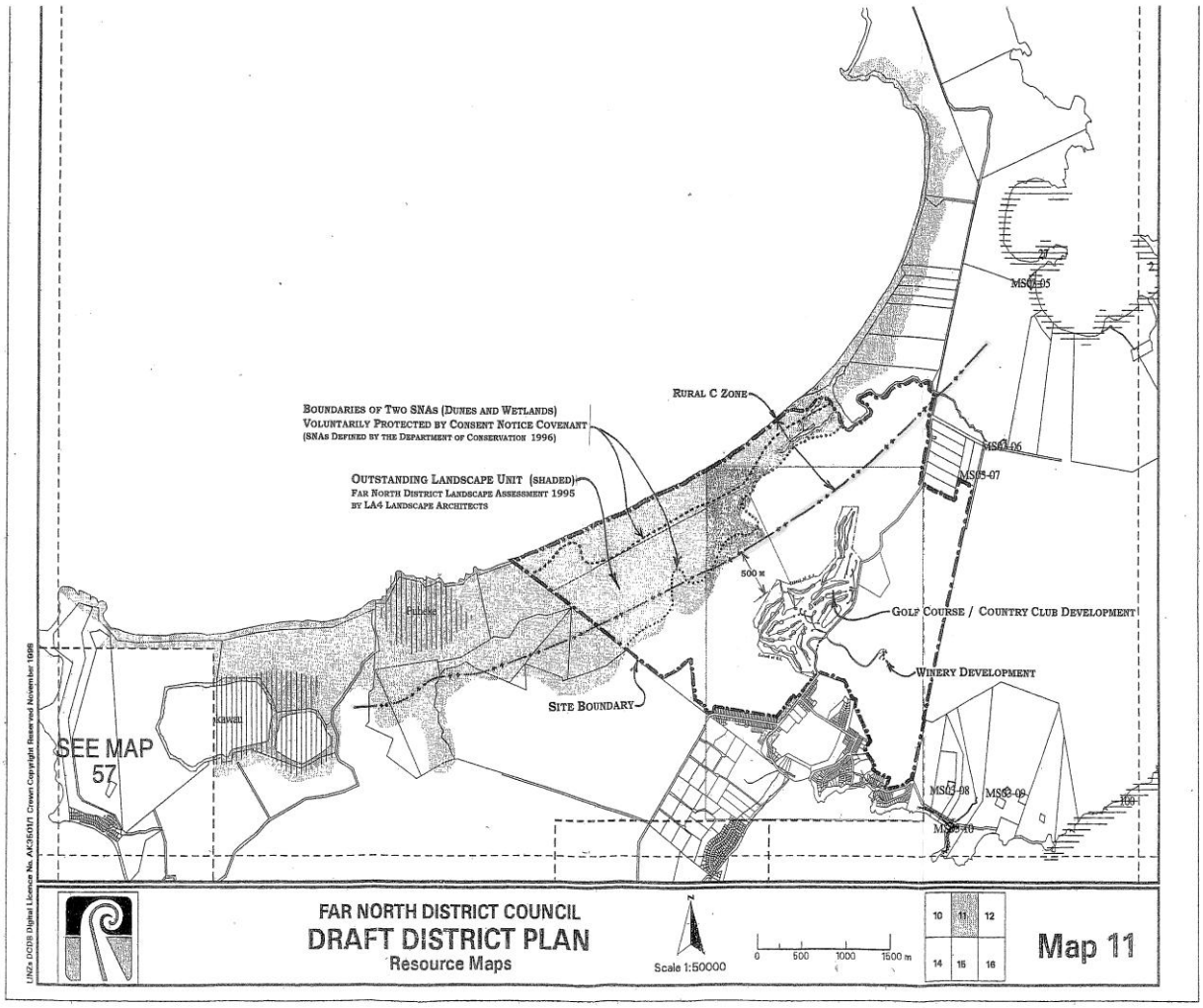
Result

[109] In the result we allow the appeals by FNDC and Carrington against the judgment of the High Court answering the first and second questions of law in Ngāti Kahu's favour, ordering costs and setting aside the decision of the Environment Court.

[110] The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

[111] In the normal course costs would follow the event. However, while we heard appeals against two separate judgments, we heard both together because they were interlinked and some issues overlapped. That connection is reflected in the composite nature of this judgment. In the circumstances we are satisfied that the award of costs against Ngāti Kahu in CA705/2011 and CA706/2011 will be sufficient to meet the interests of justice on both appeals. There will be no award of costs on this appeal.

Solicitors:
Law North Ltd, Kerikeri for Far North District Council
Russell McVeagh, Wellington for Te Rūnanga-ā-Iwi o Ngāti Kahu
Bell Gully, Auckland for Carrington Farms Ltd, Carrington Estate Ltd and Carrington Resort Ltd


BOUNDARIES OF TWO SNAS (DUNES AND WETLANDS)
VOLUNTARILY PROTECTED BY CONSENT NOTICE COVENANT
(SNAS DEFINED BY THE DEPARTMENT OF CONSERVATION 1996)
OUTSTANDING LANDSCAPE UNIT (SHADED)
FAR NORTH DISTRICT LANDSCAPE ASSESSMENT 1995
BY LA4 LANDSCAPE ARCHITECTS
RURAL C ZONE
500 m
GOLF COURSE / COUNTRY CLUB DEVELOPMENT
WINERY DEVELOPMENT
SITE BOUNDARY
SEE MAP 57
MS05-05
MS05-06
MS05-07
MS05-08
MS05-09
MS05-10
109
FAR NORTH DISTRICT COUNCIL
DRAFT DISTRICT PLAN
Resource Maps
Scale 1:50000
0 500 1000 1500 m
10 11 12
14 15 16
Map 11
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IN THE COURT OF APPEAL OF NEW ZEALAND

CA45/05

BETWEEN	QUEENSTOWN-LAKES DISTRICT COUNCIL Appellant
AND	HAWTHORN ESTATE LIMITED First Respondent
AND	T BAILEY AND OTHERS Second Respondents

Hearing: 14 March 2006

Court: William Young P, Robertson and Cooper JJ

Counsel: E D Wylie QC and N S Marquet for Appellant
N H Soper and J R Castiglione for First Respondent
No appearance for Second Respondents

Judgment: 12 June 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay costs to the first respondent in the sum of $6,000 together with usual disbursements. We certify for two counsel.

REASONS

(Given by Cooper J)

[1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 ("the Act").

[2] Fogarty J had dismissed an appeal by the council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the Council declining a resource consent application made by the first respondent ("Hawthorn").

[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.

[4] This Court gave leave for the following questions to be pursued on appeal:

> 1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):
>
> (a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;
>
> (b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;
>
> (c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.
>
> 2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".
>
> 3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are inter-related, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the Council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 hectares, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 hectares, together with access lots, and a central communal lot containing 12.36 hectares. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately four hectares in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that "the triangle" had been the subject of considerable development pressure over the past decade, and that within the 166 hectare area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is unclear from the Environment Court's decision whether any of those had been built on.

[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.

[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on." That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.

[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the Council would grant consent to subdivisions that matched the intensity of three other subdivisions in the triangle, for which the Council had recently granted consent. Those subdivisions had an average area of two hectares per allotment.

Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

> [25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply the "district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "Other Rural Landscape". In doing so the Court rejected the arguments that had been put to it by the Council and by parties appearing under s 271A of the Act that the proper classification was "Visual Amenity Landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a Visual Amenity Landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

> …in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".

[22] In the balance of its decision the Court rejected an argument of the Council that the decision would create an undesirable precedent. It considered the proposal

against the higher level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

> [h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land…

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

[25] Accordingly, the Environment Court had not erred when it took into account the approved building platforms both within and outside of the triangle. In [74] of the judgment Fogarty J said:

> In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council*.

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the Council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "Other Rural

Landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at [76]:

> Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.

[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the rural-residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an Other Rural Landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at [87]:

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The

> degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the rural general zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at [90]:

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well have been taking into account an irrelevant consideration. But where the Court considers that the Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – The environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The Council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the

exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the Council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".

[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the Council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.

[40] The definition reads as follows:

> "Environment" includes –

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the enquiry should be limited to a fixed point in time when considering "the economic conditions which affect people and communities", a matter referred to in paragraph (d) of the definition. The nature of the concepts involved would make that approach artificial.

[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

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 wellbeing 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.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is on-going, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an on-going state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under paragraph (c). "Avoiding" naturally connotes an on-going process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the

purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purposes of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act.

Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to ….

[51] The pervasiveness of Part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paragraphs (a) to (i) of s 104(1). These include: "any actual and potential effects on the environment of allowing the activity" (paragraph (a)), the objectives, policies, rules and other provisions of the various planning instruments made under the Act (paragraphs (c) to (f)) and "any other matters that a consent authority considers relevant and reasonably necessary to determine the application" (paragraph (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. Insofar as ss 104(1)(c) to (f) are concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the Council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection

of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a) were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in twenty years' time.

[57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and, possibly about how such future economic conditions might affect future people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.

[59] In support of those propositions he referred to *O'Connell v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at [73]:

> I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.

[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the Council's decision. When the Environment Court set aside the Council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

> [70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?
>
> [71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts.

[63] The Judge referred to *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council and Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of permitted baseline analysis is one that is restricted to the site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in

the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council*, at [30] and [34]-[35].

[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.

[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the permitted baseline analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the

subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at 377:

> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

> …or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the permitted baseline concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the District Council did not regard it as fanciful that the land in the locality might be

subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.

[71] That is an inference which can arise from what the Judge said at [79]:

> In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At [74] he said:

> As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the permitted baseline cases and applying it in this

different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at [26], where it was used to rule out of consideration, for the purposes of the permitted baseline test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.

[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each

successive application, they would be able to argue that the receiving environment had already been notionally degraded by its potential development under the unimplemented consents.

[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At [35] the Court said:

> [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First,

he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v*

Auckland Regional Council that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

[84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Question 1(b) - Speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to Question 1(b).

Question 1(c) – Consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at [35] that we have earlier set out. Mr Wylie submitted that properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the Council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development

occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the Council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly arise. We simply answer the question by saying that the issues raised by the Council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – Landscape Category

[92] The Council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "Other Rural Landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "Outstanding Natural Landscapes and Features", "Visual Amenity Landscapes" and "Other Rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes – the mountains and the lakes – landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "Visual Amenity Landscapes", the district plan describes them in the following way:

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees,

> greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones)".

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "Visual Amenity" or "Other Rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At [32], it said:

> We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any "arcadian" qualities of the wider setting. It concluded that the landscape category was Other Rural.

[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "Other Rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any

error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area ([79] of his decision, set out in [29] above).

[99] Mr Wylie repeated in this context his argument that the Court had been obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on Rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the Council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, Rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

> 5.4.2.1 **Landscape Assessment Criteria – Process**
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination of a landscape category – i.e. whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
>
> An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.

An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.

Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.

The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in Part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.

In making this determination the Council, shall consider:
(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in Rule 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at Step 3. He submitted that for the purposes of Step 1 and Step 2, attention should be focused solely on the current state of the environment.

[102] Mr Castiglione argued to the contrary, suggesting that the words used in Step 1, "…the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape" were apt to refer to proposed development generally within the landscape. We reject that submission. In context,

the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of Steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation of existing resource consents. Although the second paragraph in Step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in Step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the Council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within Step 2. Further, the second part of Step 2 authorises a broadly based inquiry when it requires the Council to "consider…the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in Step 2, a limitation of the consideration to the present state of the landscape.

[104] It follows that the future state of the environment can properly be considered at Steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and Question 2 should be answered no.

Question 3 – Reliance on Minimum Subdivision Standards in the Rural-Residential zone

[105] In the High Court, the Council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the rural-residential zone. The subject site is zoned rural general.

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the rural-residential provisions of the plan. In [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the Council expressed the

opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4,000 square metres and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 hectares. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of rural-residential amenity.

[107] The next reference to the rural-residential rules was in [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could co-exist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of over-domestication. That was so, because the site was in an "other rural landscape", and the district plan considered that rural-residential allotments down to 4,000 square metres retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the rural-residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the rural-residential in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the rural-residential zones. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "arcadian" character of the landscape had gone. He then

repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered no.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of Question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6,000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary by the Registrar.

Solicitors:
Ross Dowling Marquet Griffin, Dunedin for Appellant
Anderson Lloyd Caudwell, Queenstown for First Respondent

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2013
[2014] NZSC 38

BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED Appellant
AND	THE NEW ZEALAND KING SALMON COMPANY LIMITED First Respondent
	SUSTAIN OUR SOUNDS INCORPORATED Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	MINISTER OF CONSERVATION AND DIRECTOR-GENERAL OF MINISTRY FOR PRIMARY INDUSTRIES Fourth Respondents

Hearing:	19, 20, 21 and 22 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	D A Kirkpatrick, R B Enright and N M de Wit for Appellant D A Nolan, J D K Gardner-Hopkins, D J Minhinnick and A S Butler for First Respondent M S R Palmer and K R M Littlejohn for Second Respondent C R Gwyn and E M Jamieson for Fourth Respondents P T Beverley and D G Allen for the Board of Inquiry
Judgment:	17 April 2014

JUDGMENT OF THE COURT

A The appeal is allowed.

B The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect

to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.

C Costs are reserved.

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Para No

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource

Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 [RMA], s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 [*King Salmon* (Board)].

7 At [1341].

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with

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8 RMA, s 149V.

9 *King Salmon* (HC), above n 2.

10 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].

11 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41.

12 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40.

13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was

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14 *King Salmon* (Board), above n 6, at [1235]–[1236].

15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.

he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects …".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in pt 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA , being defined to mean "a district rule or a regional rule".[18]

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

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of

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16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.
18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).

whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

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23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the

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33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).

general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

> (a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:
>
> (i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.
>
> (ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal

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40 See s 87A.

41 *King Salmon* (Leave), above n 10, at [1].

Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
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> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.

> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Pt 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

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[42] BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

> 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.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters …

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is

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43 RMA, s 3.
44 Section 2.
45 Section 2.

necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92] to [97] below, in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic

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[46] The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

[47] See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of ss 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b). As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and

[48] Resource Management Bill 1989 (224-1), explanatory note at i.

provide for" seven matters of national importance. Most relevantly, these include:

(i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and

(ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Also included in ss 6(c) to (g) are:

(iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(iv) the maintenance and enhancement of public access to and along the coastal marine area;

(v) the relationship of Maori and their culture and traditions with, among other things, water;

(vi) the protection of historical heritage from inappropriate subdivision use and development; and

(vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):

(i) kaitiakitanga and the ethic of stewardship;[49]

(ii) the efficient use and development of physical and natural resources;[50] and

(iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the

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49 RMA, ss 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows

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[52] Emphasis added.
[53] See [40] below.

for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).

out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

> (a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.
>
> …

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47 to 52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to pt 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

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60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.

61 Section 46A.

62 NZCPS, above n 13, at 5.

63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
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> …
>
> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
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> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on pt 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on pt 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that

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64 *King Salmon* (Board), above n 6, at [1227].

the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that ss 5(2)(a), (b) and (c):[69]

> … may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource … is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. … [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue … .

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at

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65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed *New Zealand Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in *New Zealand Rail*] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> …
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

irreconcilable in the context of a particular case.[81] No individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed

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81 At [258].
82 *Man O'War Station*, above n 46, at [41]–[43].
83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].
84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

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85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a) to (c) and 75(1)(a) to (c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
>
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
>
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
>
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> - the coastal environment contains renewable energy resources of significant value;

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and
>
> (b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be

assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

Preservation of natural character

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

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

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

including by:

(c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and

(d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

(2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:

(a) natural elements, processes and patterns;

(b) biophysical, ecological, geological and geomorphological aspects;

(c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

(f) places or areas that are wild or scenic;

(g) a range of natural character from pristine to modified; and

(h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

Natural features and natural landscapes

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

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

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

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(v) whether the values are shared and recognised;

(vi) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(vii) historical and heritage associations; and

(viii) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In

other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the

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[88] The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> **7.2.8 POLICY - COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.
>
> *Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.*
>
> *Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.*

[67] The methods to implement this policy are then addressed, as follows:

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

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89 RMA, s 59.
90 Section 62(1).
91 Section 62(3).
92 Italics in original.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 POLICY — OUTSTANDING LANDSCAPES

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.

The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.

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93 Italics in original.

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region-wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas (previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. …

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.

regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

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105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.
108 RMA, ss 293(3)–(5).

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

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[109] *King Salmon* (Board), above n 6 (citations omitted).

> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) It asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) It assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106] to [148] below whether this approach is correct.

[84] Moreover, as we indicated at [34] to [36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to pt 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be pt 2 and not the NZCPS. The more plausible view is that Parliament considered that pt 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to pt 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that pt 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which pt 2 is given effect in relation to the coastal environment.[110]

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[110] Indeed, counsel in at least one case has submitted that pt 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of pt 2. He submitted that the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with pt 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation. However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to pt 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document

whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) … and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket

[111] *Man O'War Station*, above n 46, at [48].
[112] *Wairoa River Canal Partnership*, above n 46.

prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (ie, low density residential development on rural land) "avoids development in those areas … identified … as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate …".[115]

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through … identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting

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113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both pt 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

[116] RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> … in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;

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

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

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

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

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

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an

aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a

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[117] (28 August 1990) 510 NZPD 3950.
[118] (4 July 1991) 516 NZPD 3019.

> more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

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119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed

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122 RMA, s 58(a).

123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. …

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

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124 At 19.
125 At 22.
126 At 23.
127 At 23.

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (ss 58(a) and (ga));

(b) the Crown's interests in the coastal marine area (s 58(d));

(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see

what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so

specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> …
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the

[128] Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).

level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of ". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one

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[140] *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of

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[141] See [16] above.

subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have

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[142] Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up

for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

146 See [63] above.

means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of

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147 *New Zealand Rail Ltd*, above n 71, at 86.

policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a)

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148 At 86.

("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

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149 At 85.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist

body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

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150 At 86.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].

> the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
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> …
>
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
>
> …
>
> (2) A further evaluation must also be made by—

[153] *King Salmon* (Board), above n 6, at [121]–[172].

(a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and

(b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

…

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application

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154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the

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156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

> environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the

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158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the

circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application

focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

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[165] *King Salmon* (HC), above n 2, at [171].

WILLIAM YOUNG J

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

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166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

167 At [17] of the majority's reasons.

168 At [165]–[173] of the majority's reasons.

169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

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

(b) the protection of outstanding natural features and landscapes from inappropriate … use, and development:

…

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

13 Preservation of natural character

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

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

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

…

15 Natural features and natural landscapes

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

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

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

…

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the

RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58 Contents of New Zealand coastal policy statements**
>
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate … use, and development:
>
> …
>
> (c) activities involving the … use, or development of areas of the coastal environment:
>
> …
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal

> environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:
>
> …

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*[170]) and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> … does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> - identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and
>
> …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7 Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules.
>
> …

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
>
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to

the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

…

[192] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8

and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:

[172] At [98]–[105] of the majority's reasons.

> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to

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[173] Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

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

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there

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[174] The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

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[175] At [144] of the majority's reasons.
[176] See above at [195].

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
Russell McVeagh, Wellington for First Respondent
Dyhrberg Drayton, Wellington for Second Respondent
DLA Phillips Fox, Wellington for Third Respondent
Crown Law Office, Wellington for Fourth Respondents
Buddle Findlay, Wellington for Board of Inquiry

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002064
[2015] NZHC 767

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under s 299 of the Resource Management Act 1991
BETWEEN	MAN O'WAR STATION LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing:	24 and 25 March 2015
Appearances:	M E Casey QC and M J E Williams for Appellant B O'Callahan and J Burns for Respondent R B Enright and M C Wright for Environmental Defence Society Incorporated (s 301 party) R Gardner for Federated Farmers of New Zealand (s 301 party)
Judgment:	21 April 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 21 April 2015 at 2.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Introduction

[1] The appellant, Man O'War Station Ltd ("MWS") owns a 2,364 hectare rural property at the eastern end of Waiheke Island and on Ponui Island in the Hauraki Gulf, known as Man O'War farm ("the farm property"). Proposed Change 8 to the Auckland Regional Policy Statement ("Change 8") introduced new policy provisions for Outstanding Natural Landscapes (ONLs) and the Auckland Council prepared a new set of ONL maps for the Auckland region. The new mapping resulted in approximately 1,925 hectares of the farm property (more than 75%) being mapped as ONLs, referred to as "ONL 78" (on Waiheke Island) and "ONL 85" (on Ponui Island).

[2] MWS appealed to the Environment Court against the Council's mapping. In its decision given on 29 July 2014, the Environment Court accepted that areas in Man O'War Bay and Hooks Bay, and the whole of Ponui Island (apart from the eastern coastal margin and sea scape), should be excluded from the ONL.[1] However, the Court rejected MWS's submission that only coastal areas and particular inland areas should be included in the ONL.

[3] MWS has appealed to this Court, pursuant to s 299 of the Resource Management Act 1991 ("the RMA"), on the grounds that the Environment Court made errors of law.

Interim or final decision?

[4] The decision of the Environment Court is headed as an "Interim Decision". At [152] the Environment Court directed that the mapping of ONL 78 and ONL 85 in Change 8 was to be revised as set out in the decision, "subject to possible further consideration of mapping should wording in the [Auckland Regional Policy Statement] change after further agreement or input from parties".

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1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167.

[5] An interim decision of the Environment Court decision cannot be appealed.[2] However, counsel for MWS accepted that in relation to the mapping of ONLs, the decision is final. There is, therefore, no issue as to MWS's ability to appeal.

Relevant statutory provisions

[6] The applicable law is set out in the provisions of the RMA as they were when Change 8 was publicly notified in September 2005. In Part 2 of the RMA "Purpose and principles", s 5(1) provides that the purpose of the Act is to promote the sustainable management of natural and physical resources. "Sustainable management" is defined in s 5(2) as including "avoiding, remedying, or mitigating any adverse effects on the environment". Section 6 is headed "matters of national importance" and provides that in achieving the purpose of the Act, persons exercising functions and powers under it "shall recognise and provide for the following matters of national importance", including at s 6(b): "the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development". Those sections have remained unchanged since 2005.

[7] Provisions relating to the sustainable management of the environment are set out in a three-tiered system, moving from the general to the specific: national, regional, and district.[3] Section 57(1) of the RMA (unchanged since 2005) provides that "there shall at all times be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation …" Section 60(1) provides that there must be a regional policy statement for each region, prepared by the regional council. Section 61(1) provides that the regional policy statement must be prepared and changed in accordance with (among other things) Part 2 of the Act, and the regional policy statement must, pursuant to s 62(3) give effect to a New Zealand coastal policy statement. Sections 60 to 62 are also unchanged since 2005.

[8] Policies 13 and 15 of the New Zealand Coastal Policy Statement 2010 (NZCPS 2010) are particularly relevant in the present case. Policy 13 "Preservation of natural character" is:

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2 See *Mawhinney v Auckland Council* HC Auckland CIV 2010-404-63, 26 October 2011 at [90]-[99] and *Motiti Avocados Ltd v Minister of Local Government* [2013] NZHC 1268.

3 See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [9]-[16].

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

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

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

[9] Policy 15 relates to "Natural features and natural landscapes" and begins:

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

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

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

Policy 15 then sets out means by which the policy is to be achieved, including:

(c) identifying and assessing the natural features and natural landscapes of the coastal coastal environment of the region and district, at minimum by land typing, soil characterisation and landscape characterisation …

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies, and rules; …

[10] The term "outstanding natural landscape" is not defined in the RMA. The Environment Court referred to the approach and factors set out in the Environment Court's decisions in *Wakatipu Environmental Society Inc v The Queenstown-Lakes District Council ("WESI")*,[4] and in *Maniototo Enviromental Society v Central Otago*

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

District Council ("Maniototo"),[5] in which the Court will first identify a "landscape", then consider whether the landscape is sufficiently "natural" to be classified as a natural landscape, then assess whether the natural landscape is "outstanding". That latter assessment is undertaken by reference to the factors set out in *WESI*. In essence, these require the landscape to remarkable, exceptional, or notable.

The judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited*

[11] In submissions to this Court, counsel made extensive reference to the judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd ("King Salmon")* delivered on 17 April 2014 (after the hearing of MWS's appeal to the Environment Court).[6] The Environment Court received and considered submissions from counsel as to its impact on the proceeding, before issuing its decision.

[12] *King Salmon* concerned a proposed salmon farm in an area of the Marlborough Sounds (Papatua, in Port Gore) that was accepted as being "an area of outstanding natural character and an outstanding natural landscape". It was also accepted that the proposed salmon farm would have significant adverse effects on that natural character and landscape.[7] The appeal concerned whether a plan change, which would allow the salmon farm, but would not give effect to Policies 13 (1)(a) and 15(a) of the NZCPS 2010, should have been refused.

[13] The Supreme Court held by a majority that the Board of Enquiry considering the proposed plan change was required to give effect to the NZCPS policies,[8] that "avoid" (in the phrase "avoid adverse effects") means "not allow", or "prevent the occurrence of",[9] and that the Policies provided "something in the nature of a bottom line".[10] The NZCPS is "an instrument at the top of the hierarchy" of environmental instruments, and gives effect to the protective element of sustainable management.[11]

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5 *Maniototo Enviromental Society v Central Otago District Council* Decision C103/2009.
6 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 3.
7 *King Salmon*, at [5].
8 At [77].
9 At [96].
10 At [132].
11 At [153].

In reaching this conclusion, the majority rejected the "overall judgment" approach adopted by the Board of Enquiry, and the High Court on appeal.

[14] In his dissent, William Young J noted the possibility of overbroad consequences of the majority's decision: "severe restrictions being imposed on privately-owned land in areas of outstanding natural character", and the potential to be "entirely disproportionate" in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted."[12]

[15] Counsel for both MWS and the Council agreed that the Auckland Regional Policy Statement would need to be revised following the *King Salmon* judgment, and that the Policy Statement will inevitably be more restrictive as regards the coastal environment.

Application to adduce new evidence on appeal

[16] MWS applied to adduce further evidence on appeal, being a statement of Mr Andrew Christopher McPhee, principal planner in the Central and Islands area planning team at the Auckland Council. Mr McPhee's statement considers the planning implications of the Supreme Court's judgment in *King Salmon*, in particular, whether changes are required to be made to planning instruments as a result of the judgment.

[17] At the hearing in this Court, counsel for the Council, Mr O'Callahan, advised the Court that the Council acknowledges that there needs to be revisions to the Auckland Regional Policy Statement, and that the policy in respect of the coastal environment will inevitably be more restrictive. Mr O'Callahan submitted that there would be no purpose in allowing the evidence to be adduced.

[18] In the light of that acknowledgment, I agree that there is reason to adduce Mr McPhee's evidence.

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[12] At [201].

Environment Court decision

[19] The Environment Court noted that it was agreed by the parties that all of the areas that were in dispute as being ONLs were "landscapes", and had sufficient "natural" qualities for the purposes of s 6(b) of the RMA.[13]

[20] The Environment Court considered a submission for MWS that (in particular as a result of the *King Salmon* judgment, and the inevitability of more restrictive policies) a more conservative (higher) threshold should be adopted for determining what comprises an ONL, and that the assessment should be made at a national scale. However, the Court accepted a submission for the Council that the planning consequences would flow from the fact that the land is an ONL, and are not relevant the determining whether it is an ONL or not.[14]

[21] Further, the Court was not comfortable with MWS's submission that the assessment of "outstandingness" should be made on a national rather than a regional scale, for two reasons. First, the task would be enormously complex, if not impossible, and secondly, if pristine areas of New Zealand such as parts of Fiordland, the Southern Alps, and certain high country lakes were to be regarded as the benchmark, nothing else might qualify to be mapped as outstanding.[15]

[22] The Environment Court then considered in detail evidence given for MWS and the Council concerning ONL mapping. It is evident from the maps presented in the Environment Court that the principal witnesses for both parties agreed that the entire coastline and sea scape, and the prominent landscape in the higher parts of the property were properly assessed as ONLs, and that areas in Man O'War Bay and Hooks Bay were properly excluded.

[23] The debate focussed on intermediate areas between the coastal and interior landscapes. MWS's witness, Ms Gilbert, distinguished between the "coastal environment landscape area" and the "interior landscape character area". The

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13 Environment Court decision, above n 1 at [4].
14 At [37]-[39].
15 At [57]-[67].

Council's witness, Mr Brown, disagreed with this separation. The Environment Court said that during a site visit:[16]

> … it became obvious to us that [MWS's] property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. … In particular, we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception … we do not find it appropriate the separate coastal and inland landscape …

[24] Accordingly, the Environment Court allowed only limited amendments to the ONL mapping.

Approach on appeal

[25] It was common ground that the principles to be applied in approaching an appeal to the High Court under s 299 of the RMA are as summarised by French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*:[17]

> [33] An appeal to this Court under s 299 is an appeal limited to questions of law.
>
> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
>
> i) applied a wrong legal test; or
>
> ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
>
> iii) taken into account matters which it should not have taken into account; or
>
> iv) failed to take into account matters which it should have taken into account.
>
> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

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16 At [128]

17 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]-[36].

> [36] Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.
>
> (Footnotes omitted)

[26] Further, as Mander J observed in *Young v Queenstown Lakes District Council*:[18]

> The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, nor will it delve into questions of planning and resource management policy. The weight to be attached to policy questions and evidence before it is for the tribunal to determine, and is not able to be reconsidered as a point of law.

[27] Finally, it is appropriate to note the observation of Wylie J in *Guardians of Paku Bay Association Inc v Waikato Regional Council*:[19]

> The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

Appeal issues

[28] On behalf of MWS, Mr Casey QC first submitted that the Environment Court had erred in its consideration of the effect of the Supreme Court's judgment in *King Salmon*. In particular, it was submitted, the Environment Court erred in:

a) failing to address the *WESI* factors when determining whether the landscapes in question were ONLs;

b) failing to undertake the assessment of whether areas of the farm property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

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[18] *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19].

[19] *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

c) failing to recognise that as a result of the level of protection required for ONL's in the coastal environment being clarified in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under Change 8; and

d) failing to recognise that given the implications of the judgment in *King Salmon*, it was required to determine which parts of the farm property fell within the coastal environment, and which did not.

WESI factors

(a) Submissions

[29] Mr Casey and Mr Williams submitted for MWS that while the Environment Court listed the factors set out in *WESI* and other decisions, it did not actually evaluate whether the landscape was "outstanding", by reference to the factors. Rather, the Court simply adopted the approach taken by the Council's expert witness. They further submitted that the Court failed to give adequate consideration to the "naturalness" of the disputed landscape: the MWS land is a working farm, and so heavily developed that it cannot properly be described as "natural".

[30] Mr Williams also submitted that the Environment Court was wrong to reject MWS's submission that it is necessary to separate coastal and non-coastal areas for the purposes of identifying ONL's. He submitted that there is a "fourth dimension" involved in assessing non-coastal land, which is not present in relation to the coastal environment. He described this as a "real world enquiry", which allows for the dynamic nature of farming, and the fact that a simple farming step (such as spraying weeds to reclaim pasture) may lead to a substantial change in a landscape. He submitted that the Environment Court had erred in law in failing to take this factor into account.

[31] It was submitted that, as a result of the above errors, the Environment Court had identified as ONLs landscapes which, while picturesque or handsome, were best

described as "fairly normal rural landscapes". Counsel referred to the comment in *High Country Rosehip*, that not all handsome landscapes are "outstanding".[20]

[32] Mr O'Callahan submitted for the Council that the Environment Court was not in error. He submitted that the Court was not required to consider whether the farm property was "landscape" and "natural", as that was agreed by the expert witnesses for MWS and the Council. Further, there was agreement that substantial parts of the farm property were ONLs. The debate was as to drawing the line between the ONLs and areas that were not ONLs. The Environment Court was dealing with areas around the fringes, so did not have to rank the "outstandingness" of particular areas.

[33] Mr O'Callahan submitted that in deciding whether a natural landscape is "outstanding", the Environment Court had to have regard to the appropriate factors and synonyms used to understand "outstandingness", as set out in cases such as *WESI*, *Maniototo*, and *High Country Rosehip*. Those factors and synonyms were derived in cases that did not involve the coastal environment. He submitted that, in any event, the assessment of "outstandingness" is essentially the same whether carried out in the coastal or non-coastal environment.

[34] Mr O'Callahan submitted that the Environment Court had appropriately set out and understood the relevant factors, and had set out and considered the competing evidence and submissions. Ultimately, he submitted, the Court's determination was a matter of the specialist court exercising its judgment on the expert evidence. It was not necessary for the Court to set out and analyse the individual factors. The Court's determination was a factual determination, which cannot be appealed.

[35] Mr Enright submitted for the Environmental Defence Society that the real issue on appeal was whether the Environment Court undertook the exercise of deciding whether the land at issue was "outstanding". In that assessment, divisions of the Environment Court have in other cases referred to synonyms, or qualifying adjectives, such as those set out in *WESI* and *High Country Rosehip.* In the present case, he submitted, in identifying disputed ONL areas, the Court had in mind the

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[20] *High Country Rosehip v MacKenzie District Council* [2011] NZEnvC 387 at [104].

relevant adjectives, or synonyms, used to assess whether the land was outstanding. Ultimately, whether land is outstanding is a factual determination.

(b) Discussion

[36] I am not persuaded that the Environment Court failed to undertake an appropriate assessment of the disputed ONL areas. I accept that the Court was not required to consider whether the disputed areas were "landscapes" and "natural landscapes", as those issues were agreed. The sole issue for the Court was whether they were "outstanding".

[37] The Court referred to the discussion of the concept of "outstandingness" as set out in *WESI*, and the qualifying adjectives and synonyms noted in the evidence of MWS's expert witness. There was no error in the Court's analysis of the evidence before it. Its conclusions as to which areas were ONLs were then factual determinations, and cannot be appealed.

[38] So, too, was the Environment Court's rejection of the MWS submission that there must be a separation of coastal and non-coastal land for the purposes of identifying ONLs. The "real world enquiry" is recognised in the factors set out in *WESI* and *Maniototo*, where human intervention was accepted as being part of the development of the natural landscape. In *Maniototo*, in particular, the element of human engagement and interaction with the landscape is recognised. Far from detracting from the "naturalness" of the landscape, the human engagement and interaction contributes to the intrinsic value of the landscape.

[39] I am not persuaded that the Environment Court has been shown in the present case to have failed to take that factor into account. The Court had the evidence of the expert witnesses for MWS and the Council before it, and referred to both in its decision. It is not an error of law to have accepted one over the other.

Regional or national reference?

[40] As noted earlier, the second aspect of MWS's appeal concerned the scale against which the assessment of "outstandingness" is carried out: whether it should be on a national, regional, or district-wide scale.

(a) Submissions

[41] Mr Williams submitted that the Environment Court was wrong to assess the "outstandingness" of the MWS farm property at a regional level; he submitted that the assessment should be at a national level. Mr Williams accepted that in *WESI* the Environment Court had referred to a regional basis for assessment, but submitted the in later decisions, for example *Maniototo*, the assessment was on a national basis. He submitted that this is appropriate, as an "outstanding" landscape must, by definition, "stand out against the rest". He submitted that it follows from the fact that protection of ONLs is a matter of national importance, that the assessment of them must be on a national, not regional or district basis.

[42] Mr O'Callahan submitted that the MWS submission on this point misinterpreted the provisions of the RMA. He submitted that the MWS submission would equate to saying that the RMA is to be read as "protecting nationally significant landscapes" and "nationally significant indigenous flora and fauna. However, that is not how the RMA is framed. The RMA provides that *protection* is of national importance; it is of national importance to protect ONLs and other matters that are of significance.

[43] Mr O'Callahan further submitted that if it had been intended that only "nationally outstanding landscapes" were to be protected, then the RMA would have provided accordingly, and would have provided the machinery for such protection at the national level. Further, various divisions of the Environment Court have developed the law concerning the identification of ONLs at the district or regional level; albeit on occasion (as in *Maniototo*) asking how the landscape in issue compared with other New Zealand landscapes.

[44] Mr Enright, for the Environmental Defence Society, submitted that there is no reason to interfere with the well-established factors for assessing "outstandingness" which were developed at the regional or district level and were agreed upon by all parties before the Environment Court.

(b) Discussion

[45] There is no basis on which I could accept that the assessment of "outstandingness" in this case should have been undertaken on a national, rather than regional or district basis. I accept the submissions for the Council and the Environmental Defence Society that the wording of the RMA does not support MWS's submission. Section 6 is clear in its terms, that it is protection of ONLs (and the other matters listed) that it is national importance. It does not say that it is only natural landscapes that are of national significance that are to be protected.

[46] There is force, too, in Mr O'Callahan's submission that if it had been intended that only nationally significant natural landscapes were to be protected, the RMA would have included an express provision to that effect. It is significant that the jurisprudence surrounding the identification of ONLs has developed through divisions of the Environment Court considering the issue on a regional or district basis.

[47] Further, I am not persuaded that it is necessary to incorporate a "national" comparator (or even a regional or district one) into the consideration of "outstandingness". The Courts in which the jurisprudence has been developed have not been asking "is this a nationally significant outstanding natural landscape?" They have been asking simply "is this an outstanding natural landscape". That is the issue that they are required to consider, under the RMA.

Effect of King Salmon

(a) Submissions

[48] On this point Mr Williams submitted that mapping of ONL's on the farm property for the purposes of Change 8 had been undertaking in the policy context

that prevailed before the Supreme Court judgment in *King Salmon*. That context included the adoption of the "overall judgment" approach to planning decisions. Mr Williams referred to *North Shore City Council v Auckland Regional Council*, in which the Environment Court said: [21]

> We have considered … the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paras (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and principles of statutory construction, which are not applicable to the broad description of the statutory purpose. To do so would not allow room for the exercise of the kind of judgment by decision makers (including this Court – formerly the Planning Tribunal) …

[49] Mr Williams submitted that a different paradigm now applied, with the clear direction that higher order documents in the hierarchy of environmental management have primacy over lower order documents. He submitted that *King Salmon* would have a substantial and serious impact on its farming operation. It has a reasonable fear that the judgment will translate into a prohibition on all activities on the farm property, in order to comply with the directions in higher order documents. Working within a policy framework where farming activities could continue (on an overall judgment approach) is vastly different from a situation where those activities could be prohibited, under a requirement to "avoid adverse effects".

[50] Mr Williams further submitted that *King Salmon* has substantially changed the nature of environmental policies and objectives. The corollary must be, it was submitted, that there must be a change in mapping, as the nature of the protection to be provided (in the present case, for ONLs) must inform the process of mapping. ONL's are not mapped for their own sake, but for the purposes of protecting them from inappropriate subdivision, use, and development, and from adverse effects (if they fall within the coastal environment). In essence, Mr Williams argues that the definitions of ONLs was contextual and depended on the extent of protection that that status would grant.

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[21] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59

[51] He submitted that as a result of *King Salmon*, it necessarily follows that the manner in which ONL criteria are applied must change; the increased level of protection required for ONLs necessitates a higher threshold for identification of an ONL.

[52] Federated Farmers of New Zealand supported the submissions for MWS. Mr Gardner also expressed concern as to the consequences of the *King Salmon* judgment for the level of landscape protection required under the RMA. He submitted that the issue of the threshold for identification of an ONL is of crucial importance for any farm that is in the coastal environment and is "outstanding" in terms of s 6 of the RMA.

[53] Referring particularly to rural production activities, Mr Gardner submitted that, following *King Salmon*, it was implausible that the many and varied activities associated with rural production (such as construction of farm tracks, planting exotic shelter belts, or constructing some farm buildings) which would previously have been considered appropriate in an ONL in the coastal environment would now have to be avoided (prohibited) because of their adverse effect.

[54] Applying *King Salmon* would necessarily mean that the very activities Change 8 relies on as warranting classification as an ONL should no longer take place. Thus, it is "logically difficult" to identify working rural landscapes as ONLs, and the underpinning of the landscape identification and mapping under Change 8 is undermined.

[55] Regarding the impact of *King Salmon*, Mr O'Callahan submitted that MWS was wrong, at a conceptual level, to submit that if the level of protection for ONLs set out at the policy level increases, the threshold for identifying ONLs must be stricter. He submitted that policies do not drive identification as ONLs. Rather, the RMA clearly provides a delineation between identifying ONLs, and the policies for protecting them.

[56] Mr O'Callahan further noted that in *King Salmon*, it was accepted that the area where the proposed salmon farm was to be sited was an ONL. There was no

suggestion that, as a result of the Supreme Court's judgment, the local authority should reconsider the ONL identification. Rather, the policies for protecting the area identified as an ONL had to be reconsidered.

[57] Mr Enright submitted that the *King Salmon* judgment does not affect mapping of ONLs. It impacts upon the wording of objectives, policies and methods to protect ONLs. He submitted that *King Salmon* could not, by a side wind, change anything relating to identification of ONLs. More particularly, it could not have been in the Supreme Court's mind that the identification of ONLs should be more confined, and their numbers reduced as a consequence.

(b) Discussion

[58] I do not accept the submission for MWS that as a consequence of the *King Salmon* judgment, the identification of ONLs must necessarily be changed, and made more restrictive. There is no justification for such a submission in the *King Salmon* judgment, and it is not justified by reference to the RMA.

[59] It is clear from the fact that "the protection of outstanding natural features and landscapes" is made, by s 6(b), a "matter of national importance" that those outstanding natural landscapes and outstanding natural features must first be identified. The lower level documents in the hierarchy (regional and district policy statements) must then be formulated to protect them. Thus, the identification of ONLs drives the policies. It is not the case that policies drive the identification of ONLs, as MWS submits.

[60] As identified by the Council, the RMA clearly delineates the task of identifying ONLs and the task of protecting them. These tasks are conducted at different stages and by different bodies. As a result it cannot be said that the RMA expects the identification of ONLs to depend on the protections those areas will receive. Rather, Councils are expected to identify ONLs with respect to objective criteria of outstandingness and these landscapes will receive the protection directed by the Minister in the applicable policy statement.

Decision

[61] For the reasons set out above, MWS's appeal against the Environment Court decision must fail. The appeal is dismissed.

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Andrews

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 81

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	R J DAVIDSON FAMILY TRUST
	(ENV-2014-CHC-34)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner I Buchanan Dr A J Sutherland as special advisor under section 259 of the Act
Hearing:	at Blenheim on 4 to 8 and 11, 12 May 2015 and 17 July 2015
Appearances:	J D K Gardner-Hopkins, A M Cameron and E J Hudspith for Davidson Family Trust J W Maassen for Marlborough District Council J C Ironside for Kenepuru and Central Sounds Residents Assn Inc. and Friends of Nelson Haven and Tasman Bay Inc. – section 274 parties
Date of Decision:	9 May 2016
Date of Issue:	9 May 2016

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991 the Environment Court:

(1) confirms the decision of the Marlborough District Council on application U130797;

(2) refuses resource consent application (MDC ref) U13097 to establish and operate a 7.34 hectare marine farm at Beatrix Bay, Pelorus Sound.

B: Reserve costs; any application is to be made within 15 working days and any reply within a further 15 working days.

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Reasons of Judge Jackson and Environment Commissioner Mills

Reasons of Environment Judge Jackson and Environment Commissioner Mills

0. Introduction

0.1 The issue: another marine farm in Beatrix Bay?

[1] On 24 December 2014 the R J Davidson Family Trust applied (Marlborough District Council Application No U130797) for consent to establish and operate a 8.982 hectare marine farm in Beatrix Bay, Central Pelorus Sounds, to enable the cultivation of green shell mussels[1] and other crops. The application also seeks consent to disturb the seabed with anchoring devices, to take and discharge coastal seawater, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest.

[2] The ultimate issue for the court is whether the proposal achieves the objectives and policies of the combined district and regional plan and of the New Zealand Coastal Policy Statement. The first important subordinate issue is to obtain an accurate description of the environment — there is disagreement between the parties over the accurate description of the current and reasonably foreseeable future environment. A further important issue for the court is whether, assessed under the relevant objectives and policies, the clear financial and social benefits of the proposal outweigh the direct and accumulative environmental costs. Finally, there is disagreement about the scale,

[1] *Perna canaliculus*.

character and intensity (inter alia) of the accumulative adverse effects of the proposal on:

- the natural character of Beatrix Bay;
- the landscape values of a promontory at the northern end of the Bay;
- amenities for visitors to and (the few) residents of Beatrix Bay;
- safety through reducing navigational options;
- the marine ecology of Beatrix Bay; and
- the habitat of New Zealand King Shag.

[3] More specific issues are identified as we identify and analyse the matters to be considered.

0.2 The application, the appeal, the other parties and the service of evidence

[4] The applicant for the proposed marine farm is a family trust. The beneficiaries of which are the children of Mr R J Davidson. Mr Davidson is part-owner of a number of other consented marine farm areas in the Marlborough Sounds and is a well-known marine scientist.

[5] The application is for a site adjacent to and surrounding the southern end of an un-named promontory ("the northern promontory") which juts out into the northern end of Beatrix Bay. The amended proposal is to split the farm into two separate blocks (a south-east section of 5.166 hectares and a south-west section of 2.206 hectares) either side of the point of the promontory, with a reduced total area of 7.372 hectares. The farm is otherwise of standard design: it is to consist of a number of lines with an anchor at each end and a single warp rising to the surface. At the surface is a backbone with dropper lines extending to approximately 12m depth (not to the sea floor). Each structure set is spaced 12 to 20 m apart. Despite the array of potential crops[2], we will call the proposed farm a "mussel farm" to distinguish it from other types of marine farm like salmon farms which usually have much greater adverse environmental impacts.

[2] In addition to green shell mussels, the application seeks to cultivate scallops (*Pecten novaezelandiae*), blue shell mussels (*Mytilus galloprovincialis*), dredge oysters (*Tiostrea chilensis*), pacific oysters (*Crassostrea gigas*) and algae (*Macrocystis pyrifera, Gracilaria sp., Pterocladia lucida, Undaria pinnatifida*).

[6] The application was heard by an independent commissioner Mrs S E Kenderdine[3] on 21 May 2014 and a decision to decline was issued by the Marlborough District Council on 2 July 2014. The decision was appealed by the Appellant, which has put forward to the court an amended proposal to reduce impacts on the environment.

[7] Two incorporated societies, Kenepuru and Central Sounds Resident's Association Inc and Friends of Nelson Haven and Tasman Bay Inc, (together "the Societies"), which had lodged submissions on the Davidson Family Trust's application, then joined the appeal as section 274 RMA parties in support of the Council's decision.

[8] The service of evidence in this proceeding was rather drawn out for two reasons. First, after the initial service of evidence which largely replicated the evidence given to the hearing Commissioner, the Council decided it wished to put forward evidence on ecological matters. That was challenged, and after submissions, (a procedural[4] decision) allowed a further exchange of evidence.

[9] The Council then lodged evidence by Dr B G Stewart — an ecologist, and Dr P R Fisher — an avian ecologist. The Appellant responded with evidence from its various experts and with a statement from Mr Davidson which was nearly[5] as long as his evidence-in-chief. The Council challenged the admissibility of that evidence on the grounds it was new evidence, rather than rebuttal. Subsequently the Council lodged "supplementary" evidence from Mr R Schuckard, Dr Fisher, and Dr T Cook (an ornithologist) in response to Mr Davidson's long rebuttal statement. The Appellant objected to the admissibility of this evidence on the grounds that the Council had no right to lodge it. Finally, the Appellant applied for consent to call rebuttal evidence on methodology from Dr D M Clement a marine ecologist. The admissibility of this was in turn challenged by the Council.

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3 A retired Environment Judge with very extensive experience in and knowledge of the Marlborough Sounds.

4 Procedural Decision [2014] NZEnvC 257.

5 26 pp evidence-in-chief [Environment Court document 6]; 22 pp further evidence [Environment Court document 6A].

[10] The questions of admissibility raised subsequent to the procedural decision were adjourned to be resolved at the hearing. We considered it appropriate to receive all[6] the information lodged for these reasons. First, the evidence received is relevant which is the main test. Second, Mr Davidson is, in effect, the Appellant and so if he wishes to raise matters he should be allowed to so that he can be reasonably satisfied the Trust has been given a full and fair hearing. Third, to the considerable extent that Mr Davidson raised new matters in his rebuttal, the Council and the Societies should, in fairness, be allowed to reply.

0.3 The mussel farm site[7]

[11] The site is an area of shallow coastal water — between 22m and 42m deep — adjacent to the northern promontory. Dr D I Taylor, an ecologist called by the Appellant, described the benthic environment below the farm's two blocks as primarily soft mud sediments with a small area of mud/shell hash and coarser sand/shell hash sediments at the inshore margin. A bedrock/boulder reef habitat extends to the southwest of the promontory to around 35m from the closest proposed mussel lines. It was to avoid interfering with this reef that the Appellant divided its proposed farm into the two blocks described.

[12] On the site current speeds are generally below 4cm per second which is considered to be in the low to moderate range. Higher flushing events of up to 10cm per second occur periodically throughout the water column and strong currents up to 20cm per second have been recorded in the lower section of the water column. Flow direction is generally balanced east/west around the end of the promontory.

[13] The northern promontory adjacent to the site extends around 700m into the bay, dividing the northern coastline of Beatrix Bay into two relatively sheltered embayments. The western slopes of the promontory are dominated by rough pasture mixed with tauhinu scrub[8], gorse, pig fern, and occasional wilding pines. Further regeneration is inhibited by dry conditions combined with grazing stock (e.g. cattle), feral pig rooting

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6 Except the evidence of Dr T Cook who was unable to attend at hearing to confirm his evidence and be cross-examined.

7 See the Assessment Matters in rule 35.4.2.9 of the Sounds Plan [p 35-21].

8 *Olearia leptophyllus*.

and goat and hare grazing. Vegetation cover on the eastern side of the promontory is more advanced but is also inhibited by feral animals and stock.

0.4 The landscape and seascape setting

[14] Beatrix Bay, containing approximately 2,000 ha, is one of the largest bays in Pelorus Sound (total 38,477 ha). It is roughly circular with a coastline of about 22 km. Some sense of the scale of the Bay can be gleaned from the fact that the northern promontory, where the site is, cannot be identified when entering from the south, but looms quite large from close to. The western side of Beatrix Bay is a long near-island running from Kaitira, the East Entry point to Pelorus Sound (from Cook Strait), to Whakamawahi Point. It is connected by a low isthmus along the northern side of Beatrix Bay to the Mount Stoke massif. The slopes of that hill form the higher (1,000 m above sea level) east and south-east margin of the bay. The southern end of the bay descends to Te Puaraka Point. The wide south-western end of Beatrix Bay opens to the rest of Pelorus Sound: south to Clova and Crail Bays, south-west to inner Pelorus Sound and west to Tawhitinui Reach.

[15] The relatively sheltered water of the "Mid Pelorus Marine Character Area"[9] is described in the plan as "... turbid and warm and the seafloor as mostly mud with conspicuous sparse marine life fringed by narrow cobble reef"[10]. Most of Beatrix Bay is 30 to 36 m deep with a seabed of soft sediment[11] (the most common type of habitat in the Marlborough Sounds).

[16] Much of the land surrounding the northern end of Beatrix Bay is in the single ownership of Mr W Scholefield. It has been farmed for many years, but is in varying stages of regeneration (i.e. pasture to kanuka/broad-leaf scrubland). Some of the upper hillsides are administered by the Department of Conservation and support mature forest. Three small reserves reach the coast (two on the western coast of the Bay and one on the eastern coast). None of the reserves are close to the application site.

9 Map 106 Sounds Plan Vol. 3.
10 Appendix Two of Sounds Plan [p Appendix Two – 67].
11 B G Stewart evidence-in-chief para 3.1[Environment Court document 26].

[17] There are[12] 37 existing marine farms (approximately 304.4 ha in total[13]) located around the edge of Beatrix Bay. Backbones (surface structures) on the 37 marine farms span approximately 8.5 km (33%) of total shoreline length[14] at sea level (but more under water). Approximately 85% of the surface area (2,000 ha) of Beatrix Bay is not occupied[15] by mussel farms.

