SUBMISSIONS OF COUNSEL FOR REMARKABLES PARK LIMITED AND QUEENSTOWN PARK LIMITED

HEARING STREAM 13 – QUEENSTOWN MAPPING

29 August 2017

CASE BUNDLE

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BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	COLONIAL VINEYARD LIMITED
	(ENV-2012-CHC-108)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A J Sutherland
Venue:	Blenheim
Hearing dates:	9 to 13 and 16 and 17 September 2013. (Final submissions received 24 October 2013).
Appearances:	N Davidson QC and M J Hunt for Colonial Vineyard Limited S F Quinn and M Booth for Marlborough District Council Q A M Davies and D P Neild for New Zealand Aviation Limited and The Marlborough Aero Club (under s274) M Radich for Trustees of the Carlton Corlett Trust (under s274)
Date of Decision:	14 March 2014
Date of Issue:	14 March 2014

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991:

(1) the appeal is allowed;

(2) the decision of the Marlborough District Council dated 31 July 2012 is cancelled; and

(3) Plan Change 59 as notified is approved subject to the changes stated in the Reasons below.

B: Subject to C, the parties are directed to discuss the proposed policies, maps and rules and if possible to lodge an agreed set by Wednesday 30 April 2014.

C: Under section 293 the council is directed to consult with the parties over the urban design principles included in Mr T G Quickfall's Appendix 4 and to lodge its approved version for approval by the Environment Court by 30 April 2014.

D: Leave is reserved for any party to apply for further directions (under section 293 of the RMA or otherwise) if agreement cannot be reached.

E: Costs are reserved.

REASONS

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1. Introduction

1.1 The issue: should the land be rezoned residential?

[1] The principal question in this proceeding is whether a 21.4 hectare vineyard in New Renwick Road on the southern side of the Wairau Plains near Blenheim should be rezoned for residential development, as sought in private Plan Change 59 ("PC59").

1.2 The vineyard and its landscape setting

[2] The vineyard is owned by Colonial Vineyard Ltd ("CVL"). The land is legally described as Lot 2 DP350626 and Lot 1 DP11019 ("the site"). The site is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees[1].

[1] M Davis, evidence-in-chief at para [9] [Environment Court document 3].

[3] The land opposite the site on the eastern and northern boundaries has Residential zoning[2]. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development[3].

[4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

[5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicates and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.

[6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B[4]. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.

[7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

1.3 Plan Change 59

[8] CVL was the initiator of the request for a private plan change (PC59) to the Wairau Awatere Resource Management Plan ("WARMP"). The proposal for Plan Change 59 was lodged with the Marlborough District Council in April 2011. PC59 sought to rezone the site from Rural 3 (the Wairau Plain zone) to Urban Residential 1 and 2 to provide for residential development. The plan change also sought to amend or

2 T G Quickfall, evidence-in-chief [9](b) [Environment Court document 18].
3 T G Quickfall, evidence-in-chief [9](c) [Environment Court document 18].
4 J W Trevathan, supplementary brief of evidence, Attachment B [Environment Court document 14B].

add some policies[5] in the district plan, together with consequential changes to methods of implementation.

[9] CVL initiated its plan change following the initial completion of the Southern Marlborough Urban Growth Strategy 2010 ("the 2010 Strategy") that assessed the residential growth potential in different areas using a "multi-criteria" approach[6]. The analysis under the 2010 Strategy is quite comprehensive and CVL placed some reliance on that process and its findings as part of its section 32 analysis of PC59.

[10] CVL's original version of PC59 (as notified) sought the following:

(a) to produce a residential development consistent with good design principles;
(b) to rezone the bulk (15 hectares) of the site as Urban Residential 1;
(c) to rezone 6.4 hectares on the southern and western boundaries of the site as Urban Residential 2;
(d) to amend the WARMP by introducing proposed policies set out in Appendix 1 to the application;
(e) to amend Appendix G of the WARMP so that the CVL site be identified and the rules will require buildings to be constructed in accordance with the 'Indoor Design Sound Levels set out in Appendix M'[7].

[11] The only important policy change is that PC59 (as notified) proposes that policy (11.2.2)1.3 be amended as follows:

> Maintain high density residential use <u>close to open spaces and</u> within the inner residential sector of Blenheim located within easy walking distance to the west and[8] [south of] the Central Business Zone.

The underlined words are the addition. The effect of the proposed change would be to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[12] The application for a plan change was approved for notification and publicly notified. There were submissions and a hearing. So far that was routine. However, at the council hearing CVL purported to amend its application to incorporate the following changes:

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5 Policies (11.2.2)1.3; (19.3)1.7 and (19.7)1.8; (23.5.1)1.17 and 1.18; (29.2)8.1.
6 T G Quickfall, evidence-in-chief [15] [Environment Court document 18].
7 Commissioners' Decision para 12 – citing the CVL application at p 56.
8 PC59 actually uses the words "sought for" rather than "south of" but that misquotes (and makes nonsense of) the actual policy.

(a) the provision of an internal roading hierarchy including a primary local road and low speed residential streets;
(b) a requirement for acoustic insulation within the entire site for dwellings;
(c) a new zoning map;
(d) a concept plan showing likely roading connections and open space layout; and
(e) other changes to objectives and policies to better reflect those requirements in this location.

Changes (a) to (d) cause us no jurisdictional difficulties, but (e) may.

[13] The potential difficulties were compounded because the proposed objectives and policies were further amended in Mr Quickfall's evidence. CVL now proposes to add two new objectives to Section 23.6 of the WARMP[9]. The first is a new objective specific not to the site but to Omaka Aerodrome and the aviation cluster. This would be[10]:

> To recognise, provide for and protect on-going operation and strategic importance of the Omaka Aerodrome and aviation cluster (activities related to the Aerodrome).

While well-intentioned, the additions to objectives proposed by CVL at the council hearing and then, in an expanded version, to the court are beyond jurisdiction. They refer to land which is not the subject of the notified plan change (and not even contiguous to the site) and there are persons not before the court (e.g. some neighbours of the airfield) who might be affected by further amendments to the plan change. On the principles stated in *Hamilton City Council v NZ Historic Places Trust*[11] and *Auckland Council v Byerley Park Limited*[12], there must be considerable doubt about the court's jurisdiction to add the first objective. In any event, since no party suggested we give directions under section 293 in respect of them, we will not consider them further.

[14] Although the 2010 Strategy made some initial recommendations, the final recommendations are dated March 2013 and were adopted by MDC on 21 March 2013. These final recommendations note the importance of Omaka airfield as a regional resource and suggest that the appellant's land (the subject of PC59) be earmarked for employment activities, rather than residential. That is a significant shift from the 2010 Strategy's recommendations[13] as we shall discuss in more detail later.

[15] The council issued its decision declining CVL's application for private plan change on 31 July 2012. CVL appealed the decision to the Environment Court. The

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9 We question the number: existing 23.6 of the WARMP relates to Methods of Implementation, not objectives or policies.
10 T G Quickfall, evidence-in-chief Annexure 4 [Environment Court document 18].
11 *NZ Historic Places Trust v Hamilton City Council* [2005] NZRMA 145 at [25] (HC).
12 *Auckland Council v Byerley Park Limited* [2013] NZHC 3402 at [41]-[42].
13 M J Foster, evidence-in-chief [1.11] [Environment Court document 27].

council supported its decision and was supported by the section 274 parties — NZ Aviation Ltd and the Marlborough Aero Club (together called "the Omaka Group") and the Carlton Corlett Trust.

[16] Throughout the hearing various terms were used to describe non-residential urban land. We will, with some reservations about the term's generality, follow the council's new practice and use the term "employment land" to encompass land suitable for business, retail and industrial uses.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements
   1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
   2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
   3. When preparing its district plan (change) the territorial authority **must give effect to**[23] any national policy statement or New Zealand Coastal Policy Statement[24].
   4. When preparing its district plan (change) the territorial authority shall:
      (a) **have regard to** any proposed regional policy statement[25];

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14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[35].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) 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[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

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26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must **have regard to** one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

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41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].

[20] In relation to C, a key part of the case is to consider the proposed new policy and the rezoning. Since the new policy effectively seeks to justify the zoning of the site for residential purposes, we will consider the policy and the zoning together under the section 32 tests. They require us to examine, having regard to the efficiency and effectiveness of the proposed policy change and zoning, whether they are the most appropriate method for achieving the objectives of the district plan.

[21] We will consider D in relation to the proposed rules at the appropriate time. E (Other statutes) is irrelevant. Finally, in relation to F: we will have regard to the Commissioners' decision at the end of this decision.

1.5 The questions to be answered

[22] In summary the questions which need to be answered under the list in the previous section are:

- what are the relevant provisions in the operative regional policy (which must be given effect to) and what are the relevant objectives in the WARMP — the operative district plan (which must be implemented by PC59)? [See 2 below];
- what are the benefits and costs of PC59 and the alternatives? [See 3 below];
- what are the risks of approving (or not) PC59? [See 4 below];
- does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP? [See 5 below];
- does PC59 achieve the purpose of the RMA? [See 6 below];
- should the result be different from the council's decision? [See 7 below].

[23] The first alternative in this case is, whether the site should be rezoned for residential development now or whether any urban rezoning should wait until a district plan review is carried out. It is largely uncontested (at least by the council, the Omaka Group position is less clear) that the site should be used for urban purposes. However, the case for the council before us was that the site should probably be used for industrial ("employment") purposes, and that should be resolved in a proposed plan review.

[24] The other choice is to do nothing. That is, to retain the existing zoning at present because of the alleged effects that residential development may have on future use of the Omaka airfield and the Omaka Aviation Heritage Centre.

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

[25] We must give effect to any operative regional policy statement. In these proceedings the relevant document is the Marlborough Regional Policy Statement ("the RPS") which became operative on 28 August 1995. The policies and methods most relevant to this proceeding are found in the chapter on Community Wellbeing (Part 7 of the RPS). Objective 7.1.2 focuses on the quality of life, seeking to maintain and enhance the quality of life for people while ensuring activities do not adversely affect the environment. Implementing policy 7.1.5 seeks to avoid, remedy or mitigate adverse effects of activities on the health of people and communities. Another implementing policy is to enhance amenity values provided by the unique character of Marlborough settlements[51]. The explanation recognises that Blenheim is the main urban, business and service settlement in Marlborough.

[26] A further policy[52] enables the appropriate type, scale and location of activities by:

- clustering activities with similar effects;
- ensuring activities reflect the character and facilities available in the communities in which they are located;
- promoting the creation and maintenance of buffer zones (such as stream banks or 'greenbelts');
- locating activities with noxious elements in areas where adverse environmental effects can be avoided, remedied or mitigated.

[27] Objective 7.1.14 is to provide safe and efficient community infrastructure in a sustainable way. An important implementing policy relates to 'Air Transport'. The relevant policy, methods and explanation state[53]:

> 7.1.17 Policy – Air Transport
> [To] enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 Methods
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.*

51 Policy 7.1.7 [RPS p 57].
52 Policy 7.1.10 [RPS p 59].
53 Policy 7.1.17 and 18 RPS.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant[54] in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the District Plan, (as we will see shortly). On the other hand, the Omaka airfield does have heritage values — especially in connection with the Aviation Heritage Centre — which we consider later.

[28] In relation to heritage values, objective 7.3.2 of the RPS requires that buildings and locations identified as having significant heritage value are retained. Potentially, that could apply to the Omaka airfield. However, the implementing policy[55] is to protect "identified" heritage features. The methods contemplate that resource management plans will identify significant features, and the Omaka airfield has not been so identified in the RPS.

2.2 The Wairau Awatere Resource Management Plan

[29] The combined district and regional plan for the Wairau Awatere area of the district is called "The Wairau Awatere Resource Management Plan" (abbreviated to "WARMP") and envisages its life as being ten years[56]. It became operative in full on 25 August 2011.

[30] The WARMP is in three volumes. Volume 1 contains 24 chapters of objectives and policies, the rules are in Volume 2, and zoning and other maps are in Volume 3. Of the many chapters of objectives and policies, three are of particular relevance in this proceeding. They are:

54 Closing submissions for Marlborough District Council, dated 4 October 2013, at [87].
55 Policy 7.3.3 RPS.
56 Chapter 1, para 1.5 [WARMP Vol 1 p 1-2].

Chapter 11	Urban Environments
Chapter 12	Rural Environments
...	
Chapter 22	Noise

[31] The principal policies guiding potential residential development are found in Chapter 11, to which we now turn.

Urban environments (Chapter 11)

[32] The first objective in this chapter of the WARMP is to maintain and create[57] residential environments which provide for the existing and future needs of the "community". The primary policy to implement that objective is to accommodate[58] residential growth and development of Blenheim within the current boundaries of the town. Policy 1.3 states:

> Maintain high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and[59] south of the Central Business Zone.

We have already recorded that PC59 proposes a minor change to this policy with the addition of words justifying high density residential use "close to open spaces".

[33] Some urban expansion is contemplated by policy 1.5 which is[60]:

> ... [to] ensure where proposals for the expansion of urban areas are proposed, that the relationship between urban limits and surrounding rural areas is managed to achieve the following:
>
> - compact urban form;
> - integrity of the road network;
> - maintenance of rural character and amenity values;
> - appropriate planning for service infrastructure; and
> - maintenance and enhancement of the productive soils of rural land.

[34] Chapter 11 of the WARMP also describes the sort of environment contemplated for an urban environment. Objective 11.4 provides for "the maintenance and enhancement of the amenities and visual character of residential environments".

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57 Objective (11.2.2)1 [WARMP p 11-3].
58 Policy (11.2.2)1.1 [WARMP p 11-3].
59 PC59 actually uses the words "sought for" rather than "south of" but it misquotes (and makes nonsense of) the actual policy.
60 Policy (11.2.2)1.5 [WARMP p 11-3].

[35] Chapter 11 of the WARMP also provides for business and industrial activities. In relation to the latter the objective[61] is to contain the effects of industry within the two identified Industrial Zones: the heavy industrial activity in Industrial 1 Zone at Riverlands and Burleigh; and the lighter Industrial 2 Zone strung along State Highways 1 and 6. There is no objective or policy governing the creation of new industrial zones within the urban environments of the district.

The rural environment (Chapter 12)

[36] Chapter 12 contains two relevant sections, relating to General Rural Activities and to Airport Zones. Subchapter 12.4 which covers the area outside Wairau Plain's Rural 3 zoning[62] contains an objective[63] of providing a range of activities in the large rural section of the district. The implementing policy[64] seeks to ensure that the location, scale and nature, design and management of (amongst other activities) industry will protect the amenity values of the rural areas. In summary, any industrial growth in the Rural Zones is to be in the general rural areas, not in the lower Wairau Plain.

[37] In fact the land of most interest to this case is in special zones:

- the current zoning of the site[65] is Rural 3;
- the Omaka airfield is zoned[66] 'Airport Zone' (as are the Woodbourne and Picton airfields) in the WARMP;
- the Aviation Museum site to the northeast of the Omaka airfield is also zoned Rural 3.

[38] Chapter 12 (Rural Environments) of the WARMP sets out a range of issues, objectives and policies for the district's "Airport zone[s]". PC59 as notified did not include any amendments to chapter 12 and so it should be consistent with the objectives and policies in that chapter so far as that may be required by the plan. Paragraph 12.7.1 identifies[67] as an issue:

> Recognition of the need for and importance of national, regional and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

The explanation continues:

> Each of the air facilities has the potential to cause significant environmental effects including traffic generation, chemical / fuel hazard, landscape impact, and most significantly, noise pollution. The operational efficiency and functioning of Marlborough Airport, Base

61 Objective (11.4.2)1 [WARMP p 11-24].
62 Subchapter 12.2 pp 12-1 *et ff.*
63 Objective (12.4.2)2 [WARMP p 12-15].
64 Policy (12.4.2)2.5 [WARMP p 12-15].
65 See e.g. Map 155 in WARMP Vol 3.
66 See Maps 153 and 164 [WARMP Vol 3] which shows the airport zone in an ochre colour and specifically identifies "Omaka Airport".
67 WARMP Vol 1 p 12-22.

> Woodbourne, and Omaka Airfield requires continual on-site maintenance and servicing of aircraft, often associated with significant noise generation (engine testing in particular). It is essential for the continued development of industry, commerce and tourism activity in the District that a high level of air transport access is maintained. Performance standards will be applied to all activities within airport areas to avoid, remedy or mitigate adverse effects. **Likewise, the sustainability of the airport is also dependent on not being penalised by the encroachment of activities which are by their very nature sensitive to noise for normal airport operations.** (emphasis added).

[39] In that light, the objective and three policies for the airport zone(s) are[68]:

Objective 1	The effective, efficient and safe operation of the District's airport facilities.
Policy 1.1	To provide protection of air corridors for aircraft using Marlborough, Omaka and Picton Airports through height and use restrictions.
Policy 1.2	To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.
Policy 1.3	To protect airport operations from the effects of noise sensitive activities.

[40] The methods of implementation identified are to represent the airfields as Airport Zones in the planning maps and then to establish rules to[69]:

> Plan rules provide for the continued development, improvement and operation of the airports subject to measures to avoid remedy or mitigate any adverse effects. Rules define the extent of the airport protection corridors through height and surrounding land use restrictions.
>
> Plan rules will, within an area determined with reference to the 55 Ldn noise contour (surveyed in accordance with NZS 6805 'Airport Noise Management and Land Use Planning'), require activities to be screened through the resource consent process and where permitted to establish noise attenuation will be required.
>
> | | |
> |---|---|
> | Performance Conditions | Conditions are included to protect surrounding residential land uses from excessive noise. |

[41] In fact no air noise contours or outer control boundaries have yet been introduced for the Omaka airfield. In contrast they <u>are</u> shown for the Woodbourne Airport on Map 147[70] as an "Airport Noise Exposure Overlay". CVL placed significant weight on this difference since the WARMP anticipated that an outer control boundary will be created for all the District's airports[71]. The council's evidence is that the process began for the Omaka airfield in 2007[72] and as demonstrated by the uncertainty in the noise evidence it will apparently take some time yet to resolve.

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68 Objective 12.7.2 [WARMP p 12-23].

69 Para 12.7.7.3 [WARMP p 12-23 to 12-24].

70 WARMP Vol 3 Maps 146 and 147.

71 e.g. noise buffers surrounding the airport are considered the most effective means of protecting "their" operations (WARMP p 12-23).