0.5 The matters to be considered when making the decision

[18] The site is located within Coastal Marine Zone 2 ("CMZ2") in the Marlborough Sounds Resource Management Plan (the "Sounds Plan"). That is a zone in which "appropriate"[16] marine farms are provided for, at least close to the shore, as discretionary activities[17]. In fact, because the proposed farm extends beyond 200 m from the shore, the status of the activity under Rule 35.5 of the Sounds Plan is non-complying. One of the gateways of section 104D RMA must therefore be passed before we can grant consent. Those gateways require either:

- that the adverse effects will be minor; or
- that the activity is not contrary to the objectives and policies of the Sounds Plan.

[19] If one of these tests is met, section 104(1) identifies the matters we are to have regard to in coming to a decision. In this case the relevant matters include:

- the actual and potential effects of the activity on the environment (section 104(1)(a));
- the provisions of the New Zealand Coastal Policy Statement ("the NZCPS"), the Marlborough Regional Policy Statement ("the RPS") and the Sounds Plan (section 104(1)(b));

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12 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
13 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
14 R J Davidson rebuttal evidence-in-chief para 8.1 [Environment Court document 6A].
15 R J Davidson evidence-in-chief Table 1 [Environment Court document 6].
16 Explanation to Issue 9.2 [Sounds Plan p 9-4]; Objective (9.2.1) 1 and Policy (9.2.1) 1.14 [Sounds Plan p 9-6].
17 Rule 35.4.2.9 of the Sounds Plan where "close" means between 50m and 200m of the shore within CMZ2.

- any other relevant matters, if that is reasonably necessary (section 104(1)(c)).

Consideration of matters under section 104(1)(a)-(c) is "subject to Part 2 of the RMA". We must also have regard to[18] the Commissioner's Decision.

[20] The "environment" in section 104(1)(a) is not only the current description of its components (as identified in the section 2 RMA definition) but also the past environment as described in the relevant district plan and the reasonably foreseeable environment. Thus the environment includes the accumulated and reasonably foreseeable accumulative effects of all stressors (other than the application) on the past and current environment.

[21] The future component of the "environment" is well established. In *Queenstown Lakes District Council v Hawthorn Estate Limited*[19] ("*Hawthorn*") the Court of Appeal identified the central question in section 104 (rather than section 104D) of the Act as[20]:

> … whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future …

The court examined numerous provisions in the Act in which the "environment" was referred to, then analysed[21] the scheme and purpose of the RMA and concluded:

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

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18 Section 290A RMA.

19 *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424; (2006) 12 ELRNZ 299 (CA) at [57].

20 *Hawthorn* at [11].

21 *Hawthorn* at [57].

[22] More recently, in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*[22], the Court of Appeal confirmed that:

> In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. [Emphasis added].

0.6 The obligation to supply adequate information (section 104(6) RMA)

Introduction

[23] There is one other, procedural, aspect of section 104 which we need to consider in the light of the evidence given to us. It is the question how to apply section 104(6) of the RMA (as added[23] in 2009). That states:

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

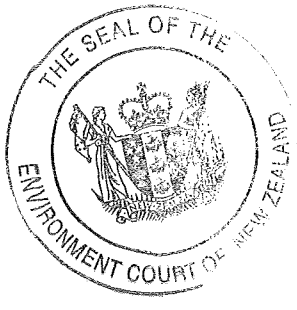
[24] For the Council Mr Maassen relied on this as the basis for his submission[24]:

> … that even though a submitter or the Council does not call evidence on a particular effect, it is open for the consent authority to determine that the information is inadequate and decline the application accordingly. The only way, for example, one can faithfully fulfil the Parliamentary direction to "recognise and provide for" [the] matters of national importance [is] to have adequate information. This supports the evidential onus that the applicant bears.

Mr Maassen carefully did not call this burden an onus of proof. For the Appellant, Mr Gardner-Hopkins did not respond directly to Mr Maassen's submission about section 104(6).

The obligation to supply adequate information

[25] Section 104(6) appears to place an onus on the Appellant for a resource consent to supply enough relevant information to the consent authority to enable it to determine



22 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221 at [80].
23 By section 83(6) Resource Management (Simplifying and Streamlining) Amendment Act 2009.
24 Submissions for Marlborough District Council dated 29 June 2015 at [113].

the application. In particular, the decision-maker must be able to reasonably assess a credible region[25] of probabilities of the relevant adverse effect even if only qualitatively.

[26] However, in some situations there may be inadequate information to even assess the likelihood of the effects of a stressor, and it is then that section 104(6) RMA may come into play. Clearly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case. The power is also discretionary — that is shown by the use of the word "may" — so the consent authority may grant consent even if it lacks sufficient information. An example may be if there is a proposal for adaptive management to respond to uncertainties.

[27] Some assistance as to the purpose of section 104(6) RMA may be gained from Part 2 of the Act. The purpose of Part 2 is, as described in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*[26] ("*King Salmon*"), principally to guide local authorities, for example when considering a resource consent. However, as Mr Maassen observed, it is difficult for a consent authority to provide for the matters of national importance in section 6 unless it recognises them first. This suggests an applicant should put forward adequate information for the consent authority to be able to identify the relevant stressors and their effects.

[28] Another particular provision of Part 2 of the RMA that may assist application of section 104(6) is section 7(b) of the RMA, which requires decision makers to have particular regard to the efficient use and development of the relevant resources. While section 7(b) is only ever one, of many, matters to be considered (and it is silent about the protection of resources) it does imply that in many cases it is the more[27] valuable use and development of the resources which should be preferred. How often could a consent authority deliberately and rationally choose a wasteful use of resources? It appears to us that section 7(b) reinforces or creates a burden on an appellant to show that its proposed consent would use the resources better than the status quo or some other possible use if that is put forward in the evidence.

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25 I.e. between 34% and 66%.

26 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195 at [24] and [25] per Arnold J.

27 Or most valuable if there are three or more options.

[29] Several aspects of the scheme of part 6 (Resource Consents) of the RMA are relevant as to how section 104(6) should be applied. First, section 88 prescribes[28] that an application for resource consent must include an Assessment of Environmental Effects ("AEE") as required by Schedule 4 of the Act. The information required by the Schedule (principally as to the effects of the proposal) "… must be specified in sufficient detail to satisfy the purpose for which it is required[29]". One purpose[30] is — as stated in the previous paragraph — found in the particularised objectives and policies of the relevant plan. This appears to impose an obligation to supply information of adequate quality (as well as sufficient detail) to enable grant of consent if no other information is put forward.

[30] An application may now[31] be determined to be incomplete if it does not include the information required by Schedule 4, and returned[32] to the Appellant. Then the Council has the power to request[33] that the Appellant provide further information or to commission a report[34] (in addition[35] to any standard report under section 42A RMA) before the hearing, although the Appellant has the right to refuse[36] to provide the information or even to ignore[37] the request. A similar provision[38] applies in respect of refusing to agree to the commissioning of a report.

[31] So the procedural scheme of Part 6 of the RMA emphasises the provision of information to the consent authority even before the hearing. That is to ensure the consent authority is adequately informed before making a decision. Because the appellant may refuse or ignore the request, section 104(6) still confers a power enabling the consent authority to decline if it has inadequate information.

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28 Section 88(2)(b) RMA.
29 Clause 1, Schedule 4 RMA.
30 Another purpose is to fully and fairly inform the public of the potential effects.
31 Since the Resource Management Amendment Act 2013.
32 Section 88(3A) RMA (added by section 92(2) Resource Management Amendment Act 2013).
33 Section 92(1) RMA.
34 Section 92(2) RMA.
35 Section 92(4) RMA.
36 Section 92A(1)(c) RMA.
37 Section 92A(3) RMA.
38 Section 92B RMA.

[32] The Environment Court has the same[39] powers, duties and discretions as the consent authority in relation to section 104(6) under this appeal, so it appears the court may also decline the application if it has inadequate information to satisfy it that the purpose of the Act will be achieved. Further, when making an assessment under section 104(6) on the adequacy of the information, the consent authority (or, on appeal, the Environment Court) must have regard to[40] whether any request for further information or reports resulted in further information being available. Presumably if further information (or a report) has not been requested that is a factor against declining the application on the grounds of inadequate information.

[33] In *Saddle Views Estate Limited v Dunedin City Council*[41] Whata J, a Judge of the High Court with extensive experience of the RMA, stated:

> Burden of proof is a complex issue in RMA proceedings. Very often RMA proceedings involve proof of existing fact, assessment of future effects and an evaluative judgment in light of prescribed statutory thresholds. Allocation of evidential and persuasive burden is problematic and sometimes inapposite in this context, as several leading cases demonstrate[42].

We respectfully agree subject to two minor qualifications: first we consider it may be more accurate to move (or repeat) the phrase "in light of prescribed statutory thresholds"[43] to follow the words "assessment of future effects"; second, the statement needs to be read in the light of section 104(6) RMA.

[34] In one of the cases referred to by Whata J, *Shirley Primary School v Telecom Mobile Communications Ltd*[44], the Environment Court held that "in a basic way there is always a persuasive burden" on an Appellant for resource consent reflecting the principle that "the person who desires the Court to take action must prove the case".

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39 Section 290(1) RMA.

40 Section 104(7) RMA.

41 *Saddle Views Estate Limited v Dunedin City Council* (2014) 18 ELRNZ 97 (HC) at [90].

42 Referring to *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84 (PT); *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC); *Ngati Maru Iwi Authority v Auckland City Council* HC Auckland AP 18/02 June 2002; *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (2005) 11 ELRNZ 15 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC).

43 "Thresholds" is rather idealistic: few plans are so forthright, and the Sounds Plan is a classic plan that always qualifies its objective and policies.

44 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [121]-[122].

That approach was endorsed (obiter) by the majority of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[45].

[35] We conclude that since 2009 section 104(6) now imposes a type of legal burden on an Appellant to supply adequate information, although it may in certain circumstances be able to sidestep that if it can satisfy a consent authority that an adaptive management or similar condition is appropriate (i.e. the *Sustain Our Sounds v New Zealand King Salmon Company Ltd*[46] criteria are met — we discuss these later).

[36] The method of applying section 104(6) discussed above seems generally consistent with Principle 15 of the *Rio Declaration*[47]. That includes the statement that "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". However, we give that no weight since we did not receive full submissions on the principle. In any event, a precautionary approach is (as we shall see) included in the New Zealand Coastal Policy Statement which we will consider later.

[37] Does that mean that an Appellant must either in its AEE[48] or in its evidence "... pre-empt all possible arguments made by opponents, in order to disprove alleged effects"?[49] The answer is "no" for two reasons. First, the relevant effects should usually have been identified in the relevant plan, as should what the plan expects to be done about them. That is why the particularisation in subordinate policy statements or plans of the purpose and principles of Part 2 of the Act, as identified in the majority decision in *King Salmon*[50], is so important. Second, it is impossible to prove (or disprove) a future event, simply because it has not happened yet. The most that can be established is a probability or likelihood that an effect may (or may not) occur. Third, on the facts of this case it is quite clear that the Appellant knew from the beginning that lost feeding habitat for King Shags is an issue because its AEE records that[51].

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45 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA) at [23].

46 *Sustain Our Sounds v New Zealand King Salmon Company Ltd* [2014] NZSC 40; [2014] 1 NZLR 673; (2014) 17 ELRNZ 520 at [124] and [125].

47 *The Rio Declaration on Environment and Development* UNESCO, 1992.

48 Required under section 88(2)(b) and Schedule 4 of the RMA.

49 Making a question of a proposition by Mr G Severinsen in his recent paper *Bearing the Weight of the World: Precaution and the Burden of Proof* (2014) 26 NZULR 375 at 384.

50 *King Salmon* above n 26.

51 Assessment of Environmental Effects para 5.7 (Seabirds) [Exhibit 6.5].

0.7 The standard of proof and prediction under the RMA

[38] As to the standard of proof, Mr Gardiner-Hopkins submitted[52] that the High Court in *"Buller Coal"*[53] stated that the appropriate standard of proof to be applied is "… the balance of probabilities". He made no distinction between the standard of proof of facts and any assessment of likelihood for predictions. We consider the differences are important.

[39] We accept that we must decide all questions of fact on the preponderance of the evidence. Of course not all disputes about the environmental setting of a proposal are factual. To the extent that the "environment"[54] includes the reasonably foreseeable future, questions about what that may look like are also predictive. However, a standard of proof for predictions that is "on the balance of probabilities" is problematic for several reasons.

[40] First the concept of a "probability of a probability" is at least awkward if not inchoate. Second, the definition of "effects" in section 3 of the Act includes "… effects of low probability but high potential impact". As the court has stated before, it is difficult to understand what is meant by determining an effect of low probability on the "balance" of probabilities.

[41] Third, in *Clifford Bay Marine Farms Ltd v Director General of Conservation*[55], the Environment Court suggested that applying "the balance of probability test to predictions of risk or any other prediction of future effects on every occasion is unhelpful". The court subsequently considered the issue further in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[56] (*"Long Bay"*) and considered it was bound[57] by the advice of the Privy Council in *Fernandez v*

52 Closing submissions dated 13 July 2013 at para 2.3(a).
53 Citing *"Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2005] NZRMA 193 (HC) at [73]". The correct reference is [2006] NZRMA 193 (HC).
54 As defined in section 2 RMA.
55 *Clifford Bay Marine Farms Ltd v Director General of Conservation* Decision C131/03 at [63].
56 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.
57 *Long Bay* at [321].

Government of Singapore[58] where Lord Diplock referred to "the balance of probabilities" as[59]:

> … a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences.

He continued:

> But the phrase ['the balance of probabilities'] is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a Court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens.

As the court said in *Long Bay* that is a clear statement of the law, equally applicable in New Zealand. Predictions of the likelihood of an effect are decided upon the preponderance of the evidence.

[42] The Likelihood Scale[60] set out by the International Panel on Climate Change is useful in this context. It suggests the following "calibrated language for describing quantified uncertainty"[61] about the future:

Table 1. Likelihood Scale

Term	**Likelihood of the Outcome**
Virtually certain	*99-100% probability*
Very Likely	*99-100% probability*
Likely	*66-100% probability*
About as likely as not	*33 to 66% probability*
Unlikely	*0-33% probability*

58 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC).
59 *Fernandez v Government of Singapore* [1971] 2 All ER 691 (PC) at 696.
60 Table 1 Likelihood Scale in *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).
61 *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* MD Mastrandrea et al (2010).

Very unlikely	*0-10% probability*
Exceptionally unlikely	*0-1% probability*

We will endeavour to be consistent with that Table in our assessment of probabilities of future events.

[43] The court also invited[62] the parties to make submissions before the hearing on the application of the probabilistic principle known as Bayes Rule to evidence (and hypotheses about future effects) but neither counsel nor the witnesses took up the opportunity. The court raised this point because most expert evidence that attempts to quantify the effects of stressors on the environment does so in a frequentist manner with 95% confidence limits. Since much data does not justify frequentist conclusions (disproving — or not — a null hypothesis, when that hypothesis is usually the opposite of what a consent authority wants to know), that information is then discarded as useless. However, such information can still be useful to assess the probabilities of potential events. As the Minute suggests, the principal method known to the court enabling consideration of more uncertain probabilities is Bayes Rule, so we regret the opportunity was not taken. That is especially so since Dr Clement, called for the Appellant, after making standard (and largely justified) frequentist criticisms of the Council's evidence, then admitted to the court that "Bayesian frameworks come in"[63] when assessing probabilities in conditions of uncertainty.

1. The marine environment of Beatrix Bay

1.1 Overview of the environmental setting

[44] The marine environment of Beatrix Bay, like the rest of the Marlborough Sounds, has been the focus of considerable historic human activity. It has been modified by physical disturbance (e.g. dredging and trawling), by runoff after land clearance, and by contaminants from residential and farming use of the land. Little data exists describing the ecological attributes of the Sounds prior to these activities. Some early publications reported on resources such as commercially viable intertidal mussel beds and subtidal scallop and horse mussel beds in the Pelorus Sound although most of these

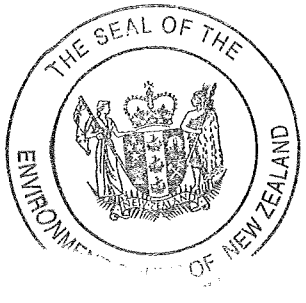
62 Minute dated 14 April 2015.
63 Transcript p 369.

have been lost as a result of dredging and/or smothering sedimentation from land use practices.

[45] Dredging still occurs in the area, however, the actual number of dredge and trawl tows is not publicly available. The consensus of the experts seemed to be that dredging only occurred once or twice a year, whereas in the past it had been more frequent. In any event the experts seemed to agree that repeated and ongoing trawling for flatfish in Beatrix Bay has resulted in significant changes to the seafloor with fine sediments remaining on the surface. This could potentially result in a turbid layer across the whole Bay, but whether that is so is unclear. Much of the soft bottom marine environment in central Pelorus Sound remains in a modified state with small remnant sites supporting biologically significant communities[64]. Close to the shore there is often domestic rubbish[65] on the seabed.

[46] The intertidal zone of Pelorus Sound is dominated by cobble and boulder substrata interspersed by areas of bedrock. Isolated areas with low gradient soft shores exist at the heads of bays where shellfish such as cockles and pipis exist. In many parts of the Sounds the intertidal biological communities have been modified by historical recreational and commercial fishing activities. For example, from 1960 to 1980, hand harvesting as well as subtidal dredging of natural green-lipped mussel beds was widespread in the Sounds.

[47] The inshore shallow subtidal edges of Pelorus Sound are dominated by relatively steeply sloping shores. These areas have not been dredged and the impact of sediment runoff is minimised due to wave action and water currents that keep these shores relatively free from the effects of sediment smothering. Inshore shallow subtidal habitats in Pelorus Sound and the wider Marlborough Sounds are therefore in a relatively natural[66] state. Where currents are strongest, a variety of filter feeding organisms such as hydroids, sponges, ascidians and tubeworms become abundant. These current-swept shallow subtidal areas have often been recognised as significant sites.



64 Davidson R, Duffy C, Gaze P, Baxter A, DuFresne S, Coutney S and Hamill P. (2011). Ecologically significant marine sites in Marlborough New Zealand (Davidson Environmental Limited) [Exhibit 6.3].

65 R J Davidson rebuttal evidence para 7.5 [Environment Court document 6A].

66 R J Davidson evidence-in-chief para 24 [Environment Court document 6].

[48] At the foot of the shore slope, the topography of the sea floor becomes relatively flat. Deep offshore flat areas are usually dominated by silt and clay (mud). Mud is the most common and widespread marine habitat in the Sounds and supports a characteristic invertebrate community in addition to benthic fish species such as flat fish. In general, the diversity of surface dwelling species in these offshore mud areas is considerably lower than on the sloping bay edges. Surface dwelling species in particular are often relatively uncommon on deep mud. These offshore areas have been dredged in the past and that still continues[67]. Dredged sites support a community dominated by opportunistic species able to cope with regular disturbance. In many instances the original community types found on these offshore soft bottoms do not recover (or recover very slowly) from activities such as dredging.

[49] In addition to dredging and trawling the stressors on coastal marine environments such as Beatrix Bay include anthropogenic effects such as accelerated climate change, sedimentation from run-off from land-based activities[68], fishing[69] and marine farming. We received minimal evidence as to how the effects of climate change might affect the habitats of Beatrix Bay or the species that live in them.

[50] Dr Taylor also observed that[70]:

> Confounding the issue of determining any cumulative ecological effects on sub-tidal and intertidal communities will be the Sound-wide impacts of stochastic (largely random but can be predicted on a probabilistic basis) environmental events. This includes a rapid succession of floods from the Pelorus River (catchment 880 km²) and the Kaituna River (catchment 155 km²), which discharge on average 43.0 m^3s^{-1} and 5.4 m^3s^{-1} respectively (Sutton & Hadfield 1997), and decadal oscillations in weather patterns like El Nino/La Nina[71]. Both of these drivers can cause

67 R J Davidson rebuttal evidence para 8.11 and Figures 5 and 6 [Environment Court document 6A].

68 D I Taylor evidence-in-chief para 36 [Environment Court document 8] referring to "deforestation, pastoral farming, clear-felling of exotic forestry".

69 D I Taylor evidence-in-chief para 36 [Environment Court document 8].

70 D I Taylor evidence-in-chief para 39 [Environment Court document 8].

71 Citing Zeldis JR, Hadfield MG, Booker DJ 2013. "Influence of climate on Pelorus Sound mussel aquaculture yields: predictive models and underlying mechanisms". *Aquaculture Environment Interactions* at 4:1-15.

large shifts in the abundance of intertidal and sub-tidal species[72], and are known to affect the distribution of species within the Marlborough Sounds[73].

1.2 The effects of the existing mussel farms

[51] We have referred to the 37 marine farms around the bay. Many of the earlier mussel farms in Beatrix Bay were — in accordance with the Sounds Plan — located close in to the shore and over rocky or reef substrates. As awareness of the ecological importance of those areas has risen, and as demand for farming space has increased, farms have extended seawards. That has had the effect of extending farms over the soft (flatter) substrate that characterises the seabed of most of Beatrix Bay.

[52] Cultured shellfish such as mussels feed on microscopic suspended particulate matter both living and non-living (collectively referred to as seston) by filtering it from the water column. Mussel diets are primarily composed of phytoplankton, but also include some zooplankton and other living and non-living material. Following digestion of food, the faeces produced by mussels are generally light and tend to break up and dissolve readily. That process releases dissolved nutrients, particularly nitrogen, into the water column. Mr B R Knight, another ecologist called for the Appellant, wrote that nitrogen is considered to be a limiting factor to the growth of phytoplankton in Beatrix Bay, so the effect of grazing by mussels — which reduces phytoplankton stocks — may be somewhat balanced by the recycling of nutrients that encourage replenishment of phytoplankton stocks[74]. However, that is somewhat academic because Mr Knight also described the current trophic status of Beatrix Bay as low-mesotrophic. Indeed basic nitrogen budgets developed for the Pelorus Sound indicate there is an excess of nitrogen inputs occurring.

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72 Citing Schiel DR (2004). "The structure and replenishment of rocky shore intertidal communities and biogeographic comparisons". *Journal of Experimental Marine Biology and Ecology* at 300:309-342.

73 Citing Davidson R.J.; Duffy C.A.J.; Gaze P.; Baxter A.; DuFresne S.; Courtney S.; Hamill P. 2011. "Ecologically significant marine sites in Marlborough, New Zealand". Coordinated by Davidson Environmental Limited for Marlborough District Council and Department of Conservation.

74 B R Knight, evidence-in-chief para 19 [Environment Court document 9].

[53] Mr Knight relied on papers[75] which he said found no change in the base food web as a result of mussel production in Pelorus Sound. There was no indication from these studies that mussel production at a bay or Sounds-wide scale was nearing ecological carrying capacity or that mussel farming associated change in water column properties was occurring[76].

Water column effects

[54] More authoritative information on water column effects is contained in a report by Dr N Broekhuizen and others called "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound"[77]. A draft was produced by Dr Broekhuizen, under a witness summons, and the final version ("*the Broekhuizen Report*") was referred[78] to by Mr Maassen in his memorandum of June 2015 and produced to the court and parties in February 2016.

[55] *The Broekhuizen Report* presents the results from large scale biophysical modelling of Pelorus Sound designed to describe the effects of existing (at 2012) and proposed (consented since 2012) mussel and finfish farms on water quality[79]. Various marine farming and geochemical scenarios were modelled. A finding of particular relevance in this case was that bay scale effects of increased ammonium concentrations and decreased seston concentrations are predicted by the model as a result of mussel farming.

[56] Counsel submitted that *the Broekhuizen Report* shows that the Existing Mussel farms in Pelorus Sound as at January 2012 have changed the environment compared with a "No Mussel farms" scenario. The report states, as Mr Maassen for the Council quoted[80], that:

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75 Zeldis JR, Howard-Williams C, Carter CM, Schiel DR 2008. *ENSO and riverine control of nutrient loading, phytoplankton biomass and mussel aquaculture in Pelorus Sound, New Zealand.* Marine Ecology Progress Series 371; 131-142; Zeldis JR, Hadfield M, Booker D 2013. *Influence of climate on Pelorus Sound mussel aquaculture yield; predictive models and underlying mechanisms.* Aquaculture Environment Interactions 3(4); 1-15.

76 B R Knight, rebuttal evidence at 4.9-4.10 [Environment Court document 9A].

77 Broekhuizen, N; Hadfield M; Plew D "A biophysical model for the Marlborough Sounds Part 2: Pelorus Sound" (2015) NIWA Report CHC 2014-130.

78 Environment Court document 10A.

79 Broekhuizen N, Hadfield M and Plew D 2015 *A biophysical model for the Marlborough Sounds. Part 2: Pelorus Sound.* NIWA Client Report CH2014-130.

80 Memorandum from Marlborough District Council dated 22 July 2015.

> Relative to the nominated baseline scenario (EM-EF-WD[81]), a no mussel, existing fish with denitrification simulation (NM-EF-WD[82]) yields:
>
> **Winter-time:** lower concentrations of ammonium and nitrate but higher concentrations of particulate organic detritus (dead plankton etc.,) phytoplankton and zooplankton. The largest changes in relative concentration are seen in Kenepuru Sound and the largest relative concentration changes are within the zooplankton. There, time-averaged near-surface winter-time seston3 concentrations in the NM-EF-WD simulation are more than double those of the EM-EF-WD scenario (for zooplankton in Kenepuru, substantially more than double). The Beatrix/Crail/Clova system also exhibits similar (but smaller) changes.
>
> **Summertime:** lower concentrations of ammonium, nitrate, higher concentrations of detritus and zooplankton, but phytoplankton concentrations which are similar to (or lower than) those of the EM-EF-WD scenario. During summer, mussels convert particulate organic nitrogen (not directly exploitable by phytoplankton) to ammonium (directly exploitable by phytoplankton). Phytoplankton growth is normally nutrient limited during this time, but in the immediate vicinity of the mussel farms, phytoplankton (which survive passage through the farms) find a plentiful ammonium supply. This enables them to grow quickly – more than offsetting the losses that the population suffered to mussel grazing (the 'excess' accrued phytoplankton biomass being fuelled out of the detritus that was consumed). …

[57] In summary the *Broekhuizen Report* suggests that there have been "material" changes in water column properties as a result of the development of mussel farms. However, the report does not assist with determining any threshold regarding the ecological carrying capacity of Pelorus Sound for mussel farms. Nor does it substantiate a trajectory of insidious decline (in Mr Maassen's phrase) in relation to the water column.

The benthic zone: physical effects

[58] Shell, mussels, faeces and pseudofaeces are released from mussel farms. The latter comprise inorganic and organic material filtered from the water column, but not digested. The rejected particles are aggregated into a mucus-bound mass and

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81 The abbreviation stands for "existing mussel-farms, existing fish-farms, with benthic dentrificantion": (EM-EF-WD). This "corresponds to present-day conditions in Pelorus Sound" Broekhuizen et al para 4.9.

82 The abbreviation stands for "no mussel-farms, existing fish-farms, with benthic dentrification": (NM-EF-WD).

periodically ejected back into the water column. Pseudofaeces are heavier than faeces and settle out rapidly to the seafloor as sediment.

[59] Between 250 and 400 tonnes of shell, mussels and sediment is released under each hectare of farm each year[83]. For the 304 hectares (approximately) of current farms in Beatrix Bay, that is a minimum of 76,000 tonnes of sediment. The nutrients and fine particulate matter which are part of that sediment are dispersed at a rate which is a function of the current flow at the individual sites and the flushing characteristics of the bay as a whole. The shell hash and live mussels settle on the sea floor.

[60] The obvious visual effect of a mussel farm on the sea floor is the accumulation of live and dead mussels, increased sediment, and the increase in invertebrate predators such as the 11-armed sea star. Chapter 3 (Benthic Effects) of the *Literature Review of Ecological Effects of Aquaculture*[84] ("the *Literature Review*") published by the Ministry of Primary Industries states generally:[85]

> Visual observations suggest that shell deposition within a farm can be patchy, ranging from rows of clumps of live mussels and shell litter directly beneath long lines to widespread coverage across the farm site[86].

Further "Mussel clumps and shell litter beneath a mussel farm have been observed as acting as a substrate for the formation of reef-type communities"[87].

[61] Specifically in the Marlborough Sounds a more recent study we were referred to shows that at two sheltered farm sites[88]:

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83 B G Stewart evidence-in-chief para 6.4 [Environment Court document 26] referring to Hartstein, N.D. and Rowden, A.A. (2004). "Effect of biodeposits from mussel culture on macroinvertebrate assemblages at sites of different hydrodynamic regime". *Marine Environmental Research* 57:339-357 and Hartstein, N.D. and Stevens C.L. (2005). "Deposition beneath long-line mussel farms". *Aquaculture Engineering* 33:192-213.

84 *Literature Review of Ecological Effects of Aquaculture* (2013) Ministry of Primary Industries ("MPI") at section 2.2.2 (Exhibit 11.2). This publication does not contain a consensus view but is a series of individual chapters by different experts on the subject of their expertise.

85 *Literature Review* at p 3-20.

86 *Literature Review* citations omitted.

87 *Literature Review* citations omitted.

88 N D Hartstein "Acoustical and Sedimentological Characterization of Substrates in and Around Sheltered and Open-Ocean Mussel Aquaculture Sites and Its Bearing on the Dispersal of Mussel Debris" (2005) *IEE Journal of Oceanic Engineering* Volume 30 No 1 p 85 at 85.

> Photography and sediment samples reveal farms are underlain by mounds of shells with biodeposits infilling intershell voids and forming a veneer over entire mounds. In contrast, the surrounding seabed is naturally sedimented soft mud. Sediment from beneath the farms had total organic contents of 8%-19% decreasing sharply to natural levels of 4%-7%, 30 m from the farm's boundaries.

The author adds[89] "Given that [the farms] have low current flows and little potential wave energy … there is likely little lateral transportation and redistribution of the shell and organic material, thus causing it to deposit directly beneath the culture site." That might suggest the mussel shells and mussels only fall directly underneath the lines so that there is soft substrate between them. However, that possible interpretation is belied by the description of the "surficial sediments" in Hartstein's Figure 8. That shows the whole footprint of both low-energy farms was "silt and clay with mussel shells" or (smaller areas of) "predominately mussel shells"[90].

[62] We find on the balance of probabilities that the whole area underneath an average mussel farm in Pelorus Sound has a changed substrate. It is no longer reef or soft mud but is usually a patchy mix of clumps of mussels and shells, and larger areas of mud and mussel shells. It is unlikely there is consistent soft mud and an absence of shells. We also find that on average the penumbra of sediment extends no further than 30 metres from the farms, and shell hash extends far less, depending on wind drifting long lines.

[63] Dr Stewart calculated[91] the total amount of soft substrate habitat available within Beatrix Bay as approximately 1960 ha. He then compared that with "… the amount of habitat likely changed due to the presence of mussel farms (approximately 365 ha), based on 320 ha of consented farm space and 15-20% extra for movement of longlines and impacts beyond farm boundaries". He concluded that "…approximately 19% of the soft substrate habitat is potentially affected" by existing mussel farms. He considered that insufficient information was available to determine the effects of mussel farms on

89 N D Hartstein, above n 88, at p 92.
90 N D Hartstein above n 88, at p 91.
91 B G Stewart evidence-in-chief para 7.4 [Environment Court document 26].

benthic communities away from the immediate farm footprint[92] or on the accumulated effects[93] from the scale of farming in Beatrix Bay on these communities.

[64] We are uneasy about Dr Stewart's calculations. The Appellant was generally critical of them, but did not attempt to put up on alternative figure. It seems to us (for example from Figure 1 attached to Dr Fisher's evidence[94]) that about 60% of the existing farms in Beatrix Bay are over water that is at least 20m deep and is thus likely to be both over soft mud seafloor and within King Shag foraging depths (which start at about 10m). Of the 320 hectares of consented space perhaps only 200 hectares is over soft substrate. In addition there is a 30 metre wide strip along the outside edge of all the total farm's length (8.5km) which adds a further 25 hectares of substrate substantially affected, albeit more by sediment than by shell hash and live mussels. Thus the total 225 hectares of affected benthic environment is very approximately 11% of the total area of Beatrix Bay (but more than 11% of the total soft substrate).

The benthic zone: biochemical and infaunal effects

[65] Dr Taylor wrote that[95]:

> … mild enrichment effects are common under mussel farms in the Marlborough Sounds, and are relatively minor and are a natural feature of mussel beds on the seabed. These effects are often result in enriched infauna (animals living in the sediments) and epifauna (animals living on the sediments) communities with greater taxa diversity and abundances[96].
>
> …
>
> In general, mussel farm-related seabed effects reduce to no near undetectable levels within 20 m–30m of farm boundaries[97].

[66] In relation to the deposition of finer sediments, Dr Taylor described how in his opinion deposition in the form of faeces and pseudofaeces from the mussel farm will

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92 B G Stewart evidence-in-chief para 4.2 [Environment Court document 26].

93 B G Stewart evidence-in-chief paras 5.13 and 6.40 [Environment Court document 26].

94 P R Fisher evidence-in-chief p 7 [Environment Court document 28].

95 D I Taylor evidence-in-chief paras 32 and 33 [Environment Court document 8].

96 Citing Kaspar, H.F., Gillespie, P.A., Boyer, I.C. and MacKenzie, A.L. (1985). "Effects of mussel aquaculture on the nitrogen cycle and benthic communities in Kenepuru Sound, Marlborough Sounds, New Zealand". *Marine Biology* at 85: 127–136.

97 Citing Keeley, N., B. Forrest, G. Hopkins, P. Gillespie, D. Clement, S. Webb, B. Knight and J. Gardner (2009). "Review of the Ecological Effects of Farming Shellfish and Other Non-finfish Species in New Zealand". Prepared for the Ministry of Fisheries: *Cawthron Report No. 1476*. Nelson, New Zealand, Cawthron Institute: at p 144.

result in "mild" enrichment of the soft sediment directly below and immediately adjacent to the farm. This enrichment reduces to near undetectable levels within 20-30m of the farm boundary in low to moderate water flow sites.

[67] Dr Mead asserted that based on his own observations and modelling evidence on currents, he expected anoxic conditions (highly enriched) to be widespread under the majority of the mussel farms in Beatrix Bay[98]. He extrapolated from research by Christensen and others[99] in Pelorus Sound.

[68] Responding to Dr Mead's assertion[100] that enrichment of the benthic environment under existing mussel farms had not been investigated, Dr Taylor referred us to two qualitative assessment studies he had been involved with in Pelorus Sound, one of these in Beatrix Bay. Mr Ironside, in a lengthy cross-examination, took Dr Taylor through a detailed examination of all of the elements contributing to benthic changes under mussel farms reported in Christensen[101]. Dr Taylor responded that all have been taken into account in this case.

[69] In response to cross-examination by Mr Ironside on the Christensen research[102] on the "cumulative" effects of suppression of the natural denitrification process under mussel farms, Dr Taylor suggested that it was difficult to extrapolate to a bay-wide scale or even a farm-wide scale the results from three 5cm cores as reported by Christensen. He maintained his position that a gradient of effects under and moving out from mussel farms resulted in largely benign effects at a Beatrix Bay scale. In his opinion, "cumulative" effects were not distinct, marked or adverse[103]. When asked by the court

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98 Transcript, p 412, line 20.

99 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

100 S T Mead evidence-in-chief at para 41 [Environment Court document 20].

101 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

102 Christensen P B, Glud R N, Dalsgaard T and Gillespie P 2003. "Impacts of longline mussel farming on oxygen and nitrogen dynamics and biological communities of coastal sediments". *Aquaculture* 218, 567-588 [Exhibit 8.4].

103 Transcript, p 186, line 17.

if the sediment sampling reported in the Christensen study was adequate to establish bay-wide conclusions, Dr Mead agreed that "this wouldn't be a normal process"[104].

[70] Dr Stewart presented findings from his own dive surveys of "inshore habitats" at the proposed site, under and adjacent to an existing mussel farm, and at a control site in Miro Bay. These surveys revealed a range of differences in epifaunal community structure (diversity) and abundance between sites. Hard substrate communities showed larger differences than those on soft substrate. Dr Stewart observed[105] that without more comprehensive survey work, linking differences in diversity to any specific cause would be difficult. He did however go on to make such a linkage[106] to the presence or close proximity or absence of mussel farms. He concluded that as the benthic community "will almost certainly differ" following development of a mussel farm, the effect on that community was likely to be significant within 100m of the farm.

[71] Dr Taylor and Dr Grange were critical of the design of Dr Stewart's study in that it examined a single site beneath the mussel farm and one control site some 14 km further into Pelorus Sound from Beatrix Bay in an area influenced by freshwater and sediment-laden plumes from the Pelorus River. Dr Taylor considered[107] the lack of site replication meant that analysis of the results had a very high risk of making a type 1 error (a false positive) suggesting there is an effect when none is actually present. In Dr Taylor's opinion the limitations of the study ruled out any conclusions on mussel farm effects on inshore communities as any differences can equally be explained by natural site to site variability as evidenced by the Davidson/Grange study referred to earlier.

[72] Of particular concern in this case are the effects of the mussel farms on specialist (rather than generalist[108]) taxa and particularly on (the habitat of) the specialist King Shag. It is apparent that the 37 mussel farms in Beatrix Bay each have some effect in altering the benthic environment below and adjacent to (within 30 metres of) the direct footprint of the farm. The evidence does not, however, support the claim that bay-wide effects on benthic communities are generally significant. The same conclusion was

104 Transcript, p 416, line 14.
105 B G Stewart evidence-in-chief at 4.19 [Environment Court document 26].
106 B G Stewart evidence-in-chief at 4.24 [Environment Court document 26].
107 D I Taylor, rebuttal evidence-in-chief [Environment Court document 8A].
108 A simple everyday example is to compare nearly ubiquitous house sparrows (relatively generalist) with rock wren (mountain specialists).

earlier reached by the author of Chapter 12 of the *Literary Overview*[109] with the statement:

> While benthic effects are one of the most commonly expected changes as a result of shellfish farming, they are typically of minor ecological consequence **beyond** the boundary of the farm. (Emphasis added).

The implication is that benthic effects are of more than minor ecological significance underneath mussel farms. That is consistent with the evidence of Dr Stewart.

The photic zone

[73] Dr Stewart carried out an analysis[110] in respect of the photic zone — the sunlit zone within which photosynthesizing algae play a significant role in primary production. Using a "conservative" figure of 30 metres to define the depth of the zone in Beatrix Bay, he calculated the percentage of the photic zone likely altered by mussel farms is about 85-90%.

[74] Upon first reading, this appears to be a significant change resulting from mussel farming. However Dr Taylor wrote that[111]:

> … the level of productivity of the microphyto-benthos (the micro algal mats that grow on muddy substrata throughout the Marlborough Sounds) is known to fluctuate greatly depending on the time of year and the time elapsed since significant flood events in the Pelorus River. This is because the river plume reduces water clarity and contributes significantly to sedimentation in the Pelorus Sound[112].

He continued:

> Not only is the productivity of the microphyto-benthos highly variable in space and time, but it is also capable of remaining highly productive beneath mussel farms.

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109 *Literature Review* above n 84: Chapter 12 (C Cornelisen) at section 2.3.2.
110 B G Stewart evidence-in-chief para 7.6 [Environment Court document 26].
111 D I Taylor rebuttal evidence para 4.1 [Environment Court document 8A].
112 Citing Handley S 2015. "The history of benthic change in Pelorus Sound (Te Hoiere), Marlborough". *NIWA Client Report No: NEL2015-001*. Prepared for Marlborough District Council.

[75] We have inadequate information to determine whether the effects of mussel farms have been adverse or beneficial generally on the photic zone of Beatrix Bay. However, since we were not given evidence of any direct link between this and any alleged adverse effect of relevance under the Sounds Plan or NZCPS we consider it no further.

Summary

[76] We find on the balance of probabilities that the effects of the existing mussel farms on:

(a) the water column is that they deplete seston supplies from the water column in winter and add to it in summer;
(b) the reef zone around the promontory are negligible;
(c) the photic zone are uncertain;
(d) the benthic zone are confined to changing the substrate to patches of shell, live mussels and sediments within an incomplete ring no wider than 30 metres from the farm boundaries;
(e) the soft seafloor of Beatrix Bay is that about 11% has been changed quite substantially.

[77] All those accumulated and accumulating effects are a key part of the environmental setting of the proposal.

1.3 Have mussel farms changed fish distribution?

[78] The soft mud floor of Beatrix Bay provides habitat for flatfish including Witch Flounder, other (right-eyed) flounder species and Lemon Sole. While fish species typically spend[113] some of their time feeding, "the remainder of the time [is spent] in other activities such as predator avoidance, where their location may be driven by benthic habitat". When not breeding or feeding, flatfish spend much of their time hidden in the soft substrate of the seafloor according to Dr Fisher. Beatrix Bay also provides habitat "for adult spawning and nursery areas for juvenile flat fish"[114].

113 P R Fisher evidence-in-chief para 4.26 [Environment Court document 28].
114 P R Fisher evidence-in-chief para 4.42 [Environment Court document 28].

[79] The *Literature Review* states[115] "Direct effects from the development of shellfish farms include alteration of essential fish habitats through the deposition of shell litter and biodeposition of particulate matter." It goes on to add "These effects can be avoided or minimised through proper site selection and effects assessments prior to development". Dr Fisher's evidence was consistent with that. In his view[116] the habitat under mussel farms is no longer soft muddy floor.

[80] The *Literature Review* continues[117]:

> The initial attraction of wild fish species to aquaculture structures (e.g., habitat creation) can lead to a variety of related effects including:
>
> - Changes in the distribution and productivity of wild fish populations due to the addition of artificial structures that create new habitats used by wild fish.
> - Changes in recreational fishing patterns and pressure, which in turn could affect wild fish populations differently than in the absence of the structures.
> - Larval fish depletion by shellfish and/or potential trophic interactions (e.g., alteration of plankton composition and food availability).

[81] Dr Stewart was also of the opinion that the "formation of reef-like communities immediately below mussel farms [both] create predator oases"[118] and cause "habitat loss and/or modification"[119] as well as "increased competition for bottom feeders …"[120]

[82] In Mr Shuckard's experience[121] "[f]ish abundance around mussel lines is small[122] and dominated by small, demersal species characteristic of rocky reefs in the area, notably triplefins (*Forsterygion lapillum* and *Grahamina gymnota*) and Spotty (*Notolabrus celidotus*)." He has also observed[123] common species of fish around mussel

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115 *Literature Review* above n 84, at p 5-6.
116 B G Stewart evidence-in-chief para 3.15 [Environment Court document 26] (see P R Fisher evidence-in-chief para 6.2).
117 *Literature Review* above n 84, at p 5-6.
118 B G Stewart evidence-in-chief para 6.15 [Environment Court document 26].
119 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
120 B G Stewart evidence-in-chief para 6.17 [Environment Court document 26].
121 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
122 Citing Morrisey, D.J., Cole, R.G., Davey, N.K., Handley, S.J., Bradley, A., Brown, S.N. and Madarasz, A.L. (2006). "Abundance and diversity of fish on mussel farms in New Zealand". *Aquaculture* 252:277-288.
123 R Schuckard evidence-in-chief para 59 [Environment Court document 25].

farms such as Smooth Leatherjacket (*Parika scaber*) and Yellow-eyed Mullet (*Aldrichetta forsteri*).

[83] Mr Davidson wrote[124]:

> ... Dr Fisher suggests[125] the "smothering of benthos" under mussel farms excludes "naturally occurring benthic species" ... There are no published data on the abundance or distribution of witch flounder (or, for that matter, flat fish) under mussel farms compared to adjacent areas. His statement is therefore unsupported speculation. As mussel farms exclude trawling it is entirely possible that flatfish abundance may be higher under and between farms. Apart from studies investigating fish species inhabiting farm structures, I am not aware of comprehensive data investigating benthic species. (Underlining added).

This is one of the points where the burden on the Appellant (as applicant) of putting forward adequate information becomes critical.

[84] We accept that it is possible that some flatfish may be found underneath mussel farms: some of the prey (e.g. polychaetes) of Witch Flounder may increase in abundance. However, we find that the overall assemblage of fish and other fauna changes quite markedly underneath and in the proximity of most mussel farms. In relation to benthic fish species, Mr Schuckard[126] referred to overseas research which shows that:

> Declining environmental conditions under and in the vicinity of farms as a result of faeces and pseudo-faeces deposition in small discrete areas in and around the farms, have a generally negative impact on oxygen-related processes for the different life stages of fish; settlement probability of juveniles; habitat utilisation of spawning fish; age structure of successful spawners; and food consumption rates of adult fish.

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124 R J Davidson rebuttal evidence para 8.16 [Environment Court document 6A].

125 P R Fisher evidence-in-chief para 6.6 [Environment Court document 28].

126 R Schuckard evidence-in-chief para 57 [Environment Court document 25] citing Folke, C., Kautsky, N., Berg, H., Jansson, A., Troell, M.. (1998). "The ecological footprint concept for sustainable seafood production: A review". *Ecological Applications*, 8(1) Supplement, pp S63-S71; Hinrichsen, H.H., Huwer, B., Makarchouck, A., Petereit, C., Schaber, M. And Voss, R. (2011) "Climate-driven long term trends in Baltic Sea oxygen concentrations and the potential consequences for eastern Baltic cod (*Gadus morhua*)". *ICES Journal of Marine Science*, 68: 2019-2028; Diaz, R., Rabalais, N.N. and Brietburg, D.L "Agriculture's Impact on Aquaculture: Hypoxia and Eutrofication in Marine Waters". *OECD Publishing* (2012)..

That supports the third bullet point in the *Literature Review* quoted above. Further, there appears to be effects on the substrate which may decrease the quality of habitat even for feeding flatfish: increased predator numbers and potentially a poorer hiding environment.

[85] We find that the habitats of flatfish and other benthic fish species have been reduced by the introduction of mussel farms in that:

(a) it is likely that the changes in substrate underneath mussel farms are physically (a change from soft mud to mud and shell, or shell and mussels), chemically (increases in organic matter) and ecologically (a change of in-fauna and increases in predators) different from the original seafloor;
(b) it is very likely that the fish assemblages have changed;
(c) flatfish in all stages of their life-cycle and in most of their activities are largely excluded from underneath most mussel farms;
(d) it is likely that flatfish have been at least partly displaced within about 30 metres of the outside boundary of mussel farms in the Sounds.

[86] The reduction in that habitat within Beatrix Bay is an accumulated effect or stressor which is part of the environment. However, we have found it quite difficult to assess the extent of change to that part of the benthic environment which is soft mud, because by no means all of the existing mussel farms are anchored over that type of seafloor exclusively.

[87] The Appellant (through Dr Taylor) did not address the question whether the nutrients under mussel farms — whether in or on the benthos (seafloor) or in the photic zone — change the food web in a way that assists species higher up the chain, for example by providing them with more prey, or inhibits them. We now turn to that and related issues in respect of one particular species — the New Zealand King Shag.

2. New Zealand King Shags and their habitat

2.1 Description, population and conservation status

[88] One aspect of the environment in which the site is located is of particular importance in this case. It stems from the fact that Beatrix Bay is within the extent of

occurrence ("EOO")[127] of the endemic New Zealand King Shag[128]. The New Zealand King Shag[129] ("King Shag") is one of 16 taxa[130] of blue-eyed shags. Like almost all *Leucocarbo* shags, it is dimorphic: males are larger and heavier than females and they tend to feed in deeper water[131].

[89] The King Shag is a large black and white bird with pink feet and white bars on its black wings. It has yellowish-orange patches of bare skin at the base of the bill. It is smaller than the Black Shag[132] and larger than the Pied Shag[133] (with which it can be confused).

[90] We received evidence about King Shags from three witnesses. Mr R Schuckard who holds a MSc in Biology gave evidence for the Societies. Since 1991 he has conducted long term[134] studies and monitoring of New Zealand King Shag. He is a committee member of the Friends of Nelson Haven and Tasman Bay Inc[135] and is thus not completely disinterested in the outcome of this proceeding. We treat his evidence with caution as we do that of Mr Davidson for the Appellant. In fact Mr Davidson expressly renounced[136] being an expert witness in these proceedings. On the whole those two witnesses both attempted to be as objective as possible and our caution is more about subconscious biases than obvious partisanship by these two witnesses. The largest exceptions are parts of Mr Davidson's rebuttal evidence where he alternates between critical statements on the evidence of other parties' witnesses and rather broad or simplistic assertions of his own. The Council called Dr P R Fisher, a completely independent avian ecologist who has studied the King Shag.

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127 "Extent of occurrence is defined as the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred or projected sites of present occurrence of a taxon, excluding cases of vagrancy … This measure may exclude discontinuities or disjunctions within the overall distributions of taxa (e.g. large areas of obviously unsuitable habitat) … Extent of occurrence can often be measured by a minimum convex polygon (the smallest polygon in which no internal angle exceeds 180 degrees and which contains all the sites of occurrence)". IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. iv + 34 pp11-12.

128 *Leucocarbo carunculatus*.

129 Te Kawau-a-Toru *Leucocarbo carunculatus*.

130 Seven blue-eyed species occur in New Zealand (including the Sub-Antarctic species).

131 P R Fisher evidence-in-chief para 4.5 [Environment Court document 28].

132 Better called Great Cormorant *Phalacrocorax carbo*.

133 *Phalacrocarax varius*.

134 R Schuckard evidence-in-chief para 3 [Environment Court document 25].

135 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

136 R J Davidson evidence-in-chief para 10 [Environment Court document 6].

Population

[91] Mr Schuckard estimated the average population between 1992 and 2002 as 645 birds[137] with breeding colonies restricted to four areas: Duffers Reef, Trio Islands, Sentinel Rock and White Rocks[138]. Relying on his earlier research Mr Schuckard informed[139] us that "... the numbers of shags appear to have been stable for at least the past 50 years — and possibly over 100 years[140]". Mr Davidson saw this as providing "some comfort"[141] that marine farms have not effected the population of King Shags. In Dr Fisher's opinion[142] the methodology used by Mr Schuckard was "... appropriate for the task ..." and provided accurate counts.

[92] Dr Fisher initially wrote that[143] "the most recent *estimate* for the total King Shag population was of 687 birds". That is based on a survey of the marine avifauna of the Marlborough Sounds undertaken between September and December 2006. He sounded a precautionary note that the estimate is based on "... counts at colonies when significant numbers of birds were absent feeding"[144], and that caution was justified by subsequent events.

[93] New, more thorough (and expensive) techniques for surveying the King Shag population have recently (2015) been set up. On 11 February 2015 an aerial survey by Mr Schuckard and two other experts counted more (839)[145] King Shags than ever before. The increase in numbers of birds compared to the results of his earlier surveys is attributed by Mr Schuckard[146] to a better accuracy in the count than before, to the count being done in one morning rather than over tens of days and to more colonies being counted.

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137 R Schuckard "Population Status of the New Zealand King Shag ..." *Notornis* (2006) 53(3): 297-307.

138 All are protected as wildlife sanctuaries under the Reserves Act.

139 R Schuckard evidence-in-chief para 23 [Environment Court document 25].

140 Citing W L Buller "Notes and Observations on New Zealand Birds" (1891) *Trans. NZ Inst.* 24: 65-91.

141 R J Davidson rebuttal evidence para 8.10 [Environment Court document 6A].

142 P R Fisher evidence-in-reply para 3.4 [Environment Court document 28A].

143 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28] citing M Bell "Numbers and distribution of New Zealand King Shag ... colonies in the Marlborough Sounds, September-December 2006" (2010) *Notornis* 57:33-36.

144 P R Fisher evidence-in-chief para 3.2 [Environment Court document 28].

145 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

146 R Schuckard Supplementary evidence para 30 [Environment Court document 25A].

[94] The highest number of birds counted by Schuckard at the four main colonies during his 1991-2002 surveys was 626 in 1994. The count for these four sites by the 2015 aerial survey was[147] 637. This suggests, given Dr Fisher's comment on the accuracy of Schuckard's 1991-2002 counts, that the numbers of birds at the four colonies has not changed significantly and thus the increase in the total number of birds is likely to be a result of a more wide ranging count.

[95] Mr Gardner-Hopkins in his closing submissions said:

> In 1992, the closest colony to Beatrix Bay, Duffers Reef, posted 168 (of 524) King Shag individuals. In contrast, the latest population count (early in 2015) has nearly 300 King Shags at Duffers Reef (out of 839 overall).[148]

It was unclear what inference he intended us to draw from that. One thing we cannot do is assume[149] there has been an increase in the total population[150].

[96] We conclude that King Shag numbers in the four main colonies have been approximately the same since 1991 and there is no declining trend in total numbers, but that finding is subject to the qualifications stated by Dr Fisher[151] who elaborated on this in his rebuttal evidence[152]: "the colony counts cannot be used to determine the long term '*stability*' of the population because the count[s] do … not reflect the number of breeding pairs, successful breeding attempts or age and sex ratio of birds, the latter determining the number of potential breeding pairs".

Status

[97] The King Shag is a Nationally Endangered[153] species in the *New Zealand Threat Classification System* published by the Department of Conservation. As at 2012 the criteria for King Shag's inclusion as a "Nationally Endangered Species" were that it had

147 R Schuckard evidence-in-chief para 30 [Environment Court document 25].
148 As summarised in the Council's submissions at para 277.
149 Transcript, p 525, line 17.
150 R Schuckard supplementary evidence para 30 [Environment Court document 25A].
151 P R Fisher evidence-in-chief para 3.4 [Environment Court document 28].
152 P R Fisher rebuttal evidence para 6.6 [Environment Court document 28A].
153 "Nationally endangered" is the second in three categories of "Threatened Species": Nationally Critical, Nationally Endangered, and Nationally Vulnerable in the Department of Conservation's Threat Classification System.

a small (250-1,000 mature individuals), stable population[154]. It was also described as "Range Restricted"[155].

[98] The *IUCN Red List Categories and Criteria* ("the *Red List*") categorises taxa by assessing them under five sets of criteria[156]:

A: Reduction in population;
B: Geographic range (EOO or AOO — see next paragraph — or both);
C: Small population size and declining population;
D: Very small or restricted population size;
E: Quantitative analysis showing the probability of extinction in the wild meets a threshold[157].

[99] Obviously the "AOO" needs explanation. The *Red List* states[158]:

> Area of occupancy is defined as the area within its 'extent of occurrence' which is occupied by a taxon, excluding cases of vagrancy. The measure reflects the fact that a taxon will not usually occur throughout the area of its extent of occurrence, which may contain unsuitable or unoccupied habitats. In some cases (e.g. irreplaceable colonial nesting sites, crucial feeding sites for migratory taxa) the area of occupancy is the smallest area essential at any stage to the survival of existing populations of a taxon. The size of the area of occupancy will be a function of the scale at which it is measured, and should be at a scale appropriate to relevant biological aspects of the taxon, the nature of threats and the available data …

[100] King Shag is identified as *vulnerable* by the International Union for the Conservation of Nature and Natural Resources ("IUCN") in the *Red List*. *Vulnerable* is one of the three 'threatened' species in the *Red List*. Dr Fisher explained that the King Shag is so categorised because[159]:

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154 H A Robertson, J E Dowding, G P Elliot et al p 10 Conservation Status of New Zealand Birds (2012) Department of Conservation.
155 H A Robertson, J E Dowding, G P Elliott et al Conservation Status of New Zealand Birds (2012) Department of Conservation p 10.
156 IUCN (2012) *IUCN Red List Categories and Criteria*: [*Version 3.1, Second Edition*] Gland, Switzerland and Cambridge, UK: IUCN. IV + 34.
157 50% probability means taxon is critically endangered, 20% endangered, 10% vulnerable.
158 The *Red List* above n 156, at p 12. The definition of "EOO" is given above n 127.
159 P R Fisher evidence-in-chief para 3.5 [Environment Court document 28].

> ... this **species is facing a high risk of extinction in the wild in the medium-term future** based on the criterion (D1) **population less than 1000 individuals,** *and* is restricted to four core breeding colonies (criterion D2: **five or less locations**), rendering the species susceptible to stochastic effects (e.g. infrequent, significant events) and human impacts.

The criteria he was referring to are contained in the *Red List*. Either of the two criteria referred to (D1 and D2) are sufficient[160] to place King Shag in the *vulnerable* category.

2.2 What is the geographic range of the King Shag?

[101] Neither the extent of occurrence nor the area of occupancy of King Shags is known with much accuracy. In answer to the Appellant's sustained attack on the accuracy of the Sounds Plan's inclusion of King Shag habitat as an area of ecological value (we discuss this later), Dr Fisher suggested that the extent of occupancy is the entire area of the Marlborough Sounds because individuals have occasionally been seen in remote corners. The species is known to breed at less than 10 locations.

Proximity of King Shag colonies to the site

[102] Relatively small numbers of birds breed[161] in any year across the four main colonies (Duffers Reef, Trio Islands, Sentinel Rock and White Rocks) ranging from a minimum of 70 to a maximum of 166 pairs based on census counts between the years 1992-2002.

[103] The closest main colony to Beatrix Bay is the Duffers Reef colony, with approximately[162] 240 birds. That may represent about 30-40% of the world population. There is also a small colony of up to 20 King Shags located 2 kilometres due west of the Beatrix Bay entrance at Tawhitinui Bay point[163].

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160 The *Red List* above n 156, at p 15.

161 P R Fisher evidence-in-chief para 3.7 [Environment Court document 28] citing Schuckard, R "New Zealand King Shag (*Leucocarbo carunculatus*) on Duffer's Reef, Marlborough Sounds." (1994) *Notornis 41*: 93–108 and Schuckard, R. "Population status of the New Zealand King Shag (*Leucocarbo carunculatus*)" (2006) *Notornis* 53: 297-307.

162 P R Fisher evidence-in-chief para 3.8 citing Ornithological Society of New Zealand 2013 [Environment Court document 28].

163 P R Fisher evidence-in-chief para 3.8 [Environment Court document 28].

Foraging areas

[104] Research from the Trios and (Northern) Stewart Island[164] in Admiralty Bay shows that King Shags forage mostly within 10 kilometres of the colonies. That was an approximation from Mr Schuckard's research which found that the mean distance of foraging birds from the Duffers Reef colony was 8.2km for a total count of 219 birds[165]. The maximum distance recorded was 24 kilometres although Dr Fisher acknowledged there had been no systematic studies at greater distances.

[105] In Mr Schuckard's opinion King Shags "… feed predominately southwest from the colonies in the outer Marlborough Sounds where their distribution in the feeding areas appear[s] to be constrained by distance and direction from the colony, and water-depth"[166]. To illustrate that he referred to his Figure 3 identified as "Figure 3 Distribution of feeding King Shags in the Marlborough Sounds". Certainly to our eyes that appears to illustrate his point about distance and direction. However, it was criticised by a witness for the Appellant, Dr D Clement who when asked in cross-examination whether it was an attempt to show area of occupancy agreed but qualified that by answering "… it is an attempt but not necessarily correct"[167]. We understand Dr Clement to be implying that there may be other squares beyond that distance which are within the area of occupancy, and we accept that. However, we also accept Dr Fisher's evidence that[168]:

> The potential marine foraging areas available to King Shags are constrained by energetic and food delivery requirements during the chick rearing period and body-morphometric related physiological constraints on maximal flight distances from the colony and water depth.

[106] Mr Schuckard's first surveys of the Duffers Reef breeding colony and feeding King Shags from this colony were 12 trips in 1990-1991. The foraging surveys were repeated along the same route, but in Beatrix Bay and Forsyth Bay only, in 1997 and 2014. Fewer trips (5) were made for these than for the 1990/91 survey. Finally, a single survey was undertaken by Mr Schuckard in 2015. He considered that he has established

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164 Davidson et al (Ex 6.3) at p 25.

165 P R Fisher evidence-in-chief para 4.8 [Environment Court document 8] citing R Schuckard "New Zealand King Shag … on Duffer's Reef Marlborough Sounds" (1994) *Notornis* 41: 93-108.

166 R Schuckard evidence-in-chief para 7 [Environment Court document 25].

167 Transcript, p 361, line 33 dated 7 May 2015 1418.

168 P R Fisher evidence-in-chief para 4.4 [Environment Court document 28].

that the majority of feeding occurs within 15 km of the colony (although individual birds were observed beyond that distance).

[107] Usually, King Shags fly low to the sea and do not fly overland on foraging trips. There is one interesting and relevant exception. Beatrix Bay is unique in terms of foraging habitat for King Shags because they access[169] it from Forsyth Bay by flying over the narrow Piripaua Neck. In a nearly direct line the application site in Beatrix Bay is between 8 and 9 km from the Duffers Reef colony. We note that Mr Schuckard also recorded[170]:

> Some differences in foraging range between colonies does occur; about 34% of the feeding birds from the White Rock population fly between 20km and 26km from the colony into the Queen Charlotte Sound whereas most King Shags from Duffers Reef, Trio Island and Sentinel Rock feed up to 16km from their colonies.

[108] We find that Beatrix Bay is part of the area of occupancy of King Shag and that the area outside the ring of mussel farms is used for foraging and feeding.

2.3 King Shag prey and the shag's foraging depths

King Shag prey

[109] Dr Fisher stated that the "small colony sizes and solitary foraging strategy"[171] of King Shags indicate a "patchy" prey resource which is confirmed by their diet of flatfish and other benthic[172] (seafloor) species, including:

> Witch [Flounder] (*Arnoglossus scapha*), Lemon Sole (*Pelotretis flavilatus*), New Zealand or Common Sole (*Peltorhampus novaezeelandiae*), Sole (*Peltorhamphus* sp.), Flounder (*Rhombosolea* sp.), Opalfish (*Hemerocoetes* sp.), Sea Perch (*Helicolenus percoides*), Triplefins Tripterigydea, Leatherjacket (*Parika scaber*), Blue Cod (*Parapercis colias*), Red Cod (*Pseudophycis bachus*), Red Scorpionfish (*Scorpaena papillosus*), Spotty (*Notolabrus celidotus*) and Octopus (*Octipodidae* sp).

169 P R Fisher evidence-in-chief para 3.9 [Environment Court document 28].
170 R Schuckard evidence-in-chief para 16 [Environment Court document 25].
171 P R Fisher evidence-in-chief para 4.2 [Environment Court document 28].
172 P R Fisher evidence-in-chief para 4.27 [Environment Court document 28].

Not all those prey species are equally important: flatfish are the most frequently taken[173] prey, and spotties are a very small part of King Shags' diet. Lemon Sole (which are known[174] to breed in Beatrix Bay) are an unusually large component of the diet of King Shag from Duffers Reef. That is consistent with the evidence[175] of Mr Schuckard which was uncontested on this issue.

[110] Because, like many predators, King Shags have to search for their prey, the distribution and density of flatfish and other benthic species is important. Dr Fisher wrote[176] "... the foraging efficiency of shags is ... strongly influenced by the availability of prey. Even a small reduction in prey density will prevent birds meeting their energy requirements".

Foraging depth

[111] Reports by Mr Schuckard on some limited observations of foraging King Shags suggests that within Beatrix Bay they "predominantly" feed between 30 and 40 metres depth[177]. However the same survey gave 25% of foraging in Forsyth Bay[178] was in water from 10-30 metres deep. Those figures should not be regarded as conclusive because of the low sample size and differences in survey effort[179] (amongst other reasons[180]).

[112] Because female King Shags are smaller than males it is likely they forage in shallower water[181].

[113] Counsel for the Appellant summarised the evidence in respect of King Shags' use of Beatrix Bay as:

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173 R Schuckard evidence-in-chief paras 51 et ff [Environment Court document 25].
174 B G Stewart evidence-in-chief para 3.3 [Environment Court document 26].
175 R Schuckard evidence-in-chief para 59 [Environment Court document 25].
176 P R Fisher evidence-in-chief para 4.35 [Environment Court document 28] citing D Grémillet and R P Wilson "A life in the fast lane: energetics and foraging strategies of the Great Cormorant" (1999) *Behavioural Ecology* 10: 516-524.
177 P R Fisher evidence-in-chief para 4.11 [Environment Court document 28].
178 P R Fisher evidence-in-chief para 4.12 [Environment Court document 28].
179 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
180 P R Fisher evidence-in-chief para 4.14 [Environment Court document 28].
181 P R Fisher evidence-in-chief para 4.21 [Environment Court document 28].

(a) In 1991 and 1992, when Mr Schuckard undertook his survey (upon which the 1/11 notations are based), there were approximately 33 marine farms in Beatrix Bay. However, these were smaller, not having been extended by subsequent applications[182] …

(b) Across all 12 of Mr Schuckard's surveys in 1991 and 1992, he only recorded 24 sightings of King Shags in Beatrix Bay.

Mr Gardner-Hopkins continued that later surveys showed:[183]

(i) Between 1997 and 2003, 13 King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992).[184] During that period a further eight farms and 23 extensions to existing farms were consented.

(ii) Between 2010 and 2015, nine King Shags were observed feeding in Beatrix Bay during "two to five" survey events (compared to 12 in 1992). [185] During that period it appears as if a further two farms and four extensions were consented.[186]

…

[114] Mr Gardner-Hopkins then submitted:

> … it was Mr Schuckard's evidence that King Shags in Beatrix Bay tend to feed at depths between 20-40m[187]. In fact, in Mr Schuckard's studies from 1991 to present day, very few King Shags (2) were recorded feeding between 20-30m, and 94% of all King Shags were recorded feeding at depths of greater than 30m.[188]

He put a map called "Special Map: King Shag Foraging/Water Depth/Beatrix Bay" to Dr Fisher. It showed that only one King Shag was recorded in Beatrix Bay as foraging in water less than 20 metres deep, and two between 20 to 30m (where total n = 46). We consider that the evidence does not bear out Mr Gardner-Hopkins' contention that those figures are "significant because most of the mussel farms in Beatrix Bay are situated over seabed that is shallower than 30m deep."

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182 Referring to Exhibit 33.1.
183 Referring to Exhibit 28.1.
184 Citing Schuckard Transcript at 502, lines 25-28.
185 Citing Schuckard Transcript at 503.
186 For accounting purposes, some of the new consented farms have now been counted alongside others to reach the 39 farms currently consented within Beatrix Bay.
187 Schuckard evidence-in-rebuttal at para 11.
188 See Exhibit 28.1 and P R Fisher, transcript at 576-577.

[115] Our reason for that finding is based on Mr Schuckard's description[189] of his survey method. This involved travelling on a reasonably consistent track at around 46 kph for approximately five hours, observing for King Shags 250m either side of the boat. A total of 115 km^2 out of an estimated 240 km^2 area was covered. Survey coverage did not include much of the close inshore areas, or the centre of Beatrix Bay, as shown on the survey track[190]. Indeed his "stylistic depiction" of his survey trips shows that for most of his trips he would have been beyond range to identify any inshore or shallow (20 to 30m) water foraging. We conclude that a more plausible explanation of the data is that fewer shags were observed in the shallower (less than 30m deep) water because there was less survey effort there. To that extent Mr Schuckard's results are biased (in the scientific sense).

[116] Indeed the Appellant called some evidence directed solely to that issue. Dr D Clement challenged the statistical validity of Mr Shuckard's survey methodology in supporting the conclusions reached. In her opinion, the study was not designed to allow for relative and statistical comparisons of King Shag use between areas. Dr Clement's evidence concluded with her opinion that[191]

> In summary, the 1994 Schuckard paper … was not designed to systematically survey the stated study area for observations of feeding king shags from Duffers Reef. Based on the opportunistic distribution and feeding observations collected, this study cannot statistically presume that any survey sector may be more important as a feeding area relative to any other sector nor assess where feeding may or may not be occurring. Additionally, the stated mean foraging distance appears to represent a minimum range due to sampling design biases. As a result, it would not be appropriate to use the 1994 findings to statistically assess any potential changes in king shag distribution within the Sounds or through time.

[117] She continued[192]:

> Some readers may over- or misinterpret the study's findings based on wording and the lack of discussion around the limits of the study's methods. I attribute some of this confusion to the author's use of the collected data to drive the research questions (rather than the reverse), and the general lack of written detail in the paper. Additionally, the lack of any recent, more systematic

189 R Schuckard evidence-in-chief para 10 [Environment Court document 25].
190 Exhibit 25.5.
191 D Clement evidence-in-chief para 3.26 [Environment Court document 12].
192 D Clement evidence-in-chief para 3.28 [Environment Court document 12].

> studies focused on the distribution and / or foraging ranges of the Duffers Reef colony (unlike Admiralty Bay colonies; Fisher & Boren 2012) also precipitates the data from Schuckard (1994) being applied beyond what is considered statistically defensible.

[118] Dr Clement also states[193] with regard to the identification of King Shag feeding areas:

> … it does not appear that the 1994 study has considered or corrected for any … biases. As a result, the presence of foraging King Shags in the sector most relevant to Beatrix Bay (south) will be an under- or over-estimation in relation to the other sectors due to uncorrected biases. … Given these factors, the study's original Figure 8 map and its caption, *"Main feeding area of king shags from Duffers Reef"* is simply a conclusion that cannot be drawn based on the data collected. It would be more appropriate to say that the map simply represents *observed* feeding locations of king shags from Duffers Reef.

We accept Dr Clement's criticisms.

[119] The Appellant also relied on a report by Mr Davidson and others called *Ecologically Significant Marine Sites in Marlborough, New Zealand*[194] ("the *Davidson 2011 Report*"). This includes a statement[195] that:

> King Shags regularly feed in the middle of the main channel and side arms in the outer Pelorus, particularly Beatrix Bay.

Mr Schuckard considered that is wrong. In his opinion[196]:

> Beatrix Bay has a rather flat bottom without any channels and feeding King Shags are widespread throughout Beatrix Bay at depths ranging predominantly from 20-40m.

We prefer the latter evidence which is consistent with that of Dr Fisher.

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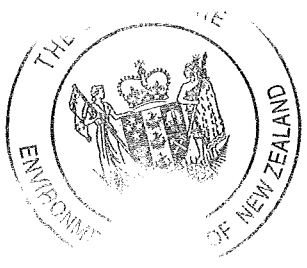
193 D Clement evidence-in-chief para 3.24 [Environment Court document 12].

194 R J Davidson et al *Ecologically Significant Marine Sites in Marlborough, New Zealand* Marlborough District Council and Department of Conservation 2011 [Exhibit 6.3].

195 The *Davidson 2011 Report*, above n 194, at p 83 [Exhibit 6.3].

196 R Schuckard evidence-in-chief para 19 [Environment Court document 25].



2.4 Use by King Shags of habitat within mussel farms

[120] Mussel farms provide one obvious advantageous change to King Shag's habitat: they supply buoys on which shags roost/rest/preen/loaf between flights or foraging. But do they forage within them?

[121] Dr Fisher wrote[197] that the existing and proposed mussel farms in Beatrix Bay "... exclude King Shag foraging from ... much of the soft substrate habitat ..." that is, or was, underneath them. Dr Fisher relied on the evidence of Dr Stewart to establish that about 19% of Beatrix Bay was affected. We have found that figure is an over-estimate, but we do not consider that invalidates Dr Fisher's evidence.

[122] A figure in Dr Fisher's evidence[198] appears to show that a high proportion of King Shags have been observed feeding in offshore areas both with and without mussel farms. Mr Davidson wrote[199] about this:

> Assuming these observations are representative, there are two possible reasons for this:
>
> (a) King Shags avoid mussel farms; or
>
> (b) they prefer to feed in deeper offshore areas of Bays and Reaches.

He continued[200]

> In order to determine which is the case, it is necessary to investigate shag preference in bays without mussel farms. These data have not been produced by Dr Fisher, however, in a paper by Schuckard (1994) the author delineated areas in Pelorus Sound where birds were observed feeding (Figure 4). Most feeding areas are in bays with mussel farms, however, in areas north and west of Maud Island free of mussel farms most feeding areas were located on offshore areas of these reaches. This suggests that birds select these deep offshore areas rather than avoiding mussel farms.

197 P R Fisher evidence-in-chief at para 6.2 [Environment Court document 28].

198 P R Fisher evidence-in-chief Figure 1 [Environment Court document 28] based on unpublished data from Mr Schuckard.

199 R J Davidson rebuttal evidence-in-chief para 8.4 [Environment Court document 6A].

200 R J Davidson rebuttal evidence-in-chief para 8.5 [Environment Court document 6A].

[123] Dr Fisher has conducted and published[201] research directly on this point within inner Admiralty Bay and Current Basin (also in the outer sounds, near French Pass). The most pertinent parts of the paper state[202]:

> Whilst mussel farms are sited away from breeding colonies and appear to have no appreciable direct impact, cumulative effects from habitat modification, alteration of habitat suitability for fish below the farm and wider area, and potential changes in marine species assemblages need to be considered.
>
> ...
>
> King Shags were recorded on 36% of the farms (n = 44) from 13 surveys within inner Admiralty Bay. No individuals were recorded foraging between farm lines from any of the survey methods. The low number of sightings within mussel farms suggests that farms are not important foraging areas for king shags, at least in Admiralty Bay. However, this may vary by site, prey availability and distance from colony/roost. Sightings of king shags foraging within mussel farms [reported in evidence in other proceedings before the Environment Court] show that mussel farms do not preclude king shags However, the low number of reported sightings and lack of published data would suggest that king shags do not exclusively use the areas occupied by mussel farms.

[124] After Mr Davidson relied on that passage to support the Appellant's position, Dr Fisher responded[203]:

> Less than 1% of all foraging King Shag records have been recorded within farms; of these most sightings are of birds diving between lines or on the edge of farms. Whether these individuals successfully captured fish associated with the farm structure, shell debris on the seabed or open water between the mussel lines remains to be substantiated.
>
> The comprehensive coastal strip surveys through all the mussel farms within inner Admiralty Bay between November 2006 to March 2007 (Fisher & Boren 2012) confirmed that King Shags do not feed (rarely; based on observations from Lalas and Brown) within mussel farms and have low attendance rates resting on buoys. ...

[125] Dr Fisher then hypothesised why King Shags do not use mussel farms[204]:

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201 P R Fisher and L J Boren (2012) "New Zealand King Shag (Leucocarbo caruneulatus) foraging distribution and use of mussel farms in Admiralty Bay, Marlborough Sounds". *Notornis*, 59:105-115.

202 P R Fisher and Boren (2012) cited by R J Davidson rebuttal evidence-in-chief at paras 8.6 to 8.8 [Environment Court document 6A].

203 P R Fisher rebuttal evidence-in-chief paras 5.9 and 5.10 [Environment Court document 28A].

204 P R Fisher evidence-in-chief para 5.7 [Environment Court document 28].

> King Shags are typically not pelagic feeders or opportunistic taking prey near the surface … Whether mussel farms exclude King Shags through the physical structure of the submerged lines reducing the open marine space and ability of birds to access the sea bed and benthic prey, or through unsuitable modification to the benthos habitat where benthic fish prey hide, and changes in benthic assemblages has yet to be determined.

[126] Mr Davidson, while he did not agree that mussel farms exclude King Shag, agreed that there is inadequate information on this. He disputed[205] the first theory on the basis that the water is so opaque near the seafloor anyway that the obstacles in a mussel farm would cause King Shags no difficulties. We have insufficient information to determine this issue.

[127] In any event, Dr Fisher's answer was[206]:

> The modification of the seabed under mussel farms is well documented; whilst it is recognised that the changes in seabed infauna and epifauna are dominated by mussel shell debris that forms artificial reefs and is habitat for a range of marine invertebrates and assemblage of fish. The modified seabed environment is less than suitable for flatfish to hide from predators such as the King Shag. The adverse effects to the King Shag foraging habitat within the footprint of the farm are more than minor.

[128] Mr Schuckard added a further reason why King Shags may not forage on the seafloor under and around mussel farms is their prey may be largely absent because of the increased organic matter underneath them.

[129] There was some suggestion by the Council's witnesses[207] that there is a wider zone of influence outside the boundaries of mussel farms. Dr Fisher referred to a 50 metre exclusion zone around a mussel farm based on the *Literature Review*. This habitat exclusion describes an alleged effect of the physical presence of farm structures in reducing the habitat available for "surface feeding seabirds"[208]. This last point seems to have been overlooked by Mr Gardner-Hopkins when he cross-examined Dr Fisher[209]. King Shags are benthic feeders not surface or even mid-column feeders.

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205 R J Davidson rebuttal evidence para 8.12 to 8.15 [Environment Court document 6A].
206 P R Fisher rebuttal evidence-in-chief para 7.3 [Environment Court document 28A].
207 We have summarised the relevant parts of Dr Stewart's evidence above in part 1 of this decision.
208 Table 6.10 *Literature Review* above n 84, at p 6-9.
209 Transcript, p 587.

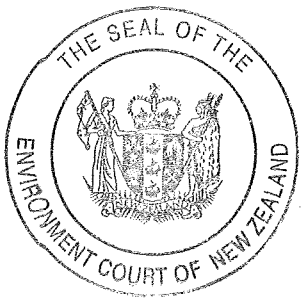
[130] The more relevant table in the *Literature Review* is Table 6.11 which describes[210] the effect of reduced habitat available for "benthic feeding seabirds, such as shags and penguins … because of changed benthic fauna due to the settlement of shell and debris from ropes used to grow filter feeders". This effect is described as taking place immediately underneath and within 200 metres of a farm. We are inclined to consider the shadow effect is largely confined to within about 30 metres of the seaward boundary of most mussel farms in Beatrix Bay, and is much narrower around the other three boundaries.

[131] The "Summary" in Chapter 6 (Seabird Interactions) of the *Literature Review* commences[211]:

> The potential effects of smothering of the seabed by debris from ropes leading to changes in the fauna are considered to be insignificant given the small area occupied by filter feeder aquaculture in New Zealand in relation to the large total area of suitable habitat available for foraging seabirds.

Mr Gardner-Hopkins said to Dr Fisher[212] "… again, you haven't given consideration to how the area of mussel farms compares with the foraging area that you define for King Shags?" and the answer was "That's correct". We have two problems with this whole cross-examination. First it appears to suggest that it was Dr Fisher's problem that he had not compared the foraging areas with the area of the mussel farms, when it is, we have held, the Applicant who has the obligation to supply adequate information for us to determine the application.

[132] Second, Dr Fisher's answer might, by itself and if the apparently superfluous word "again" is ignored, convey the wrong impression to a reader of the transcript. To obtain Dr Fisher's fuller answer one needs to read the previous page of the Notes of Evidence. There, Mr Gardner-Hopkins had asked essentially the same question in



210 Table 6.11 *Literature Review* above n 84, at p 6-9.
211 Table 6.11: *Literature Review* above n 84, at p 6-9.
212 Transcript, p 588.

respect of (the barely relevant) Table 6-10 in the *Literature Review*. That contains a summary with a similar first sentence. In answer to the same question Dr Fisher said[213]:

> No. if I can just add to that, I did comment on this, this report and prior reports in my evidence and I noted that they didn't include the DOC survey that I was involved with, which was the most comprehensive survey looking at effects of King Shags on mussel farms …

[133] Mr Gardner-Hopkins submitted that:

> Of the 9 King Shags recorded to be feeding between 2010 and 2015, over half (5) were recorded feeding within the 50m and 200m zones relied upon by Dr Fisher as "excluding" King Shags.[214] The empirical data proves there is no exclusion around the marine farms.

That submission overstates both what Dr Fisher said and any (tentative) conclusion which can be drawn from the information, which is that King Shag may still forage "close" to the outside edge of marine farms. Whether that is with the same success rate, or higher — or lower — than in the absence of marine farms is not known. Changing environmental conditions such as the introduction of mussel farms may lead to an adaptive response that maintains or even increases the productive nature of the benthic ecosystem below the farm. That may even benefit King Shags. For example, it may be that there is an 'edge' effect in which King Shags are drawn to the outer edge of the 30m shadow (of sediment and some shell) because their prey such as Witch Flounder are finding more food e.g. polychaetes in the richer sediments there. That is however, our speculation and we have no evidence for it.

[134] We find on the basis of Dr Fisher's and Mr Schuckard's evidence that King Shags forage within mussel farms only very infrequently and that likely contributors to that is the reduced presence of flatfish on or in the changed seafloor underneath the farms. King Shags' use of mussel farms is likely to be largely confined to resting on them.

213 Transcript, pp 587-588.
214 Exhibit 28.2 and P R Fisher, transcript at 579-580.

[135] While Dr Fisher considered that the whole of the Marlborough Sounds was a "significant habitat" for King Shags[215] — in reliance we suspect on the IUCN Red List and on a policy in the NZCPS[216] — he was also of the opinion[217] that Pelorus Sound (or at least the parts shown on the 1991/1992 map by Mr Schuckard) are the core feeding areas for the birds from the Duffers Reef colony.

3. The statutory instruments

3.1 The relevance of the statutory instruments

[136] The statutory instruments are of course relevant because the consent authority must have regard to[218] them. However, they are of even more importance now than previously in the light of *King Salmon*[219] because the effects on the environment to be considered are not (except in unusual circumstances) necessarily or usually the relevant effects inferred from Part 2 or alleged by opponents of an application but the potential effects particularised in the statutory instruments.

3.2 The Marlborough Sounds Resource Management Plan

[137] The Sounds Plan, made operative on 28 February 2008, is a combined[220] district, regional and regional coastal plan. It is contained in three volumes — Volume 1 sets out the objectives and policies and methods, Volume 2, the rules and Volume 3 the maps. In Volume 1 five (of 23) chapters are particularly relevant. We summarise the relevant provisions below.

Natural Character (Chapter 2.0)

[138] Chapter 2 (Natural Character) of the Sounds Plan attempts to integrate[221] the values and interests identified in other chapters which promote activities while avoiding, remedying and mitigating adverse effects on the identified values.

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215 P R Fisher evidence-in-chief para 7.4 [Environment Court document 28].
216 Policy 11(a)(iv) [NZCPS p 16].
217 P R Fisher rebuttal evidence-in-chief para 3.29 [Environment Court document 28A].
218 Section 104(1)(b) RMA.
219 *King Salmon* above n 26.
220 Sounds Plan para 1.0 [page 1-1].
221 Chapter 2.0 para 2.1 [Sounds Plan p 2-1]. This is repeated in the explanation to policy (2) 1.4 [Sounds Plan p 2.2].

[139] The single objective simply repeats section 6(a) of the RMA. The implementing policies are[222] first to avoid the adverse effects of use or development within those areas of the coastal environment which are predominantly in their natural state and have natural character which has not been compromised[223]; to encourage appropriate use and development in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated[224]; and to consider the effects on those qualities, elements and features which contribute to natural character[225], including (relevantly):

(a) coastal and freshwater landforms;
(b) indigenous flora and fauna, and their habitats;
(c) water and water quality;
(d) scenic or landscape values;
...

[140] Other non-repetitive[226] policies require regard to be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal when considering "appropriateness"[227]; adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment are unknown[228]; recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole[229].

[141] Since this chapter attempts to integrate all the others in the Sounds Plan we will state the questions it raises at the end of this subpart, after ascertaining the other questions those chapters raise.

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222 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].
223 Policy (2) 1.1 [Sounds Plan p 2-3].
224 Policy (2) 1.2 [Sounds Plan p 2-3].
225 Policy (2) 1.3 [Sounds Plan p 2-4].
226 Policy (2) 1.5 largely repeats policy (2) 1.1 and the start of the chapter.
227 Policy 1.6.
228 Policy 1.7.
229 Policy 1.8.

Indigenous Vegetation and Habitats of Indigenous Fauna (Chapter 4.0)

[142] Objective (4.3) 1 and its two relevant supporting implementation policies[230] are important. The objective provides for "The protection of significant ... fauna ... and their habitats from the adverse effects of use and development". The first two policies are relevant:

> Policy 1.1 Identify areas of significant ecological value which incorporate areas of indigenous vegetation and habitats of indigenous fauna.
>
> Policy 1.2 Avoid, remedy or mitigate the adverse effects of land and water use on areas of significant ecological value.

[143] Those policies are important because feeding habitat of King Shag is identified in Volume 2 of the Sounds Plan (Appendix B, notation 1/11) of the Sounds Plan as an "Area of Ecological Value" ("AOEV"[231]) with national significance. The relevant ecological overlay for King Shag habitat is shown in Map 69 of the Sounds Plan. The site is within an area subject to that notation. Ironically, since this classification was based on recommendations in a report by Mr Davidson and others[232] (and that in turn drew on the foraging range information reported in Schuckard 1994[233]), the Appellant challenged the science behind this notation and asked us to place less weight on it as a result. We will consider that issue later.

[144] Modification of values associated with the ecological overlay for King Shag habitat are to be assessed as discretionary activities[234] with the anticipated environmental result[235] of maintaining population numbers and distribution of the species. The questions that arise under policies (4.3)1.2 are therefore:

- What are the likely adverse effects on the feeding habitat?
- What is the probability of adverse effects occurring?

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230 Policy (4.3) 1.1 and 1.2 [Sounds Plan p 4-2].

231 Not to be confused with an "AOLV" or "Area of Outstanding Landscape Value" which is the term used in the Sounds Plan for outstanding natural features or parts of outstanding natural landscapes.

232 The *Davidson 2011 Report*, above n 194.

233 Schuckard R, 1994 "New Zealand Shag (Leucocarbo Carunculatus) on Duffers Reef, Marlborough Sounds". *Notornis* 41, Collin 93 to 108.

234 Section 4.4 Methods of Implementation [Sounds Plan p 4-4].

235 Section 4.5 Anticipated Environmental Results [Sounds Plan p 4-5].

- What is the probability of adverse effects being avoided, remedied or mitigated?
- What is the probability of a decrease in the number of King Shags? (Noting this last question derives from the methods not the policies).

Landscape (Chapter 5.0)

[145] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values"[236]. Areas of "outstanding landscape value" are shown on the Landscape Maps in Volume 3. The promontory in Beatrix Bay, which the site is at the tip of, is not identified as an "Area of Outstanding Landscape Value".

[146] There are no relevant policies. However, Chapter 5 recognises as a relevant issue[237] that when deciding whether development is appropriate or not:

> ... the siting, bulk and design of structures ... on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

That is an evaluation matter raised directly in Appendix 1 of the Sounds Plan which we will refer to in due course.

Public access (Chapter 8)

[147] There is a single objective to maintain and enhance public access[238]. The relevant implementing policy expressly states[239] that adverse effects of marine farms on public access should as far as practicable be avoided and otherwise mitigated or remedied. The questions under this policy are first whether there would be any adverse effects on access? Second, can they practically be avoided, or at least mitigated or remedied?

236 Para 5.1.1 [Sounds Plan p 5-1].
237 Para 5.2.2, Landscape [Sounds Plan p 5-3].
238 Objective 8.3.1 [Sounds Plan p 8-2].
239 Policy 8.3.1/1.2 [Sounds Plan p 8-2].

The Coastal Marine Area (Chapter 9)

[148] The first objective (of three) for Chapter 9 is[240] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The relevant implementing policy (9.2.1) 1.1 identifies as values to be maintained[241]: conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, public access to and along the coast, public health and safety, recreation values, and water quality. Most of these are at issue to some extent in these proceedings. The policy also requires any adverse effects to be avoided, remedied or mitigated. Policy (9.2.1) 1.2 is at first sight rather repetitive but actually requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied.

[149] The other relevant policy is (9.2.1) 1.14 which is to enable a range of activities in appropriate places in the Sounds. Marine farming is expressly included and is zoned in the Coastal Marine Zone 2 in which marine farms are controlled or discretionary in the inshore area and non-complying beyond 200 metres from the shore. The Sounds Plan explains[242] that "the extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters".

[150] The second coastal marine area objective[243] is to manage water quality at a level that enables shellfish gathering and cultivation for human consumption. Implementing policies seek to avoid the discharge of contaminants that adversely affect significant ecological value, cultural areas, outstanding landscapes and seafood consumption. The only possibly relevant policy is that which seeks to avoid discharges affecting "significant ecological value" which seems to echo the policies relating to "areas of ecological value" already referred to, and we will consider the effects under that heading.

240 Objective 9.2.1 [Sounds Plan p 9-4].
241 Policy (9.2.1)1.1 [Sounds Plan pp 9-4 and 9-5].
242 Explanation of objective 9.2.1/1 [Sounds Plan p 9-6].
243 Objective 9.3.2 [Sounds Plan p 9-10].

[151] The third coastal marine objective[244] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy (9.4.1) 1.1 identifies the same list of values as did policy (9.2.1) 1.1 already listed and so does not raise independent predictive questions. Policy (9.4.1) 1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which emphasizes the wording of the rules.

Summary: stating the questions about the natural character of the area

[152] Returning to the policies in Chapter 2 of the Sounds Plan, the summarising questions these raise are:

(1) is the natural character of the area around the site compromised? And if so, to what extent?

(2) can any adverse effects of the mussel farm on coastal landforms, flatfish, King Shag and their habitats, water quality and scenic/landscape values be appropriately avoided, remedied or mitigated?

The rules

[153] Volume 2 of the Sounds Plan contains the rules implementing the objectives and policies. Chapter 35 covers Coastal Marine Zones One, Two and Three. General Assessment Criteria for discretionary activities are set out in Rule 35.4.1 and the specific criteria for marine farms are detailed in Rule 35.4.2.9. The former rule requires consideration of the "likely" effects of the proposal on the locality and wider community, the amenities values of the area, any significant environmental features including the habitat of indigenous species, and generally on the natural and physical resources of the area. The latter rule[245] requires specific assessments for marine farms of (relevantly):

- an assessment of the present nature of the site, both physical and biological including the nature of the sea floor and species found in the area;

...

244 Objective 9.4.1 [Sounds Plan p 9-16].
245 Rule 35.4.2.9 [Sounds Plan p 35-24].

- consideration of navigational matters …
- consideration of aesthetic and cultural matters;

…

- other matters including
  - (a) likely effect on areas used for commercial and recreational fishing;
  - (b) the visual effect of the farm and its operation;
  - (c) likely effects on water quality and ecology;
  - (d) the alienation of public space.

…

The Council only requires assessment of "likely" effects on some resources. "Likely" may mean "as likely as not" or "fractionally above the balance of probabilities" or it may, following international conventions[246], mean effects with a 66% or higher probability of occurring. Either way, we doubt whether these policies and rules can be said to fully implement part 2 of the RMA in conjunction with that part of the definition of "effects" in section 3 RMA which includes[247] "any potential effect of low probability which has a high potential impact". The Sounds Plan is incomplete on those issues especially on the risk of extinction of King Shag: that may be an event of low probability but high potential impact.

3.3 The Marlborough Regional Policy Statement

[154] We are obliged to have regard to[248] the Marlborough Regional Policy Statement ("MRPS"). However, because it became operative (1995) over a decade before the Sounds Plan (2008) its provisions are deemed to be given effect to and particularised in the Sounds Plan (unless the latter is incomplete, unclear or *ultra vires*) — see *King Salmon*[249]. On the whole it is so broad it gives us little assistance, except that there is an objective[250] to ensure that "… natural species diversity and integrity of marine habitats be maintained and enhanced".

246 See the IPCC's *Guidance Note* (2010) quoted in part 0.7 of this Decision
247 Section 3(f) RMA.
248 Section 104(1)(b)(v) RMA.
249 *King Salmon* above n 26.
250 Objective 5.3.10 [MRPS p 44].

3.4 The New Zealand Coastal Policy Statement

[155] The New Zealand Coastal Policy Statement 2010 ("the NZCPS")[251] was described in *King Salmon*[252] by the Supreme Court as "an instrument at the top of the hierarchy". We respectfully adopt the Supreme Court's description of the objectives in that document. The NZCPS is important in this case because it has not yet been implemented in the Sounds Plan. One procedural policy of potential importance in this case is Policy 3 which requires us to adopt a precautionary approach. We will consider the implications of that later.

[156] The NZCPS identifies the following issues[253] relevant to this proceeding:

- the ability to manage activities in the coastal environment is hindered by a lack of understanding about some coastal processes and the effects of activities on them;
- loss of natural character, landscape values … along extensive areas of the coast …;
- continuing decline in … habitats and ecosystems in the coastal environment under pressures from subdivision and use, vegetation clearance, … plant and animal pests, poor water quality, and sedimentation in estuaries and the coastal marine area;
- demand for coastal sites … for aquaculture …;

…

These issues recognise that in their current state some areas in the coastal environment are not necessarily being managed sustainably.

[157] The NZCPS provides for integrated management of the resources of the coastal environment by requiring particular consideration of situations where "significant adverse cumulative[254] effects are occurring"[255]. A later policy[256] requires plans to set thresholds (including zones …) where practicable "… to assist in determining when activities causing adverse cumulative effects are to be avoided". The areas of ecological value in the Sounds Plan can be seen as an anticipation of this approach.

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251 This came into force on 3 December 2010.
252 *King Salmon* above n 26, at [152].
253 NZCPS 2010 p 5.
254 The word "cumulative" in these policies is being used in the normal (accumulative) sense not in the narrow *Dye* sense discussed below, in part 4.1 of this Decision.
255 Policy 4(c)(v) [NZCPS p 13].
256 Policy 7(2) [NZCPS p 15].

[158] We now turn to the substantive implementing policies.

Aquaculture

[159] Policy 6(2) of the NZCPS 2010 is important[257] because, in relation to the coastal marine area, it requires recognition of:

> a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area; ...
> b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
> c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
> ...

[160] Those more general policies are then elaborated on with a specific Policy 8 (b) for aquaculture which is obviously relevant in this case. It is to[258] recognise the significant potential contribution of aquaculture to the well-being of people and communities by[259]:

> ...
> b. taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
> c. ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

These policies are clearly applicable. What is less clear is whether these are intended to refer to the net benefits of aquaculture. We assume that they are to be consistent with section 7(b) RMA, otherwise the NZCPS would be incomplete. In any event there was no disagreement over the brief evidence called for the Appellant on the social and financial benefits of the proposal.

Indigenous biodiversity

[161] Policy 11 is (relevantly):

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257 Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.
258 Policy 8: Aquaculture [NZCPS 2010 p 15].
259 Policy 8 (a) is not relevant, because we are not here concerned with the approval of a regional policy statement or plan [NZCPS 2010 p 15].

Policy 11: Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) …

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare[260];

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

…

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, **rocky reef systems**, eelgrass and saltmarsh;

… [emphasis added].

[162] The first important aspect of policy 11 is that certain adverse effects are simply to be avoided: the effects on certain threatened categories of animals and birds and on certain classes of habitat of indigenous fauna. We note that categories in (a)(i) and (ii) are not mutually exclusive. Adverse effects of activities on a taxon obviously include injury to or death of individuals and reduction in population, but they may also include reductions in EOO or AOO, and reduction in habitat area or quality. This results from the reasons (e.g. very small populations) why they have been classified as threatened or at risk in the first place.

[163] Policy 11(a)(i) and (ii) refer to the adverse effects of activities on taxa, whereas 11(a)(iv) refers to habitats of indigenous species. Subparagraph (i) and (ii) thus simply implement section 5(2) whereas subparagraph (iv) also implements section 6(c) RMA (significant habitats). We mention that because there is some potential for confusion about subparagraph (i) and (ii). They do not refer to 'habitats' or 'significant habitats' and thus do not implement section 6(c). However, to particularise and implement section 5(2)'s direction for the "… protection of natural … resources" the NZCPS adopts the

260 "Naturally rare" is defined in the Glossary as meaning "Originally rare: rare before the arrival of humans in New Zealand" [NZCPS 2010 p 27].

lists in the New Zealand Threat Classification System and in the IUCN Red List. These largely refer to population criteria. However, some of the criteria for small populations do refer to habitat (and they happen to be the relevant ones in this case). But that does not turn the criteria into section 6(c) RMA implementations.

[164] As recorded above, New Zealand King Shag is an indigenous taxon which is listed as threatened in both the New Zealand Threat Classification and in the IUCN Red List, so NZCPS policy 11(a)(i) and (ii) both apply. That means that the issue emphasised so strongly by the Appellant — whether the site's classification as a "significant habitat" for New Zealand King Shag is correct — is not really relevant at least to policies 11(a)(i) and (ii) of the NZCPS.

[165] Policy 11(a)(iv) recognises that habitats are particularly important at the edges of a species' range. This policy recognises that reduction in the quality or quantity of habitat may itself have consequences for a qualifying species, even if the consequences for individuals and/or populations are not yet known, and treats such reductions as effects to be automatically avoided.

[166] The King Shag is at the limit of its natural range primarily because its apparent area of occupation is so small. Anywhere within the AOO is close to its edges in the sense that birds from the principal Pelorus colonies are always within foraging range of the edges. The evidence is that the King Shag has a foraging range of about 25 km. Given the very small number of colonies we do not understand NZCPS policy 11(a)(iv) to apply in a way so that only the outermost ring (with an inner radius of say 20 km) is protected habitat. That would be an absurd consequence whereby potentially less important habitat is protected under the policy while more important habitat is not. Consequently we consider policy 11(a)(iv) applies in this proceeding.

[167] The court's knowledge of New Zealand King Shag suggests that neither its taxonomic status nor its (former) extent of occurrence are necessarily as black-and-white as Mr Schuckard portrayed them. It is possible, for example, that King Shag should be lumped as a northern outlier of a superspecies of "New Zealand Blue-eyed Shags" within the *Leucocarbo* genus. That would put King Shags at the limit of the (super-) species range so NZCPS policy 11(a)(iv) would still apply (i.e. a lumping of the species

with, for example, Stewart Island Shag, would make no difference to the analysis). The other matter is that the fossil record of King Shags apparently shows[261] a wider extent of occurrence (EOO) in the past. However, no evidence was given about these matters so we simply record them as potential complications in any future cases.

[168] The site is also close to the reef system wrapped around the promontory so policy 11(b)(iii) is relevant.

[169] The questions raised by these policies are: will the proposed mussel farm cause adverse effects on:

(a) the King Shag species?
(b) the habitat of King Shags?
(c) effects which are significant on the reef system around the promontory?

Natural character and natural landscapes in the coastal environment

[170] Policy 13 is (relevantly):

Policy 13: Preservation of natural character

1. To preserve the natural character of the coastal environment and to protect it from inappropriate use, and development:
   a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
   b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:
   ...

The meaning of "natural character" in section 6(a) of the RMA — as it applies to the coastal environment — now needs to be read in the light of the particularisation of that phrase in policy 13(1) of the NZCPS.

[171] Policy 15 is (relevantly):

261 P Schofield and B Stephenson Birds of New Zealand (2013) Auckland University Press p 229.

Policy 15: Natural features and natural landscapes

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

a. Avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment;

b. Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects on other natural features and natural landscapes in the coastal environment;

...

[172] The important questions raised by these two policies are:

(1) Will the proposed mussel farm cause adverse effects:
  (i) to the natural character of Beatrix Bay?
  (ii) to the natural features in, or landscape of, Beatrix Bay?

(2) If the answer to question (1) is "yes" will any of those effects be significant?

(3) Will the proposed mussel farm, together with other mussel farms, cause cumulative adverse effects on the natural character/natural features/landscape of Beatrix Bay?

4. What are the predicted effects of the mussel farm?

4.1 Introduction: identifying the relevant effects

[173] Under section 104(1)(a) RMA the consent authority must have regard to the "actual and potential effects on the environment of allowing the activity".

[174] At first sight that requires a comprehensive inquiry because the word "effect" is defined very widely in section 3 of the Act as including:

3 Meaning of effect

In this Act, unless the context otherwise requires, the term **effect** includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

The wording suggests that any cumulative effects of any stressor appear to be included. For example, the ecologist Dr Stewart referred to Chapter 12 of the *Literary Overview* which describes "cumulative" effects in relation to marine aquaculture as[262]:

> *... Ecological effects in the marine environment that result from the incremental, accumulating and interacting effects of an aquaculture development when added to other stressors from anthropogenic activities affecting the marine environment (past, present and future activities) and foreseeable changes in ocean conditions (i.e. in response to climate change).*

That description appears to fit within section 3(d) RMA.

[175] However, in 1999 the Court of Appeal issued a decision in *Dye v Auckland Regional Council*[263] ("*Dye*") which held that a "cumulative effect" is not a wide concept in the context of a resource consent application. Tipping J, giving the decision of the Court, wrote[264]:

> The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effects separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. [Underlining added].

The converse appears to be that effects of other stressors (which are not the activity under consideration) are not cumulative effects as a matter of law. That is problematic in

262 *Literature Review* above n 84, at p 12-13.
263 *Dye v Auckland Regional Council* [2002] 1 NZLR 337; [2001] NZRMA 513 (CA).
264 *Dye* at paras [38] and [39].

relation to the (extensive) parts of the environment which are[265] "ecosystems and their constituent parts" because they are all affected accumulatively by all effects from all stressors. Further, *Dye* does not recognise that 'cumulative' effects of multiple stressors are the main consideration in preparations of district plans and other statutory instruments.

[176] *Dye* was explained by Cooper J in *Rodney District Council v Gould*[266] as follows:

> … I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a "cumulative effect".

[177] We record that other decisions show some disquiet over that restrictive application of the term "cumulative effects". First, *Dye* does not use the ordinary meaning of "cumulative" as pointed out by the Environment Court in *The Outstanding Landscape Protection Society Inc v Hastings District Council*[267]. Second, the learned Chief Justice, in her minority judgment in *West Coast ENT Inc v Buller Coal Ltd*[268], wrote:

> I … would have thought that contribution to the greenhouse effect is precisely the sort of cumulative effect that the definition in s 3 permits to be taken into account under s 104(1)(a) in requiring the consent authority to "have regard to any actual and potential effects on the environment of allowing the activity".

Third, *Harris v Central Otago District Council*[269] has recently pointed out that strictly *Dye* is only authority for the proposition that a potential effect on the environment which might be caused by some other activity which requires a resource consent under the relevant plan is not a cumulative effect of allowing the activity for which consent is sought. It seems that the restrictions of *Dye* are not necessary: the potential effects of

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265 Section 2 RMA.

266 *Rodney District Council v Gould* [2006] NZRMA 217 (HC) at [122].

267 *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [50].

268 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87; [2014] 1 NZLR 32; [2014] NZRMA 133; (2013) 17 ELRNZ 688 (SC) at [91].

269 *Harris v Central Otago District Council* [2016] NZEnvC52 at [48].

another independent application for resource consent would not usually be part of either the existing or the reasonably foreseeable future environment and so are irrelevant anyway.

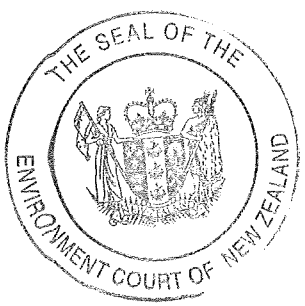
[178] We observe that the complexity of *Dye*'s discussion of 'actual and potential effects' in section 104(1)(a) RMA are also unnecessary. There is a simple reason why Parliament used that phrase rather than the defined word "effects". Obviously if a resource consent is applied for in the proper order — in advance of carrying out an activity — all its effects are potential, i.e. they have not occurred yet. However, the legislature anticipated the reality that in a small but significant percentage of cases, particularly after an abatement notice has been issued by a local authority, a resource consent is applied for retrospectively. In such a case most of the effects are "actual".

[179] To those points we can add:

(1) *Dye* does not take into account — because it did not need to — the reality that all stressors, regardless of who or what causes them, cause "cumulative" effects on ecosystems; and

(2) the *Dye* view of the world is rather static — in reality this second's effects are the next second's environment. The past effects of stressors — the accumulated[270] effects — have become and are continually becoming, part of the environment which is the setting of any proposal.