72 R L Hegley, evidence-in-chief, para 5 [Environment Court document 25].

Noise (Chapter 22)

[42] Chapter 22 of the district plan essentially provides for the protection of communities from noise which may raise health concerns. The objective and most relevant policies are those in subchapter 22.3 which state:

Objective 1	Protection of individual and community health, environmental and amenity values from disturbance, disruption or interference by noise.
Policy 1.1	Avoid, remedy or mitigate community disturbance, disruption or interference by noise within coastal, rural and urban areas.
Policy 1.2	Include techniques to avoid the emission of excessive or unreasonable noises within the design of any proposal for the development or use of resources.
Policy 1.3	Accommodate inherently noisy activities and processes which are ancillary to normal activities within industrial and rural areas.

...

Subdivision (Chapter 23)

[43] We were referred to a number of policies in this chapter. Policy 1.6 requires decision-makers to "recognise the potential for amenity conflict between the rural environment and the activities on the urban periphery". Similarly policy 1.8 is to: "consider the effects of subdivision on the rural environment in so far as this contributes to the character of the Plan Area, and avoid or mitigate any adverse effects". Policy 23.4.1.1.11 is "to ensure that any adverse effects of subdivision on the functioning of services and other infrastructure and on roading are avoided, remedied or mitigated". We consider these policies are to be applied when a subdivision application or consent for land use is being applied for. They are not relevant when the rezoning of land is being considered. There is a plethora of policies — as identified above — to be considered already.

Rules

[44] For completeness we record that in the volume of rules[73], section 44 sets out the rules in the Airport Zone. These apply to Omaka airfield. The usual aviation activities are permitted activities[74]. Woodbourne Airport has its take-off and landing paths protected on the Planning Maps in accordance with Map 213 'Airport Protection and Designation 2'. Omaka airfield's flight paths are set out in a rule[75] rather than in a map.

2.3 NZS 6805: the Air Noise Standard

[45] It will be recalled that the methods of implementation in the district plan expressly contemplate application of the New Zealand Standard ("NZS 6805:1992") called "Airport Noise Management and Land Use Planning". That includes as the main recommended methods of airport noise management[76]:

73 WARMP Vol 2.
74 Rule 44.1.1 [WARMP Vol 2 p 44-1].
75 Rule 44.1.4.2.2 [WARMP Vol 2 p 44-3].
76 NZS 6805 para 1.1.5.

(a) ... establish[ing] maximum levels of aircraft noise exposure at an Airnoise Boundary, given as a 24 hour daily sound exposure averaged over a three month period (or such other period as is agreed).

(b) ... establish[ing] a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary.

[46] In relation to the latter, NZS 6805 explains:

1.4.2 *The outer control boundary*

1.4.2.1
The outer control boundary defines an area outside the airnoise boundary within which there shall be no new incompatible land uses (see table 2).

1.4.2.2
The predicted 3 month average night-weighted sound exposure at or outside the outer control boundary shall not exceed 10 Pa^2s (55 Ldn).

[47] NZS 6805 then describes how to locate the two boundaries. The two important points for present purposes are that once the technical measurements and extrapolations have been made, the decision as to where to locate the two boundaries is made under the procedures[77] for preparation of district plans under the RMA; and, secondly, that evaluative (normative) decisions have to be made by the local authority under clause 1.4.3.7 as to whether the predicted contours at the chosen date in the future are a "reasonable basis for future land use planning", taking into account a wide range of factors.

[48] For completeness we record that the standard then refers to two tables which are explained in this way[78]:

1.8 Explanation of tables

C1.8.1
All considerations of annoyance, health and welfare with respect to noise are based on the long term integrated adverse responses of people. There is considerable weight of evidence that a person's annoyance reaction depends on the average daily sound exposure received. The short term annoyance reaction to individual noise events is not explicitly considered since only the accumulated effects of repeated annoyance can lead to adverse environmental effects on public health and welfare. Thus in all aircraft noise considerations the noise exposure is based on an average day over an extended period of time — usually a yearly or seasonal average. (Further details may be obtained from US EPA publication 500/9-74-004 "Information on levels of environmental noise requisite to protect public health and welfare with an adequate margin of safety").

77 Schedule 1 to the RMA.
78 Para 1.8 NZS 6805.

Table 2

[49] A Table 2 is then introduced as follows[79]:

> Table 2 enumerates the recommended criteria for land use planning within the outer control boundary i.e. 24 hour average night-weighted sound exposure in excess of 10 Pa^2s.

Table 2 states:

> RECOMMENDED NOISE CONTROL CRITERIA FOR LAND USE PLANNING INSIDE THE OUTER CONTROL BOUNDARY BUT OUTSIDE THE AIR NOISE BOUNDARY

Sound exposure Pa^2s (1)	Recommended control measures	Day/night level Ldn (2)
>10	New residential, schools, hospitals or other noise sensitive uses should be prohibited unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory internal noise environment. Alterations or additions to existing residences or other noise sensitive uses should be fitted with appropriate acoustic insulation and encouragement should be given to ensure a satisfactory internal environment throughout the rest of the building.	>55

> NOTE –
>
> (1) Night-weighted sound exposure in pascal-squared-seconds or "pasques".
>
> (2) Day/night level (Ldn) values given are approximate for comparison purposes only and do not form the base for the table.

[50] There is a problem as to what Table 2 means. The MDC's Commissioners wrote[80]:

> There appear ... to be two alternatives we should consider viable:
>
> (a) that the qualification after the word *unless* only applies if the District Plan presently permits residential activity within the OCB. In such a case the Standard does not consider that the existing 'development rights' attaching to the land should be withdrawn on acoustic grounds alone. In such a case mitigation will be a sufficient response; or
>
> (b) that the qualification after *unless* applies to both existing and new district plan provisions where new residential activity is proposed subject to appropriate acoustic insulation.

They preferred the first interpretation[81].

[51] We are reluctant to step into this debate. It is not our task to establish an outer control boundary in this proceeding and so we do not need to establish the correct meaning of the Standard. We consider the proper approach to the standard is to use it as

79 Para 1.8.3 NZS 6805.
80 Commissioners' Decision para 118 [Environment Court document 1.2].
81 Commissioners' Decision para 119 [Environment Court document 1.2].

a guide — always bearing in mind, as we have said, that the standard itself involves value judgements as to a range of matters.

2.4 Plan Changes 64 to71

[52] Following the Southern Marlborough Urban Growth ("SMUGS") process the council notified Plan Changes 64-71 ("PC64-71") to rezone areas to meet the demand for residential land. CVL is a submitter in opposition.

[53] As noted by the Omaka Group, these plan changes do not form part of the matters the court is to consider in terms of the legal framework although the need for residential land was one argument put forward in support of PC59[82]. It is submitted by the Omaka Group that, given any future residential shortage will be addressed by PC64 to 71, the court should be cautious in giving weight to the effect of PC59 on this need[83]. For its part the council says that while that may be the case the court must still make its decision in the context of the relevant planning framework[84]. Notification of PC64 to 71 is a fact and that process is to be separately pursued by the council[85]. While there is no guarantee the plan changes will become operative in their notified form, they are — at most — a relevant consideration under section 32 of the RMA. PC64 to 71 are of very limited assistance to the court since these plan changes are at a very early stage in their development. They had not been heard, let alone, confirmed by the council at the date of the court hearing.

3. What are the benefits and costs of the proposed rezoning?

3.1 Section 32 RMA

[54] Under section 290 of the Act, the court stands in the shoes of the local authority and is required to undertake a section 32 evaluation.

[55] Section 32(1) to (5) of the Act, in its form prior to the 2013 amendments[86], states (relevantly):

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... 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 —
> (a) ...
> (b) ...
> (ba) ...

82 Closing submissions for Omaka Group, dated 11 October 2013 at [26].
83 Closing submissions for Omaka Group, dated 11 October 2013 at [29].
84 Closing submissions for Marlborough District Council, dated 4 October 2013 at [72].
85 Closing submissions for Marlborough District Council, dated 4 October 2013 at [48].
86 Schedule 12 clause 2 Resource Management Amendment Act 2013: If Part 2 of the amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), then the further evaluation for that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of Schedule 1); or
(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of the Schedule 1.

(2) A further evaluation must also be made by —
(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
(b) ...

(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 ... 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.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

[56] Mr T G Quickfall, a planner called by CVL, gave evidence that he prepared PC59 including its section 32 analysis[87]. He relied on that in his evidence-in-chief[88], writing "I am confident that section 32 has been met". To the opposite effect Ms J M McNae, a consultant planner called by the council, stated that the section 32 analysis was "inadequate"[89]. The other planners who gave evidence[90] did not write anything about the plan change in relation to section 32.

3.2 The section 32 analysis in the application for the plan change

[57] In fact, the analysis in the application for the plan change is confusing. Table 2[91] commences by referring to the appropriateness under section 32 of three objectives (in chapters 11, 19 and 23 respectively). However, PC59 does not seek to change any objectives or to add any new ones so that analysis is irrelevant.

[58] Slightly more usefully the next table in the application then contains[92] a qualitative comparison of the benefits and costs. In summary the Table stated that the proposed changes to explanation; policies, rules and other methods would lead to these benefits: better provision for urban growth, alignment with urban design principles, implements growth strategy and land availability report, implements NZS 4404:2010, provides for more flexible road design and more efficient layout, reduces hard surfaces,

87 Section 4 of the proposed plan change dated 28 April 2011.
88 T G Quickfall, evidence-in-chief para 30 [Environment Court document 18].
89 J M McNae, evidence-in-chief para 40 [Environment Court document 28].
90 M J G Garland, M A Lile, P J Hawes and M J Foster.
91 Proposed Plan Change 28 April 2011 p 25.
92 Proposed Plan Change 28 April 2011 p 26.

increases residential amenity through wider choice of roading types, and recognises Omaka airfield as regional facility and avoids reverse sensitivity effects.

[59] The only costs were the costs of the plan change in his view.

[60] Similarly, the application identified[93] the benefits of the proposed zoning as being:

- provides for immediate to short term further growth and residential demand;
- wider range of living and location choices;
- implements urban design principles;
- enables continued operation of Omaka and avoids reverse sensitivity effects; and
- improved connections to Taylor River Reserve.

The costs identified were "the replacement of rural land use with residential land use".

[61] The application for the plan change identifies it as being more efficient and effective although what PC59 is being compared with is a little obscure — presumably the status quo. That analysis merely makes relatively subjective assertions which are elaborated on more fully in the planners' evidence. It would have been much more useful if the section 32 report or the evidence had contained quantitative analysis. As the court stated — of section 7 rather than section 32 of the RMA, but the same principle applies — in *Lower Waitaki Management Society Incorporated v Canterbury Regional Council*[94]:

> ... it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

[62] Section 4 of the application for the plan change then assessed[95] the following "alternative means for implementing the applicant's intentions":

> ...
> (i) Do nothing.
> (ii) Apply for resource consent(s).
> (iii) Initiate a plan change.
> (iv) Wait for the final growth strategy.
> (v) Wait for a council initiated plan change ...

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93 Proposed Plan Change 28 April 2011 Table 3 p 26.

94 *Lower Waitaki Management Society Incorporated v Canterbury Regional Council* Decision 080/09 (21 September 2009).

95 Application for plan change 28 April 2011 pp 27-58.

We have several difficulties with that. First, we doubt if (i) or (v) would implement the applicant's intentions. Second, the application is drafted with reference to a repealed version of section 32.

3.3 Applying the correct form of section 32 to the benefits and costs

[63] The applicable test is somewhat different. As noted earlier, from 1 August 2003, with minor subsequent amendments, section 32 (in the form we have to consider[96]) requires an examination[97] of whether, having regard to their efficiency and effectiveness, the policies and methods are the most appropriate for achieving the objectives. Then subsection (4) reads:

> (4) For the purposes of the examinations referred to in subsection (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.

The reference to "alternative means" has been deleted, so read by itself, the applicable version of section 32(4) looks as if a viability analysis — are the proposed activities likely to be profitable? — might suffice. Certainly section 32 analyses are often written as if applicants think that is what is meant. However, the purpose of the benefit/cost analysis in section 32(4) is that it is to be taken into account when deciding the most appropriate policy or method under (here) section 32(3). The phrase "most appropriate" introduces (implicitly) comparison with other reasonably possible policies or methods. Normally in the case of a plan change, those would include the status quo, i.e. the provisions in the district plan without the plan change. Here, as we have said, the recently notified PC64 to 71 are also relevant as options.

[64] Given that the relevant form of section 32 contains no reference to alternatives, the applicant questioned the legal basis for considering alternative uses of the land. Counsel referred to *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Co. Ltd*[98] where Dobson J stated:

> 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.

Given that the High Court decision in that proceeding was appealed direct to the Supreme Court (with special leave) we prefer to express only brief tentative views on the law as to alternatives under section 32. First, that 'most appropriate' in section 32

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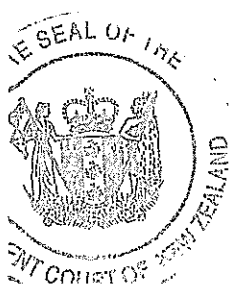
96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

98 *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Company Limited* [2013] NZRMA 371 at [171] (HC).



suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory. The rational choices appear to be the current activity on the land and/or whatever the district plan permits. So we respectfully agree with Dobson J when he stated that consideration of yet other means is not compulsory under the RMA. We would qualify this by suggesting that if the other means were raised by reasonably cogent evidence, fairness suggests the council or, on appeal, the court should look at the further possibilities.

[65] Secondly a review of alternative uses of the resources in question is required at a more fundamental level by section 7(b) of the RMA. That requires the local authority to have particular regard to the "efficient use of natural and physical resources". The primary question there, it seems to us, is which, of competing potential uses put forward in the evidence, is the more efficient use. We consider that later.

[66] For those reasons, Mr Quickfall was not completely wrong to rely on the analysis in section 4 of the application for the plan change when he relied on its qualitative comparison of alternatives. However, as we have stated the analysis is not, in the end, particularly useful because it adds little to the analysis elsewhere more directly stated in his and other CVL witnesses' evidence-in-chief.

[67] The only planner to respond in detail on section 32 was Ms McNae for the council. Her analysis[99] is as unhelpful as Mr Quickfall's for the same reason: it repeats subjective opinions stated elsewhere[100]. We will consider their differences in the context of the next section 32 question, to which we now turn.

4. What are the risks of approving PC59 (or not)?

4.1 Introducing the issues

[68] The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk", recalling that a risk is the product of the probability of an event and its consequences (see *Long Bay Okura Great Park Society v North Shore City Council*[101]).

[69] The evidence on the risks of acting[102] (i.e. approving PC59) was that the experts were agreed that the following positive consequences are likely:

99 J McNae, evidence-in-chief para 53 [Environment Court document 28].
100 e.g. J McNae, evidence-in-chief para 54 [Environment Court document 28].
101 *Long Bay Okura Great Park Society v North Shore City Council* A078/2008 at [20] and [45].
102 See section 32(4) RMA.

(a) urgent demand for housing will be (partly) met[103];

(b) the site has positive attributes[104] for all the critical factors for residential development except for one. That is, the soils and geomorphological conditions and existing infrastructure and stormwater systems are all positive for such development. The exception is that the consequences for the roading network and other transport factors would be merely neutral;

(c) of the (merely) desirable factors[105], the site only shows positively on one factor — the proximity of recreational possibilities. It is neutral in respect of community, employment and ecological factors, and is said to be negative in respect of landscape although we received minimal evidence on that point;

(d) although the potential to develop land speedily is not a factor referred to in the district plan, we agree with CVL that it is a positive factor that the land is in single ownership and could be developed in a co-ordinated single way. The 2010 Strategy recognised[106] that with the anticipated growth rates the site might be fully developed within 3.5 years.

[70] The negative consequences of approving PC59 are likely to be:

(a) that versatile soils would be removed from productivity;
(b) that some rural amenities would be lost;
(c) that an opportunity for 'employment' zoning would be lost;
(d) there is the loss of a buffer for the Omaka airfield;
(e) there may be adverse effects on future use of Omaka airfield.

[71] The risks of not acting (i.e. refusing PC59) are the obverse of the previous two paragraphs.

[72] Few of the witnesses seemed much concerned with loss of rural productivity. As Mr Quickfall recorded[107] the site contains 21 hectares, and the Rural 3 Zone as a whole covers 17,100 hectares. Development of the whole site would displace 0.1228% from productive use. We prefer his evidence to that of Ms McNae.

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103 Transcript p 427 (Cross-examination of Mr Bredemeijer).
104 South Marlborough Urban Growth Strategy May 2010 — summarised in T G Quickfall, evidence-in-chief Table 1 at para 25 [Environment Court document 18].
105 T G Quickfall, Table 1, evidence-in-chief at para 25 [Environment Court document 18].
106 2010 Strategy para 120.
107 T G Quickfall, evidence-in-chief para 54 [Environment Court document 18].

[73] On the effects of PC59 on rural character and amenity, again we accept the evidence of Mr Quickfall[108] that the site and its surroundings are not typical of the Rural 3 Zone. Rather than being surrounded by yet more acres of grapevines, in fact the site has sealed roads on three sides[109], beyond which are residential zones and some houses on two sides, and the Carlton Corlett land to the south. We accept that rural character and amenity are already compromised[110].

[74] The remaining questions raised by the evidence are:

- what is the supply of, and demand for, employment land?
- what is the reasonably foreseeable residential supply and demand in and around Blenheim?
- what is the current intensity of use, and the likely growth of the Omaka and Woodbourne airports?
- what effects would airport noise have on the quantity of residential properties demanded and supplied in the vicinity of the airports?

4.2 Employment land

[75] Obviously the risk of not meeting demand for industrial or employment land is reduced if there is already a good supply of land already zoned. There was a conflict of evidence about this, but before we consider that, we should identify the documents relied on by all the witnesses.

The Marlborough Growth Strategies

[76] In relation to the CVL land, all the planning witnesses referred to the fact that the MDC has been attempting to develop a longer term growth "strategy" which considers residential and employment growth. There are three relevant documents:

- the "Southern Marlborough Urban Growth Strategy" ("the 2010 Strategy") (this is the 2010 Strategy already referred to);
- the "Revision of the Strategy for Blenheim's Urban Growth" ("2012 Strategy")[111];
- the "Growing Marlborough ... district-wide ..." ("2013 Strategy").