[180] It is important to realise that *Dye* does not mean that "cumulative" effects in a wider sense are irrelevant. If the potential effects of stressors, other than the activity for which consent is sought, are relevant then they may be taken into account under section 104(1)(c) RMA. Accordingly we will analyse such potential effects — which we will call "accumulative effects" — separately so as not to confuse the analysis imposed by *Dye*. The different treatment of such effects under *Dye* may have been intended to have this consequence: whereas cumulative (in the *Dye* sense) effects must be had regard to under section 104(1)(a), the consent authority has a discretion under section 104(1)(c) as to whether it takes accumulative effects into account at all. However that is probably an



270 We will use "accumulated" for the past effects of any stressors; "accumulative" for future effects of all stressors (other than the application).

over legalistic approach, because the potential (future) effects of other stressors are also part of the reasonably foreseeable future environment (under section 104(1)(a)) and that must be established in any event. In other words, there is no bright line distinguishing accumulative effects of other stressors from the future dimensions of the 'environment': to the contrary, they are the same thing.

4.2 Effects on the water column[271]

[181] As described earlier, the operation of the mussel farm will cause discharge of seawater and contaminants (mussel shells, mussel faeces and pseudofaeces) to the seawater of Beatrix Bay. The question under the Sounds Plan is whether discharges affecting significant ecological value are avoided.

[182] Mr Knight also assessed the effects of the proposed farm structures on currents, waves, shading and water column stratification, concluding that these effects would be small and localised[272]. In Mr Knight's opinion, an additional mussel farm is unlikely to contribute to oligotrophication (lowering of nutrient levels) of the region. He described his application of the *Aquaculture Stewardship Guidelines*[273] to estimate the effects of the proposed farm on phytoplankton depletion. He reported as follows[274]:

> Results of the carrying capacity analysis ... show that the estimated stocking density of the farm would filter the estimated area of influence of the farm every 13.5 days (the clearance time CT) and that the area of influence would be flushed approximately every 4.5 days (the retention time RT). Consequently, the analysis shows that the water currents at the site are sufficient to support the proposed culture at the site and that the proposal will meet with the ASC (2012) criteria, that the ratio of the clearance to retention time would be greater than one. (Footnote omitted).

This analysis of local scale effects of the proposed farm on phytoplankton productivity diversity and succession was not challenged by other expert evidence or in cross-examination. In fact, the conclusion appears to be supported by Dr S T Mead[275], ecologist for the Societies, because he stated that the farm in isolation is unlikely to exceed its localised carrying capacity or influence nutrient properties in the wider bay.

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271 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].
272 B R Knight, evidence-in-chief at para 82 [Environment Court document 9].
273 Aquaculture Stewardship Council 2012: *ASGBivalve Standard Version 1* (January 2012).
274 B R Knight, evidence-in-chief para 56 [Environment Court document 9].
275 S T Mead, evidence-in-chief, paras 25 and 34 [Environment Court document 20].

[183] Dr Mead extrapolated the farm scale calculations by Mr Knight to show how quickly or slowly the seawater in the bay is replaced. He calculated a bay-wide CT/RT[276] score of 0.0675. In his opinion the capacity indicators[277] for clearance efficiency and regulation ratio indicated that cultured mussels control the ecosystem of Beatrix Bay (i.e. exceed carrying capacity)[278]. Based on his calculations, Dr Mead asserted that the accumulated ecological effects of mussel farms were already significant in Beatrix Bay and that no more farms should be added. Mr Knight responded to those calculations[279], noting that while they were useful tools "they do not account for the spatial complexity of an area and so will become increasingly less useful at larger scales." An equally cogent criticism of Dr Mead's opinion was that of Dr Stewart. He did not see the relevance in extrapolating the theoretical calculations because empirical observations at a base scale showed that carrying capacity was not being exceeded most of the time.

[184] We consider that the proposal is unlikely to add any adverse cumulative effects to the water column in Beatrix Bay that are more than minimal in the context of larger "natural"[280] variations. However, whether the regularity of winter/summer fluctuations changes the food web in a way that affects King Shag is unknown.

4.3 Effects on the seabed[281]

[185] Dr Taylor and Dr K Grange provided expert ecological evidence for the Appellant on the benthic effects of the proposal. Mr Davidson also gave us his expert opinions (although not claiming to be independent). Dr Stewart and Dr Mead provided expert evidence for the Council and the Societies respectively. A site-specific assessment[282] of the proposal was prepared by Mr R Forest for the original (now

276 CT=clearance time; RT=retention time.

277 Using methodology described in Gibbs M T 2007. "Sustainability performance indicators for suspended bivalve aquaculture activities". *Ecological indicators*, 7(1), 94-107.

278 S T Mead, evidence-in-chief, at para 28 [Environment Court document 20].

279 B R Knight, rebuttal evidence at para 4.11 [Environment Court document 9A].

280 "Natural" is in inverted commas to recognise the possibility that el Niño/ la Niña events may be influenced by anthropogenic global warming.

281 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

282 Forest R 2013, *Proposed Marine Farm Site Assessment for a new application located in Northern Beatrix Bay, Pelorus Sound*, (Cawthron Report No 2406) [Exhibit 6.5].

modified) application. While Mr Forest was not called by the Appellant, that report was relied on by Dr Taylor and others.

Will there be adverse effects on the rocky reef system at the promontory?

[186] We must assess the probability and degree of adverse effects on the rocky reef[283], which it will be recalled, is at least 35 metres from any part of the marine farm. There was no suggestion that there would be any shell drop on the reef. The only issue was whether finer suspended sediments would be moved on to and smother the reef.

[187] For the Appellant, Dr Taylor's evidence[284] was that the water flow regime at the site (typically less than 4cm per second), combined with the 35 metre buffer, would make farm-related deposition difficult to distinguish from background levels at the adjacent inshore reef area. Further, episodic high current flows recorded at the site (up to 20cm per second) would have the effect of re-suspending any fine organic material that might reach the reef. Dr Taylor also pointed out[285] research evidence establishing the inherent variability of rocky reef communities supporting his opinion that any "cumulative" effects from mussel farming on these communities are likely to be very difficult to detect when compared to large scale environmental processes. Finally Dr Taylor suggested that any residual concerns around potential effects on the reef habitat could be met by requiring an adaptive management approach based on benthic monitoring linked to a review of the farm's layout if significant issues were identified. Proposed conditions to this effect have been provided by Mr J C Kyle, planning witness for the Appellant[286].

[188] Dr Mead, after recalculating his figures related to flow rate and the deposition footprint, accepted that a deposition footprint limited to up to 35m from the farm was likely[287]. He also accepted[288] that the high currents experienced from time-to-time at the site may re-suspend any fine sediment that may travel further than the main footprint. Despite accepting these propositions, Dr Mead continued to assert that fine material

283 NZCPS policy 11(b)(iii).
284 D I Taylor evidence-in-chief paras 33 and 34 [Environment Court document 8].
285 D Taylor evidence-in-chief paras 38 to 43 [Environment Court document 8].
286 J C Kyle, evidence-in-reply, Appendix A [Environment Court document 32].
287 Transcript, p 394, line 28.
288 Transcript, p 396, lines 10-15.

reaching the reef area from the proposed adjacent mussel farm would have a major effect on the ecological community at the reef.[289]

[189] We see a low probability of such an effect — it is unlikely to occur on the preponderance of the evidence given to us.

Will there be adverse effects on the intertidal zone?

[190] We are also required[290] to examine whether there will be adverse effects on another indigenous ecosystem found only in the coastal environment — the intertidal zone. Prompted by concerns expressed at the Council hearing on the possible impact of mussel farms on the wider biological community at Beatrix Bay, Mr Davidson undertook a sampling project on intertidal habitats[291] adjacent to and distant from mussel farms within Beatrix Bay in collaboration with Dr Grange. Mr Davidson selected the survey sites and collected the relevant data, which was analysed by Dr Grange. While acknowledging the snapshot nature of the survey, Dr Grange concluded from his analysis that there are differences in the biological communities between sites, but these differences are not consistent with the proximity to mussel farms. In his opinion, the differences can be explained by habitat differences and inherent patchiness in the shore communities (temporal and spatial variability)[292].

[191] Dr Grange's analysis was not disputed by Dr Stewart and he agreed[293] that it provided useful data. However, he went on to suggest that effects from mussel farms on intertidal communities are less easily determined than effects on subtidal communities. This was due to the influence of factors such as time submerged, wave action, aspect, substrate type, adjacent land use and exposure to the sun. These influences are moderated in the subtidal zone by the overlying water column.

[192] For his part Dr Mead dismissed[294] the analysis and conclusions of Dr Grange as providing no evidence one way or the other of the effects of mussel farms on intertidal communities. He asserted that the effects of mussel farms on intertidal habitats have not

289 Transcript, p 397, line 2.
290 Under policy 11(b)(iii) of the NZCPS.
291 K Grange evidence-in-chief Appendix 1 [Environment Court document 11].
292 K Grange evidence-in-chief at para 8.1 [Environment Court document 11].
293 B G Stewart evidence-in-chief at para 8.23 [Environment Court document 26].
294 S T Mead evidence-in-chief 15 [Environment Court document 20].

been extensively researched. Responding to questions in cross-examination, Dr Grange disputed this, noting extensive research had been reported and that no effects had been observed.[295] On this issue we prefer the evidence for the Appellant and predict that it is likely there will be only very minor (if any) independent or cumulative effects on the intertidal zone.

What will be the effects of the marine farm on the seafloor and its macrofauna?

[193] There is no policy in the NZCPS which directly requires consideration of this ecosystem in itself. However, the Sounds Plan requires identification of likely effects on the sea floor and marine ecosystems generally. As it happens, the Appellant's experts all acknowledged that sedimentation and shell drop from mussel farms does alter infaunal and epifaunal biological communities (these include flat fish) within the direct footprint of the farm. Species diversity may diminish in some circumstances and the abundance of some species may increase. This can vary from site to site depending on current velocities and farm management practices.

[194] We have already described the shell drop from other mussel farms. No one disputed that the same will occur under the Appellant's farm. The proposal will change the 7.372 hectares of soft mud seafloor to a reef-like system of shells, live mussels and sediment to a distance of 30 metres from the seaward edge of each part of the farm.

[195] When questioned by the court on the relative impact of mussel farming alongside other anthropogenic influences and stochastic events, Dr Mead asserted that mussel farms were having by far the greatest impact[296], but without giving any detail to support this assertion other than to dismiss the impact of dredging and trawling as pulse events from which recovery was rapid. This was in contrast to the evidence of Dr Stewart, who considered the risk or threat from aquaculture to be lower than that from other influences. In his opinion, the probability of adverse effects occurring remained high, but the consequence of these effects would be orders of magnitude less than other stressors. Dr Stewart qualified this to some extent by saying that changes in dredging/trawling effort, reductions in exotic forest harvesting and native tree and shrub regeneration may mean that the gap between relative importances of major influences

295 Transcript, p 284, line 11.
296 Transcript, p 418, line 20.

may be diminishing. Mr Davidson considered anthropogenic effects from land generated sedimentation and trawling/dredging are the "biggies"[297] in driving benthic effects.

4.4 Effects on King Shag habitat and population

[196] The Council alleged that the Appellant's case was defective because its evidence-in-chief omitted to supply any information on the question whether the proposal would affect King Shags and their habitat. Mr Gardner-Hopkins, counsel for the Appellant, explained that it had not produced expert primary evidence on this issue as it was not significant in the Commissioner's decision and had not come to the fore until receipt of primary evidence from the respondent and section 274 parties. Counsel submitted that the Appellant was entitled to rely on aspects of evidence produced by other parties and to present rebuttal evidence on this. We agree with this submission and have considered all of the expert evidence, regardless of its source. However, that does not change the legal obligation on the Appellant to supply adequate information (from whatever source) to enable us to grant consent. We have already observed that some of the cross-examination by Mr Gardner-Hopkins seemed to proceed on the opposite basis.

[197] In Part 2 of this decision we found that the habitat of King Shags has been degraded (mainly by land use causing run-off of sediment and pollution, and by dredging) and reduced by installation of mussel farms. The impact of a further mussel farm will by itself generally have less than minor impacts on that habitat. On the other hand the accumulated and accumulating impacts of existing (and past) operations are adverse and more than minor, and the Trust's application can only add to those adverse effects on habitat.

[198] For convenience we summarise our findings[298] on the preponderance of evidence from parts 2 and 3 of this decision as follows:

(1) King Shags forage, feed and rest in Beatrix Bay.

297 Transcript p 85, line 20.
298 See the Assessment Matters in rule 35.4.2.9 [Sounds Plan p 35-21].

(2) Foraging occurs principally on or above the soft substrate of the Bay's floor at depths below 10m and mainly between 20m and 40m with female shags preferring shallower water in that range.

(3) The principal prey are flat fish including Witch Flounder and Lemon Sole.

(4) King Shags rarely forage within marine farms. There is anecdotal evidence of such foraging, but Dr Fisher's study showed none.

(5) Beatrix Bay is likely to be a better habitat for the Duffer's Reef colony than similar areas further away because King Shags require less energy to travel to (and return from) this area.

(6) A mussel farm over soft substrate modifies the habitat substantially by covering the area under it and an incomplete ring of variable width[299] (but up to 30m wide) around it under shell debris, mussel faeces and pseudofaeces.

(7) Mussel farms over soft substrate are potentially stressors of King Shag because they may reduce the presence King Shag's preferred prey or the ability of King Shag to catch them.

[199] We conclude that there are already adverse effects on King Shag in the current and reasonably foreseeable environment of the site.

[200] We have already found that the presence of mussel farms is having an adverse effect on the habitat of King Shags by excluding their benthic footprints from being foraged by King Shags. The telling figure is that less that 1% of the observations of swimming King Shags in the Marlborough Sounds have been of birds within mussel farms, and even then there is no evidence that they have been foraging, let alone successful. Further, there is a 30 metre wide (maximum) bulge outside each mussel farm in which the habitat is also likely to be modified adversely.

[201] The footprint of the 37 farms is 304.4 hectares and a 30 metre strip along the outside[300] of the farms would add (8.5 km x 0.03 km =) 25 hectares, which makes a total of 329.9 hectares subtracted from the potential optimum foraging area. That is (329.9 /

299 The "ring" is likely to be incomplete because there is unlikely to be shell drop and sediment inside the farm, and it will be asymmetric too: stretching in the direction of the predominant current.

300 We assume the inside edge of most farms is on or inside the boulder/reef zones.

2,000 =) 16% of the area of Beatrix Bay which is a more than minor reduction in foraging area[301] within the Bay. There is already an adverse accumulated effect, and the addition of the proposed farm will only exacerbate that.

[202] There is one other aspect of the application which may have a more than minor effect. It results from the fact that the site is nearly the last empty but potentially available mussel farm site around the circumference of Beatrix Bay. The site may be important as a control site for recording foraging by King Shags. If a mussel farm is installed and operated on the site, that opportunity is lost.

[203] Mr Maassen submitted[302] that a threshold of "cumulative effects" would be passed. However, we have no evidence of a threshold of effects on the habitat of King Shags. There are a number of reasons why reduction in habitat might affect the King Shag e.g. directly by killing displaced individuals by removing food (or decreasing hunting efficiency) and indirectly by fragmenting populations, increasing vulnerability to extinction from stochastic events (disease, el Niño and climate change effects and genetic problems). We have no information that any of those are causing problems at present or not.

[204] The Appellant argued that because there was no, or insufficient, evidence that any "tipping point" has been reached in respect of the cumulative (or accumulative) effects which are relevant under the Sounds Plan and the NZCPS, we can disregard these matters. We do not consider that is correct: the concept of a 'tipping point' is not found in the RMA. It is a tempting but misleading metaphor: it adds a connotation of a valued resource being at the top of a cliff, and one more push (in the form of the activity being applied for) will see the resource in pieces at the bottom. In reality it is often impossible to say where tipping points are in relation to habitats. Ecosystems and their components react to the myriad of stressors they are exposed to in a multitude of ways, very few of them known with accuracy. While dose-response relationships are often (but not necessarily) sigmoidal[303], identifying a "tipping point" on such a curve can be difficult. The point is that nobody has any idea whether a sigmoidal curve is correct, or

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301 We note this is less than Dr Stewart's figure (19%) but consider our figure is more conservative.

302 Mr Maassen's submissions dated 29 July 2015, paras 216-218.

303 An elongated 'S' shape rather than the 'U' shaped or parabolic curve shown by Mr J Z Butler, the planner for the Marlborough District Council, at his para 9.4 [Environment Court document 33].

if Mr Butler's curve[304] or some other is correct. Further, nobody knows where on any of the curves the current population is, and what the effects of other stressors are.

[205] What the RMA actually requires is protection of significant habitats. Local authorities have worked at stating methods for evaluating areas of vegetation and habitats, see for example the criteria stated in *Minister of Conservation v Western Bay of Plenty District Council*[305]. In the statutory documents relevant to this proceeding (the Sounds Plan and the NZCPS) two other methods of responding to section 6(c) RMA have been used. Neither refers to tipping points. The NZCPS refers to the IUCN criteria which does use some thresholds, for example population decreases[306] or changes in extent of occurrence or area of occupancy[307] but they are tightly defined and are given as alternatives. Nobody attempted to apply them in this case. For the King Shag the IUCN small population criterion D[308] applies instead. As recorded earlier there are no applicable thresholds for criterion D in the IUCN Red List.

[206] In summary, we have adequate information to find/predict that:

(1) King Shag habitat will be changed by shell drop and sedimentation;
(2) the effects of the farm accumulate and are likely to be adverse; and
(3) it is as likely as not there will be adverse effects on the populations of New Zealand King Shags and their prey;
(4) there is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[207] On the other hand we have insufficient information to assess the effects in the previous paragraph (the combined effects of the Davidson Family Trust mussel farm together with the other mussel farms in the bay) against the effects of other major environmental stressors, both anthropogenic and stochastic. Pastoral farming, exotic forestry, deforestation, dredging and trawling fall into the first category, while flooding

304 J Z Butler evidence-in-chief para 9.4 [Environment Court document 33].
305 *Minister of Conservation v Western Bay of Plenty District Council* Decision EnvC A71/01 at [20].
306 See the *Red List* Vulnerable Criteria A above n 156.
307 See the *Red List* Vulnerable Criteria B above n 156.
308 The *Red List* Vulnerable Criteria D above n 156, at p 22.

in the Pelorus and Kaituna Rivers and oscillations in weather patterns fall into the latter (or both).

[208] The most direct likely effect on King Shag habitat is that an area of over 10 hectares (the 8.982 ha farm plus a 20 to 30 metre wide strip along its outside edge) is very likely to be covered in detritus from the farm at the rate of 250 tonnes/hectare (or more) each year. The studies of fish around mussel farms suggest that the new benthic habitats they form underneath them may not encourage flat fish. We hold that change is likely to be an adverse effect on King Shag habitat.

[209] In Dr Fisher's opinion benthic changes resulting from the scale of mussel farming reduce the availability of significant feeding habitat. Cross-examined by Mr Gardner-Hopkins he confirmed his view that the change in substrate under the farm meant that the "… benthic fish prey that the King Shags forage for are unable to use that habitat"[309]. This exchange occurred[310]:

> Q: The question that I think I asked was, on the basis of your paragraph 9.5 [of Dr Fisher's evidence-in-chief] and your earlier paragraph 7.4 you would consider any mussel farm in the Marlborough Sounds as having a more than minor effect because it removes foraging habitat for King Shags.
>
> A: That's correct. Yes I'd say that, yes.

Dr Fisher's approach is consistent with the approach in the NZCPS which is to avoid any adverse effect on threatened species and in particular to avoid adverse effects on the habitats of indigenous species (at the limit of their natural range).

[210] Given the scale of the proposal these will be minor (but not minimal) effects by themselves, but they are, with the accumulated and accumulative effects of existing farms, adverse to King Shag habitat (NZCPS Policy 11(a)(iv)) and to King Shags (NZCPS Policy 11(a)(i) and (ii)).

309 Transcript, p 585.
310 Transcript, p 585, lines 24 to 29.

4.5 Cultural effects[311]

[211] The local Iwi, Ngati Koata, supported the application as they apparently consider it complies with the Ngati Koata Iwi Management Plan. We have evaluated the evidence relating to effects on King Shag habitat and population above. We consider the application does not meet the protection focus for indigenous fauna and their habitats in the Iwi Management Plan. So we give the Ngati Koata support minimal weight.

4.6 The effects on the amenity and other values of the promontory

[212] On these and wider landscape/natural character issues the court read the evidence lodged by the following witnesses (and heard cross-examination on that evidence):

Landscape architects

- Mr C R Glasson for the Appellant;
- Mr A Bentley for the Marlborough District Council; and
- Dr M Steven for the section 274 parties.

Planners

- Mr Kyle for the Appellant;
- Mr J Z Butler for the Council; and
- Ms S J Allan for the section 274 parties.

[213] All of Beatrix Bay is considered by the landscape experts and planners and has been accepted by the court (in *Knight Somerville Partnership v Marlborough District Council*[312] and elsewhere) as having a high level of natural character even though 16% of its surface area is adversely affected by mussel farms. The promontory does not stand out from the rest of the bay in this regard in anyone's assessment except Dr Steven who considered that the southern third of the promontory is outstanding. While we do not accept Dr Steven's opinion, we do acknowledge the promontory's high values and sensitivity and we now consider the effects of the proposal on that.

311 See the Assessment Matters in rules 35.4.1 and 35.4.2.9 [Sounds Plan p 35-14 and 35-21 respectively].

312 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

How visible will the mussel farm be?

[214] For the Council Mr Bentley produced a table[313] as to the visibility of mussel farms at various distances. He explained that the table has been developed with his colleagues at the firm Boffa Miskell and contains an overall consensus from the Environment Court on different mussel farm appeals over the last 20 years. Mr Glasson, for the Appellant, produced his own table[314] of 'Visibility of Mussel Farms at Sea Level' (we think he means at about 1.5m above sea level). We have compiled this table:

Distance from farm	**Mr Glasson**	**Mr Bentley**
0-500m	Highly visible	Dominant
500-700m	Very visible	Prominent
700-1000m	Visible	Prominent
1000m-1.5km	Low visibleness	Prominent
1.5km-3km	Low visibleness	Visible as part of view
More than 3km	Low visibleness	Difficult to see

We find problems with both assessments. First, Mr Bentley's table seems to include two sets of value judgments — as to degree of visibility and as to its impact on the seascape — where the first might suffice. The use of the words "dominant" and "prominent" seems to make an aesthetic assessment which is arguably premature. In that regard Mr Glasson's vocabulary is preferable since it only attempts to assess the degree of visibility (albeit still in a subjective way).

[215] The difficulty with Mr Glasson's table is that it divides the units of distance so finely that we have doubts about its utility. A reasonable person on the water would struggle to identify whether they were 500 or 700 metres from a mussel farm in any conditions less than flat calm (and without other information).

[216] Mr Bentley's table describes the degree of visibility from 500 metres to 1.5km (from a farm) as *prominent*. We can accept this may be accurate (although we prefer

313 Visibility from water/Visibility from land (usually elevated) – J A Bentley evidence-in-chief, para 5.59 [Environment Court document 30].

314 Table 3.0, Visibility of Mussel Farms at Sea Level. Glasson evidence-in-chief, para 10.16 [Environment Court document 7].

"very visible") when viewing conditions are extremely favourable — flat sea with sun directly onto the farm. In other circumstances the table may not be correct, depending on both conditions and the eyesight of the observer.

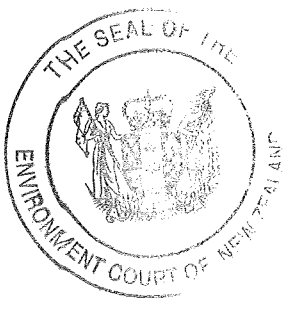
[217] In summary, on this site we predict that at a range of less than 400 metres (particularly where existing farms are not part of the foreground view) the farm would be highly visible in good conditions. In good but not millpond conditions from a range of 400m to 750m the farm may be visible depending on conditions and angle of approach. From about 750 metres to 1.5 kilometres the farm would, in many conditions, be visible. Beyond that it may be difficult to see even in good conditions.

[218] No ONL or ONF is identified for the site — it is not an Area of Outstanding Landscape Value ("AOLV") under the Sounds Plan. Thus the avoidance directives of Policy 15 NZCPS are not triggered. Given that finding, Policy 15(b) is applicable, even to an un-named promontory. That policy requires decision-makers to:

> Avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

Any significant adverse effects need to be avoided and other adverse effects need to be remedied or mitigated.

[219] In Mr Glasson's opinion[315] the proposal in its modified form will still maintain the quality of the coastline and the landscape feature of the promontory. Now that the two mussel farm blocks are separated by an expanse of water *the integrity of the promontory can remain intact*. He also concluded that the proposal has avoided significant adverse effects on natural landscape, and the natural landscape values have been protected from other adverse effects due to the fact that the proposed mussel farm is integrated with a similar scale of existing farms in the area and is appropriately sited. Therefore he does not see the proposal, as amended, being contrary to Policy 15 of the NZCPS. Mr Glasson's overall conclusion was that[316]:



315 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].
316 C R Glasson evidence-in-chief, para 11.8 [Environment Court document 7].

> The proposal is of a small scale, consistent with existing marine farm activity in Beatrix Bay, and would not compromise the landscape, natural character and visual amenity of the Bay. The presence of mussel farms in Beatrix Bay has already partly compromised the natural character at the head of the Bay, along with failed pastoral farming. One further mussel farm of this size will not affect the Bay's landscape, natural character and visual quality any further, or reach a threshold beyond which the effects are unacceptable.

[220] Mr Bentley noted that due to the location of the proposed farm, it will appear from some locations to be not *wholly visually anchored to the landform* as is the case for the majority of farms around the Bay — this could in some conditions amplify the visual presence towards the unmodified waters offshore[317]. He concluded that the proposal will occupy an area of the coastal edge that is currently free from aquaculture development and the only remaining part of the promontory's naturalness that is unencumbered by mussel farms will be lost; therefore natural character will not be preserved.[318]

[221] We accept Mr Bentley's[319] answer when he described the headland which is the background landform of the proposal as:

> … it's sort of quite different in that regard from other landscape areas within the Bay … the fact that it's at the tip of that landform that in my view amplifies its prominence from a number of viewpoints and potential viewpoints, and leads to greater effects visually in that regard.

[222] We also agree with Mr Bentley when he describes some views of the proposed farm (and some existing farms) where there is a lack of (terrestrial) backdrop[320]. He cites the example of viewing the proposed mussel farms looking at the promontory and beyond towards the mouth of Beatrix Bay. In that situation:

> … existing mussel farm development from that viewpoint is not anchored towards a local backdrop, so that it appears that it's visually a part of the open water… and what I am saying about this proposal is due to its location at the tip of the promontory, and there are more locations where that would be the case.

317 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
318 J A Bentley evidence-in-chief, para 8.51 [Environment Court document 30].
319 Transcript, page 652.
320 Transcript, page 653.

His point is illustrated from the aerial photograph on the cover of the Council's Graphics[321] (Exhibit 30.1) with the proposed farms overlaid in red — there is a considerable area at the head of the bay where a viewer from a boat cruising inside, through or outside the existing mussel farms would observe the farm with only a sea backdrop. That experience would not align with the Appellant's slightly conflicting contentions that the proposed farm continues an existing pattern of development, and/or that the proposal will not interrupt[322] the natural sequence because the two parts of the farm are on either side of the head of the promontory.

[223] In terms of NZCPS 15(b) requiring the avoidance of significant adverse effects and the avoidance remedying or mitigation of other adverse effects, Mr Bentley's conclusion was:

> That close-up these structures would detract from the valued natural qualities of this part of the coast and reduce aesthetic coherence of the promontory.[323]

In Mr Bentley's opinion the proposal clearly failed the NZCPS 15(b) requirement. That is consistent with the evidence of Dr Steven[324]. In the latter's opinion[325]:

> The presence of the marine farm will detract from the wild state that currently exists, and that is largely responsible for the erosional forces that have shaped the southern end of the promontory. The marine farms … add a degree of industrialisation to an otherwise wild natural section of the coastal environment.

[224] As we have already noted, marine farms are traditionally located away from the most exposed parts of the headlands and promontories. While none of the witnesses could be definitive as to why this was the case it appears from their responses that adverse effects on navigation are likely to be one reason and another was the potential for adverse effects on landscape and natural character. Headlands/promontories by their very name suggest prominence and therefore potential sensitivity. NZCPS Policy 6(1)(h) requires us to:

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321 Exhibit 30.1.
322 Transcript, pp 113 to 114.
323 J A Bentley evidence-in-chief, para 8.80 [Environment Court document 30].
324 M L Steven evidence-in-chief, para 117 [Environment Court document 23].
325 M L Steven evidence-in-chief, para 119 [Environment Court document 23].

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

Dr Steven[326] noted that visual impact on the promontory can arise from structures on the surrounding sea because of the way in which the sea/land interface is experienced. That aligns with Mr Bentley's evidence described above.

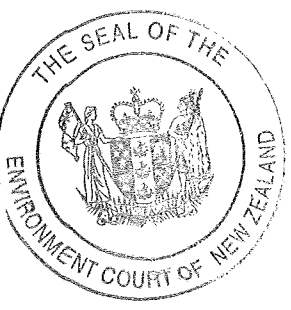
[225] We are unable to accept Mr Glasson's proposition[327] that the amended proposal (with the gap between the two farm blocks) will allow the integrity of the promontory to remain intact. We can accept from some view points (particularly from the south) that the promontory may appear unencumbered by marine farm structures. However, there are many views of the promontory that will have the proposed farm in the foreground. In such circumstances and at any distance less than 500 metres, the integrity of the promontory will, in our opinion, from a visual/aesthetic/natural character perspective be compromised. In our view that amounts to a significant adverse effect (which is clearly not avoided).

4.7 The effects on the natural character of Beatrix Bay

[226] The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in inshore areas, as appropriate use of the coastal marine area, subject to individual farm assessment. One aspect of that is to determine the "natural character" of the relevant coastal marine area.

[227] Policy 13 in the NZCPS and the Sounds Plan together require us to answer these questions:

- Does the proposed mussel farm cause adverse effects on the natural character of Beatrix Bay?
- If so, are they significant adverse effects?
- Can any adverse effects be avoided, remedied or mitigated?



326 M L Steven evidence-in-chief, para 109 [Environment Court document 23].
327 C R Glasson evidence-in-chief, para 7.28 [Environment Court document 7].

Preservation of Natural Character (Policy 13)

[228] Dr Steven described how[328]:

> When viewed from the water, the farm will be viewed against a sensitive land/sea interface. … The perception of the land/sea interface contributes significantly to the natural character and aesthetic appreciation of that part of Beatrix Bay.

[229] In Mr Glasson's opinion, as a result of its already compromised natural character, the proposed mussel farm will not adversely impact further on the natural character of the headland. He considered[329] that the proposal is not contrary to Policy 13(1)(b) of the NZCPS as it avoids significant adverse effects, and will avoid, remedy or mitigate other adverse effects on natural character in all other areas of the coastal environment by co-locating in an already modified environment. In his opinion the farm site is only a small area adjacent to the promontory, access to the coastline is available and the farm is *but a small addition to the already existing development in the Bay*[330].

[230] Mr Maassen referred[331] us to the Commissioner's decision[332] on the scale of direct visual effects. Notwithstanding the care taken by the Commissioner in her assessment, backed by decades of experience assessing the effects of marine farms in the Marlborough Sounds, we were not greatly assisted by this part of her decision because the amended application which is before us is quite different to the proposal considered by the Commissioner. In the paragraphs identified by Counsel, the Commissioner mentioned on three occasions how the farm *wrapped around the headlands* or words to that effect. This was her response to the staple-shaped farm in the original application which did indeed completely wrap around the headland without any separating gap. It gave rise to a completely different set of effects all of which were more adverse than those associated with the proposal before us.

328 M L Steven evidence-in-chief, para109 [Environment Court document 23].
329 C R Glasson evidence-in-chief, para 7.17 [Environment Court document 7].
330 C R Glasson evidence-in-chief, para 7.18 [Environment Court document 7].
331 Mr Maassen's submissions dated 29 July 2015, para 13.
332 In particular paras [139] through to [151].

[231] Mr Glasson's evidence was criticised by Mr Ironside who submitted[333] that Mr Glasson's overall approach is that existing development justifies further development. This is certainly not what NZCPS Policy 13(1)(b) intends even if it is the Sounds Plan's policy. Further, Mr Ironside observed[334] that there is no pattern of developing marine farms off headlands as Mr Glasson seeks to suggest. There has been a recent exception — the mussel farm allowed by the Environment Court in the *Knight Somerville*[335] case. The Appellant may have been fortunate in that case: the evidence against the proposal was very limited especially on King Shags; a good part of the justification for the location in that case was to avoid a reef further in; and finally, the promontory in this case is a much more dominant feature than the headland in *Knight Somerville*.

[232] In Dr Steven's opinion marine farming within Beatrix Bay has reached a point of unacceptable "cumulative" adverse effects with respect to the natural character of the coastal environment, and to the appreciation of amenity and the aesthetic quality of the landscape[336]. He went on to say that:

> cumulative effects must be understood in terms of the total changes evident in the landscape, and not simply the cumulative effects arising from an additional marine farm. In this regard, the cumulative effects of marine farming generally must be considered, together with other modifications to the landscape.

He concluded with respect to NZCPS Policy 13:

> The effects will be significantly adverse, and as such should be avoided. If the effects would have been considered less than significantly adverse, I am of the opinion that the effects can neither be remedied nor mitigated, and as such should also be avoided.[337]

[233] Our overall finding is that the adverse visual effects of the Appellant's proposal on natural character might be minor by themselves if the other farms were not in the bay. It is their cumulative effect on top of the accumulated effects of the other mussel farms which makes us pause. We assess that the proposed farm does not satisfy Policy

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333 Mr Ironside's submissions dated 6 July 2015, para 19.
334 Mr Ironside's submissions dated 6 July 2015, para 19.
335 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC128.
336 M L Steven evidence-in-chief, para 104 [Environment Court document 23].
337 M L Steven evidence-in-chief, para 111 [Environment Court document 23].

13(b) because its cumulative effect — added to the accumulated and accumulative effect of all the existing farms — will be significant and thus should be avoided.

4.8 Effects on Navigation[338]

[234] The proposed site at the head of Beatrix Bay is primarily used by commercial boats servicing mussel farms in the area and by low numbers of recreational fishers and divers. Direct access from the open water of Beatrix Bay to the reef area at the southern end of the promontory is retained by the 190m separation of the eastern and western sections of the proposed farm.

[235] Access to inshore waters and the shoreline is maintained by the siting of the nearest mussel lines 100m from the shore. Mr Brian Tear, navigation witness for the Appellant, considered navigation by recreational boats in and around mussel farms either in transit or for fishing as commonplace in the Marlborough Sounds. In his opinion, the effects of the proposed new farm are minor. While some small inconvenience may occur, this would only be to mariners transiting between the embayments on either side of the point. This was likely to affect mussel service boats only, as very few recreational boats were likely to use this route. This view was supported by Mr C Godsiff, a long-term mussel farmer and tourism operator with extensive boating experience in Pelorus Sound.

[236] Mr L Grogan, Deputy Harbour Master for the Council, considered that as the proposal breached the Maritime New Zealand *Guidelines for Aquaculture Management Areas and Marine Farms* 2005 ("the Guidelines") there was an increased risk of vessels using the area to become entangled in farm structures. Of particular concern to Mr Grogan was the placement of the farm within 200m of the promontory (a headland) and 500m of a recognised navigational route.

[237] Mr Tear responded that the Guidelines in this regard should not be applied in a blanket manner based on geography as there are many differences between headlands that determine navigational safety. Also, in his opinion, the proposed site was not on a navigational route between popular destinations since it is at the end of the promontory

338 See Assessment Matter 35.4.2.9 [Sounds Plan p 35-21].

in an isolated bay with comparatively low recreational boating use. We consider this latter point is of some importance.

[238] The Guidelines are non-regulatory and as such applications for marine farms do not need to be compliant. They do, however, identify navigational safety matters to be taken into account when assessing marine farm applications. We prefer the evidence of Mr Tear that any concern over navigational safety has been appropriately mitigated in this application.

[239] On navigational safety, the court in *Knight Somerville Partnership v Marlborough District Council*[339] said:

> Any marine farm will present some risk to navigational safety simply by its shared common space in the sea. The Sounds, and Beatrix Bay in particular, have a long history of marine farming with its associated structures and hazards and mariners in the area are familiar with these. … Prudent seamanship is required in the vicinity of all farms and the lack of serious accidents associated with marine farms in the Sounds is a clear indicator that this is generally being exercised.

We agree and predict that there will likely be no more than minor adverse effects on navigational safety from the proposal.

4.9 Effects on fishing amenity and access

[240] Most effects on amenity have effectively been considered in parts 4.6 and 4.7 of this decision. However, one particular recreation — fishing — still needs to be considered. The reef area at the southern end of the promontory is used by locals and visitors for recreational fishing and diving[340]. Access to the reef area as a recreational destination is generally by boat, travelling directly across Beatrix Bay from the south. Although the area is relatively lightly used compared to less remote reef sites in Pelorus Sound, it is nevertheless highly valued by those who regularly use it, mostly in summer months.

339 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128 at para [67].
340 Transcript, p 601.

[241] We heard competing evidence from recreational witnesses on the likely accessibility of the reef after installation of the proposed farm. These ranged from perceiving it as a complete sealing off of access to the entire southeast embayment shoreline, to having no effect at all. Observations from our site visit tend to confirm the latter. Access to the reef and adjacent shore will remain unimpeded. Indeed, it was apparent that access to inshore areas between and through mussel farms is not significantly affected in good weather conditions when most fishing takes place. We accept that a little more care may be needed, but this is not a significant limitation to a moderately competent boat user in most conditions when recreational boat users would be out on the water. In this regard we do not accept the Societies' submission that recreational use of near shore areas in Beatrix Bay is severely limited by the presence of mussel farms, making this proposed currently unoccupied site even more important. However, we do accept the evidence[341] of Mr Offen for the Societies that drift fishing around the reef at the promontory's tip for blue cod will be difficult and that trolling across the reef for kingfish may be impossible.

[242] Mr Glasson stated that while water space has been infilled, the actual effects on the amenity values will be no more than minor because there will be so few boating recreationalists passing by the proposed farm or even accessing the northern beaches. He considers that Beatrix Bay is not an attraction for recreation due to the existing number of marine farms around the coastline. He came to this conclusion because Beatrix Bay is one that boaties, recreationalists and fishermen must make a special effort to enter — rather than a place where people pass-by. As there is no road access, all public access is by boat. The nearest (and only) dwelling in the Bay is 1.37 km from the proposed farm and the distance from the seaward end of the wharf (associated with the house) to the proposed farm is 1200m.

[243] We find that the layout of the proposed farm, which provides sufficient buffer distance between the mussel farm lines and the reef, is likely to reduce substantially any adverse effects on the recreational amenity provided by the reef and its adjacent shore or on access to it. We predict (with some reservations about the effects on trolling) that the adverse effects on fishing and access are as likely as not to be minor.

[341] T Offen evidence-in-chief paras 13 and 15 [Environment Court document 19].

4.10 Economic effects

[244] Despite the court's attempt to explain how to analyse these in *Port Gore Marine Farms v Marlborough District Council*[342] we received minimal evidence on this issue. We accept that there will be a producer surplus and consumer surplus which would give benefits to society. We also take into account the social benefits of employment identified by Mr M G Holland[343] even though strictly speaking that may be double counting benefits.

[245] Beyond that we are not able to make any quantitative comparison of the net benefits of the proposed marine farm with the net benefits of the status quo (i.e. no farm).

5. Evaluation

5.1 Preliminary issues: the gateway tests and the Commissioner's Decision

The gateway tests

[246] As noted earlier, this is an application for a non-complying marine farm under the Sounds Plan. As such we must be satisfied that it passes one of the gateways in section 104(D) RMA before consideration can be given to granting consent.

[247] We have found that some of the adverse effects are likely to be more than minor, so the first gateway is not passed. As for the second, Mr Maassen submitted that the test is a blunt one: "If a proposal is contrary to any material objective or policy, it fails the second gateway test". He relied on the judgment of Fogarty J in *Queenstown Central Limited v Queenstown Lakes District Council* where Fogarty described it as an error of law to "finess… out qualifiers of one objective by looking at another objective, to reach some overall conclusion that viewed as a whole the objectives allowed … the activity"[344].

342 *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [200] and [201].
343 M G Holland evidence-in-chief para 23 [Environment Court document 5].
344 See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [39].

[248] Strictly Forgarty J's statement may have been obiter because "errors of law" found by Fogarty were (he said) sufficient to dispose of the appeals[345]. In any event we respectfully prefer to follow the Court of Appeal in *Dye* where Tipping J wrote that the correct question was whether the application was consistent "on a fair appraisal of the objectives and policies as a whole"[346]. Otherwise we prefer not to lengthen this decision and simply refer to other decisions of the court: *Cookson Road Character Preservation Society Inc v Rotorua District Council*[347], *Calveley & Anor v Kaipara District Council*[348] and *Saddle Views Estate Ltd v Dunedin City Council*[349].

[249] As it happens, because the Sounds Plan tries to be "all things to all people", as another division of the Environment Court recorded a planner's view[350], it is difficult for an application to be contrary to the objectives and policies of the plan: "... nominally non-complying activities are effectively discretionary". We consider the second threshold test is met because the application cannot be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although this is quite a close-run judgment in this case.

The Council's decision (section 290A)

[250] The court is required to have regard to the Council decision which refused the consents sought. In this case the decision of the Council's Commissioner cannot guide us because the application considered by Commissioner Kenderdine is markedly different from that put to us. In bringing the appeal the Appellant has radically altered the layout of the proposed marine farm so that we are being asked to determine a different and smaller proposal than that presented to the Commissioner. This is particularly important in relation to the key findings of the Commissioner on access, natural character, landscape and amenity on which the decision to decline the application was based.

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345 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817 [2013] NZRMA 239 at [3] to [6].

346 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

347 *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC [194] at [46]-[51].

348 *Calveley & Anor v Kaipara District Council* [2014] NZEnvC 182 at [142].

349 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1 at [82].

350 *Kuku Mara Partnership (Admiralty Bay West) v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvtC) at [86]. We understand the court was quoting Ms S Dawson the planner then advising the Council.

[251] On the effect of the proposal on King Shag, Commissioner Kenderdine wrote[351]:

> The protection of the King Shag habitat is a role not only for future decision makers, but for the applicant if this proposal goes ahead through monitoring and conditions. A large scale monitoring programme will assist in this regard. Meanwhile the King Shag population has been stable for 50 years and it appears to have adaptively managed its (new) aquaculture environment (s6(c)).

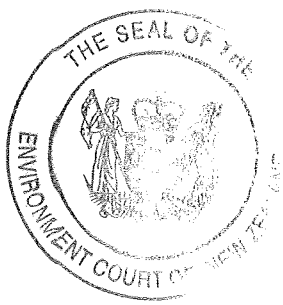
We note from the Commissioner's decision that the Council officers' section 42A report did not appear overly concerned with effects on King Shags or their habitat, and recommended that consent be granted. Mr Gardner-Hopkins submitted that the Council had (belatedly) taken a significantly different approach to this appeal than to previous applications where consents were supported. Mr Maassen's response was that this was the first application for some time that impinged on the King Shag habitat ecological overlay, which had resulted in the Council "taking a hard look" at this application to ensure the integrity of this component of the Sounds Plan. This was not a determinative factor for the Commissioner, but is for us.

[252] We now turn to consider the merits of the application as a whole under section 104 RMA, but before we do, there is a preliminary issue as to the relationship between the matters we must have regard to under section 104(1) RMA and Part 2 of the RMA.

5.2 "Subject to Part 2" in the light of the effect of *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd*

The correct application of 'subject to Part 2'

[253] As for the application of section 104 Mr Maassen submitted that in *KPF Investments v Marlborough District Council*[352] ("*KPF*") where the Environment Court concluded that the overall broad judgment under Part 2 whether a proposal would promote the sustainable management of natural and physical resources still applies.



351 Council Decision at para 279.

352 *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152 at [202].

[254] We now doubt whether that is quite accurate as a result of more recent decisions. In *Thumb Point Station Ltd v Auckland City Council*[353] ("*Thumb Point*") the implications of the majority decision in *King Salmon*[354] for the application of section 104 RMA were summarised by the High Court as being that:

> In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is one exception, however, where there is a deficiency in the plan. In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act.
> [Footnote omitted]

[255] In *Appealing Wanaka Inc v Queenstown Lakes District Council*[355] the Environment Court agreed with the *Thumb Point* summary, and explained[356] that the reference to any "deficiency" in *Thumb Point* was a reference to the "caveats" identified by Arnold J in *King Salmon* in the following passage[357]:

> … it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, **absent any allegation of invalidity, incomplete coverage or uncertainty of meaning**. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.
> [Emphasis added]

[256] We note that a similar issue about the phrase 'subject to Part 2 …' came before the High Court in *New Zealand Transport Authority v Architectural Centre Inc & Ors*[358] ("*NZTA*"). While *NZTA* was concerned with section 171 RMA, the identical wording — "subject to Part 2 of the Act" — also occurs. The reasoning behind Brown J's decision is not completely obvious.

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353 *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 at [31].
354 *King Salmon* above n 26.
355 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.
356 *Appealing Wanaka Inc v Queenstown Lakes District Council* at [44]-[45].
357 *King Salmon* above n 26, at [90].
358 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [108].

[257] Brown J quoted, and seemed to accept a passage in *Auckland City Council v The John Woolley Trust*[359] ("*Woolley*") which was an appeal about a resource consent under the RMA. Randerson J wrote:

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*[360], that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the Act.

While we doubt if anything turns on the metaphor, we respectfully question its accuracy: Part 2 of the RMA appears to us — if a nautical image is to be used — to be more akin to the bridge or, nowadays the operations room, on a flagship.

[258] In contrast, in *King Salmon* Arnold J simply described section 5 as "… a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;"[361]. Alternatively it is "… a carefully formulated statement of principle intended to guide those who make decisions under the RMA[362]". Later Arnold J also observed (presumably obiter) that the provisions in Part 2 are not operative provisions in the sense of being sections under which particular planning decisions are made[363], rather they "comprise a guide for the performance of the specific legislative functions". These passages suggest *Woolley* may need to be applied carefully in future.

[259] Brown J's other approach to the application of the phrase 'subject to Part 2 …' was simply to adopt[364] what the Board wrote[365]:

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359 *Auckland City Council v The John Woolley Trust* [2008] NZRMA 260 (HC) at [47].
360 *Auckland City Council v Auckland Regional Council* [1999] NZRMA 145.
361 *King Salmon* above n 26, at [24(a)].
362 *King Salmon* above n 26, at [25].
363 *King Salmon* above n 26, at [151].
364 *New Zealand Transport Authority v Architectural Centre Inc & Ors* [2015] NZRMA 375 (HC) at [118].
365 Decision of the Board of Inquiry into the Basin Bridge (29 August 2014) para [183].

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with ... the provisions of Part 2*.

The difficulty is that the phrase 'subject to Part 2' does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances. As Cooke P explained for the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[366] (a case under the Town and Country Planning Act 1977): "The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict". We now know, in the light of *King Salmon*, that it is not merely a "conflict" which causes the need to apply Part 2. The Supreme Court has made it clear that, absent invalidity, incomplete coverage or uncertainty of meaning in the intervening statutory documents, there is no need to look at Part 2 of the RMA even in section 104 RMA.

[260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of Part 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.[367]

[261] We consider that *Thumb Point* is, with respect, more accurate than *NZTA* on how to apply *King Salmon* in the context of section 104. Further, *Woolley* may now need to be applied with caution. None of those cases were cited to us by counsel but since no party relied strongly on Part 2 of the Act as over-riding considerations under section 104(1)(a) to (c), we consider it is unnecessary to seek further submissions. Rather this

366 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 (CA) at 202.

367 *King Salmon* above n 26, at [137]-[138].

exercise is simply the court trying to articulate the correct way of applying *King Salmon* in a section 104 context in the face of conflicting High Court decisions and the court's own erroneous decision in *KPF*[368].

Summary

[262] In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

(1) "Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans[369];

(2) having regard to any other relevant statutory instruments[370] but placing different weight on their objectives and policies depending on whether:

  (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;

  (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may over-ride the district plan even if it does not need to be given effect to; and/or

  (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;

(3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and

(4) weighing these conclusions with any other relevant considerations[371]

— achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"

368 *KPF* above n 352.
369 I.e. the operative district plan and any proposed plan (including a plan change).
370 Under section 104(1)(b) RMA.
371 E.g. under section 104(1)(c) and 290A RMA.

[263] Whether that process can still be called an "overall broad judgement" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:

- the status of the activity for which consent is applied;
- the particularity (or lack of it) in the relevant objectives and policies about the effects of the activity; and
- the existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments).

Consequently we consider that in *KPF*[372] the court may have overstated the width of the judgment under section 104 at least if the *KPF* approach is applied to other district plans which are more particular than the rather generalised Sounds Plan.

Incomplete tests for efficiency

[264] There is one other matter: it appears all district or regional plans are incomplete in the sense that they are not Stalinist Five-year Plans: they do not attempt to resolve the most efficient use of all resources: see *Meridian Energy Ltd v Central Otago District Council*[373]. While plans give guidance and/or directions (particularised implementations of Part 2 RMA) in policies, which are deemed to be appropriate (which includes efficient) — *King Salmon*[374] — some activities are stated by rules to be discretionary or non-complying so that more efficient uses can be ascertained on a case-by-case basis.

[265] That means that one aspect of Part 2 of the RMA may often need to be looked at as a result of *King Salmon*. That is section 7(b) which states:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (b) the efficient use and development of natural and physical resources:

372 *KPF* above n 352, at [200].
373 *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at 118.
374 *King Salmon* above n 26, at [24] (d).

...

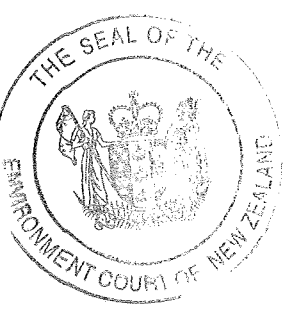
[266] Efficiency is, in our view, one of the least well understood concepts in the RMA. First it is important to understand that efficiency is a neutral concept: the efficient use of a resource cannot be ascertained until there are policies by which it can be assessed. Second, the standalone efficiency of a use of a resource can be ascertained by comparing the probability of environmental gains with the risk of adverse effects, or in 'economic' terms ascertaining whether the benefits exceed the costs. However, since those are rarely quantified, that assessment of efficiency (e.g. that refusing consent to a wind farm will "waste" the wind resource) adds little to the overall assessment. The third and potentially most useful point is that efficiency can be assessed in a practical and relative way. Efficiency asks "does the proposed use of the resource implement the relevant policies and achieve the objectives better[375] than the current (or permitted) use of the resource?" Consequently we consider there may be an extra step in the ultimate evaluation as follows:

> Having particular regard to section 7(b) RMA by assessing (at least) is the proposal more efficient in implementing the policies and achieving the objectives of the relevant plan than the status quo (or the permitted activities in the plan)?

[267] We have not needed to ask for further submissions on this issue because section 7(b) is largely irrelevant in this case. That is because the subsection is only concerned with two of the elements of sustainable management of resources — their use and development — not their third: protection. This case is essentially about the protection of the resources in the environment around the site and so we take this issue no further here.

5.3 Having regard to the potential effects of the mussel farm

[268] When considering the effects of the proposal and their consequences the consent authority should consider those effects as avoided, remedied or mitigated by any conditions of consent. We have done so in this case. However, there is one exception,



375 It is possible, especially in the absence of section 6 matters, to quantify and compare net benefits of a proposal with those of the status quo — see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

which is the proposed "adaptive management conditions". Since these neither avoid, remedy or mitigate effects but rather provide a recipe for future possible avoidance, remediation or mitigation of effects, we will consider adaptive management later.

[269] It will be recalled that in part 3 of this decision we asked a series of questions about the potential effects of concern under the Sounds Plan's objectives and policies. The answers to these questions were given in part 4. Pulling together and summarising the more important predicted non-neutral effects of the Davidson Family Trust application with the accumulative effects of the other identified stressors which we should consider under the Sounds Plan and the NZCPS, they are:

(1) likely net social (financial and employment) benefits;
(2) a likely significant adverse effect on the natural feature which is the promontory;
(3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
(4) likely adverse cumulative effects on the amenity of users of the Bay;
(5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
(6) very likely a reduction in feeding habitat of New Zealand King Shags;
(7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
(8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

5.4 Consideration under the Sounds Plan

[270] The Sounds Plan in itself requires a fairly broad judgment. In the bigger picture, the proposal is generally consistent with Chapter 2 (natural character) and Chapter 5 (landscape) provisions of the Sounds Plan. The direct visual effects on the natural character and landscape of the promontory and associated inshore area are more than minor by themselves i.e. in the notional absence of existing marine farms on either side

of the promontory. Importantly, the proposal applies the natural character policy[376] to place development in areas "where the natural character of the coastal environment has already been compromised". We have wrestled with this and find the problem nearly intractable: in the absence of this policy we would find inappropriate the cumulative effects of the proposal on the amenity of the inshore area of Beatrix Bay and the feature which is the promontory. However, this policy seems to render cumulative effects on natural character irrelevant.

[271] Focussing on Chapter 9 (The Coastal Marine Area) the first objective is[377] to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. The proposal achieves policies (9.2.1) 1.1 and 1.12 by (relevantly) enabling marine farming while maintaining, mitigating or remedying adverse effects on[378] cultural and iwi values, cultural and iwi amenity values, public health and safety, recreation values, and water quality. The question is whether it adequately mitigates effects on the remaining values in the policy (9.2.1)1.12 list, specifically conservation and ecological values, seascape and aesthetic values, the natural character of the coastal environment, navigational safety and public access to and along the coast — to make the site appropriate[379] in the landscape.

[272] The third coastal marine objective[380] seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the seabed. That raised the key question[381] whether the effects on the "value" of the marine habitat are sufficiently mitigated or remedied.

[273] It will be recalled that a key policy[382] in the Sounds Plan is to avoid, remedy or mitigate the adverse effects of (in this case) water use on areas of significant ecological value ("AOEV"). We have also recorded that the Appellant challenged the basis of the notation in the Sounds Plan describing the area around the site as an AOEV. We note that the challenge was not to the fact that the AOEV is habitat of King Shag. That is

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376 Policy (2.2)1.2 [Sounds Plan].
377 Objective 9.2.1 [Sounds Plan at 9-4].
378 Policy (9.2.1)1.1 [Sounds Plan at 9-4 and 9-5].
379 Policy (9.2.1) 1.14 [Sounds Plan].
380 Objective 9.4.1 [Sounds Plan at 9-16].
381 Policy (9.4.1)1.1 [Sounds Plan at 9-16].
382 Policy (4.3) 1.2 [Sounds Plan p 4-2].

incontestable. The challenge by the Appellant was to whether the AOEV represented 'significant' habitat of King Shag. The Marlborough District Council was obliged to recognise and then to provide for the significant habitat of King Shag under section 6(c) RMA, and the AOEV was a response. It is far too late — more than a decade after the Sounds Plan came into force — to challenge the basis on which the Council made its decision to identify the area around the site as an AOEV. The proper approach on this issue would have been for the Appellant to call evidence showing that the site was not part of the habitat of King Shag, since it is likely that the whole AOO is significant for the species given its very small population. Consequently we consider policy (4.3)1.2 should be given full weight along with all the other relevant policies.

[274] Consequently, we consider that if we were to decide simply on the Sounds Plan itself and without yet considering the NZCPS we would on balance refuse resource consent on the basis that the proposal inappropriately reduces the habitat of King Shag.

5.5 Consideration under the NZCPS

[275] We recognise that mussel farms such as the application can only be located[383] in the coastal marine area. We also take into account the (social and) economic benefits[384] of the proposed farm. However, we consider the site is not an appropriate area for the reasons identified by the Council and the Societies: the change in benthic conditions within the direct footprint of the farm and nearby, particularly alterations to seabed morphology from shell drop, faeces and pseudofaeces represented an adverse effect on the foraging and feeding habitat of King Shag. Those adverse effects on King Shag habitat cannot be avoided as directed by the policy 11 of the NZCPS.

[276] We recognise that there are considerable uncertainties about the inter-relationships between stressors. The accumulative effect of marine farms on King Shag habitat may be less of an immediate threat than sediment run-off from land-based activities and bottom dredging. That does not mean it is not a threat. Further, potential effects of climate change (such as increase in water temperature) loom in the next few decades.

383 Policy 6(2)(c) [NZCPS p 14].
384 Policy 8(b) [NZCPS p 15].

[277] The point of policy 11(1) NZCPS is that if a species is at the limit of its range then it is automatically susceptible to stressors and any adverse effects on its habitat should be avoided. Applying that policy we consider that this is a strong factor against granting consent. More information and analysis is required beyond what we have been presented with here to address accumulative effects in a comprehensive manner. In the Appellant's view this is properly the province of a review of the Sounds Plan. We do not accept that an applicant can avoid the issue in this way when faced with the strong direction given in Policy 11 of the NZCPS. The applicant needs to put forward information that will satisfy the decision-maker that the risk of accumulative effects is acceptable. The onus is on the applicant because under section 104(6) RMA we may, as discussed, decline the application on the grounds that we have inadequate information.

[278] The cases for the Council and the Societies suggested the court take a precautionary approach in declining the application on the basis of uncertainty around the current knowledge of the effects of mussel farms on the environment. This was particularly the case in respect of adverse accumulative ecological effects and accumulative effects on King Shag where these effects are poorly understood. Policy 3 of the NZCPS[385] requires us to:

> Policy 3 Precautionary approach
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>
> (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

385 Policy 3 [NZCPS p 12].

[279] Policy 3 NZCPS applies where environmental effects are both "uncertain, unknown, or little understood" and "potentially significantly adverse". The Appellant submitted[386] that neither criterion is met.

[280] We have predicted that the adverse effect of the change to King Shag habitat under the site will be minor given the extent of potential habitat in the Sounds. On the other hand we have also predicted that the accumulative adverse effects could be serious. Counsel for the Appellant warned us[387] against the "real risk of loading a (new) potential effect upon multiple (existing) potential effects to arrive at an unrealistic potential cumulative effect scenario". Some *Dye*-induced confusion in that submission aside, we have heeded the warning. However, the prediction remains: potentially the King Shag could be driven to extinction by the accumulated and accumulative effects of mussel farms which are part of the environment in Beatrix Bay. That is a low probability event, but extinction is indubitably a significantly adverse effect which would be exacerbated, to a small extent, by the Davidson proposal.

[281] The precautionary approach suggests both that we should exercise our discretion under section 104(1)(c) to take accumulative effects into account, and — to the extent we have inadequate information about those — to consider declining the application under section 104(6) RMA (after taking into account in the Appellant's favour that the Council did not, it appears, ask for further information about this before the Commissioner's hearing).

5.6 Overall weighing under the Sounds Plan and the NZCPS

[282] Weighing the proposal under the Sounds Plan and the NZCPS, we judge that the undoubted benefits of the proposal are outweighed by the costs it imposes on the environment. In particular the proposal does not avoid or (where mitigation is possible) sufficiently mitigate:

(1) the direct minor effect of changing a small volume of the habitat of King Shag;

386 Opening submissions para 6.25.
387 Closing submissions for the Appellant dated 13 July 2015 at para 2.7(c).

(2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;

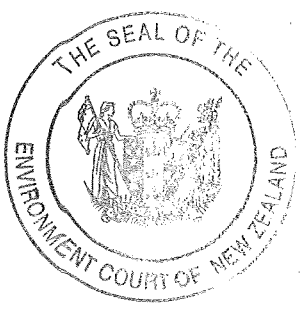
(3) the more than minor adverse effects on the landscape feature of the northern promontory; and

(4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

[283] We have spent considerable time considering the implications of the apparently stable population of King Shag. If the population is stable despite all the existing mussel farms, how can one more have an adverse effect on the taxon?

[284] The first answer is that our finding that the current population of King Shag is apparently stable needs to be qualified by the lack of information about almost all other aspects of its population dynamics. The information given to us was completely inadequate to allow us to detect any trend in the population. At present data on the number of breeding pairs, breeding success rates, or even of the age and sex ratio of birds is almost completely lacking. In particular there is no data on the survival rates and population trends of mature female King Shags. These last are particularly important because it is the likely preferred foraging grounds of females which mussel farms have been extended into over the last 10 to 15 years.

[285] A second additive answer is that it is generally recognised that the precise effects of combinations of stressors on bird populations are not known. Thus the *Red List* works usually on the basis that if there is a percentage reduction in population of a taxon over time then that puts the species at risk. There are elaborate criteria depending on initial population; size of population reduction, declines in EOO or AOO or habitat quality, and so on[388]. However, when a taxon is reduced to less than 1,000 individuals on the planet, because of the risk of stochastic events, waiting for a reduction in population is no longer regarded as an appropriate trigger for protecting the taxon.



388 "V The Criteria for Critically Endangered, Endangered and Vulnerable" The *Red List* above n 156, at p 16 et ff.

[286] The NZCPS has also recognised[389] that continuing decline in habitats is a key issue in the coastal marine area. That is one of the reasons that policy 11(a)(iv) expressly avoids adverse effects (not only significant adverse effects) on habitats of indigenous species where the species is at the limit of its natural range.

[287] No party argued that the NZCPS was uncertain or incomplete so there is no need to apply the 'subject to Part 2' qualification in section 104 RMA.

5.7 Would the difficulties be met by adaptive management?

[288] The Appellant has proposed that any uncertainty over the effect of the proposed mussel farm on the environment can be met by adaptive management conditions. In *Sustain our Sounds Inc v Marlborough District Council* ("*SOSI*") the Supreme Court stated that there are two questions[390] to be answered:

> … [First] what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.

The second question is whether any adaptive management regime is considered consistent with a precautionary approach[391] or whether consent should be refused.

[289] Giving the judgment of the Supreme Court, Glazebrook J elaborated[392]:

> As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston CJ said in *Newcastle*, adaptive management is not a "suck it and see"

389 Issues [NZCPS p 5].
390 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [124].
391 *SOSI* at [129].
392 *SOSI* at [125].

approach[393]. The Board did not explicitly consider this question but rather seemed to assume that an adaptive management approach was appropriate. This may be, however, because there was clearly an adequate foundation in this case.

[290] The proposed regime is claimed[394] by the Appellant to meet the requirements for adaptive management in respect of "proximate benthic effects" by[395]:

> (a) establish[ing] effective baseline monitoring to accurately assess the existing environment at the Application site and at least two control sites (in addition to the already existing data);
> (b) introduce[ing] clear and strong monitoring, reporting, and checking mechanisms; and
> (c) enable[ing] the removal or reduction in farming or other mitigation if monitoring results warrant such action.

[291] However that was qualified as counsel for the Davidson Family Trust explained in their opening submissions[396]:

> This adaptive management regime is offered by the Trust to assist in confirming the relationship between mussel farms and nearby reef habitats, and is offered notwithstanding the lack of any evidence that reef and rocky habitats inshore of mussel farms have been substantially altered by mussel farming.
> No other adaptive management conditions are required (or offered).

Thus the adaptive management regime is not proposed for the habitat (soft substrate) actually occupied by the farm.

[292] Given the apparent stability of the King Shag population, we have considered whether, despite the Appellant's disavowal of any other kind of adaptive management, we should impose an adaptive management condition involving research into (at least):

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393 Referring to *SOSI* at [121] and adding: "See also the comments of Tremblay-Lamer J quoted at [123] above; the explicit consideration of the two options in *Clifford Bay Marine Farms Ltd v Marlborough District Council*, above n 199, at [113]; and the threshold question discussed in *Crest Energy Kaipara Ltd v Northland Regional Council*, ..., at [229]."

394 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].

395 See proposed conditions of consent in Appendix A to J C Kyle evidence-in-rebuttal [Environment Court document 32].

396 Opening submissions paras 6.31 and 6.32.

- Use of the areas covered by mussel farms and their shell shadow by preferred prey (flatfish) of King Shags.
- Whether there are seasonal or other periodic changes to use of Beatrix Bay by flatfish?
- Use of different substrates and depths by male King Shags and (separately) by females.
- Survival rates of male versus female King Shags.
- The other matters raised by Dr Fisher.

[293] If the Davidson Family Trust's proposal was for one of the first mussel farms in Beatrix Bay, that sort of condition might work. Unfortunately, its site is one of the few still available on the soft substrate immediately outside the rocky inshore substrate. If research is carried out, as it urgently needs to be, into the various questions posed in the previous paragraph, then this site will likely be needed as an unmodified or control site.

[294] A further, more important, difficulty in this case is that there is still considerable uncertainty over the probabilities as to whether marine farms are stressors of King Shags. Clearly what is needed are before and after controlled studies, but none have been conducted in Beatrix Bay or indeed elsewhere in the Sounds. Consequently we have little confidence that amendments of the proposed[397] adaptive management conditions would reduce uncertainty and manage any remaining risk.

[295] Finally, relying on an adaptive management condition triggered by a change in King Shag population is in our view precisely what the IUCN Red List criteria suggest is inappropriate for very small populations. The geographic range criteria B and the very small population criteria D are independent of the "change in population" criteria[398]. A population change condition is inappropriate because by the time a population change (at whatever relatively arbitrary level of change — 5%, 10% or 20% — is chosen) has been established to the appropriate degree of certainty, the species may be doomed to extinction.

397 J C Kyle rebuttal evidence Appendix A [Environment Court document 32A].
398 The *Red List* above n 156, at pp 21 and 22.

[296] We find that the adaptive management threshold test of *SOSI* is not met and therefore it would be inappropriate to rely on adaptive management of adverse effects in relation to these applications.

6. Result

[297] After considering all the matters raised by the parties and after weighing all the relevant factors we judge that the objectives and policies of the Sounds Plan, reinforced by the more directive policies of the NZCPS, require that we should refuse the consents sought.

[298] We have attempted to assist the Appellant by assessing the information and making predictions where we can. For example we have attempted to assess the probable area of mud seafloor covered by mussel farms in Beatrix Bay. However, if that or any of our other assessments are too inaccurate, then the alternative outcome is clear: we were simply given inadequate information by the Appellant (and other parties) to determine that the application should be granted. Accordingly we would exercise our discretion under section 104(6) RMA to decline to grant consents.

Afterword

[299] We have also briefly considered the implications of refusing consent in this case for other applications in the area of occupancy of King Shags. In the short term this decision may cause difficulties. For the Appellant, Mr Gardner-Hopkins gained admissions[399] from a number of witnesses that the impetus for gathering information "should" occur at an industry level or higher (referring to local or even central government). The answer is that the Aquaculture Industry and the Council[400] may need to commission rather more sophisticated and detailed research into King Shags than appears to be carried out at present. In particular all the matters covered by the IUCN Red List criteria would be a minimum requirement of any research programme.

[300] The survival of a very rare species of bird is at risk here. With a population of less than 1,000 individuals it is at high risk of extinction. Much more robust research needs to be carried out both on New Zealand King Shag population structures and on the

399 For example — Transcript, p 485, line 24.

400 See the Methods of Implementation in the Sounds Plan at 9.3.3.

interrelationship between stressors on this species before the industry can expand (or even perhaps continue at the same level) in outer Pelorus Sound.

Reasons of Environment Commissioner Buchanan

Preliminary comment

[301] The application to establish a marine farm at the head of an unnamed promontory in Beatrix Bay by the RJ Davidson Family Trust was declined by the Marlborough District Council following a hearing before an independent Commissioner in July 2014. The decision to decline the application was based on the adverse effects of the proposal on navigation, natural character values, landscape values and recreational amenity being more than minor. As noted in the majority decision, the Court was presented with a modified marine farm layout at the site that sought to avoid many of the adverse effects noted in the Commissioner's decision.

[302] The majority conclude that there is an adverse effect on the habitat of King Shag and significant adverse effects on visual perceptions of natural character of the promontory and of Beatrix Bay. For this reason, the majority is of the view that the application should be refused. I disagree with the weight given to the effects on King Shag habitat and the evaluation of adverse visual effects of the proposed marine farm in an environment already containing 37 similar marine farms. The application should be granted.

King Shag

[303] I agree with the description of King Shag biology, population and status set out in Part 2 of the majority decision, including the findings:

(a) That King Shag numbers have remained constant since 1991 and that there is no declining trend in numbers.
(b) Beatrix Bay is part of the area of occupancy of King Shag.
(c) That King Shag forage very infrequently within mussel farms, likely due to reduced flatfish numbers under the farms.

[304] In relation to (a) Schuckard (2006)[401] established that the population of King Shag has on average been not less than around 650 birds over the past 50 years. Daytime counts reported from the four main colonies prior to 1992, taken when part of the population was away feeding, were adjusted by Mr Schuckard using a correction factor described in his 2006 paper. This correction factor was adopted by Bell (2010)[402] as an acceptable multiplier to estimate population and size from daytime counts at the colonies. Mr Schuckard was of the opinion that the population numbers of King Shag had remained stable for at least 50 years. The uncontested evidence he produced supports this. I therefore extend the finding of the majority decision to include the period from 1951 when full colony counts were first recorded.

Statutory instruments

[305] The questions that arise from Policy 4.3(1.2) of the Sounds Plan regarding the likely adverse effects on King Shag habitat relate only to those areas of the Sounds mapped as an area of ecological significance in Appendix B notation 1/11 of the Plan. Activities within the area of ecological value are to be assessed as discretionary and the anticipated environmental result is the maintenance of population numbers and distribution of the species, in this case King Shag.

[306] The New Zealand Coastal Policy Statement Policies 11(a)(i) and (ii) refer to threatened taxa. Taxa is a generic term used to refer to a taxonomic category at any level, such as phylum, order, family, genus or species. In this case we are dealing with a threatened seabird of the genus Leucocarbo and species carunculatus. The threatened taxon for the purpose of Policies 11(a)(i) and (ii) is the species *Leucocarbo carunculatus.* These policies direct the avoidance of adverse effects of the activity on a threatened species (King Shag).

[307] Policy 11(a)(iv) refers to the habitats of indigenous species where the species is at the limit of its natural range. Species range limits are the spatial boundaries beyond which individuals of the species do not occur. The natural range of King Shag is the Marlborough Sounds. Populations of species occupying habitats at the outer limits or

401 Schuckard, R. (2006). Population status of New Zealand King Shag (Leucocarbo carunculatus). Notornis, 53: 297-307.

402 Bell M. (2010). Numbers and distribution of New Zealand King Shag (Leucocarbo carunculatus) colonies in the Marlborough Sounds, September-December 2006. Notornis 57: 33-36.

periphery of the species' natural range are significant to ecology, evolution and conservation in that they provide opportunities to understand the conditions under which populations expand or contract or evolve new forms. Adverse effects of activities at these margin habitats may not affect the wider population of the species, so the maintenance of biological diversity in these areas of the marine environment is dependent on the avoidance of adverse effects on their habitats. This is the purpose of Policy 11(a)(iv).

[308] We are dealing here with a species that has a very limited range. The subject site is recognised as within the central feeding range of the population of King Shag centred on the Duffers Reef colony, which in turn is the largest colony of this species found within the natural range of the species.

[309] The majority decision finds that *Leucocarbo carunculatus* is at the limit of its natural range because its extent of occupancy (natural range) is small. Policy 11(a)(iv) NZCPS is not qualified by any size constraints large or small. The natural range is just that, the natural range, irrespective of its size. The majority decision also introduces the finding that *Leucocarbo carunculatus* is an outlier of a superspecies (collection of related species of largely sub-antarctic blue-eyed shags (genus Leucocarbo). This misinterprets Policy 11(a)(iv) which refers to indigenous species, not superspecies. The species *Leucocarbo carunculatus* is not found outside the Marlborough Sounds. The limit of its range is determined by the geography of the Sounds and physiology of the birds themselves that limit the foraging flight range to about 25 kilometres. King Shag are therefore not a qualifying species under Policy 11(a)(iv) NZCPS where any reduction in habitat at the limit of its range is to be avoided. King Shag cannot be considered as "naturally rare" under the NZCPS definition of that term for the purpose of the second qualifying requirement of Policy 11(a)(iv) as we have little knowledge of the status of the species in pre-human times.

Effects on King Shag

[310] The majority decision examines at length the likelihood and scale of adverse effects on the habitat of King Shag, both directly as a result of this proposal and cumulatively from all mussel farms in Beatrix Bay. The conclusion from this examination is that the altered environment under the proposed farm is likely to cause an

adverse effect on King Shag habitat. Given the scale of the proposal these effects will be minor (but not minimal) by themselves, but taken together with all the other existing farms will be adverse to King Shag habitat.

[311] The majority decision summarises that there was adequate information to find/predict that:

(1) King Shag habitat is changed by shell drop and sedimentation;
(2) The effects of each farm will accumulate and are likely to be adverse;
(3) That it is as likely as not there will be adverse effects on the population of King Shag and their prey;
(4) There is a low probability (it is very unlikely but possible) that the King Shag will become extinct as a result of this application.

[312] I did not dispute that (1) and (2) above are supported by the evidence and that regard should be given to these effects under section 104(1)(a) RMA. I disagree that there is adequate information to support (3) or (4). The accepted population information establishes that King Shag numbers are not declining and have not done so for the past 50 years at least. This cannot be dismissed. The likelihood of this farm resulting in the extinction of the species is so remote that it cannot be considered as a credible threat in the context of the definition of effect under Section 3 RMA.

[313] The majority decision states that completely inadequate information was available to detect any trend in the population, as data on breeding pairs, breeding success rates, and age and sex ratios was almost completely lacking. This does not recognise the reality that it is these and many other aspects of a species' population dynamics that contribute to the balance of recruitment and mortality that results in a static or stable population over time. Adverse effects from environmental stressors having a substantial impact on critical aspects of King Shag population dynamics would be reflected in the population counts available since 1951. King Shag are adapted to a specialist niche habitat, provided only in the Marlborough Sounds. This niche habitat has been subject to a range of anthropogenic and stochastic stressors over the past 50 years with no observed effect on the population of King Shag. A complete understanding of the population dynamics of the species will not alter this fact.

[314] I find there is adequate information to support the alternative finding that it is extremely unlikely that there will be adverse effects on the population of King Shag from the proposal.

Evaluation

[315] The subject site is within the ecological overlay (Map 69) described in Appendix B, Notation 1/11 of the Sounds Plan defining the significant foraging habitat of King Shag. A very small proportion of mussel farms occupy space within this Area of Ecological Value as it primarily covers areas seemingly favoured by foraging King Shag at depths below 30 metres. The adverse effect of a reduction of 10 hectares available to King Shag for foraging in the context of the extent of the ecological overlay is minimal and extremely unlikely to result in a decrease in the number of King Shag. The significant habitat identified within Beatrix Bay remains viable. Policy 4.3(1.2) of the Sounds Plan is satisfied.

[316] There is no question that Policies 11(a)(i) and (ii) NZCPS apply. Adverse effects on King Shag may include reduction in the area occupied by King Shag and reduction in habitat quality. While the existing mussel farms may have displaced King Shag from feeding in that area of the species' habitat occupied by mussel farms in Beatrix Bay, this has resulted in no harm to the population. The numbers of King Shag foraging in Beatrix Bay has not diminished over the 25 years since snapshot foraging bird surveys were first carried out in 1991 and the population of King Shag has not shown any downward trends since mussel farms were first established in the Sounds.

[317] Policies 11(a)(i) and (ii) are satisfied by this finding. Indigenous biodiversity in Beatrix Bay is not compromised by adverse effects on the habitat of King Shag. That habitat remains viable and the population of King Shag as far as it exploits this part of its natural range is not adversely affected by mussel farms.

[318] Policy 11(b)(iii) NZCPS refers to avoiding significant adverse effects on rocky reef systems. Adverse effects of the proposal on the rocky reef area at the head of the promontory have been evaluated in the majority decision which found there to be a low probability of there being a more than minor effect on the ecology of the reef. The

majority decision also evaluates the adverse effects on the indigenous eco-system within the intertidal range as required by Policy 11(b)(iii) finding that it is likely there will be only minor (if any) independent or cumulative effects on the intertidal zone. Policy 11(b)(iii) it is therefore satisfied by these findings.

Comment

[319] Concern for the effects of new salmon farms being introduced into the area of occupancy of King Shag was raised at the Board of Inquiry (BOI) into the New Zealand King Salmon proposal. The BOI found that there were potential adverse effects of low probability but high consequence that needed to be considered. The Board adopted a precautionary approach to these effects in granting consents within King Shag habitat by including in consent conditions the requirement for an adaptive management approach under a King Shag Management Plan (KSMP). This approach was confirmed as part of the wider consideration of adaptive management conditions by the Supreme Court[403].

[320] The KSMP is required to include a baseline survey of King Shag numbers followed by repeat surveys at least every three years. The BOI identified a statistically significant decline in King Shag numbers of 5 percent as a threshold for investigation of whether the marine farm was contributing to the decline and possible remediation measures if such a contribution was identified. The baseline counts for the KSMP were those included in the evidence of Mr Schuckard and Dr Fisher and recorded in the majority decision. If, as the majority decision suggests, a residual low risk remains that the reduction in King Shag habitat from this proposed farm either directly or cumulatively with all other mussel farms may adversely affect the King Shag population, then a similar adaptive management approach would seem to be appropriate.

[321] The scale of this proposal in comparison to the King Salmon application does not justify a specific adaptive management approach for King Shag as applied by the BOI decision. It is very important, however that the mussel industry within the Sounds generally becomes linked in some manner to the KSMP. A way needs to be found to involve the mussel industry in monitoring the KSMP results as they are published on the

403 *Sustain our Sounds Inc v Marlborough District Council* [2014] NZSC 40; (2015) 17 ELRNZ 520 at [140] and [158].

New Zealand King Salmon website and contribute to any subsequent investigation if the threshold 5 percent decline in King Shag population is exceeded in order to establish whether mussel farming is contributing to that decline and response measures that could be adopted. This would be a sensible and pragmatic marine farming approach to a potential effect of low probability but high consequence, but is not one we can impose on a single consent holder in this case.

[322] The alternative approach is to decline all future applications for marine farms in the natural range of King Shag until such time as sufficient information is available to determine with certainty the risk posed by marine farms on the King Shag population. This seems to be the approach taken in the majority decision.

Conclusion on King Shag

[323] The majority decision largely turns on the interpretation of Policy 11(1)(iv) NZCPS and the directive within that policy to avoid adverse effects on habitats of an indigenous species and the risk this poses as a potential contributor to the decline (or indeed demise) of King Shag. This, in my view, is not a correct application of the policy.

[324] The real issue (under Policies 11(a)(i) and (ii)) is the effect of the small adverse reduction in habitat on the population of King Shag. The primary indicator of the population status of King Shag is the reliable data set on the trend in the population over time. This indicates to me that marine farming in the Sounds has not had a negative influence on that population.

[325] The very low residual risk of the adverse effects of mussel farming in the Sounds on King Shag habitat having an adverse effect on King Shag population warrants an industry wide adaptive management approach that piggybacks on the KSMP now in place for New Zealand King Salmon.

Effects on the Promontory

[326] Competing evidence on the effects of the proposal on the promontory was provided by three independent experts as summarised in the majority decision. All of Beatrix Bay is considered by the experts and accepted by the Court (in *Knight*

Somerville Partnership[404] and elsewhere) as having a high level of natural character. The promontory does not stand out from the rest of the Bay in this regard. The Sounds Plan through its CMZ2 zoning provides for the establishment of marine farms, particularly in the inshore area of Beatrix Bay, as appropriate use of the coastal marine area subject to individual farm assessment. The proposed farm is not exceptional in this environment. The small (2 percent) extension of occupied space at the southeast and southwest ends of the promontory does not differ in effects on natural character from any other farm in the Bay, including the recently consented (by the Court) farm adjacent to the headland between Tuhitarata and Laverique Bays (*Knight Somerville Partnership*).

[327] Mr Glasson's opinion and conclusion set out in paragraph [217] of the majority decision provides an evaluation of the proposal in the context of the land/water interface of the promontory and the presence of existing mussel farms. I accept Mr Glasson's proposition that the proposal will allow the integrity of the promontory to remain intact. When viewed from the south, the most common approach by sea, the end of the promontory and its background are unencumbered by marine farm structures even with this proposal in place. From all other viewpoints, the visual effects of the proposal on the natural character of the promontory cannot be viewed in isolation from existing farms that stretch to the outer margin of the feature. The visual perspective in this regard is already compromised with the seaward extension resulting from the proposal having only a minor additional effect.

[328] The majority decision accepts that cumulative effects on the natural character of Beatrix Bay reported by Dr Steven are significantly adverse. This conclusion does not appear to recognise the collective advice of the landscape experts that the natural character of the Bay remains high. This is inclusive of the presence of 37 marine farms. It was not suggested by anyone that the assigned high status would be revised to some lower assessment category as the result of adding this additional farm. As such, the very small change on a Bay-wide scale of an additional 7.34 ha of mussel buoy lines cannot be considered as significant. To do so would require the acceptance that some concept of threshold for the area covered by marine farms existed, beyond which additional

404 *Knight Somerville Partnership v Marlborough District Council* [2014] NZEnvC 128.

marine farms had significant cumulative effects and were therefore inappropriate despite the CMZ2 zoning. No case for this was made other than Dr Steven's assertion that it was a *reasonable and defenceable proposition* that such a threshold had been reached.

[329] For the above reasons, I give greater weight to the evidence of Mr Glasson than to that of Mr Bentley and Dr Steven in concluding that the adverse effects on the visual/natural character perceptions of the promontory in particular, and Beatrix Bay in general, are likely to be no more than minor.

[330] In considering the Sounds Plan, I agree with the evaluation in the majority decision that Policy 2.2(1.2) seems to render cumulative effects on natural character irrelevant in that it encourages development in already compromised areas of the coastal environment.

[331] In considering the NZCPS, my finding on the absence of significant adverse effects on natural character and landscape means the "avoidance" directives of Policy 13(1)(b) and Policy 15(b) respectively are not triggered. In having regard to the policy alternative to avoid, remedy or mitigate any adverse effects on natural character and landscapes, I consider that it is not possible to achieve any of these in operating a marine farm that requires visible suspension infrastructure, although the ability to remove this infrastructure can be seen as a mechanism to remedy any unacceptable adverse effects of the mussel farm over time. The adverse visual effects of this proposal in the context of existing marine farms in the visual catchment are of a scale that is not determinative on its own.

Summary

[332] In summary:

(a) An adverse effect on King Shag habitat is likely that is more than minor but less than significant at a cumulative Bay-wide scale.

(b) There is no evidence that the adverse effect on King Shag habitat is having any adverse effect on the population of King Shag generally and the Duffers Reef Colony in particular.

(c) There is a low risk that mussel farms in the outer Pelorus Sounds may have adverse effects on the Duffers Reef Colony of King Shag.

(d) The proposal is unlikely to have significant adverse visual effects on the natural character and landscape of the promontory or cumulatively on the natural character and landscape of Beatrix Bay.

(e) The proposal is likely to have no more than minor adverse effects on non-visual aspects of natural character including benthic and water column effects, recreational amenity, navigation and King Shag.

Result

[333] The application should be granted with standard mussel farm conditions to be advised by the Council.

[334] The majority decision to refuse the application is a disproportionate response to the extremely unlikely risk that an additional marine farm in Beatrix Bay may contribute to a decline in the King Shag population in the Marlborough Sounds. In my view, the proposal represents an appropriate development in the coastal marine area.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

J R Jackson
Environment Judge

J R Mills
Environment Commissioner

I Buchanan
Environment Commissioner

Jacksoj\Jud_Rule\d\Davidson Family Trust v Marlborough DC

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2013-425-95
[2013] NZHC 1712

BETWEEN	SHOTOVER PARK LIMITED AND REMARKABLES PARK LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

CIV-2013-425-94

BETWEEN	FOODSTUFFS (SOUTH ISLAND) LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing:	24, 25 and 26 June 2013
Appearances:	R Somerville QC and S Schaepfer for Shotover Park Limited I Gordon and J B Orpin for Queenstown Central Limited N H Soper and A C Ritchie for Foodstuffs (South Island) Limited R S Cunliffe and J E MacDonald for Queenstown Lakes District Council
Judgment:	5 July 2013

JUDGMENT OF FOGARTY J

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Summary of judgment

[1] The appellants allege that one Environment Court failed to consider reasoning of another Environment Court on the same, or sufficiently similar, facts and issues. Justice requires that like cases should be decided the same way. That this was an error of justice and law, so that the Court who failed to consider the other should have its decision set aside.

[2] At the heart of these appeals is criticism of Judge Borthwick's division's decision to disregard the fact and merit of Judge Jackson's division's grant of resource consents to the Pak'nSave and Mitre 10 Mega proposals.

[3] The Court could have considered the reasoning of the other Court, allowing for the differences in the issues. The questions each Court were examining, however, were materially different. So different that in this case there was no duty of one to consider the reasoning of the other.

[4] The Court was not obliged to assume that the environment within PC19 contained the Pak'nSave supermarket and Mitre 10 Mega. This is because when deciding the content of a plan for the future, as distinct from the grant of a particular resource consent, the Court is not obliged to confine "environment" to the "existing environment", as defined in [84] of *Hawthorn*.[1]

[5] The appeals are dismissed.

Introduction

The objective of the operative plan

[6] The Queenstown Lakes District Council plan became fully operative in 2009. Approximately 69 hectares of rural land, zoned rural general, on the Frankton Flats adjacent to the airport is the last remaining greenfields site within the urban growth boundary of Queenstown. The operative plan has an objective:

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1 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

Objective 6 – Frankton

> ***Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.***

[7] By Plan Change 19 (PC19), the Council proposes that this last remaining area of rural zoned land on the Frankton Flats yet to be rezoned for urban zoning be rezoned for urban development.

A brief chronology

YEAR	EVENT
2007	PC19 was first notified by the Council.
2009	In October 2009, hearing commissioners appointed by the Council released a decision recommending that PC19 be approved. In the same year, appeals were lodged, including by Foodstuffs.
2010	Foodstuffs also applied to the Council for resource consent for a Pak'nSave supermarket within the area of PC19.
2011	Foodstuffs' application for resource consent was declined. Cross Roads applied for resource consent for a Mitre 10 Mega adjacent to the proposed Pak'nSave supermarket.
2012	February - a division of the Environment Court, chaired by Judge Borthwick, began hearing the appeal against PC19. March – A month later, Cross Roads applied for direct referral of its resource consent to the Environment Court. 3 May - (After four sittings over four separate weeks, 19 days in all), Judge Borthwick's division reserved its decision on PC19. Later in May, another division of the Environment Court, chaired by Judge Jackson, began hearing the Foodstuffs 2010 appeal against the refusal of resource consent for the Pak'nSave supermarket, and Cross Roads' 2011 direct referral to the Environment Court for consent to a Mitre 10 Mega.

	July - Judge Jackson's division granted resource consent for the Pak'nSave supermarket,[2] and in August for the Mitre 10 Mega.[3] November - Judge Borthwick's division resumed hearing the PC19 appeal in order to hear oral argument on the relevance, if any, of Judge Jackson's division's decisions on Foodstuffs and Cross Roads. By this time both of those decisions were themselves the subject of appeal to the High Court.
2013	February - Judge Borthwick's division issued its judgment on PC19.[4] In this judgment, Judge Borthwick's division placed no weight on these consents. (This judgment is called the *PC19* decision.) On the same day that Judge Borthwick's division delivered its judgment on PC19 this High Court began hearing the appeals against the grant of the Pak'nSave and Mitre 10 Mega resource consents by Judge Jackson's division. Those appeals were successful. March - Foodstuffs, Shotover Park Limited and Remarkables Park Limited appeal Judge Borthwick's division's decision in PC19. In PC19, and so in this decision, both parties are referred to as SPL. April – The High Court allows the appeals against Judge Jackson's division's decisions, and remits the resource consent applications back to the Court, to be reconsidered against the current state of PC19.[5] June - This Court grants leave to Foodstuffs and Cross Roads to appeal the decision of this Court on the resource consents to the Court of Appeal.[6] On the same day, this Court starts hearing the appeals against Judge Borthwick's division's decision.

The allegations of error of law

[8] As already noted, there are two appeals; one by Shotover Park Limited and Remarkables Park Limited, together referred to as SPL, and the other by Foodstuffs. They take different, but complementary grounds of appeal.

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2 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

3 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

4 *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

5 *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815; *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817.

6 *Foodstuffs (South Island) Limited & Anor v Queenstown Central Limited* [2013] NZHC 1552.

SPL's contention of error of law

[9] SPL contends that Judge Borthwick's division erred in concluding that the considerations in ss 31 and 32 of the Resource Management Act 1991 (the RMA) do not support significant weight being given to Judge Jackson's division's findings in the *Foodstuffs*[7] and *Cross Roads*[8] decisions. SPL relies on the following particular grounds:

(a) Judge Borthwick's division failed to act consistently with Judge Jackson's division in terms of relevant findings of fact and law concerning the proposed activities in activity areas E1, E2 and E3.

(b) It acted on the basis that before doing so the above decisions needed to be determinative of the PC19 proceedings (not pursued in oral argument).

(c) It failed to place weight on the findings of fact and law in terms of ss 5, 7, 31, 32 and 74 of the RMA (as found in Judge Jackson's division's decisions).

(d) It failed to put weight on Judge Jackson's division's decisions in *Foodstuffs* and *Cross Roads* in respect of the decisions version of PC19 (PC19 (DV)). This being the version of PC19 as it was when the Queenstown Lakes District Council adopted the commissioners' decision on the submissions to PC19.

(e) Judge Borthwick's division failed to consider the planning implications of the area of land being used by the activities covered by the Environment Court's decisions in *Foodstuffs* and *Cross Roads* when proposing objectives for that land.

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7 *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs).*

8 *Cross Roads Properties Limited v Queenstown Lakes District Council* [2012] NZEnvC 177 (*Cross Roads*).

(f) Judge Borthwick's decision made factual findings that conflict with factual findings in the *Foodstuffs* and *Cross Roads* decisions, but did not explain the reasons for these conflicting findings.

(g) Judge Borthwick's division relied on the fact that some of the experts that appeared in *Foodstuffs* and *Cross Roads* did not appear before the Court, but did not acknowledge that there were many common witnesses, particularly in relation to matters of urban design and amenity.

(h) Judge Borthwick's decision failed to consider the implications of the Mitre 10 Mega and Pak'nSave decisions to its assessment under ss 31 and 32.

[10] SPL posed the question of law to be answered as:

> Did Judge Borthwick's division err in concluding that the considerations in ss 31 and 32 of the Act did not support significant weight being given to Judge Jackson's division's finding in the *Foodstuffs* and the *Cross Roads* decisions?

Activity areas E1, E2 and E3, the Eastern Access Road (EAR) and Road 2

[11] To understand the alleged error of law it is essential to explain at this point the above terms, as part of an explanation of the factual setting of this dispute within the 69 hectares of PC19.

[12] This dispute is over an area of approximately 10 hectares. This 10 hectare site is located at the intersection of two to be built roads. One is called the Eastern Access Road (EAR), which will run off State Highway 6 (SH6). In time the EAR will give access to the land south of the airport via this area.[9] SH6 is the main highway into Queenstown from Cromwell. Of its nature that state highway has few intersections in order to maintain its high level of traffic service. The EAR will itself have arterial road status. That means that the traffic engineers will have high expectations as to the quality of traffic flow along this road, and so will be inclined

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9 *PC19* at [26](d).

to take steps to minimise right hand turning on the road and the number of intersections on the road, and maybe, parking on the side(s) of the road.

[13] One planned intersection of the EAR is with Road 2. Road 2 is an important road. It is the proposed main road from the western end of PC19 to the east, to link up with the Glenda Drive industrial area to the east. It is expected to have significant traffic. Road 2 is the first intersection on the EAR after you leave SH6. As you come down the EAR you will come to the intersection with Road 2 and EAR. At that intersection, on your left and on the south side of Road 2, would be a large development containing a Pak'nSave, a Mitre 10 Mega and a significant car park in front of the two retail and trade retail businesses.

[14] From a commercial point of view, this site is an ideal location for a large supermarket and a very large hardware, outdoor supplies and garden centre business. Easily found, straight off main roads. The site is also proximate to the intended residential development immediately to the east, on the other side of the EAR. It is readily reached by the main roads from other parts of Frankton Flats and from Queenstown. It is quite understandable, to this Court, why the landowner (SPL), Foodstuffs and Cross Roads (the developer of Mitre 10 Mega) are vigorously litigating in support of this project.

[15] The location of this project does not fit the content of PC19 as released by the Council (PC19 (DV)). The Pak'nSave part of the project straddles two zones, E2 and E1. E2 is a zone which itself straddles the EAR. E2 is intended to be a "sleeve" on either side of the road. It would contain two-storey buildings, the ground floor being showroom trade related type retail, for example, a plumber merchant, with the upper floor available for residential use. Remember that to the west (closer to Queenstown) is an intended residential and commercial area. The E1 zone is a zone more dedicated to industrial activities. That is deliberately a vague sentence because the planning has not yet reached the state where the activities allowed within the zone can be set out with any great certainty. The Mitre 10 Mega is in the E1 zone, but abutting the Pak'nSave. The car parks, which customers of both businesses would share, straddle both the E1 and E2 zones.

[16] An immediate consequence of the Pak'nSave proposal is that it would eliminate part of the E2 sleeve, as the Pak'nSave operation will go right up to the boundary of the EAR. So it is, in part at least, a direct challenge to the E2 zone. This is partly because it is of a size (approximately 6,000 m^2 ground floor area (gfa)) much greater than the range of 500 to 1,000 m^2 ground floor area gfa preferred by Judge Borthwick's division.

[17] The Mitre 10 Mega, functioning as a major retail activity, presents a challenge to the notion of the E1 zone having a dominance of industrial activity. Before Judge Borthwick's division, Shotover Park Limited was recommending a new zone, E3. E3 was a zone containing the whole of the SPL property of about 40 hectares or so. In other words, four times the size of the Foodstuffs' and Mitre 10 Mega projects. This block includes those two, but is generally running on the east side of the EAR, being the side away from the direction of Queenstown and towards the Glenda Drive industrial area.

Refinement of SPL's error of law

[18] Mr Somerville QC for SPL argued that the effects on the environment of the future development of the urban form, amenity and function of the EAR and Road 2 (the proposed main road to the Glenda Drive industrial area) were critical issues for both divisions of the Environment Court, and that both divisions heard from some of the same witnesses on those issues.

[19] In this context, he argued that the deliberations of Judge Jackson's division, as revealed in its two decisions granting the resource consents for the Pak'nSave and Mitre 10 Mega, ought to have been considered by Judge Borthwick's division when it reconvened to hear argument after delivery of Judge Jackson's division's decisions, and particularly in the reasoning of its decision. I heard his contended error of law to break out into three propositions:

(1) That the reasoning and views of Judge Jackson's division on the merit of the Pak'nSave and Mitre 10 Mega projects and their associated impact/qualification of the E2 zone sleeve and the functioning of the EAR were relevant considerations which Judge Borthwick's division

was obliged by law to have regard to before it reached its decision on PC19.

(2) Either as an aspect of the first proposition or as a separate ground, the common law principle that like cases should be treated alike, required Judge Borthwick's division to consider with some care the reasoning of Judge Jackson's division, and only differ from it for good reasons.

(3) That Judge Borthwick's division failed to do this.

The response by Queenstown Lakes District Council and Queenstown Central Limited to SPL's error of law

[20] Queenstown Central Limited (QCL) is the other major property owner in the PC19 area. Its land is on the other side of the EAR, where a mix of residential and commercial uses are proposed to be located. It can be readily appreciated (the motivations are not part of the evidence) that QCL views the development of another retail centre on the other side of the road to the east as inimicable to its commercial interests to the west.

[21] Counsel for QCL and QLDC's essential response to the contended error of law by SPL was that:

(1) Judge Borthwick's division had a different function under the RMA from Judge Jackson's division. It was applying different sections of the Act, particularly ss 31, 32 and 33, so that it was asking different questions and applying different criteria than those being examined by Judge Jackson's division, which was applying ss 104 and 104D. This is notwithstanding that, as a common element to both statutory functions, Part 2 of the RMA (ss 5, 6 and 7) applied.

(2) That by the time Judge Jackson's division gave its decision the hearing on PC19 had been completed. The decision was reserved. Many of the witnesses were different. The task of Judge Borthwick's division was to resolve the conflicting evidence of the witnesses it

heard, and that it could not do this in natural justice to the parties before it by taking into account and giving weight to a different contest that took place before Judge Jackson's division, albeit over similar merit considerations of the Pak'nSave and Mitre 10 Mega proposals.

(3) While as a matter of law like for like considerations are desirable, in this case, for reasons (1) and (2) combined, Judge Borthwick's division's refusal to undertake a like for like analysis was not an error of law.

Foodstuffs' contended error of law

[22] Foodstuffs supports SPL's argument, but adds a separate point. This point relies on [84] of the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Ltd*,[10] which provides:

> [84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.
>
> (Emphasis added)

[23] Counsel for Foodstuffs argued that Judge Borthwick's division erred by declining to consider the Foodstuffs resource consent as forming part of the environment, being (with the Mitre 10 Mega) resource consents which are likely to be implemented. Foodstuffs' counsel argued that [84] applies equally to consideration of applications for resource consents and consideration as to the future content of plans in an environment.

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[10] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

[24] Mr Soper for Foodstuffs argued that the fact that the resource consents were under appeal was irrelevant to the application of [84] of *Hawthorn*. As at the time Judge Borthwick's division reached its decision the appeals were pending only before the High Court, the resource consents were still afoot, they had not been stayed, they were likely to be implemented. Therefore, according to law, Judge Borthwick's division had no alternative but to face the reality of these consents as altering the future environment and thus being facts that had to be taken into account in the analysis of the future content of PC19. They were not, and so that is error of law.

[25] The submissions in reply from QLDC and QCL were predictably that, as a matter of fact, the appeals against those decisions had rendered it impossible to make a finding that the resource consents were likely to be implemented, and that that judgment (which was the judgment by Judge Borthwick's division) was vindicated by the appeals being allowed and the applications being sent back to Judge Jackson's division for reconsideration.

The reasoning of Judge Borthwick's division

[26] Judge Borthwick's division's decision addresses the two decisions of Judge Jackson's division under the heading:[11]

> **Part 3 Weighting to be given to recent Environment Court decisions**

[27] The reasoning opens by recording that, given the grant of the two resource consents and the fact that both decisions had been appealed, the Court had released a minute expressing the tentative view that, while the decisions were relevant and a matter to which the Court could have regard, as they were under appeal little or no weight should be attached to them.[12]

[28] Judge Borthwick's division's decision went on to note that apart from the appeal the consents could not be exercised until a third consent was available to subdivide SPL's land, and that a subdivision application had been lodged with the

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[11] *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZEnvC 14 (*PC19*).

[12] At [103].

Council in 2009. The Court did not regard this aspect and other consents contingent upon the upgrading of QLDC's potable water supply, storm and wastewater systems as a serious barrier to the likelihood of the consents being implemented.

[29] Judge Borthwick's division recorded Foodstuffs' submission that there was a commonality of issues, and that for this reason Judge Borthwick's division should give significant weight to the factual findings, particularly in *Foodstuffs*, concerning (a) landscape, (b) industrial land supply, (c) the amenity of the neighbourhood – particularly on the EAR and Road 2, and (d) urban structure. It recorded the submission by Foodstuffs that these same issues are to be considered by this Court under ss 5, 7, 31 and 74 of the RMA.

[30] It is then appropriate to set out a number of paragraphs of Judge Borthwick's division's Part 3 reasoning in full:

> [114] Further, SPL and Foodstuffs submit decisions made on the following topics should be accorded significant weight:
>
> (a) the court's findings in *Foodstuffs v QLDC* at [193, 194, 224, 254 and 283] in relation to AA-C2, assuming this Activity Area were to extend to the EAR as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL;
>
> (b) the court's findings in *Foodstuffs v QLDC* at [192] concerning the sleeving of retail activity along the EAR if car-parking is not allowed as proposed by SPL in the PC19 proceedings and opposed by QLDC/QCL; and.
>
> (c) the court's findings in *Cross Roads Properties Ltd v QLDC* at [176] in relation to a "trade retail centre" south of Road 2.
>
> [115] SPL, citing a line of case authority, submits that while this court is not bound by decisions of other Environment Court divisions, and is free to consider each case on its own facts and merits, the court is entitled to take into account decisions made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* on similar facts. When deciding whether to consider the decision of another division, and the weight to be given to the findings made therein, this court must act reasonably and rationally. Failure to do so may be regarded as giving rise or contributing to irrationality in the result of the process. If this court were to come to contrary findings of fact or law than *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* then we should give reasons for our contrary decisions.
>
> [116] Disputing the District Council's submission that an appeal or direct referral of a resource consent application is more narrowly focused than these plan change proceedings, SPL submits the Environment Court in

Foodstuffs v QLDC and *Cross Roads Properties Ltd v QLDC* addressed the "very issues" to be determined on the plan change appeals including sections 31(l)(a), 32(3) and (4), 74(2) and Part 2 of the Act; there are no gaps in the analysis or evaluation of the relevant evidence; the Environment Court's decisions address the relevant potential adverse effects of land and the objectives and policies of the operative District Plan and PC19(DV).

[117] Foodstuffs submits that this court has two options, either:

> (a) give "adequate" weight to [the] Environment Court's decision to grant consent to Foodstuffs; or
>
> (b) await the outcome of the High Court proceedings.

...

The issues

[121] While submitting that the decisions of *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant (and we agree that they are), SPL and Foodstuffs gave scant regard to the *relevance* of the decisions to these proceedings. In the end two themes emerged:

> (a) whether the grants of consent are relevant to an assessment of the environment?
>
> (b) is the implementation of the consents relevant to an evaluation under section 31(1)(a) and section 32(3) generally and in particular, the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

Issue: Whether the grants of consent are relevant to an assessment of the environment?

[122] In a plan change proceeding, a grant of consent may be relevant to an assessment of the environment, which we find would include the future environment as it may be modified by the implementation of resource consents held at the time the plan change request is determined and in circumstances where those consents are likely to be implemented. Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[123] The likelihood of the consents being implemented is a question of fact and this is difficult to determine, but not because these particular consents are contingent upon the gaining of other consents and approvals. (While this will take time we were told of no compelling reason why these would not ultimately be forthcoming).

[124] Rather, the question is difficult because it involves speculation as to the outcome of the High Court appeals. Subject to the High Court's

decisions, it may be open to the other division of the Environment Court to confirm the grants of consent with or without modification or (possibly) to reject the applications. Given this, we are not in a position to determine the likelihood that these consents will be implemented.

[125] But even if we are wrong in finding this, any consent granted to the Foodstuffs and Cross Roads Properties Ltd may be exercised. This is so notwithstanding that the underlying zoning does not permit the activities authorised (and after all it was on this basis that they were granted). While Foodstuffs (South Island) Ltd and Cross Roads Properties Ltd may consider it preferable that the underlying zoning is enabling of the consents held, this would not preclude the exercise of their consents (see section 9 of the Act).

Issue: Is the implementation of the consents relevant to an evaluation under section 31(l)(a) and section 32(3) generally, and in particular the efficiency and effectiveness of policies, rules and other methods which may anticipate a different environmental outcome?

[126] The consideration of unimplemented resource consents as forming part of the future environment is important when we come to consider the integrated management of the effects of use, development or protection of land. Section 31(l)(a) provides:

> Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (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.

The resource consents are also relevant under section 32 (which we summarised earlier).