It should be noted that the three strategies cover different areas — Southern Marlborough, Blenheim, and the whole district respectively. Further, as Mr Davies reminded us these documents are not statutory instruments.

[77] As we have recorded, PC59 was strongly influenced by the 2010 Strategy, so CVL was disappointed when the 2010 Strategy, after being put out for public

108 T G Quickfall, evidence-in-chief paras 57 and 58 [Environment Court document 18].
109 T G Quickfall, evidence-in-chief para 57 [Environment Court document 18].
110 T G Quickfall, evidence-in-chief para 58 [Environment Court document 18].
111 C L F Bredemeijer, evidence-in-chief Appendix 3 [Environment Court document 21].

consultation, was revised by the subsequent strategies. The council pointed out that, while the 2010 Strategy was relevant in terms of PC59, it had not undergone the process set out in Schedule 1 of the RMA and so was always subject to change[112].

[78] For the reasons given in the 2013 Strategy, Colonial's site (and its proposed PC59) was set aside as an option for Residential zoning and the matter left for this court to determine.

The council's approach

[79] Mr C L F Bredemeijer, of Urbanismplus and on behalf of the council, was the project manager and report author during the processes leading to the three Marlborough Growth Strategies[113]. He, in turn, engaged Mr D C Kemp, an economist and employment and development specialist, to investigate employment and associated land issues for the Marlborough region[114].

[80] In Mr Kemp's view the traditional rural services at present around the Blenheim town centre should be relocated and provision made for future growth in employment related activities which should be located away from the town centre. The CVL site, according to Mr Kemp, offers "an exceptional opportunity" for accommodating these activities[115]. He saw a need to protect the site as strategic land for existing, new and future oriented business clusters[116].

[81] To quantify the need for employment land up to the year 2031 Mr Kemp considered two scenarios. The first he called the Existing Economy Scenario and the second, a realistic Future Economy Scenario. The latter includes, in addition to all factors considered in the Existing Economy Scenario, consideration of the perceived shortfall in industrial land uses where Marlborough currently has less than expected employment ratios and provides for relocation of existing inappropriately located activities[117]. For the period 2008 to 2031 the Existing Economy Scenario led to a requirement for 69 hectares of employment land with 120 hectares required for the Future Economy Scenario[118]. These represent growth rates of 3.0 and 5.2 hectare/year respectively.

[82] Mr Kemp's figures were incorporated into the 2010 Strategy, being referred to as the "minimum" and the "future proofed" requirements[119]. The latter required:

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112 Closing submissions for Marlborough District Council, dated 4 October 2013 at [24].
113 C L F Bredemeijer, evidence-in chief para 7 [Environment Court document 21].
114 D C Kemp, evidence-in-chief para 7 [Environment Court document 20].
115 D C Kemp, evidence-in-chief paras 11–19 [Environment Court document 20].
116 D C Kemp, evidence-in-chief para 26 [Environment Court document 20].
117 D C Kemp, evidence-in-chief paras 31 and 35 [Environment Court document 20].
118 D C Kemp, evidence-in-chief paras 33 and 36 [Environment Court document 20].
119 Southern Marlborough Growth Strategy 2010, p 108.

- 63 hectares for small scale Clean Production and Services;
- 7 hectares for Vehicle Sales and Services;
- 24 hectares for larger-scale Transport and Logistics; and
- 30 hectares for other "Difficult to Locate" activities with low visual amenity and potentially offensive impacts.

The 2010 Strategy then notes: "There is clearly sufficient employment land in Blenheim to meet all of these potential needs with the exception of "... 5 ha ..."". The 5 ha refers to land for "difficult to locate activities" which Mr Kemp acknowledged would be inappropriate to place on the site[120].

[83] Following the 2010 and 2011 Christchurch earthquakes the council sought reports on liquefaction prone land in the vicinity of Blenheim. The reports raised serious concerns about the suitability of some of the land identified for development in the 2010 Strategy. (No liquefaction issues were identified with respect to the site). The council recognised that there would be a severe shortfall of residential and employment land in Blenheim[121] assuming no change to the demand for employment land. Instead of there being "clearly sufficient" land for employment purposes there was now a shortfall of approximately 85 hectares[122]. Mr Hawes, planner for the council, appeared to accept this figure[123]. The court has no reason to dispute it and thus accepts it as the best estimate of employment land required to future proof Blenheim in this regard until 2031.

[84] To meet the perceived shortfall of 85 hectares, revised strategies for provision of employment land identified a preference for employment land development near Omaka and Woodbourne airports. That near Omaka included the site, which was identified in the 2010 Strategy for residential use[124] and the Carlton Corlett Trust land to its south[125]. This was seen as a logical progression of employment land north from the Omaka airport to New Renwick Road and as a solution to noise issues. These preferences were carried through to the 2013 Strategy which was released in March 2013 and ratified by the full council on 4 April 2013[126]. We note that neither CVL as the site's land owner nor adjacent residential owners and occupiers[127] were consulted about this change in preference from residential to industrial[128].

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120 D C Kemp, evidence-in-chief para 25 [Environment Court document 20].
121 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].
122 C L F Bredemeijer, evidence-in-chief para 37 [Environment Court document 21].
123 P J Hawes, evidence-in-chief para 36 [Environment Court document 22].
124 P J Hawes, evidence-in-chief Figure 1 [Environment Court document 22].
125 P J Hawes, evidence-in-chief para 37.3 [Environment Court document 22].
126 P J Hawes, evidence-in-chief paras 44 and 46 [Environment Court document 22].
127 There are 84 adjacent residential properties, 31 of which face the site along New Renwick Road and Richardson Avenue.
128 C L F Bredemeijer, evidence-in-chief paras 44-46 [Environment Court document 21].

[85] The 2013 Strategy summarised planning over the last 5 or 10 years for urban growth as follows[129]:

> Land use and growth
> The original Southern Marlborough Urban Growth Strategy Proposal catered for residential and employment growth in a variety of locations on the periphery of Blenheim, including the eastern periphery. As explained earlier, the areas to the east of Blenheim were removed from the Strategy as a result of the significant risk and likely severity of the liquefaction hazard. This decision was made by the Environment Committee on 3 May 2012.
>
> The Strategy now focuses residential growth to the north, north-west and west of Blenheim and employment growth to the south-west. In this way, the Strategy will provide certainty in terms of the appropriate direction for growth for the foreseeable future.
>
> The Strategy, including the revision of Blenheim's urban growth, is based on the sustainable urban growth principles presented in Section 2.1. In assessing the suitability of these sites, it was clear that residential activity would encroach onto versatile soils to the north and north-west of Blenheim. The decision to expand in this direction was not taken lightly. However, given the constraints that exist at other locations, the Council did not believe it had any other options to provide for residential growth. The decision was made also knowing that land fragmentation in some of the growth areas had already reduced the productive capacity of the soil.

[86] In summary, the council's strategic vision with respect to provision of employment land is set out in the 2013 Strategy as[130]:

- a further 64 hectares for future general and large scale industry in the Riverlands area;
- additional employment land near the Omaka Aerodrome (53 hectares) and the airport at Woodbourne (15 hectares);
- possible future business parks near Marlborough Hospital, near Omaka and near the airport at Woodbourne.

[87] However, the 2013 Strategy expressly left open the future appropriate development of the (Colonial) site[131]:

> W2 (or Colonial Vineyard site)
> During the process of considering submissions on W2, the owners of the land requested a plan change to rezone the property Urban Residential to facilitate the residential development of the site. The Council declined to make a decision on this growth area to ensure there was no potential to influence the outcome of the plan change process. Given the delay caused by the liquefaction study and the subsequent revision, the plan change request has now been heard by Commissioners and their decision was to decline the request. This decision has been appealed to the Environment Court by the applicant. This appeal will be heard during 2013.
>
> Due to the effect of the liquefaction study on the strategy and the areas it identified for employment opportunities to the east of Blenheim, other areas have now been assessed in terms of their suitability for employment uses. This includes the W2 site and adjoining land in the vicinity of Omaka Aerodrome. Refer to the employment land section below for further details.

129 Page 36 of the 2013 Strategy.
130 2013 Strategy, p 30.
131 C L F Bredemeijer, evidence-in-chief Appendix 4 [Environment Court document 21].

> It is noted that if the plan change request is approved by the Court, the subsequent development of the rezoned land will assist to achieve the objectives of this strategy. If the Court does not approve the plan change then the Council will be able to promote Area 8 as an alternative.

CVL's approach

[88] Mr Kemp's approach was challenged by the applicant's witnesses on the grounds that:

- much industrial expansion and new employment occurs in the rural zone as discretionary activities. This reduces the need for industrial zoning. This factor was not mentioned by Mr Kemp[132];
- Mr Kemp's projections require an additional 3,650 employees to support them while Statistics New Zealand's projection of population growth for the same period is 2,700 persons[133];
- use of only one year's data on which to base projections is inappropriate. That the year is a boom year, 2008, and prior to the global financial crisis caused further concern[134].

[89] In predicting the future need for employment land CVL's witnesses preferred to consider the past take up of industrial land and to account for the areas of land available at present for employment land. They also considered which industries would be likely to develop on or relocate to the site. Mr T P McGrail, a professional surveyor, compared land use as delineated in a 2005 report to council with the existing situation for what he described as business and industrial uses. Noting the area of land available for these uses in 2005 was essentially the same as that available in 2013 he concluded the net take up of vacant land since 2005 has been "very low"[135]. As an example he records that in May 2008 54 hectares was rezoned at Riverlands but no take up of this land has occurred in the 5 years it has been available[136]. His evidence was that there have been three greenfield industrial subdivisions in the Blenheim area in the last 34 years of which 19 hectares has been developed[137]. This is at a rate of 0.56 hectares/year. That contrasts with the growth rates of 3.0 and 5.2 hectares/year adopted by Mr Kemp and noted above.

[90] In considering which industries may chose to locate or relocate to the site, Mr McGrail dismissed wet industries (on advice from the council) together with processing of forestry products and noxious industries including wool scouring and sea food processing on the basis of their effects on neighbouring residents[138]. Other employment uses discussed by Mr McGrail were aviation, large format retail and business. Due to

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132 T P McGrail, Rebuttal evidence paras 37 and 38 [Environment Court document 9A].
133 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
134 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
135 T P McGrail, Rebuttal evidence paras 3–6 [Environment Court document 9A].
136 T P McGrail, Rebuttal evidence para 33 [Environment Court document 9A].
137 T P McGrail, Rebuttal evidence paras 26 and 28 [Environment Court document 9A].
138 T P McGrail, Rebuttal evidence paras 8–10 [Environment Court document 9A].

the Carlton Corlett Trust land's proximity to the airfield it would be preferred to the site for aviation related industries. This 31 hectares together with 42 hectares designated as Area 10, located immediately to the northwest of Omaka airfield, gives 73 hectares of land better suited to employment (particularly aviation) uses than the site.

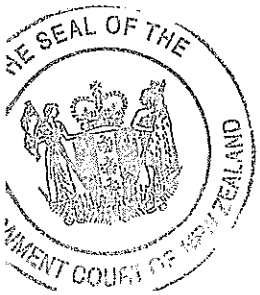
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose to locate or relocate to the site because they would lose the advantages that accrue by being close to main traffic routes and the town centre[140]. This underlay his skepticism of Mr Kemp's projections for business uptake of the site[141].

[92] Mr T J Heath, an urban demographer and founding Director of Property Economics Limited, was asked by CVL to determine if there was any justification for the council preferred employment zoning of the site[142]. To do so he assessed the demand for employment land using his company's land demand projection model. This uses Statistics New Zealand Medium Series population forecasts, historical business trends and accounts for a changing demographic profile in Marlborough. It first predicts increases in industrial employment which are then converted to a gross land requirement[143]. Use of this model to predict the need for future employment land was not challenged during the hearing.

[93] Industrial employment projections from the model suggested a 28% increase over the period 2013 to 2031 which translated to a gross land requirement of 49 hectares[144]. This result is considered by Mr Heath to be "towards the upper end of the required industrial land over the next 18 years". Two other scenarios are presented in his Table 3 each of which results in a smaller requirement[145]. Mr Heath then relied upon Mr McGrail's estimates of presently available employment land which totalled 103 hectares[146]. This comprised the 19 hectares identified by Mr McGrail and referred to above plus the 84 hectares of land available at Riverlands[147].

[94] During cross examination Mr Heath stated[148] "My analysis shows me you have zoned all the land required to meet the future requirements out to 2031". This was a reiteration of his rebuttal evidence where he wrote[149] "even at the upper bounds of

139 T P McGrail, Rebuttal evidence para 19 [Environment Court document 9A].
140 T P McGrail, Rebuttal evidence para 21 [Environment Court document 9A].
141 T P McGrail, Rebuttal evidence paras 21 and 22 [Environment Court document 9A].
142 T J Heath, Rebuttal evidence para 6 [Environment Court document 16].
143 T J Heath, Rebuttal evidence para 31 [Environment Court document 16].
144 T J Heath, Rebuttal evidence Table 3 [Environment Court document 16].
145 T J Heath, Rebuttal evidence paras 35and 36 [Environment Court document 16].
146 T J Heath, Rebuttal evidence Table 4 [Environment Court document 16].
147 T P McGrail, Rebuttal evidence Figure 2.
148 Transcript p 315.
149 T J Heath, Rebuttal evidence para 39 [Environment Court document 16].



49 hectares, there is clearly more than sufficient industrial land to meet Blenheim's and in fact Marlborough's future industrial needs ...".

Findings

[95] We ignore the 15 hectares near Woodbourne as this is Crown land that could form part of a Treaty settlement for Te Tau Ihu Iwi[150]. Its future is thus uncertain. The 53 hectares near Omaka includes the site (21.7 hectares) and the Carlton Corlett Trust land (31.3 hectares). The land owner of the latter has expressed a desire to develop the property to provide for employment opportunities[151]. Indeed, together the Carlton Corlett Trust land (31 hectares) and the further 64 hectares at Riverlands total 91.3 hectares. This is in excess of the 85 hectares sought by council for its future proofing to 2031.

[96] In addition to the lands listed above, council has identified 42 hectares of land (referred to as Area 10) to the west of Aerodrome road and north of the airfield for additional employment growth in the long term[152].

[97] The council strategy requires 89 hectares of employment land to future proof the need for such land in the vicinity of Blenheim. There is at present sufficient land available to provide for this without any rezoning. We conclude the need for employment land within a planning horizon of 18 years (to 2031) is not a factor weighing against the requested plan change.

4.3 Residential supply and demand

[98] Prior to 2011, there was a demand for between 100 and 150 houses a year and an availability of approximately 1,000 greenfield sites[153]. Based on that, counsel for the Omaka Group submitted there is no evidence that the alleged future shortfall will materialise before further greenfield sites are made available[154]. We are unsure what to make of that submission because counsel did not explain what he meant by "shortfall". There is not usually a general shortfall. Excess demand is an excess of a quantity demanded at a price. In relation to the housing market(s), excess demand of houses (a shortfall in supply) is an excess of houses demanded at entry level and average prices over the quantity supplied at those prices.

[99] Mr Hayward gave evidence for CVL that there has been "a subnormal amount of residential land coming forward from residential development in Marlborough"[155]. He also stated that there was an imbalance between supply and demand, with a greater quantity demanded than supply[156]. Further, none of the witnesses disputed Mr Hawes'

150 2013 Strategy, p 41.
151 2013 Strategy, p 40.
152 2013 Strategy, p 40.
153 Environmental Management Services Limited report, dated 11 January 2011.
154 Closing submissions for Omaka at [101].
155 A C Hayward, Transcript at p 98, lines 10-15.
156 A C Hayward, Transcript at p 103, lines 20-25.

evidence[157] that the Strategies are clear that there is likely to be a severe shortfall of residential land in Blenheim if more land is not zoned for that purpose.

[100] Plan Changes 64 to 71 would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

[101] We find that one of the risks of not approving PC59 is that the quantity of houses supplied in Blenheim at average (or below) prices is likely to decrease relative to the quantity likely to be demanded. That will have the consequence that house prices increase.

4.4 Airports

[102] In view of the importance placed on the Woodbourne Airport in the RPS, it was interesting to read the 2005 assessment by Mr M Barber in his report[158] entitled "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options". He wrote[159] of Omaka:

> The principal threats to the sustainable use of Omaka Aerodrome arise from its proximity to Woodbourne/Blenheim Airport, the potential for encroachment on the obstacle limitation surfaces, and urban or rural-residential encroachment.

[103] Currently Omaka aerodrome may expand its operations as a permitted activity. However, it is uncertain what restrictions or protection may be put in place for Omaka by way of a future plan change process and it is in this uncertain context that the court is asked to determine what the likely noise effects of the airfield will be in the future.

[104] The Omaka Group argued that, given the uncertainty around the air noise boundary and outer control boundary which are likely to be imposed in the future, it is helpful to have regard to the capacity of the airfield. Although, as Mr Day conceded in cross-examination[160], the capacity approach is unusual, the Omaka Group argued it is sensible in the context of uncertainty about the level of use to consider the capacity of the airfield. This would allow for full growth in the future, regardless of the current recession[161]. CVL responded that the capacity approach is an argument not advanced by any witness and so there is no evidence as to the capacity of the airfield[162].

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157 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].

158 P J Hawes, evidence-in-chief Appendix 2 [Environment Court document 22].

159 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 40. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

[105] Mr Barber in his 2005 report wrote in relation to the potential for urban encroachment[163]:

> Clearly, there is considerable existing and future potential for urban residential development to the south-west of Blenheim which could result in encroachment on Omaka Aerodrome. To avoid possible adverse effects on the future safe and efficient operation of the aerodrome, it is important that the area likely to be subject to aircraft noise in the future be identified and appropriate protection measures be incorporated in the District Plan.

4.5 Noise

[106] In relation to the risks of acting when there is insufficient certainty and/or information about the subject matter of the policies or methods, we observe that the uncertainties are not about the current environment but about the environment in 15 or 25 years' time.