[127] However, for the following reasons we reject Foodstuffs and SPL submission that the Environment Court findings (and obiter) are either relevant to issues for determination before this court and secondly, are matters to which significant weight attaches:

(a) the court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* does not purport to determine any issue in these proceedings;

(b) the "factual findings" relied upon by SPL and Foodstuffs are conclusions given in their own policy context; namely PC19(DV);

(c) in contrast with *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC*, the evidence before this court, from largely different witnesses, sought different policy outcomes from PC19(DV);

(d) the issues considered and factual findings made in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* are not the same as in these proceedings albeit that they may

be grouped under the same topic headings with reference to sections 5, 7, 31 and 74; and

(e) to the extent that the matters at [114] above address relief sought by the parties in these proceedings, and are not provisions in PC19(DV), the comments are obiter.

[128] We find that there is nothing *inevitable* (as suggested) about the grant of consents to Foodstuffs and Cross Road Properties Ltd and the consequential approval of AA-E3 in these proceedings. The AA-E3 zone is enabling of a wide range of activities, including a supermarket and trade retailing. The Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* did not consider SPL's proposed AA-E3 zone.

[129] We have concluded that sections 31 and 32 considerations, in particular the efficiency and effectiveness of policies, rules and methods, do not (in this case) support a submission that significant weight should be given to the Environment Court's findings. Firstly, and for reasons that we give later, we have determined that the land east and west of the EAR should be subject to its own ODP process. Secondly, while there are differences in the range of activities provided for within the different sub-zones supported by QCL/QLDC and by SPL, and differences also in the road frontage controls proposed by these parties, not dissimilar outcomes in terms of achieving an acceptable urban design response would potentially arise on the balance of the AA-E2 (being the land not subject to Foodstuffs' consent application).

[130] The artifice in the SPL and Foodstuffs submission is this; in *Cross Roads Properties Ltd v QLDC* the court also found, for urban design and landscape reasons, large format trade related retail should be confined to the south of Road 2, whereas SPL in these proceedings sought a zoning enabling of these activities both north and south of the Road. We are not prepared to alter the weight given to different findings (obiter) of the Environment Court in *Foodstuffs v QLDC* and *Cross Roads Properties Ltd v QLDC* to suit SPL and Foodstuffs. If we are to give significant weight to the factual findings made in *Cross Roads Properties Ltd v QLDC* then we would partially reject AA-E3 (and reject AA-E4) as they provide for these activities north of Road 2. That is not an outcome SPL or Foodstuffs would support.

Outcome

[131] While we find that the Environment Court decisions *Foodstuffs (South Island) Ltd v QLDC* and *Cross Roads Properties Ltd v QLDC* are relevant, we are unable to assess whether the consents (if upheld) will be implemented and therefore decline to consider the consents as forming part of the environment.

[132] We decline to defer our Interim Decision pending the release of the High Court's decisions on the consent appeals as the High Court decisions are not, in our view, determinative of PC 19.

SPL's criticism of Judge Borthwick's division's reasoning

[31] Mr Somerville QC noted that Judge Borthwick's division's summary of his client's argument, at [115], is accurate. He then went on to argue that the Court did not identify any findings in either the *Foodstuffs* or the *Cross Roads* decisions as being of relevance. Despite having listed the topics in [114]. Rather, Mr Somerville QC submitted that Chapter 3 of the decision focuses almost exclusively on the *Hawthorn* [84] considerations, not on the decision-making process, the findings or the reasoning in the *Foodstuffs* and *Cross Roads* decisions.

[32] Judge Borthwick's division heard from five expert witnesses who had also given evidence in the Foodstuffs and Cross Roads proceedings. Mr Barrett-Boyes gave urban design evidence in both the Foodstuffs and Cross Roads hearings. Mr Brewer gave urban design evidence in the Cross Roads hearing. Mr Heath gave retail evidence in the Cross Roads hearing. Mr Penny gave transport evidence in the Foodstuffs hearing; and Mr Dewe gave planning evidence in the Foodstuffs hearing. All of these witnesses gave evidence at the PC19 hearing.

[33] Mr Somerville QC submitted that notwithstanding the observation of Judge Borthwick's division, that the witnesses were largely different,[13] in terms of urban design issues and traffic evidence there were issues common to both the PC19 decision and the *Foodstuffs* and *Cross Roads* decisions. During the Foodstuffs and Cross Roads hearings, Judge Jackson's division heard from two urban design witnesses who gave evidence at the PC19 hearing (Messrs Barrett-Boyes and Brewer) and two who did not (Messrs Teesdale and Williams). In terms of traffic experts, the Court in the Foodstuffs and Cross Roads hearings had evidence from Mr Penny and comments from Dr Turner, both of whom gave evidence at the PC19 hearing.

[34] In the *Foodstuffs* decision the issue of street frontage controls along the EAR was considered by the Court, which found that the proposed Pak'nSave development

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13 *PC19* at [127].

was "complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east".[14]

[35] Mr Cunliffe for QLDC pointed out immediately that this finding was under the heading "Conclusions as to effects on landscape".

[36] Under the heading of "*Street frontage, presence and amenity*", after detailed consideration of evidence of Mr Teesdale and Mr Barrett-Boyes, and having noted that the location of the EAR is not settled, Judge Jackson's division commented with apparent approval of Mr Teesdale's opinion:[15]

> ... it is likely that the carparking and main entrances to these commercial buildings [in the sleeves alongside each side of the EAR] will either be behind or at the side because of the nature of the road.

The Court went on:[16]

> ... That is important evidence because it means that the "sleeve" concept behind the E2 activity area is unlikely to work in practice – the road is the wrong design for the concept and the activity in it is mainly vehicular, as Mr Barrett-Boyes agreed when the court put that to him. The EAR is, after all, proposed to be an arterial road.

[37] Mr Somerville QC argued that this was a very important piece of evidence and conclusion, both of which should have been taken into account by Judge Borthwick's division when they reconvened.

[38] Mr Somerville QC also relied upon findings by the Court in the *Foodstuffs* judgment that the proposed land use achieved integration and met the purpose of the Act. He relied on three paragraphs from the *Foodstuffs* decision:

> **4.5 Integrated management/comprehensive development**
>
> <u>Integration with surrounding land uses and zones</u>
>
> [239] The first important aspect of integrated management is identified by objective 12. It is to ensure that the Frankton Flats B zone is integrated with the surrounding uses and other Queenstown urban areas. There was little or no evidence to suggest that was not being achieved, as the joint statement of

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14 *Foodstuffs* at [91].
15 At [192].
16 At [192].

the traffic engineers/transportation managers (already referred to) establishes.

[240] Greater emphasis was placed by QCL and the council on an alleged failure to "comprehensively" develop Lot 20 in conjunction with surrounding land. However, analysis of the evidence of Foodstuffs' witnesses does not bear that out. For example, the joint statement of the transportation engineers records their agreement:

- ... that the Glenda Drive driveway upgrade project including the Eastern Access Road and Road 2, will be able to proceed as programmed during the 2012-13 construction season without requiring a decision on Plan Change 19.

- ... that the pedestrian facilities provided for access into and within the proposed sites will provide a good level of service. It is agreed that the pedestrian crossings of the right-of-way are adequate and do not provide the "dead end" suggested by Mr Denney.

- it does not interfere with the location and layout of the EAR and Road 2, thus connecting streets efficiently;

- it enables mixed uses within the Frankton Flats B zone while providing for travel demand management;

- it ensures that land use and public access and transport is integrated

...

5. Outcome

5.1 Under the operative district plan

[280] We have no difficulty with granting a resource consent under the operative district plan. Despite the fact that the area is zoned Rural General, we have found that it is surrounded by urban activities and falls into the third (lowest) of the district's landscape categories. Further, the rural objectives in Chapter 5 of the operative district plan are replaced by a specific urban growth objective in Chapter 4. The site is in an area (Frankton Flats) which is clearly marked for urban development under objective (4.9.3)6 of that plan. All potential adverse effects have been sufficiently mitigated so that the important district-wide objectives as to landscape and protection of airport functioning (by avoiding reverse sensitivity effects) are met. In regard to the latter, we note that the Queenstown Airport Corporation was not even a party to the proceedings. The proposal is integrated into the roading network (specifically the EAR and Road 2) as required by the first policy. Space for industrial activities in any expansion of the Glenda Drive zone is left to the east and south of the site and the proposal will help buffer those activities from the residential area also aimed for in the Frankton Flats objective. There would be a greater benefit under section 5 of the Act by granting consent, than there would from refusing it.

[39] In the *Cross Roads* judgment, Judge Jackson's division found large format retail (LFR) (known more colloquially as "big box retail") south of Road 2 is probably desirable in urban design terms and for landscape reasons.[17] As to integration, the same Court found:[18]

> [77] The residential growth objective seeks residential growth sufficient to meet the district's needs. The first implementing policy is to enable "... urban consolidation ... where appropriate", and the second is to encourage new commercial development (*inter alia*) which " ... is imaginative ... urban design and ... integrat[es] different activities". The first is met because, as we shall see shortly, the later objective 6 expressly contemplates urban development of the Frankton Flats. As for the second policy, while nobody could claim that the trade retail store building is particularly imaginative, the policy is merely encouraging, not directive. Further, the proposal does integrate different activities in several ways: it contains several different types of activities (as defined in the district plan and discussed earlier) on the site itself; as a trade retail operation it will supply to local industry; and it would integrate car parking with the proposed Pak 'N Save on the adjacent land to the west; and finally (but importantly) it fits into the now nearly fixed road network (the EAR and Road 2) in this corner of the Frankton Flats...

[40] Judge Jackson's division was comfortable about inserting trade retail uses over the E2 and E1 zones, because it knew that the QLDC then appeared to support (though QCL opposed) the introduction of a "trade related retail overlay" diametrically opposite from the proposed Pak'nSave and Mitre 10 Mega, on land enclosed by the EAR, SH6 and Road 2.[19]

[41] So Judge Jackson's division in *Cross Roads* saw themselves as resolving an issue as to whether trade related retail should be placed north or south of Road 2, and concluded:

> [175] ...This decision would determine that large format trade retail is south of Road 2 rather than north. As it happens, we have cogent evidence that is probably desirable in urban design terms, and for landscape reasons.
>
> [176] However, in the bigger picture for Frankton Flats (or at least the "B" zone) introduction of a trade retail centre either side of Road 2 (if that occurs) will not relevantly interfere with the development of a village/town centre further west. That is because "Town Centres are pedestrian orientated, and it is necessary to ensure these attractive environments are not degraded by retail activities that are incompatible with their amenities."

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17 *Cross Roads* at [175].
18 At [77].
19 *Cross Roads* at [175].

[42] As I will discuss further, one of the criticisms of this reasoning is that Judge Jackson's Court was embarking on planning, rather than resolving a resource consent application.

[43] Earlier in the *Foodstuffs'* decision the Court appeared to remind itself that it was not engaged in planning:

> [45] We remind ourselves here that while we heard some evidence about possible outcomes of the hearing on PC19(DV) we must strictly apply the objectives, policies and rules in the decisions version itself. We must not speculate on any witness' (in this proceeding) improvements on PC19(DV) and/or with one possible exception - when predicting the reasonably foreseeable future environment - whether this is likely to be accepted by the (other division of) the Environment Court. We were also advised by the parties that, apart from the location of the EAR, all issues about PC19(DV) are still open for the court that heard the appeals on it to decide. Obviously that will affect the weight to be given to PC19(DV) if the proposal passes the gateway tests and we get to consider the substantive merits of the proposal (and if questions of weight arise).

[44] In *Cross Roads*, it is apparent that Judge Jackson's division was aware that its rulings in [175] and [176] were intruding into planning issues as to the content of PC19, because in the next paragraph they explain why they are doing this:[20]

> [177] A further factor, which did not apply in the Foodstuffs case, is that this is a direct referral to the Environment Court. One of the principal points of the procedure is to have a speedy determination of the matter brought before the court. That would not be achieved if we adjourned this matter until 2013 while the appeals on PC19 are resolved. Further, we bear in mind that if the council had not agreed to the referral of CRPL' s application to the Environment Court, it would have had strict time limits within which to hear and notify the decision. Given that the direct referral was introduced in 2009 to streamline processes, it would be unusual if Parliament intended applicants or the Environment Court to wait until a plan change is resolved, when the consent authority would have been obliged to proceed. We consider this is a strong indicator that we should decide now rather than wait.

[45] Mr Somerville QC submitted that Judge Borthwick's division's decision, rejecting the location of the Pak'nSave and Mitre 10 Mega, was directly contrary to the findings in Judge Jackson's division's *Foodstuffs* decision that the proposed development was:[21]

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[20] At [177].

[21] *Foodstuffs* at [91].

> ... complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east.

Further, that the finding in the *PC19* decision, Judge Borthwick's division, that larger retail units are unlikely to give rise to a high quality landscape was contrary to the findings in the *Foodstuffs* and *Cross Roads* decisions, that the proposals achieve integration and meet the purpose of the RMA. The *PC19* decision is also inconsistent with the findings in the *Cross Roads* decision, that large format retail south of Road 2 is probably desirable in urban terms and for landscape reasons.

[46] I agree. The *PC19* decision favoured leaving the EAR in place. That finding is directly contrary to the finding in *Foodstuffs,* that the sleeving concept would not work in practice. Judge Borthwick's division found the activity area E2 (the sleeve) was:[22]

> ... the most appropriate way to achieve the purpose of the Act.

[47] It might also be noted that Judge Borthwick's division had at least two other reasons why it did not favour the Pak'nSave and the Mitre 10 Mega. They were: first, that they did not want to have another "town centre" in the PC19 area:

> [555] We conclude that AA-E3 would most likely develop as a fourth commercial centre and that its policies are strongly enabling of this result. However, there is nothing in its provisions that would ensure a mix of uses eventuates. At this location the Activity Area would be inconsistent with the District Council's policies which seek to keep the urban area compact (Section: District Wide Issues, clause 4.5.3, objective 1 and policies 1.1 and 1.2). We also find that the unmet growth demand in retail activities (such that there is) should be located in AA-E2 and in a manner that complements and (reinforces the form and function of AA-Cl and that this would be the most appropriate way to. achieve the purpose of the Act.
>
> [556] And we find the QLDC's Trade Retail Overlay would have the same result.

[48] The context needs to be kept in mind. On the west side of the EAR there was proposed to be a village with a mix of residence, retail and commercial uses. Judge Borthwick's division did not want a fourth commercial centre. Nearby, already established, is the Remarkables Park town centre. A second town centre was planned in PC19, west of the EAR. This Court is not sure what counts as the fourth – it could

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[22] *PC19* at [524].

be the existing commercial activities at Frankton, at the major intersection on SH6, accessing the airport and the Frankton suburb, the extension of the Remarkables centre in PC35, or the main town centre, downtown. It appears to this Court that Judge Borthwick's division was taking judicial notice that a large supermarket and a Mitre 10 Mega, east of the EAR, whether north or south of Road 2, would inevitably attract a very large number of shoppers, which fact would in turn attract efforts by other retail businesses to locate in the same area, and thus put pressure to create by way of a series of resource consents another town centre of retail activity.

[49] Second, that the QLDC plan already provides for large format retail, and specifically provides for it nearby in the Remarkables Park Scheme enabled by Plan Change 34:[23]

> [26] By way of further context it is relevant to note the following, additional features in the wider environment:
>
> ...
>
> (e) the approximately 150 hectares Remarkables Park Special Zone (RPZ)located on the southern side of Queenstown Airport adjoining the Kawarau River. RPZ is being developed progressively for a mix of urban activities including residential, visitor accommodation, recreational, community, education, commercial and retail activities in accordance with a structure plan. The RPZ contains the largest shopping centre outside the Queenstown central business district (CBD) with a further 30,000m2 retail development enabled by the recently operative PC34.

How Judge Borthwick's division could have responded

[50] In addition to the reasoning of Judge Borthwick's division's decision in Part 3, I agree that Judge Borthwick's division could have more directly engaged upon the reasoning of Judge Jackson's division. But it did not. In this respect it did decline the opportunity to directly consider whether or not to adopt the analysis and the conclusions of Judge Jackson's division as to the practicality of "sleeving", and the suitability of the proposed Pak'nSave and Mitre 10 Mega to the road network, to resolve the introduction of trade related retail east of the EAR, in the PC19, and either north or south of Road 2.

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[23] At [26](e).

[51] Before turning to a closer examination as to whether this failure was an error of law, it is important to note, before we leave the findings of the respective Courts, some of the phrasing of the conclusions of the Courts.

[52] The finding in [91] of *Foodstuffs* is that:

> ...the proposed development is complementary and sympathetic to Road 2 to the north, the EAR to the west, and the proposed Mega Mitre 10 to the east. (Emphasis added)

The finding as to the sleeve is that:[24]

> The "sleeve" concept behind the E2 activity area is unlikely to work in practice... (Emphasis added)

The finding as to amenities was:[25]

> ...there is not much in it aesthetically.

And:[26]

> ...the effects on the amenities of the likely future environment in general and street amenities in particular will not be adverse.

As to urban design, it was:[27]

> We are satisfied that overall a high standard of urban design has been achieved...

[53] This can be contrasted with the phrasing in the *PC19* decision, where Judge Borthwick's division's reasoning found that the E2 zone was:[28]

> ... the most appropriate way to achieve the purpose of the Act.
>
> (Emphasis added)

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24 *Foodstuffs* at [192].
25 At [194].
26 At [195].
27 At [202].
28 *PC19* at [524].

Resolution of the SPL appeal issues

Judge Borthwick's division's statutory task

[54] Judge Borthwick's division was exercising functions given to territorial authorities under the Act in ss 31 and 32, particularly ss 31(1)(a) and 32(3) which provide:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (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:
>
> **32 Consideration of alternatives, benefits, and costs**
>
> ...
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> (Emphasis added)

[55] Judge Borthwick's division was addressing the content of a scheme change in respect of the Frankton Flats, which change itself had to be fitted into the goal of achieving integrated management of the natural and physical resources of the QLDC's district. See s 31(a). This means that this division of the Environment Court was obliged by law to have a district-wide perspective addressing the function of PC19 in meeting the needs of the whole of the district, as well as a narrower focus of a good utilisation of the land within the bounds of PC19, undeveloped rural land to be urbanised.

[56] The RMA provisions do not provide only one right answer as to how to do that. Any number of solutions might achieve appropriate integrated management.

[57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(3)(a) and (b). The phrase "the most appropriate" acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best. That is inherently a decision, upon which reasonable persons can differ, known to lawyers as a question of degree. That task passed to Judge Borthwick's division on appeal. That task was never within the jurisdiction of Judge Jackson's division.

[58] This task of the territorial authority is taken on by the Environment Court because the statute gives a right of appeal to the Environment Court from judgments by the territorial authorities as to this matter. The Environment Court is not given the power to initiate any new plan change.

[59] That is why we read Judge Borthwick's division applying the standard "the most appropriate way" in its deliberations. It is also why we do not see Judge Jackson's division applying that standard.

Judge Jackson's division's statutory task

[60] Judge Jackson's division was applying two different sections of the RMA, ss 104D and 104. It is part of the scheme of the RMA that resource consents are not required if activities are permitted. They are only required for activities which are not permitted. This distinction between permitted activities and then a range of activities which have varying difficulties of being approved is a policy which dates back to the predecessor Act, the Town and Country Planning Act 1977, and before that to the Town and Country Planning Act 1953. Under the 1977 Act, one had permitted uses, controlled uses, conditional uses and specified departures.

[61] Under the RMA there is a broader range: permitted activities, controlled activities, restricted discretionary activities, discretionary activities and non-complying activities and prohibited activities.[29]

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[29] Section 77A(2).

[62] In common with all of the statutes, and particularly under the RMA, different tests apply depending on the classification of the activity under the operative and any proposed applicable plans.[30]

[63] All applications for resource consent have to be examined against the state of the plans as they are at the time the application is being considered. As Judge Jackson's division reminded itself in [45] of the *Foodstuffs* decision, set out above.

[64] But as we have seen, in the exigencies of the long delays in the *Cross Roads* decision, at [177], Judge Jackson's division consciously went beyond the normal bounds of restraint into resolving what were really planning issues as to whether there should be any trade related retail activity east of the EAR, and, if so, where? These being live issues before another division of the Environment Court, as Judge Jackson's division knew at the time they were considering the resource consent.

[65] In this regard, counsel for QLDC submitted that Judge Jackson's division was taking into account irrelevant considerations under s 104 when it took into account submissions to amend proposed plan PC19 (DV), which were a matter for evaluation and judgment by the territorial authority under ss 31 and 32, and on appeal to the Environment Court, but which were completely outside the jurisdiction given to a consent authority under s 104, or on appeal therefrom to the Environment Court.

[66] This context is not directly relevant to the question of whether there is any error of law on the part of Judge Borthwick's division. But is, in my view, a partial explanation of the reaction of Judge Borthwick's division to Judge Jackson's division's evaluations of planning issues that were placed before Judge Borthwick's division, where it called those views "obiter".[31]

The law - like for like – a relevant/mandatory consideration

[67] The critical issue in this appeal is whether or not Judge Borthwick's division was obliged by law to take into account Judge Jackson's division's examination of these common issues.

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30 Sections 104, 104A-D.

31 See *PC19* at [127] and [130].

[68] Whether or not Judge Borthwick's division had to take into account these common issues is a novel question. Counsel before me agreed that nothing like this set of circumstances has arisen before in New Zealand in any of the authorities. Counsel were not able to find authorities from any other jurisdiction which might assist the Court. The problem appears to be a consequence of two different divisions of the one Court addressing the same subject matter contemporaneously.

[69] It is necessary then to go back to first principles to place Mr Somerville QC's argument, that Judge Borthwick's division was obliged to consider the analysis and conclusions of Judge Jackson's division.

[70] Judge Borthwick's division was exercising a statutory discretion, given in ss 31 and 32, as to the content of PC19, albeit on appeal from the territorial authority's exercise of a statutory discretion. Its decision is now on appeal, limited to error of law. The principles guiding the exercise of statutory discretion do not differ depending on whether the exercise is being judicially reviewed, or heard on appeal.[32]

[71] The classic statement as to what considerations are relevant and mandatory is in the judgment of Lord Greene, Master of the Rolls, in *Wednesbury*[33] as set out by the Privy Council in the case of *Mercury Energy Limited v Electricity Corporation of New Zealand Ltd*.[34] Lord Greene MR in the *Wednesbury* case said at 228-230 that the Courts:

> ... can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. .. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged

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32 *Peters v Davison* [1999] 2 NZLR 164 (CA) at [181].

33 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (the *Wednesbury* case).

34 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 at 389. The same passage is cited by Cooke J in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 181-182. *Countdown Properties (Northlands) Ltd v Dunedin City* [1994] NZRMA 145 (HC) at 153 is to the same effect and draws obviously from *Wednesbury*.

> in the courts in a strictly limited class of case. ... it must always be remembered that the court is not a court of appeal. ... the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion ... is an absolute one and cannot be questioned in any court of law.
>
> What then are those principles? They are well understood. ... The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. ...

[72] These principles are extended in New Zealand by the judgment of Cooke J, as he was, in *CREEDNZ Inc v Governor-General*.[35] In that decision, Cooke J distinguished between mandatory considerations that have to be taken into account, and a consideration which can be taken into account but which is not mandatory. The context of that case was judicial review of an administrative order, called the National Development Order, applying the National Development Act 1979 to give approval to the construction of the aluminium smelter at Aramoana. One of the arguments before the Court was that the Government was determined to give authority for the go-ahead for the Aramoana smelter, even though the project would have dire effects on the New Zealand economy. When analysing what considerations were taken into account by the Ministers (and there was scant material), Cooke J said:[36]

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in [Wednesbury Corporation]: "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

He then also cites in support Lord Diplock in *Secretary of State for Education and Science v Tameside Borough Council*.[37] Then Cooke J goes on:[38]

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35 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

36 At 182.

37 *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 at 1065.

38 *CREEDNZ Inc v Governor- General* [1981] 1 NZLR 172 (CA) at 182-183.

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. And when the tests are whether a work is likely to be in the national interest and is essential for one or more of the purposes specified in s 3(3), it is not easy to assert of a particular consideration that the Ministers were legally bound to have regard to it.

[73] It is important in this context that review for error of law is confined to requiring the decision-maker to consider matters which expressly or by implication the decision-maker "ought to have regard to", or conversely "would not be germane".

[74] Refining the point, the issue becomes whether the reluctance of Judge Borthwick's division to engage with the analysis of Judge Jackson's division is a failure to take into account a mandatory relevant consideration?

The authorities on like for like

[75] The High Court has previously held that the Town and Country Planning Appeal Boards are

> ... not bound by its previous decisions, and is free to consider each case on its own facts and merits...[39]

[76] Mr Somerville QC argued that where two divisions of the same Court are examining the same issue, then, in principle, both Courts should strive to agree.

[77] Mr Somerville QC submitted that a failure to act consistently gives rise to a ground of review on these *Wednesbury* administrative law principles. In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* Blanchard J said: [40]

> Inconsistency can be regarded as simply an element which may give rise or contribute to irrationality in the result of the process.

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39 *Raceway Motors Ltd and Others v Canterbury Regional Planning Authority* [1976] 1 NZLR 605 at 607.

40 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 67.

[78] In the same case, Thomas J, in his dissenting decision, agreed with the majority view in this respect, saying:[41]

> ...the notion that like should be treated alike has been an essential tenet in the theory of law.

Thomas J went on to say that he did:[42]

> ... not doubt ... for a moment that it is an established principle of administrative law that a statutory body must act consistently towards those in the same situation unless the unequal or different treatment can be justified on a rational basis.

Thomas J then went on to say:[43]

> ... that the principle in issue derives from the fundamental notion inherent in the rule of law that like is to be treated alike. In essence, a statutory body which fails to carry out its power or exercise its discretion even-handedly where there is no justification for acting otherwise abuses its powers or exercises its discretion wrongly.

[79] Mr Somerville QC cited the Privy Council in *Matadeen v Pointu*,[44] where the Privy Council were discussing the notion of even-handedness as one of the building blocks of democracy, and said:

> ...treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.

[80] Mr Somerville QC's argument is also reflected by the practice of common law Courts of "coordinate jurisdiction", not to differ one from the other.[45] In the case of *In re Howard's Will Trusts*,[46] a Mr Howard had devised valuable properties to his trustees, on trust for his wife for life, and after her death, for his daughter, his only child, with remainders over his grandchildren. Mr Howard wanted to retain the surname and arms of Howard over generations. The trust had a complicated clause

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41 At 72.
42 At 92.
43 At 93.
44 *Matadeen v Pointu* [1998] 3 WLR 18 (PC) at 26.
45 *Halsbury's Laws of England* (4th ed, 2001) vol 37 Practice and Procedure at [1244], entitled "Decisions of Co-ordinate Courts".
46 *In re Howard's Will Trusts* [1961] Ch 507. Co-ordinate means at the same level, as the divisions were here.

which essentially required the grandchildren acquiring these estates to change their surname if necessary to Howard. At least one of the grandchildren had refused to do that, and the question was whether or not they had forfeited their entitlement to the property. This raised an argument that it was against public policy, to force a name onto a person, so these provisions were ineffectual. Wilberforce J, sitting at first instance, later to become Lord Wilberforce, said as an observation:[47]

> ...it is evidently undesirable that on a subject so much a matter of appreciation different judges of the same Division should speak with different voices.

[81] Wilberforce J did not have to explain what was "evidently undesirable". It goes to the question of public confidence. Two Courts of equal standing should not speak with different voices.

[82] In *Murphy v Rodney District Council*,[48] one of the issues was whether another resource consent application would be more likely to be granted, out of consistency with a decision consenting to the proposal before the Court – that is to say, the precedent effect. Baragwanath J said:[49]

> [39] It does not follow from the fact that rigid precedent is unattainable that no regard may lawfully be had to broadly similar decisions. To say that is not to import into environmental decision making the rigid doctrine of precedent... that would be impossible and indeed undesirable given the wide variety of facts, the number and range of decision makers, and the cost and delay of marshalling precedents. But "justice involves two factors – things, and the persons to whom the things are assigned – and it considers that persons who are equal should have assigned to them equal things" (Aristotle, *Politics* (1952), p 129). Human experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which it is the duty of the Courts, as well as others who make decisions on behalf of the public, to avoid.

[83] There is no doubt that in this case Foodstuffs and Cross Roads have, in a broad sense, a right to have a sense of grievance after they have been granted resource consents for their proposals only to see that these proposals are not adopted and provided for in PC19. They are seeing, in a broad sense, one division of the

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47 At 523.
48 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).
49 At [39].

Environment Court supporting their proposals and another division being hostile to them. This does not encourage confidence in the judicial system.

[84] One of the central issues for judgment in this case is whether the distinction between ss 104 and 104D on the one hand (Foodstuffs and Cross Roads), and by ss 31 and 32 on the other (PC19), is sufficient to justify different merit judgments on the Pak'nSave and Mitre 10 Mega proposals.

Resolution of like for like issue

[85] As is apparent from the dicta cited above, like for like is a common law principle. It can be, and is, correctly applicable to the application of statutes. This is because all statutes are enacted into a common law legal system. The Courts bring to the interpretation of statutes the basic principles of justice which lie at the heart of the common law system, and will apply those subject only to directions from the contrary from Parliament.

[86] All Judges are very alive to the importance of maintaining public confidence in adjudication, both of common law and statutory cases. Much of the reasoning of Judges in cases compares previous decisions for their similarity to assist guiding the adjudication to the just solution of the problem.

[87] The issue in this case was to what extent the issues were so common as to make it relevant for Judge Borthwick's division to consider the reasoning and conclusions of Judge Jackson's decision.

[88] There is an aphorism used by practitioners of regulatory law, that *"the answer you get depends on the question you ask"*. It is critical when one applies a regulatory statute to apply the test set in the statute. Regulatory statutes are very carefully drafted with that in mind. They are drafted, of course, on political direction by the relevant Ministers of the Crown, but by professionals who understand the subject matter and choose language which sets very carefully the test to be applied.

[89] The RMA is a very complex statute. Significantly more complex than its predecessors, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967.

[90] The RMA, as enacted and amended, like its predecessors, reveals a compromise between regulating activities according to plans, and allowing departures from plans. As originally enacted, consent authorities were given an obligation to have regard to all planning instruments, whether operative or proposed.[50] As already noted in the RMA, activities are set on a graduating scale for ease of implementation, with or without regulatory consent, from permitted onto controlled activities (the first does not need consent and the second will get consent) and thereafter to a rising scale of restricted discretionary, discretionary, non-complying until prohibited activities.[51] The task of granting resource consents is treated as a separate task under the RMA, via s 104, than the task of determining the content of plans, ss 31 and 32. This distinction is material in this case, for the reasons which follow. Coupled with the particular context of this case, the distinction between these sections means that Judge Borthwick's division was not obliged by law to consider Judge Jackson's division's reasoning.

[91] In some contexts, when large scale proposals are pursued by way of resource consent, granting them consent can have enduring consequences for the content of plans. This is essentially the contextual setting in this case, because the establishment of a Pak'nSave and Mitre 10 Mega complex and associated car parking, east of the EAR, has to be seen in a wider framework, where PC19 is already proposing a town centre to the west of the EAR, and beyond Glenda Drive, on the other side of the airport, there is another town centre, the Remarkables Park. Now, of itself, of course, a Mitre 10 Mega and Pak'nSave would not be of itself a commercial or town centre, but, as already noted in [555], Judge Borthwick's division was concerned that allowing these retail activities to locate at the intersection of the EAR and proposed Road 2 could generate another commercial centre, indeed a "fourth".

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50 Section 104.
51 Sections 104A-D.

[92] Reading Judge Jackson's division's decision, there is no sense that it is deciding whether or not to grant the resource consent in a wider framework, embracing considerations as to the number of commercial centres to be seen as appropriate for Queenstown. Rather, Judge Jackson's division's decision focuses upon the objectives and policies of PC19, but does not address the function of PC19 relative to other parts of the Queenstown district. This is natural enough, as resource consent applications tend to be examined in the context of the immediate environment into which the proposed activity is to be placed.

[93] The sleeve of the EAR, and the associated traffic issues, was a common issue nonetheless that the two divisions had to examine. Integrated design, and particularly the bulk and location of buildings was another common issue. It was probably inevitable that Judge Jackson's division had to comment on the proposal of a Trade Retail Overlay nearby, in the PC19 issues.

[94] Judge Borthwick's division could have discussed Judge Jackson's division's reasoning and conclusions in regard to those two sub-topics of the sleeve and integrated design more expansively than it did.

[95] Paragraph [127] of Judge Borthwick's division does read as essentially dismissive. It includes implicitly a criticism that some of Judge Jackson's findings went beyond the proper scope of an enquiry as to the merit of a resource application. That is how I read the phrase "(and obiter)". But I think [127] should be read with the following paragraphs, [128], [129] and [130], which I think contain more reasons why Judge Borthwick's division did not find anything helpful in Judge Jackson's division's decision. The rejection is further explained by Judge Borthwick's division rejecting the proposal of a trade retail overlay zone, anywhere east of the EAR, that is on the same side of the EAR as the Pak'nSave and Mitre 10 Mega proposals. Judge Borthwick's division's decision was concerned about the proposed activity area E3 (which would absorb both the Pak'nSave and the Mitre 10 Mega and QLDC's proposed area for yard-based retail) as accommodating large format retail (LFR) activities in a non-town centre arrangement.[52] Judge Borthwick's division was satisfied that the growth demand for hardware, building and garden supplies

[52] *PC19* at [536].

could be accommodated within the existing zones or consented development.[53] The Court was concerned that if E3 was intended to accommodate activities of this sort, then it would provide floor space supply which would exceed the unmet growth demand for all sectors of retail activity.[54] That led to important later conclusions, which I have been explaining are relevant ultimately to understanding [127] through to [132]; these conclusions are [557] to [560]:

> **Outcome**
>
> [557] On the evidence provided we are not satisfied that AA-E3 or the proposed Trade Retail Overlay would give effect to the objectives and policies of the operative District Plan, and if a fourth commercial centre node emerges then it is likely to be inconsistent with those provisions. In short, we conclude that the AA-E3 objective is not the most appropriate way to achieve the purpose of the Act.
>
> [558] We may have reached a different view on whether there should be provision for a Trade Retail Overlay had Remarkables Park Ltd (supported by SPL) not successfully applied for a private plan change enabling up to 30,000m^2 additional retail floorspace at the Remarkables Park Zone located near the periphery of its existing centre. PC34 (now operative) is to enable future expansion of the commercial centre, including large format retail activities. In making our determination on all activities areas we have taken into consideration that there is zoned land to accommodate large format retail activities in the Remarkables Park Zone.
>
> [559] It follows from all our findings that we reject SPL's relief to zone its land AA-E3.
>
> [560] And we reject the Trade Retail Overlay.

[96] I think there is no doubt that Judge Borthwick's division was very alive to the reasoning of Judge Jackson's division as to the merits of a Pak'nSave and Mitre 10 Mega, but did not agree, principally because of its reluctance to introduce trade retail activity on SPL's land, the subject of E3, which proposed zone includes the Pak'nSave and Mitre 10 Mega proposal. That judgment was made looking at a bigger picture than the naturally limited focus of Judge Jackson's division.

[97] In this context then, I think the correct classification is that it was permissible, but not mandatory, for Judge Borthwick's division to engage in the reasoning and resolution of Judge Jackson's division when examining these two resource consent applications. The extent of their engagement and the reasons they

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53 At [538].
54 At [539].

gave are a sufficient response, and do not amount to a refusal to take into account mandatory relevant considerations, and so are not an error of law.

[98] As a precaution, I turn to treat the like for like obligation as potentially separate from an identification of relevant considerations. If it is not already clear, the like for like obligation can in some contexts make relevant considerations mandatory. I have found that they are not mandatory. But if I am wrong, and there is a separate and independent like for like obligation, I am now considering that separately. In this context, I am putting *CREEDNZ* to one side, the *Wednesbury* dictum to one side, and focussing solely on the common law principle that a Court should not differ with the views of a peer Court (co-ordinate Court).

[99] For reasons I have already canvassed, the tasks set the two different divisions are, to an RMA lawyer, two quite distinct tasks. I readily acknowledge, however, that to non RMA specialists that has to be explained.

[100] Quite independently of the common law principle, depending on the context, there can be reasons within the scheme and structure of the RMA which would encourage, where the context makes it possible, and desirable, for common decision-making when a proposal is the subject both for consideration under a proposed plan change and consideration as a resource consent. I have found above that Judge Borthwick's division could have considered Judge Jackson's division's views on the "sleeve" of the EAR, and the reasonableness of a trade retail overlay east of the EAR. The issue is whether that is possible and useful in this context, and unilaterally mandatory.

[101] It is possible to draw a meaningful distinction between the architecture of the RMA and the detail. Like many regulatory statutes, the RMA has had a lot of detail poured into it since its enactment, which has to a degree obscured its architecture. But its architecture does essentially remain via ss 31, 32, 74 and 104.

[102] The hierarchy of the statutory instruments running off the RMA, are set out in sequence in s 104(1)(b):

> **104 Consideration of applications**

> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> ...
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and

[103] Just looking at s 104(1)(b), one can see at a glance that those are all standards, regulations, policies and plans for which there is political accountability.

[104] Political accountability is not only intended by the RMA, it is inevitable. For there is no coherent set of ethics or values which dictates when resources are to be developed, for what purpose, and how, or whether or not they should be left alone. The values collected in Part 2 conflict with each other. For example, there is no necessary or best resolution of the inevitable tension between conservation and development. It is the context which drives the weight given to one value over the other. All communities have to provide for activities which many people do not want in their back yard (NIMBY). The RMA does not leave development to market forces. It is no accident then that the question of granting consents or not is required by s 104 to be judged only after having had regard to the contents of all relevant plans, operative or proposed.

[105] Of course the contents of plans can reflect the origins of plan changes which might be private plan changes. And they can reflect provisions amended or inserted by the Environment Court on appeal. But, as I have already occasioned to mention, the Environment Court's jurisdiction is that of the territorial authority.

[106] It is in this context that there is normally a deference given by the Environment Court to the responsibilities of the territorial authorities, and where appropriate Central Government, to the policy decision reflected in the plans, operative or proposed.[55]

[107] In this case, one of the reasons why Judge Borthwick's division did not engage with Judge Jackson's division's decision is that it considered that Judge Jackson's division had gone too far beyond having regard under s 104, into expressing views on the desirable content of the proposed plan PC19 planning issues. That is the context of the use of the term "obiter". For example, whether or not there should be a sleeve concept on both sides of the EAR is fundamentally a planning issue. It extends well beyond the site of the Pak'nSave, which occupies only part of the proposed sleeve. Judge Borthwick's division regarded that as a concept which is still a work in progress.

[108] I think in the context of this case, Judge Borthwick's division was entitled to be essentially dismissive in [127] of the relevance of the reasoning of Judge Jackson's division, on the sleeve, on trade retail activity east of the EAR, and on the design management of the EAR neighbourhood – all being matters in issue as to the content of PC19. Second, to engage on these issues would be to be bedevilled by the complication of no clear overlap of witnesses, but most importantly by the different question asked by s 32 analysis from s 104 analysis.

Conclusion on SPL's appeal

[109] For these reasons, I find that SPL's appeal fails. There is no error of law by reason of a failure to have regard to a similar decision.

Foodstuffs' appeal

[110] Foodstuffs argue that [84] of *Hawthorn* required Judge Borthwick's decision to include in the environment of PC19 a supermarket and hardware retail activities on the proposed site. This is because resource consent had been granted to them, and the consents were likely to be implemented. Section 104(1)(a) expressly provides

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55 *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC) at [45].

that a consent authority must have regard to the environment before allowing any activity.

[111] The purpose of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act.[56]

[112] The purpose of a territorial authority's plan is to "establish and implement objectives, policies and methods to achieve integrated management... of the land and associated natural and physical resources of the district."[57] Where some of that land is already the subject of resource consents likely to be implemented, and the plan has not yet been made for that locality, it is natural enough that the territorial authority has to write a plan which accommodates the presence of that activity.

[113] For this reason, it is a very significant decision whether or not Judge Borthwick's division's decision settles the provisions of PC19, accommodating the Pak'nSave and Mitre 10 Mega activities as proposed by SPL and Foodstuffs, or not. Judge Borthwick's division declined to take these resource consents into account at all. It distinguished [84] of *Hawthorn* as having no application to its situation.

[114] There was some difference between counsel as to whether or not Judge Borthwick's division had found as a fact that the two resource consents were not likely to be implemented. Or rather had found that it was not possible to find it a fact whether or not they were not likely to be implemented, by reason of the uncertainty of the appeals.

[115] In my view, the Court of Appeal in *Hawthorn* intended [84] to be a real world analysis in respect of resource consent applications. The setting of the case was of application for resource consents, under s 104, not the application of ss 31 and 32. [58] That is also reflected in [84], "at the time a particular application is considered". The Court of Appeal in *Far North District Council v Te Runanga-O-Iwi O Ngati*

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56 Section 72.

57 Section 31(1).

58 Not so in the case of allowing for permitted uses, for as the Court of Appeal explained, both in the *Hawthorn* and the recent *Carrington* decision, the assumption that permitted uses will be taken advantage of is not a likelihood assumption.

Kahu recently applied *Hawthorn* [84], but again in the context of the application for resource consents, not in the planning context of ss 31 and 32.[59]

[116] When a territorial authority is deciding the plan for the future, there is nothing in the Act intended to constrain a forward-looking thinking. A similar point was made by Judge Borthwick's division, when distinguishing [84]. (See [122] of their reasoning set out above). Within that paragraph they said:

> [122] ...Unlike *Hawthorn Estate Ltd* (cited to us by SPL and Foodstuffs) this court is not concerned with how the environment may be modified by the utilisation of rights to carry out permitted activities under the District Plan. Indeed the proposed modification of the existing environment is the subject matter of these plan change proceedings. *Hawthorn Estate Ltd* is therefore distinguishable on its facts.

[117] In any event, if I am wrong on that point, the likely to be implemented test in [84] was intended to be a real world analysis, as is confirmed by [42] of the *Hawthorn* decision which ends with the word "artificial":

> [42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[118] Treated as a wholly practical issue, which is what I think Judge Borthwick's division did, the Court was faced with a very uncertain situation. It knew the resource consents were under appeal. As a result, it found that they could not assess likelihood. This is clear from [131], set out above, being the conclusion, because it involves speculation as to the High Court appeals ([124], set out above).

[119] Recognising this, Mr Soper argued that the law requires the fact of the appeal to be ignored. He relied on s 116(1) which provides:

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[59] *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu* [2013] NZCA 221 *(Carrington).*

> **116 When a resource consent commences**
>
> (1) Except as provided in subsections (1A), (2), (4), and (5), or section 116A, every resource consent that has been granted commences—
>
> (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
>
> (b) when the Environment Court determines the appeals or all appellants withdraw their appeals—
>
> unless the resource consent states a later date or a determination of the Environment Court states otherwise.

And on r 20.10(1)(a) of the High Court Rules, which provides:

> **20.10 Stay of proceedings**
>
> (1) An appeal does not operate as a stay—
>
> (a) of the proceedings appealed against; or
>
> (b) of enforcement of any judgment or order appealed against.

[120] He argued that *Hawthorn's* analysis extended to the obligations being met by a territorial authority in relation to district plans, as well as to considering whether to grant resource consents. He relied on [48] and [49] in *Hawthorn*:

> [48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purpose of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66 obliges regional councils to prepare and change regional plans in accordance with Part II.
>
> [49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

He also relied upon the decision of *GUS Properties Ltd v Marlborough District Council*,[60] where the High Court held:

> ... unless there is some good basis upon which a stay should be granted then it should be refused as the appeal of the appellant is from a decision of an experienced Tribunal which should be given effect to unless the appellant will lose the benefit of its appeal unless a stay is granted.

[121] For these reasons, Mr Soper submitted that Judge Borthwick's division was required to consider the likelihood of whether consents would be implemented on the basis of the factual evidence before the Court. The Court had already found there was no compelling reason why the other associated resource consents would not be obtained. In the absence of a stay there was no basis for the Environment Court to decline to determine whether consents would be implemented, and therefore exclude them from its consideration as to what constituted the relevant environment for PC19 purposes.

Analysis

[122] There was no suggestion that the holders of the resource consents were seeking to implement them pending the appeals. Judge Borthwick's division was in a very difficult position. If it did treat the environment the subject of the plan change as including a large supermarket and trade retail in that location, on the southeast side of the intersection of the EAR and proposed Road 2, then it would have had to adjust to all the ramifications of that. It would not make particular sense and was likely to be incoherent to have incompatible plan change provisions applicable to the land.

[123] It also took into account that, if the resource consents were upheld on appeal, they could be utilised, notwithstanding that the underlying zoning would not provide for the activity. They did this when considering whether their preferred E1 and E2 zoning rendered the SPL land incapable of reasonable use, an argument addressed to it under s 85 of the Act (not pursued on this appeal). In [864], they said:

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[60] *GUS Properties Ltd v Marlborough District Council* HC Wellington AP 230/94, 12 September 1994 at 5-6.

> [864] ... It is our understanding that, if upheld on appeal, the land use consents granted by the Environment Court may be exercised notwithstanding that the underlying zoning would not provide for this activity.

[124] It was suggested in argument that one of the options of Judge Borthwick's division would have been to delay completing its decisions on PC19 until it knew the outcome of the appeal in the High Court. But discussion on this point rapidly indicated that such an approach would also require allowing time for the Court of Appeal and the prospect that the issue might go through to the Supreme Court. Years could pass. All this has to be set against the context where PC19 started its life in 2007, nearly seven years ago.

[125] There are suggestions in Judge Jackson's division that this delay is already a concern and embarrassment.[61] It must be. Parliament could never have intended that a territorial authority having designed a plan change and publicly notified it would then take seven years to receive submissions and form a judgment as to the most appropriate way to achieve the purpose of this Act. It was not envisaged that appeals would unduly extend the process. On the contrary, there are a number of sections intended to achieve speedy resolution of appeals. Section 121(1)(c) provides:

> **121 Procedure for appeal**
>
> (1) Notice of an appeal under section 120 shall be in the prescribed form and shall—
>
> ...
>
> (c) be lodged with the Environment Court and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with this Act

[126] This means that within three weeks any appeals from the territorial authority's decision should be lodged with the Environment Court. That presupposes efficient analysis of the issues arising by the appellant's advisers.

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[61] *Foodstuffs* at [267]-[269].

[127] Section 269 of the RMA gives the Environment Court the power to regulate proceedings in such manner as it thinks fit, and has a goal of a fair and efficient determination of the proceedings.[62]

[128] Section 272(1) provides:

> **272 Hearing of proceedings**
>
> (1) The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so.
>
> (Emphasis added)

[129] Counsel before the Court partially explained the long delay. The Court knows it was significantly affected by airport issues. See *Foodstuffs* at [267]-[269]. Whatever the explanation as to why this PC19 was not resolved soon after October 2009, when the commissioners released a decision recommending PC19 be approved, and why it took until February 2012 before the appeal against the commissioners' decision was heard, the predicament facing both divisions of the Court is manifest come the end of 2012.

[130] It would be very hard for Judge Borthwick to have to justify in the public interest, let alone against the efficient policy of the RMA, abandoning delivering a decision on PC19 while awaiting appeals on the Foodstuffs and Cross Roads resource consents through the appellate Courts. She did not.

[131] On the other hand, if she was going to go ahead and assume that the resource consents were granted, and write a plan change, the provisions of which would adopt the logic and reasons of the grant of the resource consent, this could have nullified the outcome of the appeal process. For if, as a result of the appeal process and the referral back, the resource consents were not granted, the parties favouring that outcome would be thwarted by the adoption of the challenged outcome in PC19.

[132] I consider that Judge Borthwick's division had in fact no choice but to keep going.

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[62] See s 269(1) and (4).

[133] It also needs to be kept in mind that the decision under appeal is an interim "higher order" decision. There is still a lot of work left to be done, and a further hearing.

[134] This next stage may be able to continue consistent with the contingencies that follow upon the now Court of Appeal litigation. If the Court of Appeal reinstates the resource consents, then there may still be time for Judge Borthwick's division to take them into account as likely to be implemented. If the Court of Appeal dismisses the appeals, there may still be time for Judge Jackson's division to reconsider the matter in the light of directions from the High Court. If the Court of Appeal issues the decision between these two options, with further directions to Judge Jackson's Court, there may likewise still be time for an urgent hearing by Judge Jackson's division to accommodate that, before Judge Borthwick's division completes the lower order matters.

Conclusion on Foodstuffs' appeal

[135] There was no error of law on the part of the Environment Court declining to treat the resource consents as likely to be implemented. For these reasons, the *Foodstuffs* appeal fails.

General conclusion

[136] Both appeals are dismissed. Costs reserved.

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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000054
[2014] NZHC 1362

BETWEEN	SIMONS HILL STATION LIMITED AND SIMONS PASS STATION LIMITED Appellants
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second respondent

Hearing:	12 and 13 May 2014
Appearances:	M E Casey QC and K G Reid for the Appellants S Gepp and P Anderson for the First Respondent M Dysart for the Second Respondent
Judgment:	17 June 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an appeal against a decision of the Environment Court refusing to partially strike out an appeal by the first respondent ("RFB").[1] RFB's substantive appeal is against the decision of commissioners appointed by the second respondent ("Council") by which the appellants ("Simons") were granted consent pursuant to the Resource Management Act 1991 ("the RMA") to take and use water for irrigation from Lake Pukaki or the Pukaki Canal for their farm properties Simons Hill Station and Simons Pass Station. These consent applications were publicly notified at the same time as 159 other applications for similar activities in the

[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2013] NZEnvC 301.

Upper Waitaki area. RFB's substantive appeal against the decision of the Commissioners cited adverse effects on landscape, terrestrial ecology and water quality.

[2] RFB has additionally filed a cross-appeal relating to the Environment Court's interpretation of s 120 of the RMA.

[3] Simons' strike out application sought to bring an end to RFB's appeals so far as they raise issues which Simons' claim are outside the scope of RFB's submission on the consent applications, dated 28 September 2007 ("the 2007 submission"). Simons say that the 2007 submission was solely confined to issues related to compliance with the Waitaki Catchment Water Allocation Plan ("the Waitaki Plan") relating to the area in question and the effects of the taking of water. The Waitaki Plan, and the 2007 submission, it is said relate only to water *allocation*, whereas any issue relating to water allocation Simons contends has now been abandoned by RFB.

[4] Simons maintains that the matters now proposed to be raised by RFB on its appeal relate only to the effects of the use and application of the water on terrestrial ecology and the landscape. These are matters with which the Waitaki Plan did not deal, and which are, Simons says, outside the scope of the 2007 submission.

[5] The substantive appeal is yet to be heard before the Environment Court as the outcome of the present appeal has the potential to influence the scope of that appeal.

The appeal

[6] The application by Simons for partial strike out of RFB's substantive appeal in the Environment Court was two-pronged:

(a) an appeal against the grant of a resource consent is constrained as to scope by the appealing party's original submission lodged with the consenting authority.

(b) the matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[7] As to the former, the Environment Court agreed with Simons' argument. As to the latter, the Environment Court determined that the matters raised on appeal to the Environment Court fell within the purview of RFB's 2007 submission, therefore circumventing the invocation of the former finding. It was on this basis that the application for partial strike out failed, which in turn led to this appeal. The grounds on which Simons now appeal are that:

(a) the Environment Court incorrectly interpreted RFB's 2007 submission as raising issues as to the effects on terrestrial ecology of Simons' proposed use of the water.

(b) the Environment Court wrongly interpreted the objectives and policies of the Waitaki Plan and reached incorrect conclusions as a result.

(c) the Environment Court wrongly interpreted Policy 12 of the Waitaki Plan and therefore incorrectly concluded it was relevant.

(d) the Environment Court was wrong to consider the adequacy or otherwise of an applicant's AEE and its responses to s 92 requests as a consideration relevant to the scope of submissions made on the application for resource consent.

(e) the Environment Court was wrong to hold that RFB's statement of issues did not qualify its notice of appeal.

[8] In response RFB submits:

(a) the grounds of appeal disclosed by Simons are seeking to relitigate the findings of the Environment Court appeal under the guise of a question of law. Accordingly, this appeal ought to fail as appeals to the High Court may only be on questions of law.

(b) even if the grounds of appeal do legitimately disclose questions of law, these are immaterial when considered in the context of the factual findings of the Environment Court in its entirety.

[9] The Council supports, to a greater or lesser extent, the position of Simons with respect to the appeal. This judgment will therefore concentrate primarily on the submissions of Simons and RFB.

The cross-appeal

[10] RFB cross-appeals against the decision of the Environment Court on the basis that it was wrong to interpret s 120 of the RMA as constraining the scope of an appellant's grounds of appeal to matters raised in its own original submission to the consenting authority.

[11] In response, Simons and the Council submit that the cross appeal should fail on the basis that the interpretation of the Environment Court was correct.

Issues for resolution

[12] Despite the apparent complexity of this case, there are ultimately only two issues which this Court is required to resolve:

(a) Did the Environment Court err *in law* in finding that RFB's original 2007 submission was sufficiently wide to encompass the grounds on which it appealed the granting of the resource consent to the Environment Court?

(b) Was the Environment Court wrong to interpret s 120 of the RMA as meaning that an appeal to the Environment Court is constrained in scope by the original submission of the appellant to the consenting authority?

The Environment Court decision

The application

[13] As previously stated, the application before the Environment Court was an application by Simons to partially strike out three of RFB's appeals on the following grounds:[2]

> (a) the Court has no jurisdiction to entertain the appeals filed by Forest & Bird;
>
> (b) Forest & Bird's submission on the notified applications for resource consent concern non-compliance with the Waitaki Catchment Water Allocation Plan … This matter is no longer in contention;
>
> (c) the court has no jurisdiction to consider the issues identified by Forest & Bird in its memorandum dated 8 March 2013;
>
> (d) Forest & Bird has failed to particularise its appeals so as to ensure that the matters to be raised in evidence are within jurisdiction; and
>
> (e) Forest & Bird has failed to clearly and unambiguously identify the matters that it wishes to raise as part of its appeal "in a way that excludes mattes not being raised".

[14] RFB opposed the application for strike out on the following basis:[3]

> (a) the matters pursued on appeal are within the scope of its submission on the resource consent applications;
>
> (b) if there is any doubt as to scope, this should be resolved in Forest & Bird's favour; and
>
> (c) Forest & Bird's appeals raise issues about water quality and quantity that have yet to settle and therefore remain in contention.

Simons' arguments

[15] In support of its application in the Environment Court, Simons submitted:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority; this position is consistent with principles of fairness and natural justice.[4]

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2 At [3].
3 At [5].
4 At [35] – [36].

(b) the scope of a submission concerns not only the grounds on which the submission is made, but also the relief sought. Here, the relief sought by RFB is referable to the applications only to the extent that they were contrary to the Waitaki Plan. Therefore, RFB was seeking only to decline non-complying activities, whereas the Simons' activities were discretionary.[5]

(c) Part 2 of the RMA cannot be used to widen the scope of the appeal beyond the scope of the original submission made by RFB. The relevance of Part 2 matters is quite different from the question of whether the Environment Court had any jurisdiction to hear them.[6]

(d) the statement of issues which the Court directed RFB to file is analogous to "further particulars" which qualifies, though does not formally amend, the notice of appeal. To the extent the appeal originally dealt with water quality issues these are no longer in issue as a result of the statement of issues.[7]

(e) RFB cannot lead evidence on the effects of dairying, including the effects of dairying on water quality.[8]

RFB's arguments

[16] In response by way of opposition in the Environment Court, RFB contended:

(a) the meaning of s 120 is clear from its context and is not limited to matters raised by the submitter in their original submission.[9]

(b) in any event, the very broad nature of the submission was sufficient to import relevant concepts from the Waitaki Plan so as to give RFB standing to appeal.[10]

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5 At [38] – [39].
6 At [40].
7 At [41].
8 At [42].
9 At [28].

(c) the Regional Council, by requesting further information pursuant to s 92, acknowledged that Lake Pukaki was considered under the Waitaki Plan to have high natural character and high landscape and visual amenity values. A submitter viewing the correspondence should be entitled to rely on statements that these values are provided for under the Waitaki Plan.[11]

(d) permitting RFB to call evidence on landscape and terrestrial ecology would result in no prejudice to Simons.[12]

(e) the Environment Court either has a discretion or is obliged to consider evidence on Part 2 matters as pursuant to s 6 any person exercising functions and powers under the Act (here the Environment Court) is obliged to so consider.[13]

(f) RFB's submission includes all of Simons' proposed activities, if only for the reason that all consent applications are listed in attachment A to the submission.[14]

(g) while RFB anticipates that the general topic of water quality will be settled, RFB has not withdrawn or abandoned its appeals on this topic, and will remain in issue if the use of water is to support a dairying activity.[15]

Decision of the Environment Court

[17] Rather helpfully, the Environment Court expressly set out the five issues which it was required to determine, and provided findings on each issue in turn. Relevant excerpts from the Environment Court judgment are replicated below:

> [43] From the foregoing the following issues arise for determination:

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10 At [29].
11 At [30].
12 At [31].
13 At [32].
14 At [33].
15 At [34].

(a) is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource application or both?

- Sub-issue: does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?

(b) did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?

- Sub-issue: if it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?

(c) does the Environment Court have a discretion to direct, or indeed is the Court required to direct, the parties produce evidence on matters pertaining to s 6 of the Act?

(d) did the Environment Court's decision on preliminary issues determine the ground of appeal that the Commissioners modified the consent application?

(e) has Forest & Bird partially withdrawn its appeal on water quality?

…

Issue: **Is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource consent application, or both?**

Sub-Issue: *Does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?*

…

[59] If a submitter is able to appeal on grounds not raised in his or her submission on the application, then the appeal would not be against the decision of the consent authority. That is because in accordance with s 104 and s 104B the consent authority makes its decision having considered both the application and any submissions received.

[60] On Forest & Bird's interpretation s 290 would be rendered ineffective as the court would be deciding the application on a different basis to that considered by the consent authority. Thus the court would not be in a position to confirm, amend or cancel the consent authority's decision as it is required to do under s 290. Section 113 requires the consent authority to provide written reasons for its decision, including the main findings of fact. Again, on appeal if a submitter is not constrained by its submission on the application there would be no relevant decision for the court to have regard to under s 290A.

…

[65] Given the fundamental role of the written submission in the consenting process, as recorded in the decision of *Butel Park Homeowners Association v Queenstown Lakes District Council* and *Rowe v Transit New Zealand*, we consider our interpretation to be consistent with the principle that there is finality in litigation.

…

Outcome

[73] We hold that on appeal a submitter is constrained by the subject matter and relief contained in his or her submission on a resource consent application.

Issue: **Did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?**

Sub-issue: *If it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?*

Introduction

[74] Simons' overall submission is that reference to non-complying activities in the Forest & Bird submission, particularises their concern as relating to the non-compliance with the flow and level regime and with the water allocations.

[75] There is no doubt that Forest & Bird could have squarely and clearly set out in the submission its concerns about the landscape and terrestrial ecology effects of the use of the water. Despite the submission having been signed by legal counsel, it is poorly constructed and at times difficult to follow. That said, the submission is to be considered against the context in which it was made, including the backdrop of the Waitaki Plan (and other relevant Plans) and the applications themselves.

…

Consideration and findings

…

[99] At the time the submission was made Forest & Bird did not know whether the Simons' applications were for non-complying activities and therefore it was not in a position to assess the applications in the context of a Plan that envisages change through the allocation and use of water. If Forest & Bird could not assess the effects of the proposal in the broader policy context of the Waitaki Plan's allocation framework- then it would be difficult, if not impossible, to form a view on the individual effects of the proposal on the environment.

[100] We agree with Forest & Bird that anyone reading the consultant's response would reasonably have assumed landscape is a matter addressed under the Waitaki Plan. Indeed, the request for information by the Regional Council also assumed this to be the case. It may be that the Regional Council and Simons had in mind that the Waitaki Plan policy applied to the

applications or that the Waitaki Plan applied because of its stated assumption that the effects related to the taking and use of water are to be addressed under other statutory plans. The writers do not shed any light on their understanding.

[101] Forest & Bird could have front footed its concerns about the landscape and terrestrial ecology effects of the use of the water. However, in this case we find that it would be wrong to alight upon individual words and phrases or to consider the submission in isolation from or with little weight being given to the fact that the submission is on 161 consent applications. Standing back and having regard to the whole of the submission we apprehend that Forest & Bird was generally concerned with the effects on the environment of all of the applications for resource consent. Secondly, it was concerned to uphold the integrity of the Waitaki Plan and to ensure that decision making under that Plan was in accordance with the purpose and principles of the Act. Thirdly, we consider it unsound to particularise or read down the submission as being confined to non-complying activities.

[102] Finally, we do not infer - as we were invited to do so by Simons - that the Assessment of Environmental Effects was adequate because the Regional Council did not determine that the application was incomplete and it to the applicant (s 88A(3)). We observe that s 88A(3) confers a discretion upon the consent authority to deal with the application in this way. It was open to the consent authority to request further information under s 92 of the Act either before or after notification (which it did). Ms Dysart referred us to the affidavit of Ms B Sullivan filed in relation to the jurisdictional hearing, where the Council's practice that applied at the time the application was lodged is discussed. 63 At paragraph [24] Ms Sullivan deposes "[w]hat would now be considered deficient applications were often then receipted, with section 92 of the RMA used to obtain the necessary information for the application to be considered notifiable".

Outcome

[103] Forest & Bird's submission on the notified application does confer scope to appeal the decision to grant resource consents to Simons on the grounds that the effects on landscape and terrestrial ecology are such that the purpose of the Act may not be achieved.

[104] Given this, we do not need to decide the issue whether an absence of prejudice confers standing to introduce new grounds for appeal.

(citations omitted)

The Resource Management Act 1991 appeals regime

[18] This appeal is governed by s 299 of the RMA, which provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

(2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.

[19] Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:

(a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.

(b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).

(c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:[16]

(i) applied a wrong legal test;

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

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

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

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for

[16] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[20] In the context of these general principles, I now turn to consider the appeal and cross appeal. It is useful here to consider the cross-appeal first.

The cross-appeal against the interpretation of s 120

Introduction

[21] A claim that a lower Court or Tribunal has erred in the interpretation of a statute is a clear example of an alleged error of law. This therefore deserves to be afforded consideration in some detail, particularly given the potential implications it might have for the wider consenting process under the RMA. Section 120 provides as follows:

> **120 Right to appeal**
>
> (1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) The applicant or consent holder:
>
> (b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.

(2) This section is in addition to the rights provided for in sections 357A, 357C, and 357D (which provide for objections to the consent authority).

Previous relevant decisions

[22] I was referred by counsel for all parties to a number of decisions as to the proper interpretation of s 120. In this respect an appropriate starting point is the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[17] That decision concerned an application by Estate Homes for a land use consent which included, inter alia, a request for compensation for constructing a road wider than was necessary for the subdivision in question.[18] One of the issues was whether *an applicant* could be granted compensation on appeal *greater* than that claimed before the originating tribunal. There the Supreme Court stated:

> [27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.
>
> [28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.
>
> [29] *We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision*

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17 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

18 At [2] – [10].

> *to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.*

(Citations omitted and emphasis added)

[23] In my view however, *Estate Homes* is distinguishable from the present type of case on the simple basis that a decision on appeal granting compensation greater than that claimed in the original application falls outside the ambit of the original decision. To the extent that the compensation was greater than the applicant sought, it had not been considered by the originating tribunal and could not form part of its decision. In the present case RFB is merely seeking that it not be constrained by its own submissions, and for it to be able to appeal the decision in its entirety; not to go beyond that decision as was the case in *Estate Homes*.

[24] There are also a number of authorities which outline statements of principle regarding the scope of appeals under s 120 and similar sections. In the decision of Judge Skelton in *Morris v Marlborough District Council* it was stated:[19]

> … it also has to be noticed that section 120 provides for a right of appeal "against the whole or any part of a decision of a consent authority …" and that seems to me to indicate an intention on the part of the Legislature to allow a person who has made a submission to advance matters by way of appeal that arise out of the decision, even though they may not arise directly out of that persons' original submission.

[25] The decision in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* evinces a similar, if not broader, interpretation of s 120:[20]

> … It was submitted that to raise an issue for the first time at a *de novo* hearing when such issues could and should have been raised at earlier proceedings is an abuse of process…
>
> I reject this submission on the basis that the Environment Court hears the appeal *de novo*, and is able to receive evidence and submissions not put forward at the first instance hearing before the local authority. Indeed

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19 *Morris v Marlborough District Council* (1993) 2 NZRMA 396, (1993) 1A ELRNZ 294 (PT).

20 *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EC).

> without such a power the s 274 provisions, which allow certain non-parties to appear and present evidence, would be of little effect.

[26] The Environment Court in *Hinton v Otago Regional Council* sought to set out the Court's jurisdiction when deciding s 120 appeals:[21]

> The Court's jurisdiction when deciding an appeal under section 120 of the RMA is limited by Part II of the Act and also by:
>
> (a) the application for resource consent – a local authority (an on appeal, the Court) cannot give more than was applied for: *Clevedon Protection Society Inc v Warren Fowler Quarries & Manukau District Council*;
>
> (b) any relevant submissions; and
>
> (c) the notice of appeal.
>
> Generally, each successive document can limit the preceding ones but cannot widen them. That seems to be the effect of the High Court's decision in *Transit NZ v Pearson and Dunedin City Council*.
>
> (Citations omitted)

[27] A further relevant decision is *Avon Hotel Ltd v Christchurch City Council* where it was stated:[22]

> [18] It is axiomatic that an appeal cannot ask for more than the submission on which it is based. I can find no direct authority for that proposition. However, I think the point is made in *Countdown Properties (Northlands) Limited v Dunedin City Council* where the Full Court stated that '… the jurisdiction to amend [the plan, plan change or variation] must have some foundation in submissions'.
>
> (Citations omitted)

[28] Similarly, in a more recent case dealing with a similar issue, *Environmental Defence Society Incorporated v Otorohanga District Council* it was stated:[23]

---

21 *Hinton v Otago Regional Council* EC Christchurch C5/2004, 27 January 2004 at [17].

22 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 at [18].

23 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70.

> [12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions.
>
> (Citations omitted)

[29] Finally, counsel for RFB referred me to the decision in *Transit New Zealand v Pearson* which concerned the appeal regime under s 174, which is similar in structure to s 120.[24] In that case the High Court agreed with the reasoning of the Environment Court that:[25]

> … appeals are constrained only by the scope of the notice of appeal filed under section 120 and in this case under section 174. As an original appellant the Council was required to state the reasons for the appeal and the relief sought and any matters required to be stated by regulations and to be lodged and served within 15 working days as provided under section 174(2). This is equivalent to the provisions under section 121(1). To the extent that Clause 14(1) limits the scope of a reference to an original submission that constraint is not contained within s 174. In this case Mr Pearson's original submission is wide enough to encompass withdrawal of the requirement. He therefore meets the threshold test of Clause 14(1) if he has an appeal in his own right. In this way Clause 14(1) and section 174 are complementary.

Discussion

[30] It seems to me that the plain words of the section, in conjunction with the lack of any real conflict in the authorities, lead to the conclusion that the Environment Court erred here in its interpretation of s 120. To my mind all that must be satisfied on appeal is that the matter in issue was before the originating tribunal. This, of course, does not necessarily mean that the matter in issue must have been put before that tribunal by the appellant submitter; the requirement exists so as to ensure that the matter being appealed was one considered by the originating tribunal. What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority. In such situations I am satisfied there is no derogation from principles of natural justice by making all of those issues the subject of further consideration on appeal.

---

24 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
25 At [38] and [41].

[31] By this analysis the plain meaning of s 120 is given full effect, without unnecessary constraint or reading down. This is not a case in which any rigid principles of statutory interpretation need be resorted to. The words are clear on their face. An appellant, which itself must have standing, is able to appeal "against the whole or any part of a decision of a consent authority on an application for a resource consent". This does not mean "the whole or any part of a decision of a consent authority [on which the appellant made submissions]".

[32] It would be anathema to the purpose of the RMA that a submitter was required at the outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts in issue before the originating tribunal the matters on which an appellant seeks to appeal, the appellate Court or Tribunal of first instance should entertain that appeal. Thus, I reach a different interpretation of the scope and operation of s 120 to that of the Environment Court. RFB as a submitter, who appealed the decision of the Commissioners on Simons' resource consent application under s 120 of the RMA, is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such, RFB's cross-appeal here must succeed.

[33] The position regarding s 120 can therefore be summarised as follows:

(a) An appealing party must have made submissions to the consenting authority if it is to have standing to appeal that decision.

(b) The Court's jurisdiction on appeal is limited by:

(i) Part 2 of the Act;

(ii) The resource consent itself (the Court cannot give more than was applied for);

(iii) The whole of the decision of the consenting authority which includes <u>all</u> relevant submissions put before it, and not just those submissions advanced initially by the appellant;

(iv) The notice of appeal.

(c) Successive documents can limit the preceding ones, but are unable to widen them.

(d) On appeal, arguments not raised in submissions to the originating tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

The appeal against refusal to partially strike out

[34] With respect to Simons' present appeal itself, I am required to reach a conclusion as to whether the Environment Court erred in law in refusing to partially strike out three of RFB's appeals. For the reasons set out below I am satisfied that this appeal must fail.

[35] First, this is not a final determination of the issues to be heard on appeal. Rather, it is a strike out application, the purpose of which is to address Simons' intention that certain grounds should never be heard substantively. The statutory foundation of the strike out jurisdiction and procedure is provided for in s 279 of the RMA. It relevantly provides:

> **279 Powers of Environment Judge sitting alone**
>
> …
>
> (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —
>
> (a) That it is frivolous or vexatious; or
>
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
>
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[36] As a preliminary matter I note that s 279 expressly refers to the powers of an Environment Court Judge sitting alone. Of course in this case Judge Borthwick was

sitting with Commissioner Edmonds. Nothing turns on this point and this judgment proceeds accordingly.

[37] The threshold for an applicant or appellant to pass in strike out applications is, understandably, very high. If such an application is successful it effectively denies a respondent the right to put its arguments before the Court in substantive proceedings. The applicable principles were considered generally by the Court of Appeal in *Attorney-General v Prince and Gardner* where it was stated:[26]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641; but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[38] In the RMA context, the decision of the Environment Court in *Hern v Aickin* is relevant.[27] In that case, it was stated:

> 6. The authority to strike-out proceedings is to be exercised sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion. The authority is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed. In considering striking out applications the Court does not consider material beyond the proceedings and uncontested material and affidavits.
>
> (citations omitted)

[39] In addition, there are at least three further considerations relevant to a strike out application in the RMA context:[28]

> a) The RMA encourages public participation in the resource management process which should not be bound by undue formality:

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[26] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).
[27] *Hern v Aickin* [2000] NZRMA 475 at [6].
[28] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [18].

Countdown Properties (Northland) Ltd v Dunedin City Council [1994] NZRMA 145 at 167;

b) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and

c) There are restrictions upon the power to amend. In particular an amendment which would broaden the scope of a reference or appeal is not ordinarily permitted.

[40] On the ground alone that the strike out application fails to meet the high threshold required, I would dismiss the appeal. Patently the Environment Court decision makes it apparent that this is not a case in which RFB's appeal is inevitably destined to fail. The Environment Court was therefore entitled to make a factual finding, having regard to all the evidence before it, that the grounds on which RFB now appeals were sufficiently disclosed in original submissions to warrant the substantive appeal being heard. The Environment Court found that the submissions from RFB were:[29]

(a) generally concerned about effects on the environment of all of the 161 applications for resource consent;

(b) concerned to uphold the integrity of the Waitaki Plan and to ensure that decision-making under the plan was in accordance with the purpose and principles of the RMA; and

(c) was not limited to non-complying activities.

[41] And, with regard to the issue of upholding the integrity of the Waitaki Plan, in my view certain principles, policies and objectives of the Plan clearly are relevant here and would tend to assist RFB's position:

(a) 6. Objectives

Objective 3…in allocating water, to recognise beneficial and adverse effects on the environment and both the national and local costs and benefits (environmental, social, cultural and economic).

---

[29] Royal Forest and Bird, above n 1 at [101].

(b) 7. Policies

> Policy 1 By recognising the importance of connectedness between all parts of the catchment from the mountains to the sea and between all parts of fresh water systems of the Waitaki River…
>
> Explanation
>
> The Waitaki catchment is large and complex. This policy recognises the importance of taking a whole catchment approach "mountains to the sea" approach to water allocation in the catchment – an approach that recognises the physical, ecological, cultural and social connections throughout the catchment.
>
> Policy 12 To establish an allocation to each of the activities listed in Objective 2 (which includes agricultural and horticultural activities) by:
>
> (a) Having regard to the likely national and local effects of those activities; …
>
> (f) Considering the relative environmental effects of the activities including effects on landscape, water quality, Mauri…

9. Anticipated environmental results

> 1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment – between the mountains and the sea…
>
> 6. The landscape and amenity values of water bodies within the catchment are maintained or enhanced.

(Emphasis added)

[42] In the Plan, "Waitaki Catchment" is widely defined as set out in s 4(1) Resource Management (Waitaki Catchment) Amendment Act 2004:

> (a) means the area of land bounded by watersheds draining into the Waitaki River; and
>
> (b) includes aquifers draining wholly or partially within that area of land.

[43] I am also mindful of the fact that this Court is to exercise the discretion to strike out a case or part of a case sparingly. In *Everton Farm Limited v Manawatu - Wanganui RC*[30] the Court said that an emphasis on efficiency should not detract from the importance of not depriving a person of their "day in court". I agree.

---

[30] *Everton Farm Limited v Manawatu - Wanganui RC* EnvC Wellington, W008/02, 22 March 2002.

[44] I am also cognisant of the fact that my conclusion reached above with respect to s 120 has the result of rendering the application for strike out more unlikely than it was in the Environment Court as it broadens the evidential foundation of RFB's substantive appeal. Nor in my judgment can it be properly suggested here that RFB's appeal grounds are frivolous or vexatious or that they constitute an abuse of process.

[45] I am reinforced in these views by the ordinary principle that an appellate Court ought generally to defer to a specialist tribunal. This principle was applied in the RMA context in *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* where Wylie J stated:[31]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. *As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.* No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Citations omitted and emphasis added)

[46] I appreciate the grounds of appeal raised by Simons purport to disclose appealable errors of law. However, there is a reasonable argument here that the conclusions reached by the Environment Court are fundamentally findings of fact. It is trite law, as noted above, that this Court, on appeal from the Environment Court, will not permit an appeal against the merits of a decision under the guise of an error of law. Though I need not reach a firm conclusion on this point, it does seem that Simons is simply unhappy with a decision and is now seeking to have those findings reconsidered. Those are matters to be properly addressed in the substantive appeal.

[47] For all these reasons, Simons' appeal against the Environment Court decision refusing to partially strike out RFB's appeal must fail.

---

[31] *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

Costs

[48] RFB has been successful both in its cross-appeal and in resisting Simons' appeal. Costs should follow the event in the usual way.

[49] I have a reasonable expectation here that the question of costs ought to be the subject of agreement between the parties without the need to involve the Court. If however agreement cannot be reached and I am required to make a decision as to an award of costs, then RFB is to file submissions within 15 working days with submissions from Simons and the Council 10 working days thereafter.

.....
Gendall J

Solicitors:
Matthew Casey QC, Auckland
Kelvin Reid, Christchurch
Canterbury Regional Council, Christchurch
Wilding Law, Christchurch
Royal Forest and Bird Society, Christchurch

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2007-463-000606

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Local Government Act 2002
BETWEEN	WHAKATANE DISTRICT COUNCIL Applicant
AND	THE BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 17-21 March and 4-6 June 2008

Appearances: D J Neutze and V T Bruton for the Applicant
J G Miles QC and K J Catran for the Respondent

Judgment: 9 April 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 9 April 2009 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J G Miles QC P O Box 4338 Auckland for the Respondent

Solicitors: Brookfields P O Box 240 Auckland for the Applicant
Cooney Lees Morgan P O Box 143 Tauranga for the Respondent

[1] The applicant challenges, by way of judicial review, a decision of the respondent to relocate its headquarters and 100 staff positions from Whakatane to Tauranga. Both parties are territorial authorities whose status and authority are derived from the Local Government Act 2002. The applicant's challenge has the support of the Rotorua and Opotiki District Councils, as well as the Te Arawa Lakes Trust, which represents 60 Iwi and Hapu in the Te Arawa Lakes area.

[2] The respondent's decision-making powers are derived from and subject to the Local Government Act. It follows that the respondent's decision to relocate its headquarters from Whakatane to Tauranga (the relocation decision) must comply with the relevant provisions of the Act, as well as any requirements that the common law imposes on decisions of this type.

[3] As with most judicial review claims, there is an overlap between some of the grounds of review. There is a challenge to the lawfulness of the decision-making process, which the respondent followed. The allegations in this regard are that:

a) The respondent failed to follow the required statutory process and, therefore, exceeded its jurisdiction;

b) The unlawful process the respondent adopted meant that it failed to take into account relevant mandatory statutory considerations; and

c) In the course of reaching its decision, the respondent breached legitimate expectations contained in the Triennial Agreement between it and various territorial authorities of which the applicant is one.

[4] There are also allegations of a breach of the duty to consult, which is a duty imposed under s 83 of the Local Government Act. This breach is alleged to stem from distinct flaws within the decision-making process. The respondent is alleged to have failed to provide a reasonable opportunity to be heard to those persons who sought to make submissions in person, which is allegedly due to certain councillors having closed minds on the topic and others being absent during the public consultation hearings.

[5] Furthermore, it is alleged that the respondent's relocation decision was the result of bias and predetermination on the part of a number of the respondent's councillors. And finally, there is an allegation the relocation decision was unreasonable.

[6] In this case the hearing was spread over two separate periods of time. By the commencement of the second period, the key issues between the parties had become more refined. The applicant helpfully provided a summary of the key issues. The findings on these issues will determine the outcome of the proceeding. I propose, therefore, to list the issues now and later to deal with each in turn. The issues are:

a) Whether compliance with ss 76 to 79 of the Local Government Act requires the express and conscious exercise of the discretion under s 79, or whether this can be done by accident;

b) Whether stage one of the decision-making process – the identification of the problems and objectives – was always focused on relocating the respondent's headquarters or whether it was for the respondent to assess what options might be open to it to carry out the new functions it was proposing to undertake;

c) Whether the end point of stage two of the decision-making process – the seeking to identify all reasonably practicable options – was reached on 7 December 2006 when the respondent made an "in principle" decision to relocate its headquarters to Tauranga, or whether the end point was reached later on 15 March 2007 when the respondent resolved to adopt amendments to its 10 year plan to provide for the relocation. Within this issue is the sub-issue of whether or not the "in principle" decision of 7 December 2006 was in fact a decision at all in terms of the Act;

d) Whether the respondent gave any consideration at all during the stage one and stage two part of the decision-making process to community views on the location of its head office;

e) Whether the councillors who did not attend all or substantial parts of the hearings should have voted on the relocation decision and, if not, what effect did their voting have on the decision;

f) Whether some of the respondent's councillors came to the hearings and deliberations in May and June 2007 with closed minds;

g) The application of the Triennial Agreement to the decisions at issue and whether that agreement gave the applicant a justifiable legitimate expectation of early notification of, and input into, the relocation decision, as well as the review leading up to the decision.

Facts

[7] Since the establishment of the respondent in 1989 (under s 41 of the Local Government Amendment Act 1989 (No 2)), its headquarters have been located in Whakatane. The location was an historical accident resulting from the local government reforms of that time. Since then, from time to time the respondent has questioned the appropriateness of this location. On 21 June 2007 a decision was made to amend the Long Term Community Plan to provide for the relocation of the respondent's headquarters to Tauranga, together with the relocation of 100 of 160 staff positions.

[8] Over the years, the possibility of relocating the respondent's headquarters has come under consideration. There were accommodation reviews in 1993, 2000, 2002 and 2003. None of these resulted in any changes. Then in 2005 the respondent considered looking at the issue again but deferred doing so until its new Chief Executive, Mr Bayfield, commenced work in the New Year (2006).

[9] At the beginning of 2006 the respondent was faced with an issue regarding the use of land it had purchased at Sulphur Point, Tauranga, from the Tauranga District Council. The respondent had intended building on the site but the independent commissioner responsible for the consent decision refused consent. An appeal to the Environment Court was lodged. This was later abandoned and the land

was sold back to the Tauranga District Council. The inability to use the Sulphur Point site for the respondent's operations in Tauranga increased the accommodation pressures the respondent was experiencing. The respondent's statutory responsibilities had increased as a result of a change in legislation. The conflux of a new Chief Executive, new expanded statutory role, and the loss of the site for some expansion in Tauranga caused the respondent to re-evaluate its performance and how it might best deliver its responsibilities in the region. Its accommodation arrangements were critical to this evaluation as they had a significant practical effect on the respondent's performance.

[10] The relevant actions the respondent took are fully described in the affidavits of its Chairperson, John Cronin, and its Chief Executive, William Bayfield. The first step was on 30 March 2006 when the respondent's Finance and Corporate Services Committee agreed to undertake an accommodation and location review using external advisers. The report the Committee had received from Miles Conway, Group Manager of the respondent's Human Resources and Corporate Services, recorded that the brief to the external advisers was to be developed in consultation with the Chairman and was to investigate "all aspects of our present and future accommodation needs, including where we would be best located to deliver our services and the estimated tangible and intangible costs and benefits associated with any recommendations".

[11] In April 2006 potential external advisers were approached. As part of this process, on 13 April 2006 a briefing letter was sent to Deloitte New Zealand (Deloitte). The briefing letter makes it clear that the respondent was seeking "a comprehensive report analysing where [it] as a corporate organisation could best be located and what [were] the tangible and intangible costs, benefits, drawbacks and hurdles".

[12] In June 2006 Deloitte responded with a proposal. Whilst the proposal referred to the task as an accommodation needs and location review, the content of the proposal reveals that Deloitte understood the wider and more comprehensive scope of the exercise. The proposal noted that:

> Environment Bay of Plenty is currently facing capacity issues in relation to its current office space in all its present locations and wishes to take this opportunity to determine a long term plan for the location of the various functions that the organisation performs now and will perform in the future.

[13] The Deloitte proposal was subsequently accepted by the respondent. In short, the proposal recommended that the respondent relocate its headquarters to Tauranga. The key findings were that there had been a significant increase in population in Tauranga, with a corresponding increase in what Deloitte described as "leadership functions in various organisations located there". The report recognised that the respondent needed to have a "presence" in Whakatane, Rotorua and Tauranga. The current offices were near to full capacity and additional space was required in all locations. It was seen as inevitable that the respondent would have a bigger presence in the Western Bay of Plenty due to the population growth in that part of the region.

[14] The issues the briefing letter required Deloitte to cover seems to me to extend beyond simple accommodation concerns. The respondent was seeking to find information on how it could best be located in terms of the impact on its functions, present and future, its leadership functions and role in the region, the extent to which its functions were location biased when it came to service delivery, and how it could efficiently deliver its functions in terms of its location. Deloitte was also asked to consider the recommendations on these issues in terms of cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. Enclosed with the briefing letter were the draft 10 year plan, volumes one and two, the Regional Policy Statement, a guide to the Regional Council, Smart Growth Strategy, Bay Trends 2004, a map of the region showing the various locations of the respondent's offices, the human resources quarterly report and the respondent's corporate structure.

[15] A steering group was set up comprising the Chairman, Mr Cronin, Councillors Riesterer and Cleghorn, the Chief Executive, Mr Bayfield, and two senior staff members, Mr Conway and Bruce Fraser. The group met regularly, including with Deloitte. Mr Bayfield's evidence was that during this stage it became apparent from the discussions with Deloitte that there was no financial imperative to

relocate the respondent's headquarters, but that relocation continued to make sense for strategic reasons.

[16] In October 2006 Deloitte undertook interviews with the respondent's councillors and with the Mayors and Chief Executives of local territorial authorities within the respondent's region.

[17] From October 2006 onwards the steering group received drafts of Deloitte's report. These drafts were discussed with Deloitte. Although, the applicant has criticised the interaction between the steering group and Deloitte during this time, I see no reason to be critical of what occurred. It was important for the respondent to ensure that Deloitte was adhering to the project's terms of reference, and these discussions were a way of achieving that.

[18] Then, in November 2006, Deloitte's issued its report. It recommended shifting the respondent's headquarters to Tauranga. The report is a comprehensive and relatively in-depth response to the terms of reference set out in the briefing letter of 13 April 2006.

[19] In the report Deloitte had concluded that there was a significant increase in the population in the western area of the respondent's region, particularly in Tauranga, whereas the population in the eastern areas was either static or in decline. Tauranga was recognised as the natural centre of the region and Deloitte considered that the respondent should have its headquarters located in the region's leading urban centre. Deloitte also considered that the success of the respondent's future performance, including it assuming a leadership role in the region, necessitated the establishment of a more significant presence in the major population centres. The need for a more significant presence in the western area of the region was seen as inevitable. The result of these conclusions was that the continuation of headquarters located in Whakatane came to be seen as an impediment to the respondent's ability to perform its newly expanded role in the region.

[20] Whilst some increase in presence in Rotorua was recognised as necessary, the location choices seen as warranting serious consideration were to remain in

Whakatane or move to Tauranga. It is clear from the report that no other centre in the region was realistically in contention. If a move was to be made, the sensible and realistic option was to move to the largest and ever expanding urban centre in the region.

[21] In December 2006, Mr Bayfield reported to the respondent recommending it make an "in principle" decision to relocate (the Bayfield report). This report contained comprehensive comment on the Deloitte report and set out a proposed plan of action, including the "in principle" adoption of the Deloitte report.

[22] The Bayfield report makes it clear that the Deloitte report was not a "blueprint for any relocation or retention project and should not be construed as setting out what changes will occur".

[23] On 7 December 2006, the respondent resolved that it supported the key recommendations in the Deloitte report and agreed in principle that the head office should be relocated to Tauranga, subject to further detailed investigative work on costs and accommodation. The Deloitte report, as well as the report Mr Bayfield prepared for the 7 December 2006 meeting, were subsequently published on the respondent's website.

[24] On 31 January 2007, the respondent had a workshop with Whakatane District Council representatives at which a formal presentation of the relocation question was presented. The respondent requested its staff to provide information on the effect of relocating the headquarters or the respondent's ability to perform its function.

[25] In February 2007 a separate independent market economics report was obtained on the potential positive and negative economic impacts likely to result from the relocation of the headquarters. Then later that month Deloitte conducted socio-economic interviews with representatives from various interest groups in Whakatane. Also during February, councillors of the respondent met with members of the community and local authority members to discuss the issues raised in the

Deloitte report. These discussions included the respondent's councillors meeting with local Iwi.

[26] On 8 March 2007, Deloitte released a social impact report. Then on 15 March 2007, there was a public release of a statement of proposal and proposed amendments to the respondent's 10 year plan. The proposal recommended moving the headquarters to Tauranga, including 130 staff positions. This action was taken because by then the respondent had realised that a decision to move its headquarters away from Whakatane was a decision that needed to be potentially provided for in the respondent's 10 year plan.

[27] Between 15 March 2007 to 2 May 2007, persons having an interest in making submissions on the question of the location of the respondent's headquarters were given the opportunity to make submissions in writing. From 21 May to 24 May and on 31 May and 1 June 2007 there were meetings at which the respondent heard and deliberated on submissions in relation to the decision on whether or not to relocate its headquarters. The decision to relocate was effectively taken on 1 June 2007 when the respondent decided to amend its 10 year plan to provide for the relocation of its headquarters. Then on 14 June 2007, the actual decision to relocate was made.

[28] The conduct of the hearings between 21 May and 1 June 2007 has generated some controversy. Two councillors who voted in favour of relocation on 1 June 2007, Councillors Eru and Sherry, were absent for 3.5 days of the hearings. Another who also voted in favour of relocation, Councillor von Dadelszen, was absent from the hearings for periods of time.

[29] On 30 May 2007, the respondent received email legal advice that it would be preferable for councillors who had not been present at the consultation hearings (21 May to 24 May 2007) not to vote on the relocation decision. However, the advice was not followed. Chair Cronin has subsequently explained that he believed he had no authority to prevent those councillors who had not attended the public hearings and all the deliberation hearings from voting on the decision. On 30 May 2007, Chair Cronin circulated a memorandum to absentee councillors requiring them

to read submissions which they had been unable to hear presented and to read the minutes of the presentation hearing before voting.

[30] The resolution to relocate the headquarters ultimately arrived at was a modified version of the recommendation. The original recommendation had been to relocate its head office to Tauranga on the basis that 130 staff positions were transferred. The decision that was actually made involved relocation of the headquarters with approximately 100 staff positions to Tauranga by 30 June 2010.

Legislative scheme

[31] The respondent's decision to relocate its headquarters to Tauranga is a statutory power of decision that had to be exercised in accordance with the empowering legislation. An understanding of the legislative scheme is, therefore, the starting point for determining whether there are any judicially reviewable flaws in the decision process of the respondent.

[32] The preliminary provisions in Part 1 set out the Act's purposes. Whereas Part 6 of the Act deals specifically with planning, decision-making, and accountability.

[33] Section 3 of Part 1 states that the purpose of the Act is to provide for democratic and effective local government. Included within this stated purpose is a recognition of the need for accountability of local authorities to their communities and the importance of the role local authorities play in promoting the social, economic, environmental and cultural well-being of their communities. Section 4 expressly addresses the Treaty of Waitangi and recognises the need for local authorities to facilitate Mäori participation in local authority decision-making processes. I consider that the more specific provisions of Part 6 need to be understood in the context of the general purposes expressed in Part 1.

[34] Part 6 commences at s 75. This section outlines the purpose of Part 6 and is of a general explanatory nature. What follows afterwards is a series of provisions

that, because they do not operate in a stand-alone fashion, are best understood when viewed collectively.

[35] Section 76(1) sets out certain decision-making requirements that local authorities must meet. Their decisions must be made in accordance with such of the provisions of ss 77, 78, 80, 81, and 82 as are applicable. However, the decision on the applicability of those considerations is left to the local authority (s 76(2)). As will be seen later, this is a discretionary exercise that in the case of ss 77 and 78 has a process that is set out in s 79. In the case of ss 80, 81 and 82, there is no process and so here the decision on applicability is subject to the general administrative law requirement of reasonableness.

[36] Section 77 sets out certain specific requirements for decision-making. Section 78 imposes a requirement to consider community views and prescribes the process for doing so. Section 80 requires local authorities to identify inconsistent decisions. Section 81 covers contributions by Mäori to the decision-making. Section 82 sets out the principles of consultation to be applied to the decision-making process. Thus far, the statutory regime applying to decision-making by local authorities has the appearance of a comprehensive prescriptive regime.

[37] However, there are some unusual aspects to this regime that make it different from the usual prescriptive regime. The language in many of the parts of s 76, s 77 and s 78 has a prescriptive tone. However, this is contrasted by more discretionary language used in other parts. The obligation in s 76(1) to make decisions in accordance with ss 77, 78, 80, 81, and 82 rests on the local authority's decision on whether or not those sections are applicable to the decision to be made. In addition, s 76(2) makes the obligations derived from s 76(1) subject to s 79. The obligations to take into account the considerations in ss 77 and 78 are also dependent on a discretionary judgment made under s 79. Sections 77(2) and 78(4) expressly provide for this.

[38] Section 78(3) expressly provides that the consideration it requires to be given to community views does not require any process or procedure of consultation to be followed. Nor do any of the provisions in s 76 or s 77 expressly require consultation

processes to be followed. Furthermore, s 82(3) provides that subject to subss (4) and (5), the consultation principles in s 82(1) are to be applied at the discretion of the local authority. Section 82(4) sets out the criteria to which a local authority must have regard when making its discretionary judgment on the applicability of the s 82 consultation principles to the decision at hand. Section 82(5) provides that where other consultation requirements are imposed as well, they take precedence over the consultation principles in s 82. Hence, the applicability of the s 82 consultation principles to decisions that are subject to ss 76 to 79 turns on the discretionary choice of the decision-maker. Unless the particular decision is also subject to other separate statutory provisions expressly requiring consultation, there is no obligation to follow a consultation process when making decisions subject to ss 76 to 79.

[39] Section 79(1) gives a local authority the power to decide (in its discretion) whether the considerations in s 77 and s 78 are applicable to the decision at hand and extent to which this is so. A local authority must turn its mind to this question but it is then free to determine for itself the very nature of the s 77 and s 78 obligations. Though this freedom is not unfettered, s 79 sets out a process for how this is to be exercised.

[40] The practical result is as follows.

i) Under s 76(1) a local authority must first decide on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the particular decision to be made.

ii) Once it has identified which of those provisions are applicable, it must then determine under s 79 how it will achieve compliance with the requirements of the those provisions. Thus, if a local authority finds that s 77(1)(a) is applicable to making a particular decision, that section will require the local authority to seek to identify all reasonably practicable options for achievement of the decision's objective. But this will be so only once the local authority has reached a judgment under s 79(1) on how it will achieve compliance with s 77(1)(a),

including the extent to which it will identify and assess different options.

iii) How many reasonably practicable options are identified and how they are then assessed is for the local authority to decide. There are always going to be at least two options, since a decision not to act is also subject to Part 6 (s 76(4)). Consequently, there will always be a choice to be made between doing nothing and doing something. Provided the conclusion on the number of different options is reasonable and is exercised in accordance with the required process (s 79), it will stand.

iv) Any person wanting to challenge the substantive decision on the ground the local authority has failed to consider all reasonably practicable options will only be able to do so successfully if he or she can establish that the s 79(1) decision on the identification of the different options is flawed. Provided the s 79(1) decision is well founded, it will not be open to someone later on to contend that the substantive decision is flawed because there was no consideration of some other reasonably practicable option.

[41] Similarly, the extent to which the identified options must be assessed in terms of the requirements of s 77(1)(b)(i)-(iv) depends entirely on the judgment a local authority has reached under s 79(1)(b) as to the extent of this assessment. Once a local authority has in its discretion reached a conclusion under s 79(1)(b) on the extent of this assessment, no one can challenge the assessment that is undertaken on the ground it fails to meet the requirements of s 77(1)(b).

[42] The same goes for s 78. The obligation this section imposes, to consider the views and preferences of persons likely to be affected by, or to have an interest in the substantive decision, is subject to a balancing exercise under s 79(1)(a). This provision allows a local authority to balance compliance with s 78 against the

significance of the matters affected by the decision. Hence, the nature and extent of the consideration to be given to the community's views will depend on the judgment a local authority makes under s 79. There can be no complaint about a local authority's failure to comply with s 78 if what has been done accords with the local authority's s 79 judgment on how compliance with s 78 is to be achieved.

[43] Section 79(1)(b) prescribes relevant procedural considerations to take into account when making the necessary judgments under this section. To exercise the s 79 discretion properly, a local authority must identify matters it thinks will be affected by the substantive decision and their significance; then a local authority must identify the degree of compliance with ss 77 and 78 that is largely in proportion to those matters (s 79(1)(a)). The s 79 discretion must also be exercised in a way that has regard to the extent to which different options are to be identified and assessed (s 79(1)(b)(i)). A judgment also has to be made on the degree to which benefits and costs are to be quantified (s 79(1)(b)(ii)), the extent and detail of the information to be considered (s 79(1)(b)(iii)), and the extent and nature of any written record to be kept of the manner in which compliance with ss 77 and 78 is attained (s 79(1)(b)(iv)).

[44] When it comes to making a judgment under s 79(1), a local authority must have regard to the significance of all "relevant matters" (s 79(2)), as well as considering the principles set out in s 14 (s 79(2)(a)), the extent of the local authority's resources (s 79(2)(b)), and the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons (s 79(2)(c)). Section 14 sets out eight principles, some of which have sub-principles, which describe the role of local authorities and the expectations attendant on that role. Section 79(3) requires consideration to be given to other enactments, as well as the matters outlined in s 79(1) and (2).

[45] Section 76(3) identifies two classes of decisions. In the case of the first class, subject to the discretionary judgments made under s 79 on what form a particular decision-making process will take, the chosen process must promote compliance with s 76(1). That is, the chosen form must promote decision-making that accords

with such of the provisions of ss 77, 78, 80, 81, and 82 as the local authority has found to be applicable when exercising its discretion under s 79. The second class of decisions are those that are considered to be "significant" in terms of the Local Government Act. For those decisions, the chosen process (again subject to the discretionary choices in s 79 on compliance) must ensure that s 76(1) has been appropriately observed. That is, the chosen form must ensure there has been appropriate observation of those provisions of ss 77, 78, 80, 81, and 82 that the local authority has found to be applicable when exercising its discretion under s 79. This must be done before the decision is made.

Discussion

[46] In essence, the combined effect of ss 76, 77, 78 and 79 is to empower and require a local authority to create a procedural template for the substantive decision to be made. That the Act had this effect is alluded to in *Reid v Tararua District Council* HC WN CIV2003-454-615 8 November 2004, Ellen France J at [135]. The local authority is obliged to create the procedural template, but the form it takes is left to the local authority's discretion. The discretionary decision as to how the template is fashioned must be carried out in a way that ensures that the design of the procedural template is largely in proportion to the significance of the matters affected by the substantive decision. There is no express obligation to record the template separately in writing. Section 79(1)(a)(iv) authorises a local authority to decide the extent and nature of any written record it might choose to make. Whilst not obligatory, a written record of how a local authority discharged its s 79 obligations would be helpful for any subsequent assessment of that topic.

[47] This is a completely new approach to local authority decision-making. It departs from the usual ways in which statutory powers of decision are vested in decision-makers. In general, statutory powers of decision either prescribe the process to be followed or empower the decision-maker with discretion as to how the power is to be exercised. In the latter case, unless specific considerations are identified as relevant to the exercise of the discretionary power, its exercise is subject only to common law constraints of legality, reasonableness and procedural fairness. With this Act, the actual process for making a particular substantive decision is

partly prescribed. For the remainder, the Act obliges a local authority to determine its own process. But in doing so, the local authority must have regard to a series of prescriptive requirements.

[48] Once the appropriate procedural template is developed, a local authority can then turn to making its substantive decision. But in making its substantive decision, a local authority must adhere to the self-determined procedural template (s 76(1)).

[49] The statutory scheme I have outlined applies to local authority decisions in general. There is also a special category of decisions that trigger what is termed the "special consultative procedure". The requirements relating to this category of decisions are set out in ss 83 to 90. Sections 91 to 97 require the making of annual and long-term plans, which are a further specialised form of local authority decision-making. In addition to the specific requirements that apply to these special categories of decision, they must also meet the requirements ss 76, 77, 78, and 79 impose on general decision-making.

[50] The purpose of, and policy behind, this new legislative approach was to improve local authority decision-making and to ensure transparency in how local authority decision-making was carried out. The approach results in what becomes in effect performance standards for each decision, in that a local authority has to express its thoughts on how it will make its substantive decision before proceeding to do so.

[51] However, a consequence of the new approach is that the discretionary judgments a local authority makes on the procedural template to adopt for any substantive decision will themselves be statutory powers of decision that are susceptible to judicial review. As with the exercise of any other statutory discretion, those judgments will be subject to the usual requirements the common law imposes on such decisions. There is also the statutory requirement of proportionality that s 79(1)(a) introduces, as well as the relevant considerations expressed in s 79(1)(b), s 79(2) and s 79(3). It follows that any flaws at this level, either through having a poorly developed procedural template or through failing to develop one at all, will flow through to and affect the substantive decision.

[52] There are some things that the Act does not expressly provide for. First, the Act does not expressly set out how compliance with s 76 and its associated provisions is to be achieved. Secondly, the Act does not expressly provide for what will be the consequences of failure to comply with s 76 and its associated provisions. Consequently, it is left to the Court to decide whether or not what has been done in any given case is sufficient to constitute compliance, as well as the consequences of non-compliance.

[53] In terms of achieving compliance with s 76 and its associated provisions, the Act does not expressly require there to be a written record of the development of the procedural template (s 79(1)(iv)). Nonetheless, the applicant contended that the Act requires a local authority to specify in an express and transparent manner the judgments it has made under s 79 as to how it will comply with s 77 and s 78. I understand the submission to include the contention that the same applies for the judgments a local authority has made under s 76(1) on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the decision at hand. The respondent contended that those provisions require no expression of a procedural template for the substantive decision. It submitted that it is enough if compliance is manifest from the process followed in making the substantive decision.

[54] Section 79(1)(b)(iv) empowers a local authority to determine the extent and nature of any written record of its procedural template. This suggests to me that this provision gives a local authority the power to choose what it does in this regard. There are likely to be simple decisions for which the ss 76 and 79 judgments on the procedural template will be identifiable from the reasoning of the substantive decision. For example, a simple decision to sell or not to sell a block of land may not necessitate separate s 76 and s 79 judgments. An example of this type of decision is to be found in *Reid v Tararua District Council* (supra [46]). However, a more complex decision may benefit from the procedural template being separately articulated. There are so many considerations to take into account when reaching judgments under s 79 that, in the case of a complex substantive decision, the development of the procedural template and compliance with it may not be readily apparent from the reasons given for reaching the substantive decision.

[55] I do not accept the applicant's` submission that the Act requires a local authority to expressly record judgments it has made under s 79 on the application of ss 77 and 78. If Parliament had required this to be done, I consider it would have expressly so provided. The decisions a local authority is called on to make are so variable that there will be many occasions when it would be a nonsense to require a record of judgments made under s 79. A local authority's decision to sell some minor item of property is quite capable of manifesting the s 79 judgments on the application (if at all) of ss 77 and 78. But with some other decisions, their nature and complexity may obscure judgments that have been made under s 79 on the application of ss 77 and 78. For those decisions, it would be sensible to ensure a written record of the s 79 judgments, on the decision-making process to adopt, was kept. Without such a record, a local authority places its substantive decision-making at risk.

[56] Section 76(4) states that s 76(1) applies to every decision made by or on behalf of a local authority. Read literally, that would cover the embryonic thoughts that can lead to a decision affecting others. But I do not think that would be consistent with the scheme and purpose of the Act. It would be a nonsense if the Act was so far reaching. For a start it would inhibit exploratory discussions at the conceptual stage. It would be hard to imagine how any decision-making could be accomplished under such a regime. The new approach created in Part 6 was for the purpose of improving the quality and transparency of local authority decision-making. It was not to create a mire in which decision-making became bogged down with preliminary requirements that impeded good decision-making.

[57] The scheme and purpose of the Act suggests to me that the new approach introduced by Part 6 was intended to apply to decisions resulting in outcomes which may potentially affect the communities of a local authority. It would be consistent with this view if s 76 and its associated provisions were understood to engage at a time when the question to be answered by the substantive decision was being formalised. Since the nature and scope of a question can influence and even invite its answer, to exclude this stage from the Act's provisions would weaken its force. However, I cannot see why Parliament would intend that antecedent stages,

encompassing preliminary attempts at framing questions to be answered, should also be subject to the Act. To do so would not serve the Act's purpose.

[58] This view of when s 76 and its associated provisions take effect fits with the first stage consideration of s 78(2)(a): to consider the community's views at the time when the problems and objectives related to the matter are defined. This view also fits with the fact that all the other considerations in ss 77 and 78 relate to later stages in the decision-making process than those that are covered in s 78(2)(a). If Parliament had intended that the stages leading up to formalising the question to be answered by the substantive decision should also be subject to s 76 and its associated provisions, I would have expected to find some indication to that effect in the Act. However, there is none to be found. I conclude, therefore, that those provisions take effect from the time the question for decision is formalised.

[59] In the course of the hearing, the applicant narrowed the focus of its complaint about non-compliance with the required statutory process to what it referred to as the first two stages of the decision-making process. These correlated with the stages identified in s 78(2)(a) and (b); that is the stage at which the problems and objectives related to the matter are defined and the stage at which the options that may be reasonably practicable options of achieving an objective are identified. The applicant accepted that in terms of the first category of its grounds of review (failure to follow required statutory process and failure to take into account relevant mandatory considerations), the evidence showed there could be no complaint about the latter stages of the process, which included the use of the special consultative procedure in ss 83 to 89, as well as an amendment to the respondent's long term plan.