[107] Similarly the Marlborough Aviation Group was aware of the issue in 2008. As a former President, Mr J McIntyre, admitted in cross-examination[164], he wrote[165] of The Marlborough Aero Club Inc. in the President's Annual Report for 2008:

> The opening of the Airpark adjacent to the Aviation Heritage Centre is a positive aspect of this, but has thrown up some curly questions as to how operations should take place from this area. Concurrent with increased numbers of aircraft (of all types) is the concern that we will draw undue attention to ourselves with noise complaints, as we are squeezed by ever-increasing urban encroachment. On this front, it does not help that the District Council did not see fit to have the fact that airfield exists included in developer's information and LIM reports for the new sub division up Taylor Pass Road.

Current airport activity

[108] The site lies under the 01/19 vector runways[166] of the Omaka airfield. Thus it is subject to some noise from aircraft taxiing, taking off and landing. How much noise was a subject of considerable dispute.

[109] Two methods of assessing aircraft noise were put forward. CVL produced the evidence of Mr D S Park based on 2013 measurements and extrapolations. In December 2012 Mr Park had installed a system at the site for recording the radio transmissions made by pilots operating at Omaka. In this way he sought an understanding of aircraft noise data obtained at the site as described by Dr Trevathan[167] and to aid in the analysis of that data. In contrast the MDC and the aviation cluster initially relied on data collected at Woodbourne between 1997 and 2008 ("the Tower data"), extrapolated to the present. They later based their predictions out to 2039 on Mr Park's measurements, as discussed below.

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163 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 42. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

164 Transcript p 732 lines 15-20 (Tuesday 17 September 2013).

165 Exhibit 35.1.

166 i.e. runways on which aircraft taking off are on bearings of 10° and its reciprocal 190° (magnetic) respectively.

167 J W Trevathan, evidence-in-chief para 5.1 [Environment Court document 14].

[110] Mr Park's figures relied on the fact that at unattended aerodromes, such as Omaka, it is normal for pilots to transmit, by radio, a VHF transmission, their intentions to take off or to land and their intended flight path. While this is a safety procedure it also provides a record of movements to and from the aerodrome. Once recorded on Mr Park's equipment the VHF transmissions were analysed to provide[168]:

- the number of takeoffs and landings by radio equipped aircraft at Omaka during the recording period;
- the approximate time of each movement;
- the runway used during each movement; and
- the aircraft registration.

An aircraft's registration allows it to be identified and thus categorised as either a helicopter or a fixed wing aircraft and, if the latter, as having either a fixed or a variable pitch propeller. This is necessary as the two types have different noise signatures with the variable pitch propellers being the louder. Helicopters are noiser again.

[111] The runway information suggests which movements are likely to have resulted in a noise event being recorded by the equipment on the site.

[112] At the time of filing his evidence-in-chief (22 February 2013) Mr Park had data from the period 10 January – 9 February 2013 only, which he acknowledged[169] was "a relatively short time". His rebuttal evidence filed on 3 July 2013 reported on data from the period 10 January – 8 April 2013. Data from the Easter Air Show was not captured as that used a different transmission frequency[170]. Data from 81 days was analysed, there being over 30,000 transmissions of which 7,553 related to movements at Omaka: 7,082 were fixed wing aircraft and 471 were helicopters.

[113] The results of Mr Park's monitoring were given as[171]:

• average fixed wing movements/day	87.4
• average fixed wing movements/night	0.8
• average helicopter movements/day	5.8
• average helicopter movements/night	0.6
• average use of runway 01 for takeoffs	26%
• ratio fixed pitch/variable pitch	84%/16%

168 D S Park, evidence-in-chief para 4.6 [Environment Court document 13].
169 D S Park, evidence-in-chief para 5.8 [Environment Court document 13].
170 D S Park, Rebuttal evidence para 11.2 [Environment Court document 13A].
171 D S Park, Rebuttal evidence para 11.4 [Environment Court document 13].

These numbers are subject to error from a number of causes including aircraft not equipped with radio, pilots choosing not to transmit their intentions, or by confusion of call signs. Mr Park chose to account for this by adding 10% to the recorded numbers: some 750 extra movements[172]. He also added 1.1 helicopter movements/night to reflect a suggestion from Mr Dodson that some night helicopter movements had been missed[173]. Whether this was before or after the 10% increase was not stated. The results of these adjustments[174] are given in terms of averages per day as:

- fixed wing 96.1
- helicopter 8.0

Mr Park noted[175] that the entry for helicopters should have been 7.5 flights per day. The quoted figure of 8.0 was retained by Mr Park and used in his subsequent projections of future helicopter movements.

[114] These figures are difficult but not impossible to understand. In summary:

- the figure of 96.1 fixed wing flights is an increase of 10% on the recorded figure for fixed wing movements/day of 87.4. The night movements of fixed wing aircraft are thus not included in the adjusted figures. We infer that the term "averages per day" used in connection with these figures means day time flights only;

- the figure of 7.5 helicopter flights can be obtained by increasing the recorded 5.8 day time helicopter flights by 10% and then adding 1.1. However this is mixing day and night flights and may well be a coincidence. For day flights only a 10% increase gives 6.4 flights, a figure that would fit into the averages per day table above. If the total of recorded day time plus night time helicopter flights (6.4) is increased by 10% and 1.1 flights added the result is 8.1 flights, a figure close to that used by Mr Park in his projections;

- of the fixed wing movements only those takeoffs from Runway 01 are assumed by Mr Park to result in noise effects on the site[176]. He reports 26.2% of day time fixed wing movements and 2.8% of fixed wing night time movements occur on Runway 01. Of the helicopter movements 25% of those departures to the north from Runways 01 and 07 together with 16.1% of those arrivals from the north on Runways 19, 25 and 30 were considered by Mr Park to have a noise effect on the site.

172 D S Park, Supplementary evidence para 3.4 [Environment Court document 13B].
173 D S Park, Rebuttal evidence para 11.6(b) [Environment Court document 13A].
174 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].
175 Transcript p 143 lines 21-24.
176 D S Park, Rebuttal evidence para 11.12 [Environment Court document 13A].

[115] Dr Trevathan was asked[177] to provide a current 55 dB Ldn contour based on Mr Park's data from the period 10 January to 8 April 2013 for aircraft movements that affect the site. This contour is shown as crossing the Carlton Corlett land in a generally east/west direction and at least 180 metres from the site[178]. We find that helicopters departing and arriving fly directly[179] over the site at present. Dr Trevathan's modeling confirms that these flights make a significant contribution to the average noise levels experienced on the site. Similarly, flight paths for departures and arrivals from the east — on the 07/29 vector runways — lie directly over the residential area to the east of Taylor River[180].

[116] Mr A Johns, a member of the Marlborough Aero Club, challenged the reliability of Mr Park's VHF recordings and the data derived from them. He was concerned about the presence of unrecorded aircraft movements which included those by aircraft not equipped with radios, movements which the pilot chose not to report and those associated with the Air Show held at Easter 2013. Possible misidentification of aircraft type which would lead to an incorrect noise signature being assigned and the percentage of movements allocated to Runway 01 were other concerns. Mr Johns' information was based on his knowledge of actual use of Omaka airfield from, presumably, records held by the Marlborough Aero Club. Mr Park through his company, Astral Limited, sought access to these records[181] which would have allowed him to assess the accuracy of his VHF results. This request was declined[182] as the Omaka Group and the Aero Club did not consider the request "had merit". We note that Mr Johns did not produce any of these records in his evidence preferring simply to give aircraft types and movement percentages that cannot be verified. Since the Marlborough Aero Club did not cooperate with Mr Park's reasonable request, we prefer the latter's evidence.

[117] With respect to the flights associated with the Air Show Mr Park, based on his experience as chair of the Ardmore Airport Noise Committee, expressed the view that these would be excluded from any noise evaluation and expressly provided for in any Noise Management Plan that the Aero Club might produce and in any special recognition the council may wish to give the Air Show in the District Plan[183].

[118] Mr Johns gave a list[184] of historic aircraft which were misidentified as modern aircraft. Having been identified by Mr Park the movements made by these aircraft would have been recorded and thus included in the total number of movements. It is

177 J W Trevathan, Rebuttal evidence para 3.1 [Environment Court document 14A].
178 J W Trevathan, Supplementary evidence Attachment 2 [Environment Court document 14B].
179 D S Park, evidence-in-chief para 65 [Environment Court document 13].
180 D S Park, evidence-in-chief Annexure 3, Figures 5 and 6 [Environment Court document 13].
181 D S Park, Supplementary evidence para 3.1 and Exhibit A [Environment Court document 13B].
182 D S Park, Supplementary evidence para 3.1 and Exhibit B [Environment Court document 13B].
183 D S Park, Rebuttal evidence para 8.2 and Supplementary evidence para 3.23 [Environment Court documents 13A and 13B respectively].
184 A Johns, Supplementary evidence para 18 [Environment Court document 24A].

likely the assigned noise category would have been in error. Reference to 48 flights of an Avro Anson, a World War II bomber, that appeared to have been missed by Mr Park was made by Mr Johns[185]. In his oral evidence[186] he stated that subsequent to filing his written evidence he had identified that the bomber had used a call sign unknown to Mr Park and that at least half the bomber's flights had been recorded, but not recognised as such, by Mr Park.

[119] Another consideration which adds uncertainty is that the split between variable pitch and fixed pitch propeller aircraft will influence the location of any derived contour[187]. Mr Johns, from a "back of the envelope" calculation, suggested aircraft with variable pitch propellers make up close to 20% of the total fixed wing aircraft movements[188]. Mr Park's measurements over the three month period indicated a figure of 16%.

[120] Mr Park's recordings indicated runway 01 was used for 26.2% of the fixed wing takeoff movements[189]. Mr Johns, having made allowance for the interruption to movements on runway 01 from the Air Show, suggested 28% which he noted was closer to the estimate provided by Mr Sinclair for the modelling done by Mr Hegley for the council[190]. In taking all these perceived deficiencies in Mr Park's recording and analysis into account[191] Mr Johns believed "a greater level of error should be allowed for than the 10% suggested by Mr Park". No alternative figure was produced by Mr Johns. We found that the 10% increase in movements (over 700) allowed by Mr Park is more than sufficient to cover at most 24 flights (48 movements) by the bomber that may have been missed.

Findings

[121] We prefer Mr Park's data set to that of the Aero Club because the latter derives from flights at a period of unusually intense activity immediately prior to the global financial crisis. For example, on the numbers of flights in 2008, Mr J McIntyre wrote[192] in the President's Annual Report for 2008:

> After dipping slightly last year, flying hours were up again with 2288 hours chalked up for the Clubs 80th year. This is the highest since 1990/91 and is heartening in the face of rocketing fuel prices and escalating charges from all quarters.

The 2013 base data from Mr Park can be used to predict the location of noise contours near and over the site in 2038. The court is not charged with fixing these contours and indeed does not have sufficient information to do so. Rather, we are interested in the

185 A Johns, Supplementary evidence para 20 [Environment Court document 24A].
186 Transcript pp 525-526.
187 As recorded above: Variable pitch propellers are louder than fixed pitch propellers.
188 A Johns, Supplementary evidence para 30 [Environment Court document 24A].
189 D S Park, Rebuttal evidence para 11. 12 [Environment Court document 13].
190 A Johns, Supplementary evidence para 33 [Environment Court document 24A].
191 A Johns, Supplementary evidence para 43 [Environment Court document 24A].
192 Exhibit 35.1.

contours as an indication of what could happen in the next 25 years. For this purpose we are satisfied that Mr Park's data is an appropriate base from which to project forward.

Future noise

[122] In fact some attempts had been made to establish likely noise contours. The experts endeavoured to formulate a growth rate and applied it to the current use to calculate the contours which would restrict the airfield's growth. Mr Park and Dr Trevathan, the experts for CVL, adopted a compounding annual growth rate of 2.7% for fixed wing aircraft[193]. Mr Foster, for the council, gave unchallenged evidence that were a proposed World War II fighter squadron project to eventuate then a 4% per annum growth rate would be more realistic[194]. Looking at the Tower data one could calculate a compounding growth rate of 4.4%[195] which provides support for Mr Foster's proposed growth rate. Omaka submits that any certainty in the contours proposed by Dr Trevathan is diminished by the uncertainty around the flight numbers supplied by Mr Park[196].

[123] Parallel to the SMUGS process, the council commissioned reports from Hegley Acoustic Consultants as an initial step to introducing airnoise boundaries and outer control boundaries.

[124] Mr R Hegley, of Hegley Acoustic Consultants, was commissioned in 2007 to undertake acoustic modelling of Omaka airfield[197]. He based his model on data provided by Mr Sinclair[198] which included growth rates to determine aircraft numbers up to the selected design year of 2028. These growth rates were not recorded in Mr Hegley's evidence. Mr Park deduced, from Mr Sinclair's evidence to the initial hearing[199], that they were[200]:

- fixed wing 2.7% per annum
- helicopter 10% per annum

The projected values used by Mr Hegley to derive his 55 dB Ldn contour were not recorded in his evidence.

[125] Mr Park[201] used Mr Hegley's growth rates to project his one month of recorded movements out to 2028 and provided the data to Dr Trevathan for his derivation of the

193 Transcript at 178 line 32ff.
194 M J Foster, evidence-in-chief at [6.17] [Environment Court document 23].
195 A Johns, supplementary evidence at [12].
196 Closing submissions for Omaka at 53.
197 R L Hegley, evidence-in-chief para 5 [Environment Court document 25].
198 R L Hegley, evidence-in-chief para 17 [Environment Court document 25].
199 D S Park, evidence-in-chief Annexure 1A [Environment Court document 13].
200 D S Park, evidence-in-chief paras 5.12–5.16 [Environment Court document 13].
201 D S Park, evidence-in-chief, para 5.19 [Environment Court document 13].

resultant 55 dB Ldn contour. Doubt was expressed by Mr Park over the 10% growth rate for helicopters which he considered excessive[202].

[126] Initial projections used by Mr Hegley on behalf of the council were 20 year projections from 2008, i.e. out to 2028. In preparing for the hearing all witnesses agreed this was too short for airport planning and agreed 2038 to be an appropriate planning horizon. The rates of growth in fixed wing and helicopter movements were not agreed.

[127] With concern having been expressed by a number of witnesses in their evidence-in-chief over the inadequacy of a 2028 design year, attention turned to providing projections out to the agreed year of 2038. Mr Hegley was instructed by the council to project out to 2038 retaining the 2.7% and 10% per annum growth rates for fixed wing and helicopters respectively[203]. He was asked to use the aircraft flight numbers as presented in Dr Trevathan's evidence-in-chief[204]. These figures came from Mr Park and were thus based on his one month of VHF recorded data. At this point all use of the alternate data set favoured by the Airport Cluster and the Aero Club ceased.

[128] Mr Park also considered the 2038 design year. He retained the 2.7% growth rate to 2038 for fixed wing aircraft and used a 6.6% growth rate for helicopters both applied to his three month 2013 base data[205]. The latter he considered appropriate in view of the CAA helicopter registration records[206] which show a 4.4% per annum growth rate from 1993 until 2013 with a period (8 years) having a maximum growth rate of 7.8% per annum. The 6.6% rate is 50% above the long term growth rate and will result in almost five times as many helicopter movements in 2038 suggesting up to 35 helicopters will be operating from Omaka at that time. In Mr Park's view the 6.6% growth rate is adequate to account for the special nature of helicopter operations from Omaka[207]. The planning consultant[208] for the council, Mr Foster, who has extensive experience in airport planning, stated that the 2.7% growth rate for fixed wing aircraft is not unreasonable[209] and that 6.6% as a growth rate for helicopters is realistic[210].

[129] Using these growth rates and Mr Park's adjusted 2013 data for flight movements the projected movements for 2038 expressed as averages per day are[211]:

- fixed wing 187.1
- helicopter 39.7

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202 D S Park, evidence-in-chief, para 5.17 [Environment Court document 13].
203 R L Hegley, evidence-in-chief para 29 [Environment Court document 25].
204 R L Hegley, evidence-in-chief para 27 [Environment Court document 25].
205 D S Park, Rebuttal evidence, para 11.7 [Environment Court document 13].
206 D S Park, Rebuttal evidence Annexure 1 [Environment Court document 13A].
207 D S Park, Rebuttal evidence paras 11.9 and 11.10 [Environment Court document 13A].
208 M J Foster, evidence-in-chief paras 1.2 – 1.4 [Environment Court document 27].
209 M J Foster, evidence-in-chief para 6.27 [Environment Court document 27].
210 Transcript at 646 line 24.
211 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].

The percentages of these flights to affect the site were assumed to be the same as those derived from Mr Park's 2013 data.

The 55 dB Ldn contours

[130] Noise contours are produced using software referred to as an Integrated Noise Model ("INM"). The acoustic experts agreed[212] this software was appropriate to predict future noise levels at Omaka airfield and that the model aircraft types and settings that have been developed by Mr Hegley and Marshall Day Acoustics and confirmed by Dr Trevathan's measurements to be appropriate. The software requires at a minimum the input of runway locations, aircraft types and numbers of flights and flight tracks. There is disagreement over the helicopter flight tracks that should be modelled.

[131] Helicopters taking off towards and landing from the north currently track over the site[213]. Mr Hegley has used these tracks in his INM modelling. Mr Park believes these tracks create unnecessary disturbance over the site and to adjacent residential areas[214]. He thus proposed "helicopter noise abatement flight paths". On takeoff to the north a helicopter would veer slightly right and as it crossed New Renwick Road it would turn left and follow the Taylor River. Approaches from the north would come along the river and turn right to reach the eastern edge of the airfield[215]. Such noise abatement paths, according to Mr Park, are in common use at other aerodromes in New Zealand and are in accord with both the Aviation Industry Association of New Zealand's code of practice for noise abatement and Helicopter Association International guidelines[216].

[132] Mr M Hunt, an acoustics expert for the council, found the use of selected flight paths to reduce noise on the ground to be highly unusual but not unheard of. He was also concerned over the practicality of the paths suggested by Mr Park and how they could be imposed and enforced[217]. Mr Day, acoustic consultant to the Omaka Group, also found the approach unusual in that it moved flight paths so as to push the noise over existing residences to avoid noise on a future residential development[218]. This criticism was echoed by Mr Dodson, Managing Director of Marlborough Helicopters and holder of a Commercial Helicopter Pilot Licence. He described the noise abatement tracks as "clearly an inferior option from a noise abatement perspective and arguably is a less safe option"[219].