[60] As I understand the applicant's submission, the failure was twofold: first a failure to take the steps required of it for the first and second stage of the decision-making process; and secondly, a failure to record having done so. The failure to follow the proper process being evidenced from the absence of any record.

[61] The failures at the first and second stage of the substantive decision-making process were said to be incapable of cure through proper compliance with the latter

stages of this process. By then, the applicant contended, the dye was caste and the scope of the matter to be decided had become unduly narrowed by the earlier procedural failure.

[62] The respondent rejected the need for a written record and maintained that provided the evidence revealed, either expressly or by implication, there was appropriate compliance with the Act's requirements, (which need be no more than accidental), that was enough. In this regard, the respondent relied upon *Reid* for support. At [148] of *Reid*, Ellen France J accepted that accidental compliance with s 77, s 78 and s 79 would suffice. Furthermore, the respondent did not accept that the decision-making process necessarily followed sequential stages. It considered that process could operate as a matrix, which I take to mean that certain stages could occur at the same time or overlap each other.

[63] I have already found that the Act imposes no legal requirement to record in writing the manner in which compliance with ss 76, 77, 78, and 79 is achieved. I will, therefore, concentrate on the question of the type of compliance the Act requires and whether there was the necessary compliance in this case.

[64] The evidence shows that during March 2006 and April 2006, the respondent was investigating its present and future accommodation needs in the context of how best it could deliver its services to the region in the light of its newly expanded role. This entailed it embarking on an information gathering exercise for the purpose of seeing if there was a question to be answered. To do so adequately, it decided to engage private consultants. The respondent's actions from March 2006 through to April 2006, including the engagement of Deloitte to prepare a report, can be viewed as being actions taken to assist the respondent to determine if there was a question to be answered. I do not find, therefore, that this activity was subject to the Act's requirements. I also find that the respondent's actions between April 2006 and up to November 2006, when the Deloitte report was published, can be similarly characterised. During this period the respondent was doing no more than to gather information. Until it was fully informed, it was unable to be sure there was a question to be decided, yet alone know how best to frame it.

[65] On 7 December 2006, with receipt of the Deloitte report, as well as the Bayfield report, the respondent was equipped to frame the question for it to answer. Only then could it proceed with defining the problems and objectives it faced in relation to its accommodation. Once the question was framed, it was then for the respondent to decide the procedural template it would follow to answer the question and then to proceed to do so in accordance with the template it had developed.

[66] The question could have taken a variety of forms. It could have been an open question of where the headquarters were best located. Alternatively, it could have been confined to questioning whether the respondent should remain in its existing headquarters or move to another specified location. Provided it followed the required process and made appropriate judgments under s 79, as well as considered the other matters required by s 76 and its associated provisions, the shape the question took was a matter for the respondent to determine.

[67] The applicant contends that the respondent's 7 December 2006 decision to accept the Deloitte recommendation in principle was premature and not in accordance with the statutory process. The applicant argues that by 7 December 2006, the defendant's decision-making process was at the end of the stage at which the respondent was obliged to identify all reasonably practicable options. Furthermore, that instead of ensuring all reasonably practicable options were identified and giving consideration to community views, the respondent jumped ahead to a later stage of the statutory processes when it made its "in principle" decision to accept the Deloitte recommendation. The result, the applicant contends, is that flaws in what the applicant asserts to be the first two stages of the decision-making process have rendered the final outcome invalid.

[68] The respondent contends that what is described in its records as an "in principle" decision is not a decision in terms of s 78 at all. It says the adoption of an "in principle" view that relocation of the headquarters was the best thing to do signified no more than this being a "work in progress", which did not come to a conclusion until March 2007. Hence, according to the respondent, it was not until March 2007 that it was obliged to identify the reasonably practical options available to it.

[69] I consider that the respondent's receipt of the Deloitte report and the Bayfield report on 7 December 2006, with its suggestion that a move to Tauranga would best enable the respondent to carry out its statutory role, coincides with the time at which the respondent, in terms of s 78(2)(a), should have been defining the problems and objectives related to the ultimate decision to be made. However, the applicant argues that by 7 December 2006, the process had reached the end of s 78(2)(b). I do not accept that view. On 7 December 2006 the respondent's decision-making process had crystallised stage one (s 78(2)(a)) only, and from there on forward began to move into stage two (s 78(2)(b)) of the process. It was the receipt of the Deloitte report and the Bayfield report which left the respondent well equipped to reach a view on what were the problems and objectives surrounding the relocation of its headquarters. Until those reports were received, the respondent did not have sufficient information to be able to identify the problems and objectives related to the question of where its headquarters should be located to ensure best delivery of services to the region. It did not even know if the location of its headquarters had any bearing on its service delivery. It might have thought that was so but, until the Deloitte and Bayfield reports were received, it could not have known there was a proper foundation for thinking that. This is why I do not accept the applicant's argument that 7 December 2006 signifies the end of the stage at which the respondent should have been identifying the reasonably practicable options or considering the views of the community in relation to its choice of such options.

[70] Since I see 7 December 2006 as a point in time signifying the end of stage one in terms of s 78(2), this was also the time to give consideration to the community's views in accordance with s 78(2)(a).

[71] As at 7 December 2006, there is no evidence that the respondent expressly formed a decision-making template. However, provided the existence of some such template can be inferred from what occurred, I see no reason why that should not be sufficient to comply with the requirements of s 76 and its associated provisions. There is nothing in the legislation to suggest otherwise. Moreover, the express provision in s 79(1)(b)(iv) for any written record of the decision-making process to be at the discretion of a local authority suggests to me that Parliament recognised

there would be occasions when the decision-making template would be implicitly present in a decision, rather than separately expressed.

[72] The view I have taken of s 76 and its associated provisions accords with that applied in *Reid v Tararua District Council* (supra [46]).

[73] Section 79 empowered the respondent to determine that at stage one of the decision-making process, it was unnecessary to consider community views, or that the consideration of such views could be achieved through the information gathering process Deloitte and Mr Bayfield had carried out as part of the preparation of their reports. Part of the brief to Deloitte was to provide recommendations on cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. This information, coupled with the knowledge the respondent's councillors would have of the community they represented, could have provided them with sufficient information on the community's views. The type of consideration s 78(2)(a) requires is not to be equated with consultation. Section 78(3) expressly provides that the section does not require consultation. How consideration of community views was to be achieved, if at all, was a matter for the respondents to determine.

[74] It is implicit from the instructions given to Deloitte that the respondent had determined that the consideration it would give to the views and preferences of the community was to be achieved through the enquiries Deloitte would make for the purpose of making the abovementioned recommendations, coupled with the knowledge of the respondent's councillors.

[75] The very purpose of instructing Deloitte to gather information on the impact on cost on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations seems to me to be in part to enable the respondent to give some consideration to the community's views. As part of the preparation of the report in mid-October 2006, Deloitte interviewed the Mayors and Chief Executives of the territorial authorities in the respondent's region. Those interviews would have

enabled Deloitte to obtain a view on the impact of the location of the respondent's headquarters on the community, as well as an opportunity to assess the view the community held on the topic.

[76] I see no reason why the respondent's consideration of community views at this early stage of the decision-making process could not be done as a matter of inference from the reports it received. The choice of performing the s 78(2)(a) consideration in this way was open to the respondent. There is nothing to suggest that this approach was out of proportion to the task at hand.

[77] The applicant drew my attention to a document of the respondent titled "Checklist For Decision-Making Under the Local Government Act 2002" dated 28 November 2006. The document was created at the time the Deloitte report was received and about to be presented to the respondent. The document notes at page 2, item 11 that the respondent does not hold information about the community's views on the matter. The applicant contends that this is an acknowledgement of the respondent that it did not have information of the community's views and, therefore, it could not discharge it obligations under s 78(2). The report has been prepared by an officer of the respondent and approved by the Chief Executive.

[78] The respondent contends that the section, in the form in which the statement is made, relates to assessing the significance of the decision in terms of the Act's requirements for "significant" decisions and that the import of the statement should not be taken to extend beyond any such assessment.

[79] The checklist is perplexing. The officer who completed the form has filled in the check boxes with the result the location decision is seen as having medium significance; not being controversial and having only a minor or no impact on residents and ratepayers. These are mistaken assessments. The decision was later recognised as a significant decision which entailed it being approached as a significant decision in terms of the Act's requirements for decisions of that type.

[80] The decision to move the respondent's headquarters would have a considerable impact on residents and ratepayers as it was driven by the respondent's

concern to ensure it was performing well. How well the respondent delivered its services to the region was a major concern for residents and ratepayers.

[81] When it comes to assessing what information the respondent had about the community's views as at 7 December 2006, there was information in the Deloitte report that would assist the respondent's councillors to form a view on this topic. This report would have included Deloitte's distillation of the information it received when it interviewed the Mayors and Chief Executives of the local territorial authorities. Furthermore, the Bayfield report of 1 December 2006 specifically drew attention to the need to engage with "stakeholders" in the region in regard to considering the proposed move. The recognition of the need to engage with stakeholders was a form of consideration of the community's views. It needs to be remembered that this was very early on in the decision-making process. Part of considering the community views must entail the recognition of the need for engagement with the community. Until the engagement takes place, community views can only be inferred. Furthermore, until the decision takes some shape and form, it is difficult to see how engagement with the stakeholders, to obtain their views, can occur. It seems, therefore, that some of the answers in the checklist are at odds with other evidence. I do not find the checklist a reliable indicator of what was known to the respondent at that time.

[82] It is for the applicant to show on the balance of probabilities that, at the stage when the problems and objectives of the matter in issue are defined (s 78(2)(a)), the respondent has failed to comply with ss 78 and 79. Certainly there is no evidence of the respondent expressly deciding (under s 79) on whether or not to comply with s 78(2)(a) and, if so, how that compliance would be achieved. But when the conduct of the respondent at this stage of the decision-making process is considered, there is nothing about it that is at odds with the requirements in ss 78 and 79.

[83] Once the Deloitte and Bayfield reports were received, the adoption in principle of the recommendation to move the headquarters fits with the commencement of the stage when the respondent could begin identifying the reasonably practicable options that would enable the identified problems and objectives to be achieved. This stage raises issues regarding s 78(2)(b) and s 77.

The view I have taken of the "in principle" decision to adopt the Deloitte recommendation means that I regard this conduct as signifying a work in progress, rather than a finite decision which represents a particular stage in the decision-making process.

[84] Section 78(2)(b) required the respondent to give consideration to the views of the community. This of course was subject to judgments made under s 79 on the extent to which, if at all, there would be compliance with s 78(2)(b) at this stage of the overall decision-making process. Section 77 required the respondent to seek to identify all reasonably practicable options for the achievement of the objective of the decision it was to make. This section was also subject to s 79 judgments on whether there should be compliance with s 77 and, if so, how that would be achieved.

[85] The respondent contends that the process of identifying the reasonably practicable options to achieve the identified objectives ran until 15 March 2007. This is because it took until 15 March 2007 to obtain all the necessary and relevant information for the respondent to be able to complete stage two of the process and to embark on stage three, stage three being the stage at which the reasonably practicable options are assessed and proposals developed. Until 15 March 2007, the respondent argues that there was insufficient information to enable a proper assessment of the merits of the "in principle" view that a move to Tauranga was best.

[86] I have already rejected the applicant's contention that 7 December 2006 heralded the end of the stage at which the reasonably practicable options were to be identified (s 78(2)(b)). The evidence suggests to me that until March 2007, the respondent was in the process of gathering information that would enable it to reach a decision on where its headquarters should be located. I consider that regard to the requirements of ss 77 and 78 would have been an implicit part of this decision-making process.

[87] The evidence shows that from 7 December 2006 to March 2007, the defendant took significant steps to equip itself with further information to enable it to determine if the "in principle" decision to move its headquarters to Tauranga should be carried out. This culminated with a decision on 15 March 2007 to amend the

respondent's long-term plan to include a proposal to move the headquarters to Tauranga. This step was taken as the respondent had belatedly realised that a decision of this magnitude required inclusion in the long-term annual plan.

[88] The degree of engagement with the community between January 2007 and March 2007 demonstrates consideration was being given to the community's views. The affidavit evidence of Chair Cronin, Councillor Bennett and Chief Executive Mr Bayfield recounts numerous meetings the respondent had with members of the community, members and officials of local authorities within its region and local Iwi. The purpose of these meetings was to inform the community on the matter under consideration and to receive comments from the community on this topic. Whilst there is no evidence of the respondent expressly determining a template for this stage of its decision-making process, there is ample evidence to suggest to me that, in terms of s 78(2)(b), consideration was being given to the community's views.

[89] I now turn to consider if the decision-making process being followed at this time reveals that implicit or accidental consideration was given to the reasonably practicable options available to the respondent for its choice of the location of its headquarters. The choice of the reasonably practicable options available was for the respondent to make. Provided its choice accorded with s 79, it is not for the applicant to point to what it considers to be additional reasonably practicable options and assert that the respondent has omitted to consider them.

[90] Following receipt of the Deloitte report and the Bayfield report, the respondent's focus was on two possible locations for its headquarters: the existing location in Whakatane or Tauranga. None of the specialist reports the respondent had received from December 2006 onwards suggested that any other location in the region was tenable. In such circumstances, I consider that the respondent has implicitly determined that the only reasonably practicable options available for it to consider for its headquarters location were Whakatane or Tauranga. The information the respondent was gathering between December 2006 and March 2007 was sufficient to inform it of the matters set out in s 77(1)(b). I also consider that the evidence is consistent with the respondent seeking to reach a decision in a manner that took account of the matters in s 77(1)(b). The entire purpose of considering the

move of the headquarters was to enable the respondent to perform its functions and responsibilities better. The achievement of that aim would encompass the matters set out in s 77(1)(b).

[91] It follows that I find the respondent's decision to move its headquarters to Tauranga is a decision that complies with s 76 and its associated provisions. The applicant's challenge on the ground there was no compliance with the required statutory processes has failed. As regards the issues for determination in this case, the finding I have reached means that:

a) As regards the first issue, I consider that it is enough if compliance with s 76 and its associated provisions is achieved by implication or accidentally.

b) As regards the second issue, I consider that at the point when the identification of problems and objectives was undertaken, the initial approach was to consider how the respondent was to carry out the new functions it was to undertake but that after 7 December 2006, the respondent moved to the second stage of identifying the reasonably practicable options to enable it to achieve its objectives, and these became focused on the location of the respondent's headquarters.

c) As regards the third issue, I consider the end point of what may be described as stage two of the decision-making process (s 78(2)(b)) was not reached until March 2007.

d) As regards the fourth issue, I consider the respondent gave proper consideration at stage one and stage two of the decision-making process to community views on the location of its head office.

[92] Before turning to the next ground of review, I propose, as an alternative to the conclusions I have reached, to consider the legal consequences of the respondent's decision not complying with s 76 and its associated provisions.

[93] In relation to the consequences of non-compliance with the statutory scheme, the concepts of mandatory and directory effect can provide some assistance on how to interpret this legislation. In *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 736, Millet LJ said:

> The difficulty (in deciding whether a statutory requirement is mandatory or directory) arises from the common practice of the legislature of stating that something "shall" be done (which means it "must" be done) without stating what are to be the consequences if it is not done.

Bennion On Statutory Interpretation at 46 states that:

> [I]t would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing to be done. So the courts' answer, where the consequences of breach are not spelt out in the statute, has been to devise a distinction between mandatory and directory duties.

[94] The unusual nature of s 76 and its associated provisions make it difficult to determine the consequences of non-compliance. The general principle is that non-compliance with mandatory considerations will invalidate a decision: see *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 183. But statutory considerations with that legal effect are truly mandatory in that Parliament prescribes them and intends that decision-makers have no choice but to take them into account. The considerations in s 76 and its associated provisions have the appearance of being mandatory but in many respects Parliament has given the decision-maker a choice as to their application in any particular case. The inclusion of a discretionary choice of this nature undermines the considerations' otherwise mandatory character.

[95] When the language of s 76, and its associated provisions, is contrasted with the latter parts of Part 6, which apply to the special category of decisions affected by ss 83 to 97, it is notable that those subsequent sections do not permit a decision-maker any choice over when they will apply and, if so, how they will be applied. The prescriptive language in ss 83 to 97 is not tempered by other expressions that resemble the discretionary authority which is also to be found in ss 76 or 79.

[96] Section 76(3)(a) enjoins a local authority to "ensure" its decision-making processes "promote compliance" with s 76(1). Being required to promote compliance is not the same as being compelled to achieve it. Section 79(1) makes it

the "responsibility" of local authorities to make discretionary judgments on how to achieve compliance with ss 77 and 78. Being made responsible for achieving compliance is also not the same as being compelled to achieve it. The use of such expressions is a departure from the usual expressions that are recognised to result in decisions being set aside for non-compliance. The language of s 76(1)(a) and s 79(1) suggests to me that the purpose of those sections is to set performance standards for achievement, rather than to impose mandatory requirements with invalidation being the consequence of non-compliance.

[97] In the case of "significant decisions", s 76(3)(b) states that a local authority must ensure that before the decision is made, s 76(1) has been "appropriately observed". The use of the words "must ensure", "before the decision is made" and "appropriately observed" is stronger language than in subs 3(a) of s 76. These words have the ring of mandatory requirements. That Parliament has chosen to use different language for "significant" and "non-significant" decisions suggests to me that Parliament was setting a stricter standard for non-compliance with s 76(3) in the case of significant decisions. Nonetheless, it is not clear to me that Parliament intended decisions that fall within the scope of s 76(3)(b) to be subject to mandatory requirements which will cause them to be invalidated if there is non compliance with the statutory scheme.

[98] The words "must ensure" suggest to me a directive to local authorities which requires them to make certain or to make sure their significant decisions comply with s 76(3). However, Parliament then uses the words "appropriately observed". The difference here is the use of the word "appropriate". This has the meaning of "right" or "suitable" [Collins Dictionary] or "fitting" [New Shorter Oxford Dictionary]. The New Shorter Oxford Dictionary defines "appropriately" as "fittingly". Whether something is appropriately observed requires a value judgment. Unlike a requirement for observation s*impliciter*, a requirement for appropriate observation is not an absolute. Its presence or absence cannot be measured in black and white terms. Any objective assessment of whether or not something has been appropriately observed will involve an element of reasonableness. Something may be appropriately observed in one context but not in another. Once this degree of relativity is introduced into s 76(3)(b), it becomes difficult to read the provision as

imposing the type of consequences that administrative law has traditionally attached to a failure to follow statutory provisions having a mandatory character. For the consequences of non-compliance to have the effect of invalidating a decision, I consider the statutory language must be expressed in clear terms. This is because such consequences carry serious repercussions. I am not able, therefore, to read s 76(3)(b) as having the effect of imposing mandatory compliance requirements on local authority decision-making under s 76 and its associated provisions. It follows that if I am wrong on finding that the respondent has implicitly complied with s 76 and its associated provisions, or that implicit compliance is sufficient to meet the provisions' requirements, nonetheless, I do not consider non-compliance will invalidate the decision.

[99] When the decision in this case is looked at overall, it is apparent that in terms of compliance with s 76 and its associated provisions (ss 77 to 82), the steps taken after 17 March 2007 can be treated as beyond criticism as there has been no challenge to those steps. This part of the decision-making process coincides with ss 78(2)(c) and (d). From 7 December 2006 to 17 March 2007 (being a period that fits with s 78(2)(b)), there is clear evidence to show there were a number of occasions on which the respondent, through its members and officials, engaged with the community for the purpose of obtaining community views on the appropriate location for its headquarters. All the expert advice and information the respondent received showed there to be only two viable choices for the location of its headquarters. This in my view demonstrates that it was reasonable for the respondent to approach the question on the basis there were only two reasonably practicable options available for it to choose from. Such an approach cannot be said to be unreasonable in the sense that term is understood in administrative law. On the information available, there is nothing to support the view that no reasonable decision-maker would have approached the location question as a choice between staying at the existing location or moving to the largest and growing urban centre in the region. Nor can taking such an approach be said to be out of proportion to the significance of the decision to be made. I do not consider, therefore, that what occurred over this period was inconsistent with the requirements of s 77.

[100] On 7 December 2006 when the respondent received the Deloitte and Bayfield reports and decided to accept the Deloitte report's recommendations in principle (being a time that fits with s 78(2)(a)), there was no reason why the respondent could not consider the community's views through inferences drawn from the information it received in the Deloitte and Bayfield reports and from the knowledge its members held, as elected representatives of the community. At this early stage of the decision-making process, that type of regard to the community's view can be viewed as being in proportion to the matter then under consideration. The discretion in s 79 contemplates that different types of consideration may be given to community views at different stages of the decision-making process. There is nothing in s 78 to suggest that the consideration to be given to community views must be of the same value throughout the decision-making process. Moreover, s 79 would permit a decision to be made that no such consideration was necessary at this stage of the decision-making process.

[101] It follows that, even if the failure to articulate the decision-making template for the first two stages of the decision does not mean there has been non-compliance with ss 77 and 78(2)(a) and (b), I consider that, in terms of s 76(3)(b), when looked at overall, the actions the respondent took in the lead up to the final decision in June 2007 were enough to ensure that s 76(1) had been appropriately observed.

[102] I will now deal separately with the allegation that there has been a failure under ss 4, 14(1)(d) and 81 to discharge properly the obligations those provisions impose in relation to Mäori. In this regard, it is alleged that Mäori were given no opportunity to contribute to stages one and two of the decision-making process. It is also alleged that at all stages of the decision-making process, the respondent failed to comply with its policy in its "LTCCP on Development of Mäori capacity to contribute to the decision-making process". The applicant contends that at stages one and two of the decision-making process, there were no discussions with Mäori. This view of events turns on the applicant's view of when these two stages in the decision-making process came to an end. I have found that stage one of the process (s 78(2)(a)) ended on 7 December 2006. At this time there had been no discussions with Mäori. However, there is nothing in ss 4, 14 or 81 of the Act that would require

discussions to have been carried out with Mäori at stage one of the decision-making process.

[103] By stage two of that process (from 7 December 2006 to 17 March 2007), there were discussions with Mäori taking place. The evidence of Councillor Bennett, Councillor Eru and Bruce Murray (the respondent's Group Manager, People and Partnerships) outlines the steps the respondent took to involve Mäori in the decision-making process. That evidence shows that during stage two (7 December 2006 to 17 March 2007), the respondent actively sought to engage with Mäori to obtain their views on the relocation decision.

[104] For completeness, I have considered s 77(1)(c) and whether that provision has any application to the respondent's decision. I do not consider that this provision impacts on a decision of the type that the respondent was making.

[105] Sections 4, 14 and 81 do not require separate consideration to be given to Mäori at a series of different stages in the decision-making process. When considering all the steps the respondent took to reach its decision on the re-location of its headquarters, I consider that it discharged those obligations to Mäori which the Act has imposed on the respondent.

Breach of legitimate expectations

[106] The next ground of review is the allegation that the respondent has breached legitimate expectations contained in the Bay of Plenty Local Government Triennial Agreement. The parties to this agreement are the applicant, the respondent, Kawerau District Council, Opotiki District Council, Rotorua District Council, Taupo District Council, Tauranga District Council and Western Bay of Plenty District Council. The agreement was entered into in fulfilment of the obligations s 15 of the Local Government Act imposes on local and territorial authorities. There are statements in the agreement to the effect that:

> The parties would, where practicable, communicate and consult openly, honestly and respectfully and proactively (no surprises).

Also, that the parties would ensure each had early notification of and participation in significant decisions that may affect them and their communities. The applicant contends that the respondent's actions have breached the legitimate expectations inherent in this agreement. The alleged failure lies in the respondent not placing the possible relocation of its head office to Tauranga on the agenda of a "Mayors and Chairs" meeting until 19 April 2007, which was after the respondent had released its statement of proposal of 15 March 2007.

[107] My reading of the agreement is that it sets out protocols the signatories will follow during its currency. Those protocols are designed to provide a means by which the signatories can work together for the betterment of the Bay of Plenty region. The agreement envisages some consultation before significant decisions are made by any one of the signatories. Its intent seems to me to be to encourage the signatories to work collaboratively where possible for the good of their region. The agreement contains statements of intent and of best practice. I consider it is akin to a policy statement providing no more than administrative reassurance to the signatories and the communities they serve. There is nothing that I can see in the agreement that could amount to an enforceable legitimate expectation that adds to the legislative requirements imposed on the respondent. In particular, I see nothing in the agreement that would require notice to be given at a Mayors and Chairs meeting prior to public notice of a proposed change as provided for in the 15 March 2007 statement of proposal. My understanding of the agreement's references to consultation is that they do no more than to recognise the statutory consultation requirements the Act imposes on the signatories.

[108] The law of legitimate expectations is derived from the duty to act fairly. It developed as a requirement that assurances given, or regular practices followed, would not be departed from without affording persons adversely affected an opportunity to be heard. In this form the law of legitimate expectation has created a common law foundation for a duty to consult. Failure to follow the assurances given, or changes of practice without providing those affected with an opportunity to be heard, could result in the decision reached being set aside. Generally, the persons claiming that they were adversely affected had to establish the decision affecting them had deprived them of a right, interest or expectation of a benefit. The law of

legitimate expectations recognised that such persons were entitled to be consulted before being deprived in that way.

[109] In this case the only benefit which the applicant claims deprivation of is the benefit of early consultation, early meaning some time before the statement of proposal was issued in March 2007. However, the respondent's consultation obligations are imposed by legislation. In order for the agreement to impose justifiable consultation obligations that were additional to those imposed under the Act, very clear language to that effect would be required. The terms of the agreement do not have that effect. I find, therefore, that in terms of issue (f) of the issues for determination, the Triennial Agreement did not give the applicant a justifiable legitimate expectation of consultation that extended beyond the statutory duties of consultation which the Act imposed. It follows that the applicant has not made out this ground of review.

"Closed minds"/failure to consult properly

[110] The grounds of review under this category are focused on what occurred in the later stages of the decision-making process (after 17 March 2007) when the respondent's members and Chair attended the public consultation meetings that were held and subsequently when the respondent came to make its final decision.

[111] The allegations in relation to a breach of the duty to consult are that the absence of certain members of the respondent from the public hearings for the purpose of consultation means that the respondent did not properly discharge its obligations to consult. The issue here being whether their absences have precluded proper consultation. Flowing from this is the secondary issue of whether those persons who were absent from the public consultation hearings should have voted on the final decision. The same absences are also relied upon as evidence to prove certain members of the respondent had already closed their minds to the outcome, with the result the respondent's final decision on where its headquarters should be located is tainted with predetermination and bias and is, therefore, invalid. There is also the wider issue of whether those members of the respondent who voted to move the headquarters to Tauranga did so as a result of predetermination and bias. Finally

there is the issue of whether those members of the respondent who were absent from part of the deliberation hearings should have voted on the final decision. The determination of these issues involves the application of similar legal principles and so there is a degree of overlap among them.

[112] I will deal first with the allegations of bias and predetermination. This type of challenge to the decisions of local authorities under the previous legislation required a plaintiff to show actual predetermination or bias, rather than apparent predetermination or bias. A helpful authority on this point is *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 47. Tipping J said:

> What in my judgment is required is no more and no less than this. The full council must come to the meeting at which the s 230 resolution is to be considered with an open mind as to whether the land in question should be sold. The councillors must be prepared to give a fair and open-minded hearing to anyone who appears at the meeting and submits for whatever reason that the land should not be sold. If it could be shown that the council had not approached the meeting on that basis, then the resolution to sell would prima facie be invalid and, subject to any relevant discretionary matters, liable to review. What I am saying is that in my judgment, in the particular statutory and factual setting with which this case is concerned, anyone challenging a s 230 resolution on the basis of predetermination or fettering of discretion is required to show actual predetermination or fettering rather than the appearance of the same.

Tipping J drew support for the conclusion he reached from a consideration of earlier cases on local government and the legal position with Ministers of the Crown and central government. In that regard Tipping J at p 47 adopted a test applied by Richardson J in *CREEDNZ Inc v Governor-General* (supra [95)] which equated predetermination with being "irretrievably committed" to a particular position. This approach sets a high threshold for proving predetermination or bias in relation to decisions of the executive or local authorities. There is nothing in the current legislation that would cause me to think that the legal test for predetermination and bias has been altered. Accordingly, I propose to approach this case on the same basis as was done in *Travis Holdings*.

[113] I propose to make some general comments on the evidence before dealing with specific allegations of bias and predetermination made against individual

members of the respondent. In June 2007 Chair Cronin and eight of the respondent's councillors voted for moving the headquarters to Tauranga. Five councillors voted against the move.

[114] In their affidavit evidence, Chair Cronin and the eight councillors who voted in favour of moving the headquarters to Tauranga denied they were biased or had predetermined their decision. Each of them contended that during the deliberations on 31 May and 1 June 2007, they had approached the relocation decision with an open mind, prepared to consider every sensible option, but, having done so, each of them concluded that moving the respondent's headquarters to Tauranga was the best decision.

[115] The report of the meeting on 31 May 2007 records Chair Cronin addressing the councillors and on the need to approach the decision they were about to undertake with an open mind and without bias. He directed them to be prepared to listen and to consider all the submissions that had been made to the respondent with an open mind. The deliberations ran over from 31 May 2007 to 1 June 2007. Because of the factual allegations of bias made against certain councillors, limited cross-examination was permitted. When under cross-examination, none of the persons who had voted in favour of the move retreated from the assertions in their evidence in chief of having had a fair and open-minded approach to the relocation decision. There was nothing in the evidence which I heard and read that would cause me to conclude that the persons who voted in favour of the relocation of the headquarters did so simply because they were "irretrievably committed" to the idea of relocating the headquarters.

[116] The evidence the applicant relied upon to prove predetermination or bias was provided by the councillors who had opposed the relocation decision or other persons in the community opposed to that decision. Their evidence, either referred to passing comments from the persons alleged to be predetermined, or offered what was in essence opinion evidence to prove the presence of predetermination or bias. Their evidence also reveals an assumption that Councillors Eru, Sherry and von Dadelszen, who were absent for part of the public consultation hearings (in the case of Councillors Eru and Sherry their absences were for 3.5 of the 4 days of

hearings), had already reached a predetermined view and should not, therefore, have participated in the deliberations. There were other comments, which in essence debated the wisdom of the decision to relocate and which suggested alternative ways in which the decision could have been approached.

[117] Proof of actual predetermination requires evidence capable of objective assessment. The opinions or value judgments of persons who have participated in the decision-making process but who have taken a different view from those alleged to have pre-determined their decision are not helpful. This type of evidence is not reliable. I have no doubt that the applicant's witnesses firmly believe their assessment of what occurred is correct. But the account they give does not go far enough to provide evidence that those who voted for relocation were irretrievably committed to that certain outcome. With decisions of this type, it is to be expected that members of regional councils will hold certain views and express those views from time to time. There is nothing objectionable about councillors holding preliminary or in principle views on decisions, provided when it comes to making the actual decision, they do so with a mind open to other alternatives. Indeed it is always likely to be the case that members of local authorities will hold particular views on certain issues. The effect of local body democracy is that persons are voted into office holding certain views. What is important is that when they come to make decisions, they follow a thought process that recognises a change of mind may eventuate. I have seen no evidence that would suggest to me that those who voted for relocation of the headquarters failed to have this recognition.

[118] In *Travis Holdings Ltd* there was evidence that, prior to reaching their final decision, councillors had adopted stances that could be taken to suggest they favoured a particular course of action. Nonetheless, the Court accepted that preliminary steps taken towards passing a particular resolution, whilst perhaps problematic under an appearance of bias test, would not be for an actual bias test. The Court recognised that constraint on a council conducting preliminary steps towards passing a resolution on the ground those steps could indicate bias would make life "extremely difficult for council staff and sub-committees". The Court was of the view that:

> There will have been some exploratory discussions as to potential purchasers, what they may wish to do with the land and so on, and I am very mindful of the fact that endless difficulties, both legal and administrative, could ensue if the threshold for intervention was set at the level of an appearance of predetermination. In my judgment when requiring a local body to pass a resolution under s 230, Parliament cannot have intended the sort of delicate footwork that would be necessary if the test were appearance of predetermination.

I think the same comments can be applied to what has occurred in this case.

[119] Having made these general comments on the evidence, I will deal with evidence of predetermination as it relates to individual members of the respondent.

[120] There was evidence from the applicant's witnesses of occasions where Chair Cronin is alleged to have made remarks which, the applicant contends, evidence of predetermination on the part of Chair Cronin. Before the 2004 elections, Chair Cronin is alleged to have said he had the numbers to move. Shortly after the election in 2004, Chair Cronin is alleged to have held a meeting at his home with the newly elected councillors and to have presented them with a number of actions he wanted to see achieved in the three year term, one of these being relocation of the headquarters. Chair Cronin rejected having any such discussion with Mr Oppatt about his intention to move headquarters. At a meeting with a regional focus group in January 2007, Chair Cronin is alleged to have said words to the effect that his driving to meetings in Whakatane would soon be history. After the first day of deliberations on 31 May 2007 when the members of the respondent went to a restaurant in Whakatane, as they left the restaurant and were walking past the regional council building in Whakatane, Chair Cronin is alleged to have said:

> If they had sold us the land, the headquarters would be staying in Whakatane.

[121] When under cross-examination, Chair Cronin was challenged about a conversation he was alleged to have had with John Forbes, who is the Mayor of the Opotiki District Council. It was put to Chair Cronin that at a Christmas social event in 2006, Chair Cronin had essentially given Mayor Forbes a:

> Heads up from yourself that the headquarters was moving and he took the heads up to be a fait accompli this was going to happen.

Chair Cronin rejected this suggestion. Chair Cronin was then challenged on his alleged failure as chair of the regional council to direct councillors who had not been present during the consultation hearings to desist from voting. His response was that he had no authority to stop councillors who were entitled to vote on the issue from voting. He said that he had been in local authorities for the best part of 20 years and that, to his knowledge, there has never been a councillor excluded from annual plan, deliberations and submissions in that time, with the exception where there was a conflict of interest. His view was that he had no authority to prevent the councillors who had not fully participated by attending all the submission hearings and deliberations from participating in the decision. It was suggested to Chair Cronin that his mind was not open to persuasion and that he was determined to see the relocation of head office to Tauranga. His response was that he rejected that suggestion entirely and that when it came to making the decision, he had addressed the councillors, stating to them:

> It is important that within the process that the issues be with an open mind and without bias. It is important that councillors be prepared to listen and consider all the submissions with an open mind, however, that does not mean councillors may not have a working plan or views but that they are prepared to listen and consider the submissions with an open mind.

Further on, he said he addressed the council to the effect:

> As we move in to the debate deliberations, I will ask you if there are any other issues for consideration so as to ensure that the deliberations are both robust and within correct procedures.

Chair Cronin said he also attempted to ask all the councillors individually did they approach the process in that position.

[122] I have no reason to doubt Chair Cronin's evidence. The overall impression I have of all the allegations of predetermination, said to be supported by evidence of comments made prior to the final decision being made, which could suggest a particular view, do not take the matter far enough to establish the presence of actual predetermination.

[123] Councillor Eru attended a public consultation meeting in Rotorua. He did not attend the meetings in Tauranga or Whakatane. He had suffered a serious car

accident at the beginning of April 2007. He also had a cataract operation at Rotorua Hospital. In addition, his wife was ill. For these reasons, he did not attend three and a half days of the four days of consultation hearings. However, Councillor Eru said that he had the opportunity to read the submissions presented at those hearings and that Councillor Bennett had come to Rotorua to go over the oral submissions with him. He did not, however, listen to the audio record of any of the oral submissions. Councillor Eru was adamant under cross-examination that he had gone through all the written submissions and, with the help of Councillor Bennett, had gone through the oral submissions and council summaries of the submissions. Councillor Eru was unable to say what exactly had been sent to him, but he said that he had read everything that had been sent to him. In this regard Chair Cronin has said that he directed that all the relevant material be sent to the respondent's councillors.

[124] Councillor Eru accepted, when cross-examined, that the volume of material and the personal difficulties he was experiencing at the time through the health problems of himself and his wife would have made his role in the deliberation process difficult. It was put to him in cross-examination that at the council meeting in June, his mind was not open to consider anything other than a shift of head office to Tauranga. He rejected that. The reasons for Councillor Eru not attending all the meetings are acceptable. Furthermore, as will be explained later in the judgment, I do not consider the Act requires councillors who participate in decisions to have personally attended all the public consultation meetings, nor, where deliberation hearings go over a number of days, do I consider they need to attend every sitting. I am satisfied, therefore, that the absences of Councillor Eru have neither affected the quality of the public consultation, nor do I think show his participation in the final decision to be affected by predetermination or bias.

[125] At a meeting with the regional focus group at the Rotorua Airport, Councillor Eru is alleged to have made it clear he supported the move and could not be persuaded otherwise. The applicant relies on an affidavit of Lorraine Brill. In her affidavit, Ms Brill said that when Mr Eru was questioned at this meeting, he made a comment to the effect he would not support doing anything that would help Ngati Awa as they had tried to take the Kaingaroa Forest away from them

(Te Arawa). Councillor Eru denied that he would have said anything to that effect. Councillor Eru's response to what Ms Brill said was, "she has got that totally wrong". Councillor Eru's view was that Ms Brill was mistaken because, in his words, "the issue with Te Arawa and Ngati Awa is totally out of kilter". His evidence was that on the basis of his knowledge of history, he would not have said something like that. When asked whether there was a view within Te Arawa that Ngati Awa tried to take the forest at Kaingaroa, he said, "no, there was not".

[126] Ms Brill's affidavit provided on 29 November 2007 records something which occurred at a meeting on 19 February 2007. Councillor Eru rejects the suggestion he would have made the statement concerned and, to support his rejection, he says that, in effect, there has never been an issue between Ngati Awa and Te Arawa regarding Ngati Awa trying to take Kaingaroa Forest with them, so that the comment is not only incorrect in terms of Councillor Eru not having made it, but it does not fit with the historic position. I note in her affidavit at paragraph 21 that Ms Brill says that Mr Eru made a comment to the effect that moving was the right decision and his mind was made up. She does not say what his words were. The statement seems simply Ms Brill's interpretation of what Councillor Eru said. Without having his actual words expressed, it is not possible to assess objectively whether or not the effect of those words could amount to a statement evidencing predetermination. An allegation of bias and predetermination is serious. To prove actual bias requires reliable evidence. I am not satisfied that the evidence from Ms Brill is sufficiently reliable to persuade me on the balance of probabilities that Councillor Eru had made what had amounted to an admission of having a predetermined view as at February 2007.

[127] Councillor Sherry only attended the public consultation meeting in Tauranga. He did not attend the meetings in Rotorua or Whakatane. He has sworn an affidavit in which he asserts that while he did not attend all the public consultation meetings, he did fully inform himself by reading all the written material from those meetings. He said he was open to persuasion and ready to be persuaded as to a different outcome from that for which he ultimately voted for. Under cross-examination he provided explanations for why he did not attend all the consultation meetings. The records of the deliberation meeting record that he addressed the meeting and gave an

assurance that he had read all the submissions and that he was approaching the decision with an open mind. I see no reason not to accept his evidence.

[128] At a Christmas function in December 2006, Councillor von Dadelszen is alleged to have said the move was "a done deal and we have the numbers". The applicant relied upon these remarks to prove predetermination on the part of Councillor von Dadelszen. Councillor von Dadelszen was cross-examined about the comments he was alleged to have made. Councillor von Dadelszen's recall was that he had started to say the respondent had voted in favour of an "in principle" decision, which would be to accept the Deloitte recommendation to move the headquarters, when Colin Hammond (a retired local body politician and member of the Regional Focus Group which opposed the relocation) aggressively attacked him about the statement. Councillor von Dadelszen refuted the suggestion that he had said the decision to move was a "done deal" and he said he would never use the words "you easties have got to live with it". His evidence was this was not the sort of language he would use. He conceded he was angered by Mr Hammond's comments and he may have said "we have the numbers", but he knew at that stage that a final decision was at least six months away.

[129] The applicant is inviting the Court to draw the inference from words said at a Christmas party in December 2006 that Councillor von Dadelszen had such a closed mind that his decision in June 2007 to vote in favour of the headquarters' move can be said to be predetermined. There was a significant time gap between the Christmas party in December 2006 and the June meeting. In view of Councillor von Dadelszen's denials of predetermination and his assertions of approaching the June 2007 decision with an open mind, which I have no reason to disbelieve, I am not prepared to rely on comments made six months earlier to find that Councillor von Dadelszen had a closed mind in June 2007.

[130] Councillor von Dadelszen was also cross-examined about him being absent on the last day of the consultation hearings in Whakatane on 24 May 2007. It was put to him that by that time he had made his mind up to vote in favour of relocation. He rejected any suggestion. He rejected the suggestion that by the time of the respondent's deliberations, he was not open to persuasion.

Councillor von Dadelszen said that although he had been absent for one day of the public consultation hearings, he had taken it upon himself to read all the submissions thoroughly to ensure that he was fully informed when it came to the time of making his decision. Again I see no reason to disbelieve him.

[131] Councillor Raewyn Bennett, in a meeting with Ngati Awa in February 2007, is alleged to have made it clear she supported the move and that it was time for Western Bay of Plenty Mäori to have the head office located in their district. In her affidavit evidence, Councillor Bennett rejected any suggestion her decision to support the headquarters move was affected by predetermination or bias. It was put to her in cross-examination that she had favoured the move because she thought it best for the Iwi which she represented (namely, Western Bay of Plenty Mäori) and that she thought they would be better served by having the regional council headquarters in Tauranga. She accepted that her concern about "the urbanisation of Iwi" was one of the factors that she took into account in her decision-making but rejected the suggestion this was entirely what had motivated her decision. She agreed that she had been at a meeting on 26 February 2007 of local Iwi that was attended by Jeremy Gardiner. Mr Gardiner's recall of the meeting was that Ms Bennett had represented to the meeting that the relocation was to go ahead and that she had told him she would be voting for it. Under cross-examination, Ms Bennett denied that she had a conversation to this effect with Mr Gardiner. She said that at the meeting she gave reasons for supporting the "in principle decision" of 7 December 2006.

[132] Ms Bennett's understanding of the communications she had at the meeting of 26 February 2007 was for her to outline why she had decided to support the Deloitte recommendation. She denied that the effect of what she said at the meeting was to promote the headquarters relocation. An email was put to her, which she had written to Bruce Fraser on 18 February 2007, in which she had said the words "at Fisheries forum tomorrow (promoting HQ)". It was put to her that the statement in the email reflected what she would actually have been doing at the meeting. She rejected that idea and said that all she was doing was to raise awareness among Iwi in the various areas. When it was suggested to her that as at February 2007 she was going out to

the community trying to sell the relocation decision, she rejected that on the basis that at that point in time no decision had been made.

[133] Mr Gardiner had sworn in his affidavit that Councillor Bennett had said it was "Ngati Rangi's turn to have the regional council located near them and that Ngati Awa had their turn". Councillor Bennett said she did not make the statement and never would make such a statement. I have no reason to reject Councillor Bennett's evidence on the points where there is a conflict with Mr Gardiner's evidence. Statements made in the context of meetings to discuss the issue of the headquarters relocation are now being lifted out of their context. In addition, it may be that certain glosses are being placed on those statements, which may not have been intended at the time the statements were made.

[134] With decisions of this type, it is to be expected that councillors will have discussions with members of the community. In the course of those discussions, councillors may make comments that may suggest they hold a particular view. It is difficult to see how councillors could engage effectively and explain why they have taken a certain stance without perhaps creating an impression of holding particular views. That is very different from having a predetermined view. It follows that I am not satisfied on the balance of probabilities that Councillor Bennett made the comments now alleged to demonstrate bias and, in any event, even if she did, I do not interpret those comments or words to such effect as amounting to actual bias.

[135] On 25 April 2007, Councillor Pringle wrote a letter to the editor of the *Whakatane Beacon* in which he stated:

> While I sympathise with the effects to what this change means to any people in Whakatane;

and

> This will happen but at the same time we do not intend to leave Whakatane in the lurch.

[136] Councillor Pringle was cross-examined about bias as revealed through the letter he had written to the editor of the *Whakatane Beacon* on 25 April 2007. It was put to him that the way in which he had expressed himself in the letter revealed he

was treating the relocation as a foregone conclusion, rather than as a possibility. He accepted that the letter could be read in that way, but said that was not his intent because the decision on the relocation was still to be made. He explained the letter on the basis that he was responding to letters that had been published earlier on and he was putting matters in context. He rejected the suggestion that at the time he wrote the letter, he had made his mind up about the relocation of headquarters. It was suggested to him that he had written the letter using references to relocation, rather than possible relocation, because, in his mind, the relocation was going to happen. He rejected this suggestion.

[137] I consider that when local body politicians write letters to local newspapers regarding issues that have become contentious within the community for the purpose of explaining the benefits of the move, the language used may be stronger and less precise than that which a lawyer would use. I am not prepared to infer from the words Mr Pringle wrote in a letter to the editor designed to answer earlier letters that this amounts to sound, reliable evidence of actual bias on his part. He has rejected that suggestion, and I have no reason to disbelieve him.

[138] The applicant has also alleged that the respondent's decisions were made with undue haste and did not allow for any or sufficient time for proper consultation and input and consideration of the community views, particularly at stage one and stage two of the decision-making process. This allegation depends on the view being taken that stage one and two of the decision-making process had reached an end by 7 December 2006. I have already rejected this view on the facts, which disposes of this allegation.

[139] Another allegation made against those who voted for relocation of the headquarters was that none of those who did so were willing to engage in any meaningful debate as to the pros and cons during the deliberation hearings on 31 May 2007 and 1 June 2007. To counter this allegation, the respondent pointed to the minutes made of the deliberation hearings. In my view, those minutes support the respondent’s view of what occurred. A perusal of the minutes reveals that a number of those who voted for the relocation actively participated in the deliberation process. It follows that I do not find the applicant has established this allegation.

[140] As regards the failure of Councillors Eru, Sherry and von Dadelszen to attend all of the submissions and deliberations hearings, I do not see their absence as undermining the quality of the consultation process. The applicant has not directed me to any authority which establishes that the members of a local authority who vote on a decision must have attended all the public consultation hearings. The applicant relied on s 83 of the Act to support its assertion that the requirement in that provision to give submitters an "opportunity to be heard" could not be met without the respondent's members attending all the consultation meetings.

[141] Like Tipping J in *Travis Holdings*, I think that parallels can be drawn between local authority decisions and those of the executive. When Ministers of the Crown come to make decisions that require consultation, there is generally no requirement that a Minister will individually attend and participate in any consultation process. That is left to the officials who then have the responsibility of preparing reports for the minister outlining the thrust of the matters consulted on and the submissions received. If the officials do a poor job of summarising the submissions produced during the consultation process, that can leave a Minister open to the accusation he or she has not properly consulted. Although decided on another ground of review, the judgment in *Air Nelson v Minister of Transport* CA279/06 5 May 2008 is relevant to understanding the consequences of decision-makers being poorly informed by their officials.

[142] I do not understand the applicant in this case to be critical of the materials that went to the respondent's members for the purpose of recording for them and informing them on the consultation submissions received. Provided the written material the respondent's officials produced provided a fair and accurate account of the submissions received during the consultation hearings and the respondent's members read this material, I can see no reason for finding the consultation process was flawed.

[143] Furthermore, when the votes of councillors whose absences from the submissions hearings are put to the side, of the remaining votes, those who voted for relocation are still in the majority. The outcome was not a closely balanced decision which hinged on the votes of those who did not attend all the submissions hearings.

Even if they had abstained, the numbers were still against those who voted against relocation. The applicant contended that as that would have resulted in a six to five split for relocation, it may well have been that some of the six may have changed their minds. I find this to be speculative. There is no foundation for it. In circumstances where the three councillors who were absent from the consultation meetings gave proper consideration to the consultation materials, and when those who voted for relocation outnumbered those against, with or without the abstention of the three councillors, I cannot see how their absences from some of the consultation meetings can have any impact on the respondent's performance of its obligations to consult under s 83.

[144] The applicant attempted to make something out of the fact the respondent's legal advisers had advised against those who had missed part of the submissions' hearings from voting on the decision. That advice may have been given out of an abundance of caution. Whilst adherence to it would have avoided one of the grounds of challenge to the decision to relocate, the departure from the advice was not wrong in law.

[145] The applicant also challenged the absences of Councillors von Dadelszen and Bennett from part of the deliberation hearings. However, at all times the necessary numbers to make up the required quorum were present. It is not as if these councillors absented themselves for most of the two days of deliberations and did no more than to arrive at the time when the vote was to be taken. It is in the nature of local body work that members of local authorities will need to absent themselves from deliberation hearings from time to time. Provided those persons ensure they are well informed and approach the decisions to be taken with an open mind, I can see no reason for being critical of them being absent for part of the deliberation process.

[146] It follows that the applicant has not made out the grounds of review of predetermination and bias, or of failure to consult. The failure to consult also came under the heading of unfairness and procedural impropriety in that the applicant contended that a breach of the duty to consult under ss 82 and 83 was also a procedural impropriety and unfair. The applicant's failure to establish there has been

a breach of the statutory duty to consult means it has failed on the ground of procedural impropriety and unfairness as well.

Unreasonableness

[147] The applicant contends that the decision to move the applicant's headquarters from Whakatane to Tauranga was unreasonable. *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 is a leading case on challenges on the ground of unreasonableness in relation to local government decisions. That case involved the setting of rates and earlier legislation. The Court of Appeal concluded that the setting of rates was essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The Court was not prepared to interfere with what was essentially a policy decision. It recognised that the setting of rates required the exercise of political judgment by elected representatives of the community. In that regard, economic, social and political assessments involved were complex. The test for unreasonableness applied in *Wellington City Council* was that given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, where it was said:

> It (unreasonableness) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[148] When I apply that test to the present decision under review, it seems to me that the decision cannot be so described. The councillors of the respondent who voted in favour of a move of the headquarters had sufficient material before them in the form of the Deloitte report, the Bayfield report and other material gained following those reports which supported the headquarters move. It is for the applicant to establish that the decision to move the headquarters was one that no sensible person could have arrived at in terms of the test set out by Lord Diplock. On my reading of the reports on which the respondent relied, they outlined the long-term wisdom in moving the headquarters to the most populace centre in the region for which the respondent was responsible. The benefits of having the headquarters sited in the most populated and growing centre of the respondent's region are set out in the reports on which the respondent relied to inform itself. These reports make

sense. It was open to the councillors to decide that it was in the region's long-term benefit for the headquarters to be sited in Tauranga. The evidence revealed that most regional authorities have their headquarters sited in the most populated centre of the region they serve. While it seems that the respondent has managed to carry out its role to date, the idea that, with the increased responsibilities legislative change has placed upon it, it would better perform its role if sited in Tauranga is a tenable one. There is nothing about the decision which would suggest to me it was unreasonable in terms of the test applied by Lord Diplock and approved of in *Wellington City Council*. I do not find the decision to be an unreasonable one.

[149] The applicant elected not to pursue the ground of review based on the taking into account of irrelevant considerations and mistake of fact. The ground of review based on failure to take into account relevant considerations is largely covered by the findings made on s 76 and its associated provisions. In regard to those additional considerations the applicant has pleaded as being relevant considerations which were not taken into account, the applicant has not identified how they have the mandatory character necessary to support this ground of review. For this reason, the applicant fails on this ground of review.

[150] After this proceeding was heard, the judgment in *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* HC CHCH CIV 2008-409-1385 25 November 2008 was issued. The Court in this judgment has interpreted the effect of s 76 and its associated provisions differently from the interpretation contained herein. I have considered the judgment but must respectfully disagree with the interpretation it expresses.

Result

[151] The applicant has failed to establish the grounds of judicial review on which it relied to support its claim that the respondent's decision was unlawful and invalid.

[152] Leave is reserved to the parties to file memoranda on costs.

Duffy J