[133] Opinion as to the efficacy of the abatement paths was clearly divided. One reason is that no evaluation of the noise effects generated by flights along the abatement

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212 Joint Statement of Acoustic Experts dated 21 August 2013 Exhibit 14.1 para 5.
213 D S Park, evidence-in-chief Annexure 3 figures 5 and 6 [Environment Court document 13].
214 D S Park, evidence-in-chief para 6.9 [Environment Court document 13].
215 D S Park, evidence-in-chief Annexure 3 figure 8 [Environment Court document 13].
216 D S Park, evidence-in-chief paras 6.10–6.15 [Environment Court document 13].
217 M J Hunt, evidence-in-chief paras 55 and 58 [Environment Court document 26].
218 C W Day, evidence-in-chief para 3.6 [Environment Court document 23].
219 O J Dodson, evidence-in-chief para 21 [Environment Court document 30].

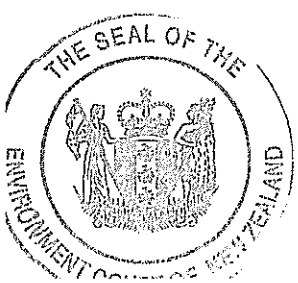
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

[134] The court received a number of 55 dB Ldn contours from the parties each derived under different assumptions. We list each contour received:

- Mr Hegley's 2028 contours: errors in the derivation of his first contour were corrected with a second contour being produced. Because both contours were for only 15 years in the future, they are disregarded.
- Mr Hegley's 2038 contour: this incorporates Mr Park's flight information for Runway 01 from one month of VHF recordings, annual growth rates of 2.7% and 10% for fixed wing aircraft and helicopter movements respectively, and uses the current flight paths from all runways. This contour crosses the site in an east/west direction with some 45% (9.6 ha)[220] of the site inside the contour.
- Dr Trevathan's 2028 contour: being only a 15 year projected contour this too is disregarded.
- Dr Trevathan's 2038 contours: all four contours are based on the three months (10 January – 8 April 2013) of recorded VHF data and a 2.7% growth rate for fixed wing aircraft movements. Two annual growth rates for helicopter movements, 6.6% and 7.7% (being 10% to 2028 and 4.4% for 2028 -2038), are used and for each there are contours with and without helicopter noise abatement paths.

[135] Dr Trevathan's contours all cross the site from east to west at varying distances from the southern boundary. The most intrusive contour is the 7.7% annual growth rate for helicopters with no abatement paths. It is at most 112.1 metres from the boundary[221] and encompasses 3.84 hectares. The least intrusive contour is the 6.6% annual growth rate for helicopters with abatement paths. This contour is not more than 42.9 metres from the boundary[222]. It encompasses 1.11 hectares.

[136] Dr Trevathan's contour assumed that helicopters would use "noise abatement flight paths" where helicopters alter course shortly after takeoff in order to reduce noise. At Omaka such a route would require a heading change of 10 degrees after takeoff from runway 01 to follow the Taylor River north and pass over an industrial area[223]. This flight path was used by Dr Trevathan in his modeling. It is a significant difference to Mr Hegley's modeling which used the current flight paths.



220 M J Hunt, evidence-in-chief para 62 [Environment Court document 26].
221 T P McGrail, Rebuttal evidence figure 7 [Environment Court document 9A].
222 T P McGrail, Rebuttal evidence figure 6 [Environment Court document 9A].
223 D S Park, evidence-in-chief para 6.20 [Environment Court document 13].

[137] The Omaka Aero Club has not implemented noise abatement paths for helicopters as an attempt to protect the amenity of its neighbours. Mr Dodson, of Marlborough Helicopters, states his company has a written policy to avoid overflying built areas whenever possible[224] but we received no indication that this policy is adopted by Omaka as an airport. Should the helicopter numbers increase at the suggested rate of 10% per annum there very likely will be reverse sensitivity effects arising from the helicopter tracks to the east which may force Omaka to adopt noise abatement paths (as suggested by Mr Park). Such paths operate at other New Zealand airports including Ardmore. Mr Park believes such paths should be developed for Omaka[225] in accordance with the Helicopter Association International guidelines and the Aviation Industry Association of New Zealand Code of Practice. The former includes a guideline[226] for daily helicopter operations which reads "Avoid noise sensitive areas altogether, when possible ... Follow unpopulated routes such as waterways".

[138] We see this as a possible way to protect residents' amenity and still let Omaka grow some of its operations as predicted out to 2038. There are differences of opinion[227] regarding the practicality and efficacy of the proposed tracks which we acknowledge. Further, as suggested by witnesses for the Omaka Group, those flight tracks might impose more noise on residents east of the Taylor River. We cannot ascertain from the noise contours (see the next paragraph) whether or not that is likely to be the case. Despite that we accept this approach in principle and thus regard Dr Trevathan's 2038 contour[228] as the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.

[139] The 55 dB Ldn contour was also plotted by Mr McGrail as a complete contour surrounding the aerodrome[229]. It encloses 349 existing residential properties east of the Taylor River. To obtain this contour Dr Trevathan assumed movements on runways other than 01 to be those recorded in a Hegley Acoustic Consultants' report which he attached to his evidence as Attachment 6. In the light of Mr Park's 2013 recording, Dr Trevathan was not confident about the correctness of these movements and thus believed the contour at places away from the site was incorrect[230]. He gave no indication of the magnitude or location of discrepancies from a "correct" contour.

Findings

[140] The 2013 55 dB Ldn noise contour produced by Dr Trevathan and not challenged by any witness will expand as airport activity increases. The court accepts Mr Day's view that the contour will reach the residential area east of the Taylor River

224 O J Dodson, evidence-in-chief para 17 [Environment Court document 30].
225 D S Park, evidence-in-chief para 6.16 [Environment Court document 13].
226 D S Park, evidence-in-chief para 6.15 [Environment Court document 13].
227 D S Park, evidence-in-chief para 6.2 [Environment Court document 13] and O S Dodson, evidence-in-chief para 21 {Environment Court document 30].
228 J W Trevathan, evidence-in-chief Attachment 9 [Environment Court document 14].
229 T P McGrail, Rebuttal evidence figure 4 [Environment Court document 9A].
230 J W Trevathan, evidence-in-chief para 6.2 [Environment Court document 14].

before it reaches the site[231]. It is the general view of the acoustic witnesses, and the court concurs, that there has not been sufficient work done to enable the location of a 55 dB Ldn noise contour for 2038 either near the site or for the airport as a whole. Not only is there insufficient information, but in any event there is considerable uncertainty as to the likely character of future use of the Omaka airfield.

[141] As a set the contours are sufficient to indicate to the court, the Omaka Group Aero Club and the council what may occur in the future. They will be a useful guide when formulating noise abatement procedures by way of a Noise Management Plan and possible protection within the District Plan.

Noise mitigation measures

[142] In addition to the use of abatement paths, Dr Trevathan provided a number of other suggestions for mitigating noise effects on the Colonial land[232]:

(i) aviation themed subdivision;
(ii) covenants;
(iii) situating houses so that outdoor areas are to the north;
(iv) reducing dwelling density on the southern boundary;
(v) mechanical ventilation;
(vi) acoustic insulation.

[143] Dr Trevathan suggested that the development could have an aviation theme[233], so that only people who liked airfield noise would choose to live there. As counsel for Omaka pointed out, this relies on people correctly identifying themselves as not being noise sensitive. Further, as the noise level is predicted to increase over time it is difficult to assess whether people will be able to cope with the noise in the future.

[144] The effectiveness of "no-complaints" covenants was discussed by Mr P Radich, an experienced lawyer in Marlborough, who gave evidence for Carlton Corlett Trust. While he accepted covenants are legally enforceable[234], Mr Radich was cautious about their effectiveness since they really just signal a problem rather than providing an effective solution[235]. He said that enforcement was dependent on how reasonable the covenanter thought it and whether they were the original covenanter[236]. Further, it is not council practice to enforce private covenants as such disputes are viewed as a private matter for the parties to determine themselves[237].

231 Transcript pp 514-515.
232 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
233 J W Trevathan, evidence-in-chief para 10.11 [Environment Court document 14].
234 *South Pacific Tyres Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58 (HC).
235 Transcript at 748 line 17.
236 Transcript at 749 line 7.
237 Transcript at 750 line 14.

[145] It was suggested each house on the CVL site could be situated to the south of its allotment so that the outdoor areas were further away, although Dr Trevathan acknowledged this would not protect residents from the noise of planes flying overhead[238].

[146] With regard to acoustic ventilation, Dr Trevathan accepted that if all houses on the Colonial land were outside the OCB any additional insulation would be unnecessary[239]. As for mechanical ventilation, this allows people to keep windows closed reducing internal noise levels. However, since the internal noise level is already satisfactory with open windows at the level of external noise likely to be experienced on the Colonial land (depending on where the future airnoise boundary is) mechanical ventilation is not needed[240].

[147] In our view the only mitigation which is desirable is the registration of "no-complaints" covenants. The other measures would simply add costs without gaining commensurate benefits. We have considered whether even the proposed covenants will give sufficient benefits to outweigh the transaction costs of imposing them. Counter-considerations are that, as we find elsewhere, residents east of the Taylor River are likely to be affected by noise from aircraft taking off and landing at Omaka airfield before residents on the site — yet, so far as we know, there are no covenants imposed on the Taylor River residents. Further, there are likely to be other limitations on helicopter numbers operating from Omaka (e.g. conflict with Woodbourne operations).

[148] Over-riding those concerns is that airports — even those with very small numbers of aircraft using them — are potentially subject to "noise" complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure. Further, there is a suggestion by the High Court that councils are responsible for ensuring that nuisance issues do not arise through activities it allows: *Ports of Auckland Limited v Auckland City Council*[241].

[149] Since CVL is volunteering the covenants, we consider they should be accepted.

5. Does PC59 give effect to the RPS and implement WARMP's objectives?

5.1 Giving effect to the RPS

[150] We judge that PC59 would give effect to the Regional Policy Statement. It would enhance the quality of life[242] by supplying houses while not causing adverse effects on the environment, and it would appropriately locate a type of activity

238 Transcript at 245 line 7.
239 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
240 Transcript at 246 line 21.
241 *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 600 at 612 (HC).
242 Regional objective 7.1.2.

(residential development) which would cluster[243] with housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.

[151] The air transport policy in the RPS — which focuses on Woodbourne — would not be affected.

5.2 Implementing the objectives of the WARMP

[152] The question for the court in this proceeding is whether the rezoning of a 21.4 hectare vineyard on the southern side of the Wairau Plains near Blenheim for 'residential' development, given its proximity to Omaka airfield, would promote the objectives and policies of the WARMP and the sustainable management of the district's natural and physical resources.

[153] The most relevant policy — (11.2.2)1.5 — requires that any expansion of the urban area of Blenheim achieves specified outcomes. We consider these in turn. In relation to achieving a compact urban form we note that development of the CVL would add to an existing part of Blenheim. In some ways it would tidy the existing rather anomalous residential enclaves along New Renwick Road and Richardson Avenue, both adjacent to the site.

[154] No issues were raised in relation to integrity of the road network. The site is adjacent to three roads, and can be suitably developed.

[155] As for maintenance of rural character and amenity values, the rural character of the site will be reduced, but the site is already rather anomalous in that respect since it has residential development to the north and east, and the business activities of the Omaka airfield and the Heritage Museum to the south.

[156] Appropriate planning for service infrastructure is an important issue. A significant feature of the site is that all services are readily available at a reasonable cost. The section 42 report presented to the council hearing stated "The development of the site is not constrained by the development of services"[244].

[157] Infrastructure must also be provided within the site to each dwelling. The site is essentially flat with a fall of 4 to 5 metres from southwest to northeast. This will allow the sewer and stormwater services to be easily staged throughout the development of the site[245]. Planning for this will necessarily be part of the overall development plan for the site and will produce no difficulties.

243 Regional policy 7.1.10.
244 T P McGrail, evidence-in-chief para 13 [Environment Court document 9].
245 T P McGrail, evidence-in-chief para 11 [Environment Court document 9].

[158] The 2010 Strategy assessed the site, along with nine other locations, for the provision of water, sewer and stormwater services. It found that "Development in this area can be connected to existing networks without upgrades of infrastructure"[246]. We conclude appropriate planning has been done for service infrastructure to the site and thus no further planning is necessary in this regard.

[159] Perhaps the key service infrastructure issue in the case — and a central issue in the proceeding — is the extent to which residential development of the site might restrain future development of the Omaka airfield. We discuss that in our conclusions below.

[160] No issue was raised in relation to productive soils.

[161] The Rural Environments section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation[247]. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained[248] and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation — flights of old aircraft — can continue and grow (within reason).

[162] While the objectives and policies of the WARMP give some protection to Omaka there is a "balance"[249] to be achieved with activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

5.3 Considering Plan Changes 64 to 71

[163] We consider the Plan Changes 64-71 are only relevant to the extent they show that the council has other solutions to the problem of supplying land for further residential development and we considered them earlier. We reiterate that these plan changes are at such an early stage in their development we should give them minimal weight.

246 SMUGS 2010 Summary for Public Consultation, p 14.
247 Wairau/Awatere Resource Management Plan 12.7.2, explanatory note at pp 12-23.
248 RPS objective 7.3.2.
249 M J Foster, evidence-in-chief para 4.14 [Environment Court document 27].

6. Does PC59 achieve the purpose of the RMA?

[164] In *Hawthorn*[250], the future state of the environment was considered in a land use context. The Court of Appeal concluded that[251]:

> ... 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.

The future state of the environment includes the environment as it might be modified by permitted activities and by resource consents that have been granted where it appears likely those consents will be implemented. It does not include the effects of resource consents that may be made in the future. CVL submitted that, in a plan appeal context, this must extend to the prospect of plan changes or even plan reviews with entirely uncertain outcomes at some indeterminate time in the future[252]. CVL accepts there is a requirement to consider the future environment and has endeavoured to do so in its evidence using a predicted level of activity and effects associated with it. However, while the projections to 2038 will influence the resolution of the plan, CVL says the plan must also reflect other influences over those 25 years[253].

[165] Counsel for the Omaka Group submitted we should distinguish *Hawthorn* as concerning a resource consent application rather than a plan change. If the proposed airnoise boundary is to be taken into account as part of the environment the Omaka Group suggested that great care needs to be taken in assuming that airnoise and (outer control) boundaries will protect the community from noise and reverse sensitivity effects when there is currently no plan change proposed[254]. CVL argued that Omaka misses the point — section 5 applies to all functions under the RMA[255].

[166] The council submitted that, given the timing of PC59, before restrictions or protection are put in place for Omaka through a future plan change process, the planning environment as it is today is the appropriate reference. Mr Quinn submitted that the policy and planning framework of the WARMP:

- affords the district's airports, including Omaka, a high level of protection relative to land use aspirations around the airport;
- provides that an outer control boundary should be created for Omaka and specifically cites NZS 6805 and states that any 55 dBA Ldn noise contour must be surveyed in accordance with it; and

250 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299
251 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [57]
252 Closing submissions for CVL, dated 21 October 2013 at [48].
253 Closing submissions for CVL, dated 21 October 2013 at [55].
254 Closing submissions for Omaka, dated 11 October 2013 at [11].
255 Closing submissions for CVL, dated 21 October 2013 at [54].

- allows expansion of the Omaka aerodrome as a permitted activity.

6.1 Sections 6 and 7 RMA

[167] Section 6 of the Act concerns matters of national importance. Only one paragraph in section 6 is relevant. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use, and development and is relevant for two reasons. First, the three grass runways are claimed to be the longest surviving set in New Zealand. They were prepared in 1928 and have been used ever since. Secondly, there is the world-class collection of World War I aircraft and replicas, superbly displayed with other thematic memorabilia, at the Aviation Heritage Centre.

[168] We accept it is a matter of national importance to protect those heritage values, and to allow their responsible expansion. There was no evidence that residential activities on the site will cause reverse sensitivity effects on the Omaka airfield in the near future. The evidence did establish that a business as usual approach for the Omaka airfield as a whole might cause issues for residents of the CVL site and thus potential reverse sensitive effects (complaints) by 2039. But not all activities at the Omaka airfield have heritage value. In particular there are helicopter and other general aviation activities whose expansion will need to be carefully examined by the council as it makes its decision about an outer control boundary for the airfield. Given those circumstances, we hold that the heritage values of the airfield need not be affected by the plan change and so give this factor minimal weight in the overall weighing exercise.

[169] Section 7 of the Act sets out other matters the court is to have particular regard to when making its decision. Section 7(b) of the Act concerns the efficient use and development of natural and physical resources and we will consider it in the context of the section 32 analysis. Section 7(c) provides for the maintenance and enhancement of amenity values and section 7(f) is also relevant since it talks about maintenance and enhancement of the quality of the environment. Both these matters are covered by and subsumed in the objectives and policies in the district plan.

[170] Counsel for the Omaka Group suggested[256] that section 7(g) of the RMA could be relevant but there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

6.2 Section 5(2) RMA

[171] The ultimate purpose of any proposed plan or plan change under the RMA is to achieve the purpose of the RMA as defined in section 5 of the Act. In the case of a plan change (depending on its breadth) that purpose is usually subsumed in the greater detail and breadth of the operative objectives and policies which are not sought to be changed. That is broadly the situation in this proceeding as we have discussed already.

256 Closing submissions for Omaka para 172.

[172] In terms of section 5 of the RMA the proceeding comes down to this: we must weigh enabling of a potential small community of residents on the site in the near future (in a situation where there is a relative undersupply of houses) against the potential longer-term (post 2038) disenabling expansion of activities on the Omaka airfield as the aviation cluster would like. We have found that the evidence, that growth in activities which would need to be restricted is unlikely, is more plausible than the evidence of greater growth (e.g. to 35 helicopters operating from the airfield by 2038). While we have recognised above the superb heritage value represented by the grass airstrips and the Aviation Heritage Centre, those can be protected into the future without causing reverse sensitivity effects if the site is rezoned under PC59.

[173] We also take into account that it is possible that some limitation on, in particular, helicopter movements at Omaka airfield may be necessary in the future. However, it will not necessarily be as the result of complaints from residents of the site. On the evidence it is more likely to be caused by complaints from occupiers of the council's subdivision east of Taylor River, or as a result of restrictions imposed by CAA, in order to safeguard operations at Woodbourne.

[174] In any event we have found that the objectives and policies of WARMP favour acceptance of the PC59 rather than its refusal. Our provisional view is that PC59 should be approved. However, there are some further considerations.

7. Result

7.1 Having regard to the MDC decision

[175] In accordance with section 290A of the Act the court must have regard to the decision which is the subject of the appeal.

[176] The Commissioners' Decision deals with the site in two parts. "Area A" is outside a notional outer control boundary ("OCB") and Area B is within the OCB. In respect of the area inside the contour — Area B — the Commissioners concluded[257]:

> 122. We consider that Area B should not be rezoned to accommodate new residential development. Sufficient reasons for that conclusion are:
>
> (a) The Standard directs that new residential activity should not be located in the OCB;
>
> (b) The reverse sensitivity effects on the Omaka Aerodrome from new residential development will be serious and potentially imperil the present and future operations of the Omaka Aerodrome not least by demand by residents to limit aviation related activities;
>
> (c) New residential development will not achieve the settled WARMP goals as expressed in the following provisions:
> (i) Section 11.2.1, Objective 1;
> Section 12.7.2, Objective 1. Section 11.2.2, Objective 2.

257 Commissioners' Decision para 122 [Environment Court document 1.2].

(ii) Section 22.3, Policy 1.1
Section 23.4.1, Policy 23.4.1 and Section 12.7.2, Policies 1.2 and 1.3.

(d) By reason of (a) – (c) above MDC is not assisted by PPC 59 in carrying out its functions under RMA s 31(1)(a) and PPC 59 does not achieve the overarching purpose of the RMA of sustainable management.

[177] In respect of mitigation they decided[258]:

(a) That full noise insulation (not just of bedrooms) was required;

(b) That insulation would have been inadequate mitigation because it did not allow for natural airflow from open windows which is an adverse amenity effect;

(c) Noise insulation within the building fabric does not address wider amenity concerns;

(d) We do not support the use of no complaint methods in this context as an adequate mitigation method to achieve the social wellbeing of the community which is a key component of sustainability.

[178] While Area A is outside of the OCB and therefore potentially suitable for residential development the Commissioners identified the following issues[259]:

124. The difficulties are:

(a) the total urban design concept presented by CVL is based on the whole site being developed for new residential use;

(b) there was no urban design assessment of the appropriateness of development on Area A alone;

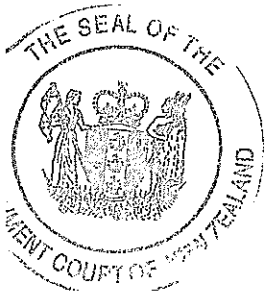
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

(d) it is unclear how the balance of the site (Area B) will be utilised in the long term. Conceivably it can be used for other purposes such as industrial development. An integrated solution will need to be carefully thought through and more detailed analysis undertaken.

[179] On balance the Commissioners considered that:

> ... the risk of approving new residential development on Area A by rezoning presents an unacceptable risk of poor strategic planning and lack of integrated development. A comprehensive strategic planning exercise is part of MDC's work stream and review of the WARMP and there is no pressing need for new residential land[260].

[180] The Commissioners' overall conclusion was that the application in its entirety should be declined[261].



258 Commissioners' Decision para 120 [Environment Commissioner document 1.2].
259 Commissioners' Decision para 124 [Environment Commissioner document 1.2].
260 Commissioners' Decision para 125 [Environment Commissioner document 1.2].
261 Commissioners' Decision para 126 [Environment Commissioner document 1.2].

7.2 Should the result be different from the council's decision?

[181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.

[182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

[183] We also accept counsel for CVL's argument that the council is being inconsistent. Mr Davidson QC and Mr Hunt wrote[262]:

> If the Council is reliant on the notion that PC59 is a pre-emptive strike to a fully integrated process under the RMA then it [the Council] stands against the very process it utilised in Plan Changes 64 – 71. The importance of integrating Employment land use was not matched with any similar urgency or affirmative action.
>
> If Plan Changes 64 – 71 are thought to be fully integrated because they are incorporated as part of the final iteration of SMUGS then the same can be said of Colonial, which is expressly acknowledged to give effect to the Growth Strategy (with the only qualification that it be approved by the Environment Court).

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Dr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately, under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

---

262 Final submissions for CVL paras 30 and 31 [Environment Court document 39].

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield — especially in helicopter numbers — will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated[263] that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints[264] on such growth of Omaka airfield use in any event — for example complaints from residents of the new subdivision east of Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.

7.3 Outcome

[191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

[192] Two new objectives were proposed by CVL for the new section 23.6.1 of the WARMP. Those objectives are beyond jurisdiction as we discussed earlier. However, they are well-intentioned, and the second in particular seeking to introduce urban design principles — is potentially very useful. We consider they can be introduced as policies.

[193] We generally endorse the amendments to the policies and rules as stated in Mr Quickfall's Appendix 4 (subject to the *vires* deletions discussed at the beginning of this

263 Transcript pp 514-515.
264 Transcript p 160 lines 20-30.

decision) but we expect the parties to agree on the amended policies and rules in the light of these Reasons. For the avoidance of doubt we record that we regard the best practice urban design principles identified in Mr Quickfall's Appendix 4 as important and expect them to be written into PC59 (since no party opposed them) although we doubt whether they should be in "section 23.6" since that already exists in the WARMP. Since we have some doubts as to our jurisdiction under section 290, we will make an order under section 293 in respect of the urban design principles in order they may be introduced as policies, rather than as objectives. In case it assists we see these as implementing the urban growth objectives in the WARMP and thus tentatively suggest they should be located there.

For the court:

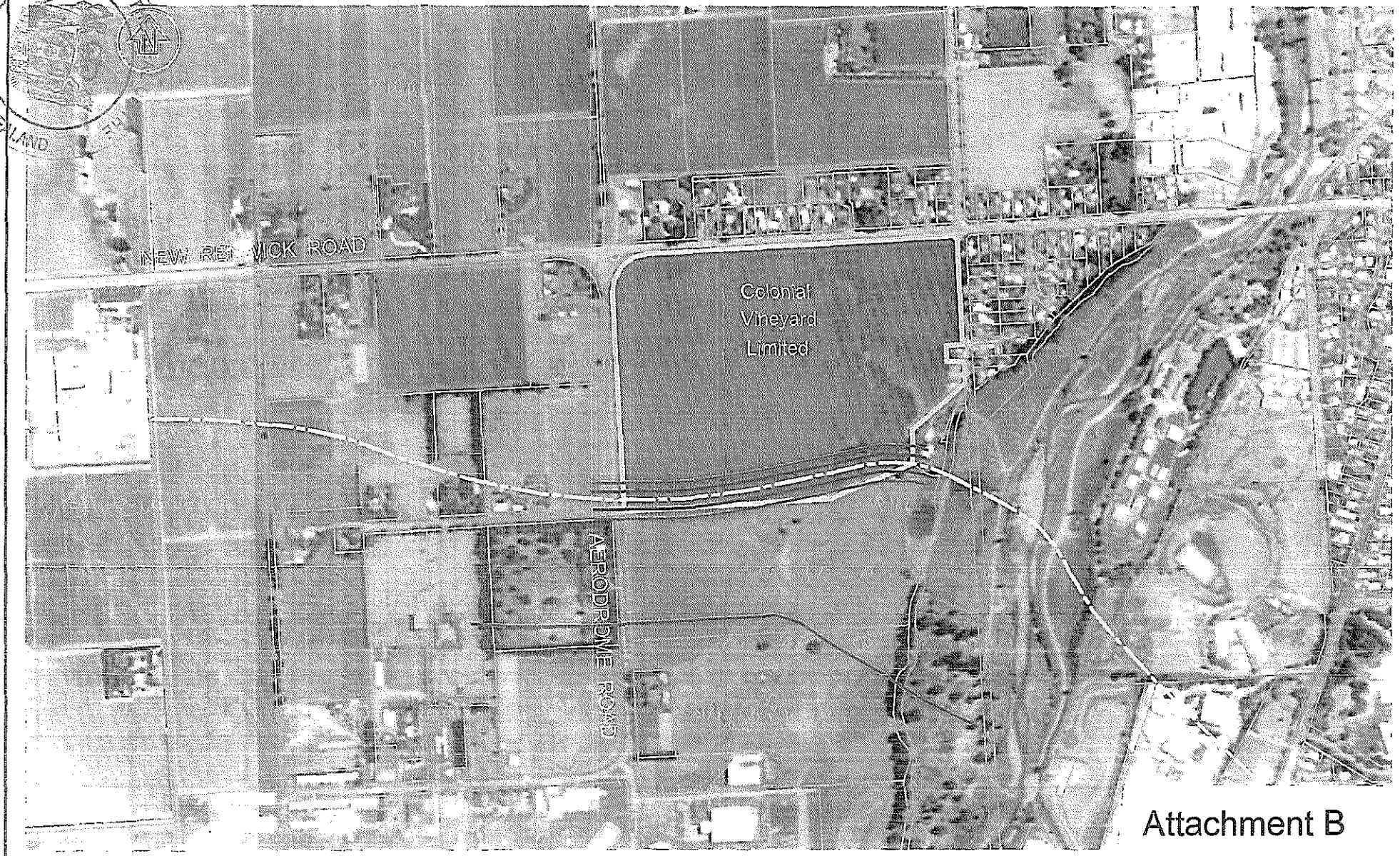
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

Ayson and Partners Ltd
REGISTERED PROFESSIONAL SURVEYORS
Davidson Ayson House
4 Nelson Street, P.O. Box 256
Blenheim, New Zealand
Ph 03 579 2099, Fax 03 578 7028
Email: office@aysonandpartners.co.nz
www.aysonandpartners.co.nz
Consultants in Surveying, Resource Management, Subdivision and Land Development

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

2038 55dB Ldn Noise Exposure Contour. Based on updated flight movement data provided by Dave Park including helicopter abatement tracks

- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 5 %
- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 10 %
- Approximate 2013 55 dB Ldn contour

SCALE (A3)	JOB NUMBER	
1:6000	13217	
DATE 09.09.2013	SHEET 25	ISSUE A
LB GW / CHECK TM		

0 10 20 30 40 50 60 70 80 90 100mm

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ATTACHMENT 1

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 229

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to Clause 14 of the First Schedule to the Act
BETWEEN	A & A KING FAMILY TRUST
	(ENV-2014-AKL-000144))
	Appellant
AND	HAMILTON CITY COUNCIL
	Respondent
AND	NEW ZEALAND TRANSPORT AGENCY
	s 274 party

Court:	Environment Judge M Harland Environment Commissioner J A Hodges Environment Commissioner KA Edmonds
Hearing:	13 – 17 June, 10 August, 8, 9, 12 & 13 September 2016 at Hamilton
Counsel:	PM Lang for A & A King Family Trust R Bartlett QC and M Mackintosh for Hamilton City Council AMB Green and MJL Dickey for New Zealand Transport Agency
Date of Decision:	23 November 2016
Date of Issue:	23 NOV 2016

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT

A: The appeal is dismissed. The Council's decision of 9 July 2014 in relation to the land now subject to this appeal is confirmed.

B: Any application for costs is to be filed within 10 working days of the date of this decision, with any reply to be filed 10 working days thereafter.

REASONS

Introduction

[1] This appeal is against parts of the proposed Hamilton City District Plan ("**the proposed plan**").[1] It concerns the planning framework that should apply to a 1.7 hectare block of land owned by the A & A King Family Trust ("**the Trust**") that fronts onto State Highway 1 ("**SH1**") at Greenwood Street (travelling north) and Killarney Road, west Hamilton. It is depicted in the map attached to this decision.[2]

[2] Under the proposed plan this land is zoned industrial. The Trust wishes to undertake certain commercial activities on its land but at the same time retain its industrial zoning despite having sought a commercial zoning of the land in its notice of appeal. The Trust has resource consent to construct a small supermarket on its land which it has not yet implemented. Even though it is still able to implement its resource consent, the Trust wants the supermarket to be specifically recognised in the proposed plan and to complement it with a limited amount of additional retail and office development over and above that which is already there.

[3] It is difficult, but not impossible to establish commercial activities such as these in the Industrial Zone, so the Trust proposes a tailor-made overlay with a new objective, policies and rules that make it easier for it to achieve its goal and to meet what it says is

[1] The proposed plan was notified in December 2012 and the Council's decision on it was dated 9 July 2014.
[2] Exhibit 1.

an unmet need for such activities in the nearby western suburbs. The Trust contends that its overlay is the most appropriate planning framework for the land.

[4] The Council and the New Zealand Transport Agency ("**the Agency**") disagree. The Council says that the objective and the new policies attached to it are outside the scope of the appeal because they were not reasonably and fairly raised in the Trust's submission or the notified plan from which the appeal emanates. If they are within scope, the Council says the notified plan provides sufficient zoned land to meet any unmet commercial need in the western suburbs without adding the Trust's land to the available pool and that the Trust's land, because of its location, is not suitable for such activities. The Agency echoes this concern with particular focus on the transport network.

[5] As well, both the Council and the Agency contend that in different ways the Trust's proposal conflicts with the strategic direction of the Waikato Regional Policy Statement ("**the RPS**") carried through into the proposed plan.

[6] Overall the Council and the Agency say that the industrial zoning of the land without the overlay is the most appropriate planning framework for it.

[7] The questions in this appeal are therefore:

(a) are the Trust's new proposed objective and policies within scope? And if they are,

(b) is the Council's industrial zoning or the Trust's overlay the most appropriate planning outcome for the land?

The statutory framework

[8] There is a right of appeal to the Environment Court if a person who made a submission on the proposed plan does not agree with the Council's decision in respect of it.[3] By virtue of s 290 of the Resource Management Act ("**the RMA**") such an appeal is heard de novo, and the Court may confirm, amend or cancel a decision made by the

[3] Clause 14, Schedule 1 of the Resource Management Act 1991.

Council, however the Court is required to have regard to the decision that is the subject of the appeal.[4]

[9] The legal framework for plan reviews is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Court in ***Colonial Vineyard Ltd v Marlborough DC***[5] and ***Reiher v Tauranga City Council***[6] as follows:

> [10] In examining a provision under the Act, including Section 32, we must consider:
>
> a) Whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
>
> b) Whether it is in accordance with Part 2 of the Act;
>
> c) If a rule, whether it achieves the objectives and implements the policies of the plan; and
>
> d) Whether having regard to efficiency and effectiveness, the provisions are the most appropriate way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.
>
> [11] In doing so the Court must take into account the actual and potential effects that are being addressed to consider the most appropriate provisions, if any, to respond to this.

[10] As well, s 74 of the RMA requires a territorial authority to prepare and change its district plan in accordance with its functions under s 31 (among other things). These functions include 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.[7]

[11] Because the proposed plan was notified in December 2012, the relevant s 32 provisions are those which were in force prior to the amendments which took effect from 3 December 2013. Relevantly, s 32(3) provides:

4 s 290A of the RMA.
5 [2014] NZEnvC 55.
6 [2014] NZEnvC 121.
7 Resource Management Act 1991, s31(1)(a).

...

(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.

[12] The test under s 32 has been considered in many decisions of the Environment Court, including *Gisborne District Council v Eldamos Investments Limited*,[8] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*,[9] *Colonial Vineyard Limited v Reiher* referred to above to name a few. As well, the High Court considered it in *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council*.[10] In *Shotover Park Limited*, the term *most appropriate* was applied as follows:

> [57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(2)(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.

[13] In addition, s 73(4) requires a council to amend its district plan to *give effect* to a *regional policy statement*, however s 74(2)(a)(i) requires a council to *have regard* to any *proposed regional policy statement.* At the time the proposed plan was notified, the RPS was also proposed, however it has now been formally declared operative.[11] No party took issue with the fact that the provisions of the RPS should be given effect to, but in any event the difference in the wording to reflect if an RPS is operative or proposed does not affect the conclusions we have reached.

The site and its context

[14] The 1.7ha site owned by the Trust consists of 18 lots held in 16 separate certificates of title, with each title able to be developed separately.[12] The site has one

8 W047/2005.
9 A78/2008.
10 [2013] NZHC 1712.
11 As of 20 May 2016.
12 Mr Manning, evidence-in-chief at [18].

existing access to Killarney Road and nine to Greenwood Street (two of which are not currently used).[13]

[15] Currently, yard-based retail is undertaken on most of the site, being car yards operated at 102-106 Killarney Road, 11-13, 21-25 and 27-35 Greenwood Street; a vehicle service workshop at 37 Greenwood Street and a trade-supply depot with ancillary retail at 15-17 Greenwood Street. Office activities are undertaken on the site. There is a pocket of residential activity at 110 (A, B and C) Killarney Road, which abuts the car yard at 104 and 106 Killarney Road to the south and east, and to the west abuts other residences that front onto Smith Street. Smith Street runs parallel to Greenwood Street (**SH1**) and can be accessed to the south from Killarney Road and to the north from Bandon Street.

[16] Most of the yard-based retail fronts onto Greenwood Street (SH1) but the properties at 102-106 Killarney Road, as the address suggests, front onto Killarney Road. The remaining car yard activity on Greenwood Street and the vehicle service workshop also abut the residential area along Smith Street on their western boundaries.

[17] All of the above was pictorially depicted in Annexure 1A to Mr O'Dwyer's evidence-in-chief and to a lesser extent in Exhibit 1 attached to this decision.

[18] Under the proposed plan, approximately 1.4ha of the 1.7ha site (83% of it) contains land uses that are provided for in the Industrial Zone.[14] This is depicted in Exhibit 1, which reveals that the bulk of the site, comprising yard-based retail, could be operated as a permitted activity, the yard-based retail undertaken on the Killarney Road sites could be conducted as a restricted discretionary activity, with the offices and residential parts of the site being the only parts that would be non-complying. Food and beverage outlets (no greater than 250m^2) are permitted activities, and drive-through services[15] are assessed as a restricted discretionary activity in the Industrial Zone.

---

[13] Mr Apeldoorn, Transportation Assessment Report, 12 July 2015 at 542.

[14] Mr O'Dwyer, evidence-in-chief at [53].

[15] **Drive-through services (excluding service stations within the Rototuna Town Centre Zone)**; means any premises where goods and services are offered for sale to the motoring public, primarily in a manner where the customer can remain in their vehicle. Drive-through services can include dispensing and associated storage of motor fuels (as the primary activity) and the sale of associated goods, services, food and beverages, fast-food outlets providing on-demand meals prepared on the premises for consumption therein or take away, the provision of servicing and running repairs for light motor vehicles and any other activity of a drive-through nature, including those ancillary to the above.

[19] To the north of the site, along Greenwood Street, are a mix of commercial properties and a place of worship. Mr King referred to this portion of Greenwood Street (SH1) as "grease alley", as there are a number of fast food outlets situated there including, on the eastern side, a Carl's Junior and McDonalds, and on the northern side a KFC.

[20] To the west of the site along Killarney Road to the Dinsdale Road roundabout is residential land, much of which is earmarked under the proposed plan for residential intensification.

[21] To the east of the site, running parallel with Greenwood Street (SH1) is the main trunk rail line. Crossing points to the rail line in the vicinity are limited to Killarney Road and the Massey Street/Hall Street over bridge approximately 750m north-east of the site. Further to the east of the main trunk line is the Frankton suburban centre. The suburban centres closest to the site are Dinsdale, Frankton and Nawton.[16]

The relief sought by the Trust

[22] In its notice of appeal the Trust sought a Business 5 zoning over a much larger area of land, being a 5.9 ha block of land fronting onto Greenwood Street from Killarney Road in the south through to Massey Street in the north. The Trust's site comprised 1.7ha of this land. After filing its evidence-in-chief, but before the hearing the Trust amended its relief to seek a planning framework that retains the industrial zoning over the site, but applies an overlay known as the Greenwood Mixed-use Overlay ("**the overlay**") to it. Specifically the Trust proposes the following:[17]

(a) add a new section to the purpose of the Industrial Zone (chapter 9.1k)) as follows:

> The Greenwood Industrial Mixed Use Overlay Area is part of the Greenwood/Kahikatea drive corridor that has a number of consented retail and office activities and has resource consent provision for a supermarket. To provide for an integrated development of that site in accordance with existing consents and compatible mixed use activities, overlay provisions for the 1.7ha site will enable a small mixed use development to occur at a scale and character that will not adversely

[16] Council Ex 2
[17] Mr Manning, supplementary evidence, dated 19 August.

affect industrial activities in the Industrial Zone or impact adversely on the strategic role and business hierarchy of the central city and other business centres in the City.

(b) add a new objective (9.2.9) to reflect the purpose outlined in 9.1k) stating:

An integrated mixed use development opportunity is provided for within the Greenwood Industrial Mixed Use Overlay area of a scale and character that will not adversely affect industrial activity in the surrounding Industrial Zone and will not adversely affect the strategic role of the Central City and other business centres in the city.

(c) add three new implementing policies for the objective, as follows:

Policy 9.2.9b

The Greenwood Industrial Mixed Use Overlay area, in providing limited retail and office development opportunities in the Industrial Zone, requires the integrated development of the site.

Policy 9.2.9c

Urban Design outcomes and Traffic Management Safety and Efficiency are best managed through the integrated development of the Greenwood Industrial Mixed Use Overlay area.

Policy 9.2.9d

Caps on the extent of retail and office development within the Greenwood Industrial Mixed Use Overlay area ensure that the viability and vitality of the Central City and other Centres within the Commercial hierarchy are not compromised.

(d) An explanation of the above provisions is also proposed.

[23] The main elements of the overlay rule framework to implement the policy framework and which override the Industrial Zone rules (which otherwise remain in effect) involve a new activity status table[18] for the overlay area[19] and specific standards[20] and provide for:

[18] Rule 9.3.5
[19] Identified in Figure 6-16 in Volume 2, Appendix 6.
[20] Rule 9.5.11

(a) development on the 1.7 ha site with a maximum gross floor area (**GFA**) of 7,000m2 [21];

(b) within the maximum combined total of 5,600 m^2 for "commercial activity" [22];

(i) supermarket with a maximum of 3,600m^2 GFA[23];

(ii) total non-supermarket retail activity that is not otherwise provided for in the Industrial Zone is not to exceed 2,000m^2 GFA retail (non-supermarket) activity[24] ; and

(iii) total office activity is to occupy not more than 1,000m^2 GFA[25];

(c) New supermarket activity under 3,600m^2 GFA is to be assessed as a restricted discretionary activity[26] and subject to the same provisions which apply to a supermarket in the Industrial Zone[27]. These are:

Resource consent applications for new supermarkets in the Industrial Zone must provide a Centre Assessment report, in accordance with section 1.2.2.19 (Information Requirements), which does the following:

(i) addresses assessment criteria H2 which reads:

Whether and to what extent the proposed Supermarket activity in the Industrial zone:	
a)	Avoids adverse effects on the vitality, function and amenity of the Central City and sub-regional centres that go beyond those effects ordinarily associated with competition on trade competitors.
b)	Avoids the inefficient use of existing physical resources and promotes a compact urban form.
c)	Promotes the efficient use of existing and planned public and private investment in infrastructure.
d)	Is located within a catchment where suitable land is not available within the business centres.
e)	Reinforces the primacy of the Central City and does not undermine the role and function of other centres within the business hierarchy where they are within the same catchment as the proposed supermarket.

[21] Rule 9.3.5j
[22] Rule 9.5.11.2.
[23] Rule 9.5.11.3.
[24] Rule 9.5.11.4.
[25] Rule 9.5.11.5.
[26] Rule 9.3.5.d.
[27] Rule 9.5.4 and Rule 9.5.6.

To demonstrate the above criteria can be satisfied an applicant must supply a Centre Assessment report. The content of the Centre Assessment report shall be prepared in accordance with clause 1.2.2.19.

(ii) demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy;

(d) new buildings, new activities, expansion of existing buildings and expansion of existing activities are to be restricted discretionary (overriding all the permitted and controlled activities in the Industrial Zone) with matters of discretion and assessment matters addressing:[28] design and layout, character and amenity, hazards and safety, transportation and three waters capacity and techniques.

Along with the cross-references to the general matters of discretion and assessment matters, there are additions for design and layout and for character and amenity. These include consideration of the design and layout, the character and amenity and the transportation effects of development of the whole of the overlay area, and integration of the proposed new or expanded building or activity with the proposed full development of the overlay area. For transportation, there are the additions of the preparation of a broad integrated transport assessment (**ITA**) and the consideration of the maximum practical reduction in the number of vehicle crossings to ensure safe and efficient traffic management.

(e) commercial activities over the caps specified above are non-complying activities;[29]

(f) add new "integrated development standards"[30] to require the Trust to provide an Overlay Area Development Plan with any application for resource consent to show details of the whole overlay area and to include:[31]

(i) title amalgamation. The proposed condition includes specific details of the lots required to be amalgamated into one certificate of title. Non-compliance with this standard results in the proposal being treated as a non-complying activity;

[28] Rule 9.7xvii.
[29] Rule 9.3.5h
[30] Counsel for the appellants' closing submissions at [154].
[31] Rule 9.5.12.

(ii) a reduction in the number of vehicle crossings (one onto Killarney Road and no more than three onto SH1 where the proposal includes a supermarket and/or results in a total GFA of development greater than 3500m^2), with failure of this standard resulting in the proposal being a non-complying activity. There is also a requirement that the location, function and controls of the vehicle crossings be addressed in the required broad ITA; and

(iii) a staging plan to show how any staging of development within the overlay area provides for the required integrated site development.

[24] Mr Manning (the planner for the Trust) referred to the above as a *commercial node*; however in reality the Trust seeks a spot zone for the site to establish a new commercial centre in the Industrial Zone whilst retaining its option to establish other industrial activities alongside it. In particular, Mr King referred to the option of a fast food drive-through being a possibility, such an activity being assessed as a restricted discretionary activity in the Industrial Zone.[32]

[25] We signal that the type of commercial centre the Trust seeks does not fit within the business centres hierarchy provisions of the proposed plan because it is neither a suburban centre nor a neighbourhood centre, the two options nearest in kind to the commercial centre the overlay seeks to provide for. More will be said of this later.

Are the Trust's new objective and policies within scope?

[26] The scope issue has arisen because the Trust has re-shaped the relief sought by it over the course of the appeal, most relevantly in relation to the underlying zoning that should apply to the site. The introduction of the overlay has proved challenging because the objectives and policies of the Industrial Zone do not sit easily with what the Trust proposes, so it has put forward the new objective and policies outlined above as part of the package for consideration.

[27] The new objective and policies that are at the heart of the Council's challenge about scope. Mr Bartlett QC submitted they are an attempt to *back-fill* something that does not fit within the Industrial Zone. However, the Trust says that its relief has

[32] Transcript, p 396, line 18.

remained the same in principle throughout the process. It argues that the new objective and policies emphasise that the rules apply only to this site and the issues peculiar to it.

[28] It is the parameters (or scope) of an appeal that provides the Court with the power (or jurisdiction) to hear it. If the new objective and policies are outside the scope of the appeal, then they are not able to be considered as part of the Trust's relief. This will impact on how well the Trust's proposed rules fit within the unchallenged objectives and policies of the Industrial Zone.

[29] It is useful to first outline the changes to the relief sought before analysing them against the legal principles that have developed about scope.

The changes/iterations to the Trust's relief

[30] Mr Bartlett QC provided us with a table which very helpfully set out the various changes to the relief sought by the Trust which was largely accepted as correct by Mr Manning during cross-examination. We have summarised the relevant parts of it below:[33]

(a) The relevant Trust submission on the proposed plan was dated 29 March 2013.[34] It opposed the proposed industrial zoning over a 5.9ha block fronting onto Greenwood Street from Killarney Road through to Massey Street (including the site) and instead sought a zone change to Business 6 (Suburban Centre Fringe) with the rules of this zone to apply as a consequence. There were no amendments sought to any objectives and/or policies of either zone.

(b) As is usual, a section 42A report was prepared and circulated to all parties prior to the Council hearing on the proposed plan. In relation to the Trust's site, it stated:[35]

> Whilst it is acknowledged that commercial activities have occurred within the Industrial Zone as a direct result of the permissive nature of the Operative Plan, the purpose of the proposed plan is to reverse this ad-hoc dispersal trend from occurring. To re-zone large tracts of Industrial Zone to commercial would be contrary to the compact centres approach and the

[33] Transcript, p 140
[34] Submission number 281, agreed bundle of documents, Tab 2. Specifically, and relevant to this appeal, it sought changes to Zoning Map 43A
[35] Agreed bundle of documents, Tab 4.

strategic direction of the PRPS. No sufficient justification has been provided to justify change of zoning of the large extent of land proposed or any consideration given to the existing centres hierarchy. Policy 6.15, now Policy 6.16 of the RPS is quite clear that commercial development is not located on land specifically provided for industrial activities unless it is ancillary to those industrial activities. No change is therefore proposed.

(c) Mr Manning provided a statement supporting the Trust's submission at the hearing of the proposed plan before the commissioners.[36] Mr Manning considered it important to consider the existing surrounding environment, which he described as comprising "a vast majority of existing premises that are of a retail-commercial nature". He referred to the regeneration of the adjoining residential area to the west (Business Zone 6 - Suburban Centre Fringe); he referred to the site having approval for *a large retail development* of approximately 3,600m^2 with at-grade parking; and he contended that the section 32 analysis by the Council was flawed because it did not detail any rationale for retaining the area as industrial; nor did it examine any alternative zoning. Mr Manning did not analyse or refer to any of the then proposed RPS provisions.

(d) The Council decided to reject the Trust's submission to change the zoning from Industrial to Business 6. The decision was expressed as follows:

> The submissions seek a change of zoning from Industrial to Business 6 zoning and are rejected as:
>
> - It reduces the efficient and effective implementation of the Plan to achieve its objectives;
> - The relief sought is not considered to be valid in the context of ensuring vitality and vibrancy of the higher order centres within the business hierarchy;
> - It contains no relevant justification as to why the alternative sought would be more appropriate.

(e) On 19 August 2014 the Trust filed its notice of appeal to the Environment Court.[37] It sought as its relief to:

[36] Agreed bundle of documents, Tab 3.
[37] Agreed bundle of documents, Tab 6.

(i) Apply a Business 5 or 6 zoning to the properties outlined in the 5.9ha block of land fronting Greenwood Street bounded by Killarney Road and Massey Street to the north;

(ii) **Alternatively** to retain the industrial zoning over the land, but provide an overlay to allow for convenience retailing and for the existing/approved/ similar developments to continue to operate and grow without having to place reliance on s 10 (existing use rights);

(iii) Such other consistent relief as appropriate to make provision for ongoing commercial use of the land and make provision for commercial use of those parts of it subject to existing resource consents for commercial activities.

(emphasis added).

(f) After various case management steps were taken by this Court and it became evident that a hearing would be necessary, an evidence exchange timetable was directed which included Court-facilitated expert witness conferencing.

(g) On 23 November 2015 the transport experts took part in such a witness conference. At this point the land area concerned was stated to be the 1.7ha site owned by the Trust and not the 5.9ha block originally covered by the notice of appeal. In other words, the appeal was identified as being limited to the land owned by the Trust. Various baseline scenarios were considered at the conference[38] upon which estimates of the traffic likely to be generated by each were discussed. The baseline scenarios used for the purposes of comparison were:

- Scenario 1 – the permitted baseline under the Industrial zoning in the proposed plan.

- Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall area taking the industrial baseline.

[38] JWS transport experts, 23 November 2016; Mr Apeldoorn, evidence-in-chief, Appendix H. The wording of the scenarios is that which appears in the JWS. The description and use of the term "baseline" is not accepted by us as legally correct, however this does not affect the figures produced.

- Scenario 3 – the proposed Business 5 zone (as referenced in the July 2015 Traffic Design Group Report – paragraph 1), assumed to have a maximum GFA of 7,000m^2.

The Business 5 zoning was not a change from the Business 6 zoning originally sought by the Trust; rather, it reflected the fact that both Business 5 and Business 6 zones had been merged into one Business 5 zone. For all intents and purposes, therefore, the zoning sought at this stage by the Trust remained the same, albeit for a reduced area (1.7 ha) with a maximum specified GFA of 7,000m^2.

(h) On 10 February 2016, Mr Manning filed his evidence-in-chief. The relief addressed in his evidence sought to retain a Business 5 zoning over the land.

(i) On 7 April 2016 counsel for the Trust wrote to the Court and parties outlining draft alternative relief for the 1.7ha site as follows:

(i) to retain the Industrial Zone over the land, but to add an overlay to enable mixed use/commercial activities based on the suburban centre zone rules;

(ii) a cap on commercial development of 5,600m^2 GFA, with the remaining land to be subject to the underlying Industrial Zone rules/standards.

(j) On 8 April 2016 counsel for the Trust proposed a further version of the alternative relief now sought by the Trust in the form of tracked changes to chapter 9 of the proposed plan which deals with the objective, policies and rules in the Industrial Zone. The tracked change amplified that which had been relayed on 7 April 2016, but added the following:

(i) a new addition to the purpose statement for the Industrial Zone;

(ii) a new objective 9.2.7 and a new policy 9.2.7a together with a new explanation;

(iii) an additional assessment criterion H entitled "Function Vitality and Amenity of Centres with particular focus on effects on the Frankton B5 Suburban Centre."

(iv) There was a proposed cap on commercial development of 5,600m ^{2} GFA, but with any remaining GFA subject to the Industrial Zone rules/standards, i.e. there was no overall cap for the site.

(k) On 11 April 2016 Mr Manning filed supplementary evidence. This evidence referred to the additional objective and policies, and referred to a site development capacity of 7,000m^2 GFA with a 5,600m^2 retail/office cap. The remaining GFA was to be "supplemented by industrial development already provided for in the Industrial Zone up to the site development capacity."

(l) On 18 April 2016 a further version of the proposed relief was circulated to the Court and the parties by counsel for the appellant in the form of tracked changes to chapter 9 Industrial Zone including proposed amendments to the Industrial Zone Purpose Statement, proposed new objective 9.2.7 and proposed new Policy 9.2.7a together with a new explanation.

(m) On 29 April 2016 a further version of the proposed relief was circulated to the parties in the form of tracked changes to chapter 9 Industrial Zone. This included a new Rule 9.3.4 requiring a comprehensive development consent for the overlay area. This was the first time the idea of a comprehensive development consent had been raised by the Trust.

(n) On 6 May 2016 Mr Manning filed further evidence-in-chief. This addressed the previous amendments that had occurred since his supplementary evidence of 11 April 2016.

(o) On 9 May 2016 further tracked changes were circulated, however these changes were described as modest and on 13 May 2016 Mr Manning filed his rebuttal evidence, which included certain minor amendments.

(p) The hearing began on 13 June 2016. On the fourth day of the hearing (16 June 2016) counsel for the Trust circulated amended and updated

proposed relief – three more policies, 9.2.9b, c and d were added; the use of a comprehensive development consent was abandoned, and a new rule was proposed in the activity status table in the list of activities to include "new buildings and activities" as restricted discretionary activities. New assessment criteria for these restricted discretionary activities were added. Standards were also included to reflect caps on commercial and office activities within the overlay. The key change to the policies was to include a reference to integrated site development in the objective and policies, as well as referencing traffic and amenity effects.

(q) Further supplementary evidence and rebuttal evidence was filed by Mr Manning in July and August 2016, and on 19 August 2016 Mr Manning filed a further statement which had not been directed by the Court and had not been provided for in timetabling directions. In relation to policy 9.2.8d, reference was made to caps on "total development" for the site, and previous reference to "convenience" retail was deleted. The further relief was refined to include reference to "supermarkets" in activity status table 9.3.5(8) together with a cross-reference to the proposed standards in rules 9.5.11.2 to 9.5.11.5, which has an activity status of non-complying. A new activity j) was included in the proposed activity status table for "development in excess of 7,000m^2 GFA within the Mixed Use Overlay Area", which was also identified as a non-complying activity.

[31] This process of refinement and iteration extended into closing submissions, when the amalgamation of titles and limitation of vehicle crossings to and from the site were proposed to be included in the rules. Whilst some changes can be expected in cases such as this, we consider that many of the changes (especially those made during the hearing) were proffered significantly late in the piece, were reactive to difficulties revealed during questioning and unfortunately gave the clear impression that the relief sought had not been particularly well thought out.

The legal principles

[32] The starting point is Schedule 1 of the RMA. It outlines the process to be followed when a district plan is reviewed.[39] The local authority that has prepared the proposed plan must prepare an evaluation report (under s 32) in respect of it, and publicly notify it.[40] Members of the public then have the opportunity to inspect the proposed plan and make a submission in respect of it, with certain limitations applying where the issue of trade competition arises.[41] A summary of all the decisions requested by submitters must then be publicly notified[42] and there is then a period provided for certain persons to make further submissions on the plan.[43] A hearing is then undertaken unless no person filing a submission has indicated they wish to be heard.[44] A decision *on the provisions and matters raised in the submissions* must then be made[45] and notified,[46] and there is a right of appeal to the Environment Court.[47] Only a person who has made a submission on a proposed plan may appeal to the Environment Court, but they can only do so if they referred to *the provision or the matter* in their submission on the proposed plan.[48]

[33] In *Re Vivid Holdings Limited*[49] the Environment Court determined that to establish the right to appeal, a submission must first raise a relevant resource management issue and then a particular form of relief must be:[50]

> (a) Fairly and reasonably within the general scope of:
>
> (i) an original submission[51]; or
>
> (ii) the proposed plan as notified[52]; or
>
> (iii) somewhere in between[53]. ...

---

39 It also applies when there are proposed reviews of regional policy statements, regional plans and regional coastal plans.
40 Clause 5, Schedule 1.
41 Clause 6.
42 Clause 7.
43 Clause 8.
44 Clauses 8B and C
45 Clause 10.
46 Clause 11.
47 Clause 14.
48 Clause 14(2)(a).
49 [1999] NZRMA 468.
50 Above FN 19 at [19]
51 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408; *Atkinson v Wellington Regional Council* W13/99 is a recent example referred to by Mr Todd
52 *Telecom NZ Ltd v Waikato District Council* A74/97 at p.4
53 *CBD Development Group v Timaru District Council* C43/99

[34] In order to determine whether or not a form of relief is within scope, the Court will need to consider the facts of the case and the inferences that can properly be drawn from those facts. We were referred to two cases which illustrate this point.

[35] In *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council*[54] neither the submission nor the notice of appeal made reference to the policy provisions that the appellant sought to change, which included a new policy and an amendment to an existing policy in order to provide consistency between the agreed amendments to the rules determining activity status for the demolition of certain heritage buildings and structures. In that case the Court held:

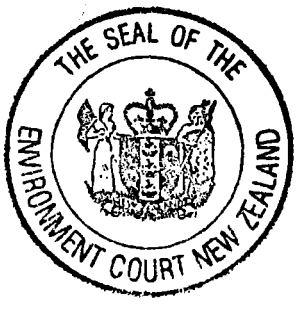
> [40] Neither the appellant's submissions nor the notice of appeal raised Policy 19.2.3a in the relief sought; however, the test is not about determining whether the policy was named in the submissions or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions.

[36] As the policy framework was raised in the course of submissions, the Court found that the agreed relief was *sufficiently inferential* such that a person reading the submissions would have contemplated that those matters were at issue.[55] The amendments were determined by the Court to be within the scope of the appeal.

[37] In *The Warehouse Limited & Ors v Dunedin City Council,*[56] the Court heard two proceedings together; a reference in relation to a decision by the Council in relation to the proposed plan's zoning of the site as industrial, and an appeal against the refusal of the Council to grant a resource consent to one of the appellants to build and operate a large scale bulk retail store on the same site.

[38] In relation to the proceeding concerning the proposed plan change, the Court considered a later proposal for amendments to objectives and policies when the submission did not raise those particular matters. We were referred to in the following excerpt from the case:[57]

> [74] We consider that a submission or (on appeal to this Court) a reference may fail simply because it is inconsistent with wider objectives and policies of a



[54] [2015] NZEnvC 166.
[55] [2015] NZEnvC 166, at [46.
[56] C101/2001.
[57] Above fn 32 at [76].

proposed plan; each case has to be assessed on the particular wording of the plan involved...

[75] However in other cases such an approach – whether by way of submission (or resulting reference) or even by plan change or variation – might lead to a substantial weakening of a (proposed) plan. Indeed results quite other than those intended in the original plan may occur because the proposed method of implementation does not implement or achieve any of the proposed plan's objectives or policies. In such cases where no specified change has been sought to the objectives and policies, the proposed zone (or rule) is unlikely to be justifiable.

[76] In our view the correct approach when drafting a submission (or reference) on rezoning is to ensure that the relief sought covers not only the issue of rezoning itself, but also – and primarily – any necessary changes to the plan's objectives and policies.

[77] We do not overlook the power given to a local authority by clause 10(2) of the First Schedule to the Act to include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions. However in our view a change to the objectives and policies which govern zonings (which are themselves either policies (*North Shore City Council v North Shore Regional Council*) or methods of implementation) will not usually be able to be perceived as a "consequential" change. We have commented elsewhere that the tail should not wag the dog: objectives and policies drive methods of implementation; not the other way round. So we do not consider clause 10(2) can be used to widen the scope of a submission or reference. ...

[39] In that case the appellant sought to add to an objective providing for large-scale retail activity to the area affected by the plan change in circumstances where the objective referred to two other areas within the city that did not include the site. The Court considered that the only way to do this would be via s 293 of the RMA and that an application would need to be made for this to occur, with the indication that the proposed re-zoning would have to be re-notified.

[40] These cases are helpful, but do no more than highlight that each particular case will depend on its facts.

Analysis

[41] As outlined above, to establish jurisdiction a particular form of relief must be fairly and reasonably within the general scope of an original submission, or the proposed plan as notified, or somewhere in between.

[42] In the present case, the proposed plan as notified zoned the Trust's land Industrial, and the Trust's submission in respect of it sought a Business 6 zoning (now Business 5) over the land. Mr Lang's point was that the relief now proposed by the Trust is between those two ends of the spectrum of jurisdiction, being an industrial zoning but with provision for business activities similar to those that can establish within the Business 5 zone, or something in between. He submitted that the overlay as opposed to a complete zone change was an option within the bounds of the two zoning options, and was therefore *something in between.* If this is accepted, Mr Lang submitted that a site-specific modification of the objectives and policies, to create consistency between the objectives, policies and the rules of the zone was foreseeable. Mr Lang referred to the use of overlay provisions being endorsed by the Council as a way to resolve other appeals against the proposed plan. He referred to the A & A King Family Trust (Greenwood Street corridor provisions) appeal,[58] the Body Corporate 550337 (Te Rapa corridor provisions) appeal[59] and the Porters (activities on land between Maui Street and Eagle Way) appeal.[60]

[43] We agree that the Greenwood Street corridor and Te Rapa corridor appeals are relevant by way of analogy, but the Porters' appeal, whilst being resolved by way of an overlay, is not, as that concerned the use of s 293 of the RMA by the Court to achieve the outcome proposed. We note that the Greenwood Street corridor and Te Rapa corridor appeals both were resolved by including dedicated objectives and policies (in the case of the Greenwood Street corridor) as well as additional permitted retail activities, and a policy in respect of the Te Rapa corridor case.[61]

[44] The question for us is whether the amendments sought were reasonably and fairly raised in the course of the submission or the notified decision. On balance we consider that they are. The Trust was seeking a commercial zoning over the land and the Council was seeking an industrial zoning. What has subsequently been sought by the Trust is something in between the two. Whilst Mr Bartlett QC correctly identified

[58] ENV-2014-AKL-000156.
[59] ENV-2014-AKL-000148.
[60] ENV-2014-AKL-000145.
[61] See [2016] NZEnvC 101 A & A King Family Trust v Hamilton City Council.

that the original submission did not signal that the objectives and policies of the Industrial Zone would be subject to amendment, this approach has been taken without objection by the Council to other areas within the Industrial Zone that have been amended through the appeal process. We have referred to these above.

[45] In all of the circumstances we consider that there is scope for the Court to consider the new objective and policies, and that the real issue for us is whether they, together with the accompanying rules, survive the legal tests applicable to plan reviews. This decision has however been one we have considered very carefully, because the iterations to the relief sought in this case and the timing of it have been well beyond what we consider to be acceptable on appeal.

Which option best meets the legal tests for a plan review?

[46] There were two main areas which the Council contended were problematic for the Trust's argument and which favoured the Council's proposed provisions. The first concerned the very nature of the commercial activity sought to be undertaken on this site (a commercial centre in an Industrial Zone), which it said fundamentally contravened the business centres hierarchy approach and the approach to the use of industrial land in the proposed plan for which there was no factual justification. The second concerned transportation effects which it and the Agency said would be greater if the Trust's overlay was favoured, and would therefore not give effect to the RPS provisions about transport or those in the proposed plan.

[47] We deal with both the commercial and transport topics in turn, however we first provide a brief overview of the strategic direction signalled under the proposed plan with reference to the RPS provisions and then address the relevance of the existing unimplemented supermarket consent. This provides a context to both the commercial and transport topics and are needed to understand the detail of the evidence called about the need for the commercial centre on the site and the potential for adverse traffic effects to arise if the overlay is incorporated into the proposed plan.

Overview of strategic provisions in the RPS and the proposed plan

[48] The proposed plan contains specific objectives and policies which are designed to give effect to the RPS. We start therefore by outlining the relevant provisions of the RPS and the background that informed them. The purpose of providing this level of

detail is to signal that the strategic direction outlined in the proposed plan as it relates to this appeal is one which has been developed over a long period of time with significant input from all three territorial authorities within the Waikato Region (including the Hamilton City Council), the Waikato Regional Council, tangata whenua (Tainui Waka Alliance) and the Agency.

Future Proof Strategy

[49] The development of the Future Proof Strategy (**the strategy**) preceded the RPS.[61] It is a growth management strategy and implementation plan for the territorial areas of the Waikato District Council, the Waipa District Council and Hamilton City Council (described in the strategy as "**the future proof area**"). The strategy was developed within the broad context of the Local Government Act 2002 (**LGA 2002**) with the regional council, tangata whenua and the Agency being directly involved in its development. It takes a strategic, integrated approach to long-term planning and growth management in the future proof area.[62] The strategy's operational and implementation processes have been designed to be consistent with the RMA, the LGA 2002 and the Land Transport Management Act 2003 (**LTMA**).[63]

[50] Having identified the future proof area as one with on-going population growth and significant levels of development, the strategy identifies 50-year land supply needs in the future proof area and sequences its release and development according to its ability to be serviced by appropriate infrastructure and equitable funding.[64] The strategic approach underpinning it is described as a "blend of compact settlement and concentrated growth". The rationale for this approach was to allow the costs of growth to be identified early so that a more cost-effective form of infrastructure could be delivered, and also because land use certainty would thereby be provided to the community, developers, local and central government.[65]

[51] The strategic options for land use were publicly consulted upon, as was the draft strategy, and the settlement pattern scenario which forms the basis of the strategy was selected on the basis of public feedback and the evaluation results.[66] Whilst the strategy is currently being updated, the evidence before us was that this will not alter

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61 Formally known as the Future Proof Growth Strategy & Implementation Plan 2009.
62 Mr Tremaine, evidence-in-chief, at [15].
63 As FN 35 above, at [16].
64 As FN 35 above, at [15].
65 As FN 35 above, at [17].
66 As FN 35 above, at [18].

the fundamental principles of it or the overall approach to the settlement pattern it promotes.[67]

[52] The strategy contains key principles for business development, with the term "business" encompassing both industrial and commercial activities.[68] It identified that devolved or out of centre retail and office development had the potential to undermine the viability of the Hamilton Central Business District (**the CBD**), neighbourhood centres, towns and villages.[69]

[53] The strategy contains the following key approaches for business development:

(a) there is a focus on Hamilton CityHeart (being the CBD)[70] as the commercial and business heart of the future proof area, i.e. it is of regional significance;

(b) it seeks to ensure commercial and industrial developments are not located in areas that undermine the areas of influence of the CBD, including the extensive development of retail/mall shopping in locations not identified in the strategy;

(c) it outlines that commercial activity should aim to maximise the use of existing areas and facilities;

(d) it seeks to discourage the development of large format retail outside of the CBD, suburban and town centres.[71]

[54] The strategy contains actions to give effect to these matters. These include:[72]

- providing for suitable business and employment opportunities close to where people live;

- agreed locations for business land; and

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67 As FN 35 above, at [22].
68 As FN 35 above, at [23].
69 As FN 35 above, at [25].
70 Whilst the strategy refers to Hamilton CityHeart, we refer to it as the CBD for consistency reasons.
71 As FN 35 above, at [26].
72 As FN 35 above, at [27].

- developing a strategic approach to office and retail development and ensuring that settlement patterns do not adversely impact upon the benefits of the Waikato Expressway.

[55] Mr Tremaine, the implementation advisor for the strategy, gave evidence that the Industrial Zone provisions of the proposed plan are consistent with these approaches. His evidence was not challenged.[73]

The RPS

[56] The RPS implements key aspects of the strategy, including the settlement pattern and gives statutory effect to its principles, approaches and actions.

[57] The RPS identifies issues relating to managing the built environment in Issue 1.4. It directs specific attention to the following matters:

(a) high pressure for development in Hamilton City;[74]

(b) increasing conflict with and demands for new infrastructure;[75]

(c) the need to use existing infrastructure efficiently and to manage and enhance that infrastructure;[76]

(d) unplanned dispersal of retail and office development having had consequential effects on the function, amenity and vitality of some elements of the CBD;[77] and

(e) the integrated relationship between land use and development, and the transport infrastructure network.[78]

[58] The Explanation to Issue 1.4 outlines that:

> ...
> Efficient and effective infrastructure is crucial for our economic progress in social and visible wellbeing. However, land use change can adversely affect this, for

[73] As FN 35 above, at [28].
[74] Issue 1.4 a).
[75] Issue 1.4 c).
[76] Issue 1.4 ca)
[77] Issue 1.4 f).
[78] Issue 1.4 g)

example ribbon development along arterial roads can result in the slowing of traffic and may consequentially affect the efficiency of transport along these routes. ...

Hamilton Central Business District's continued viability, vibrancy and accessibility is significant to the entire region. The previous planning framework has enabled an unplanned dispersal of retail and office development which has contributed to the under-performance of some elements of the Central Business District with consequential effects on its function, amenity and vitality.

[59] The relevant objective addressing this issue is:

Objective 3.12 Built environment

Development of the **built environment**[79] (including transport and other infrastructure) and associated land use occurs in an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by:

...

c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;

...

e) recognising and protecting the value and long-term benefits of **regionally significant infrastructure**[80];

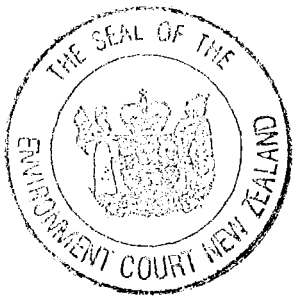
...

g) minimising land use conflicts, including minimising potential for reverse sensitivity;

...

j) promoting a viable and vibrant central business district in Hamilton city, with a supporting network of sub-regional and town centres; and

k) providing for a range of **commercial development** to support the social and economic wellbeing of the region.



[79] The RPS bolds terms that are defined in its glossary.
[80] The RPS defines "regionally significant infrastructure" to include "significant transport corridors as defined in Map 6.1 and 6.1A".

[60] Policy 6.16 of the RPS deals with commercial development in the future proof area. "Commercial development" is defined in the glossary to the RPS as:

> The range of commercial activities including office, retail and commercial service provision.

[61] Particularly relevant to this appeal are the following parts of Policy 6.16:

> Policy 6.16 - Commercial development in the Future Proof Area
>
> Management of the built environment in the **Future Proof area** shall provide for varying levels of **commercial development** to meet the wider community social and economic needs, primarily through the encouragement and consolidation of such activities in existing commercial centres, and predominantly in those centres identified in Table 6-4 (Section 6D). Commercial development is to be managed to ...
>
> b) support and sustain existing physical resources, and ensure the continuing ability to make efficient use of, and undertake long-term planning and management for the transport network, and other public and private infrastructure resources including community facilities;...
>
> f) maintain Industrial Zoned land for industrial activities unless it is ancillary to those industrial activities, while also recognising that specific types of commercial development may be appropriately located in industrially zoned land; and
>
> g) ensure new commercial centres are only developed where they are consistent with a) to f) of this policy. New centres will **avoid** adverse effects, both individually and cumulatively, on:
>
> (i) the distribution, function and infrastructure associated with those centres identified in Table 6-1 (Section 6D);
>
> (ii) people and communities who rely on those centres identified in Table 6-4 (Section 6D) for their social and economic wellbeing, and require ease of access to such centres by a variety of transport modes;
>
> (iii) the efficiency, safety and function of the transportation network; and
>
> (iv) the extent and character of industrial land and associated physical resources, including through the avoidance of reverse sensitivity effects.
>
> (underline added for emphasis)

[62] Table 6-4 sets out a hierarchy of major commercial centres which identifies the CBD as the primary centre in the region for commercial, civic and social activity and the Te Rapa North Commercial Centre (The Base shopping centre) as the primary sub-regional centre and Chartwell as a secondary sub-regional centre. Table 6-2 sets out the number of hectares allocated for industrial land allocation within the future-proof area and the timing or staging of its release. Industrial development is to be *primarily* located in the strategic industrial nodes (Policy 6.14 c)) outlined in Table 6-2. The overlay area is not one of these.

[63] The implementation methods in respect of Policy 6.16 include a requirement that any new commercial development is managed in accordance with Policy 6.16 through the Council's district plan.[81]

The proposed plan

[64] Mr O'Dwyer, the Council's city planning manager, gave evidence about the role and influence of the strategy in the plan review and also addressed how the proposed plan gives effect to the RPS provisions, which he described as being "directive about the preservation of the industrial land resource in Hamilton". He described the introduction of the centres hierarchy within the proposed plan as also giving effect to the relevant provisions of the RPS.[82] Mr Manning did not fully address the ways in which the Trust's most recent proposal gives effect to the RPS.

[65] The proposed plan involves a substantial shift in the policy approach to retail and commercial provision from the operative plan, reflecting concerns about the outcomes of the approach in the operative plan which enabled dispersed, ad hoc office and retail development across the city, including within the Industrial Zone and outside the CBD. This, coupled with the strategy's proposed land use pattern embedded in the RPS (which was developed at around the same time as the proposed plan), and the specific policies about industrial and commercial development, have influenced the strategic direction of the proposed plan.

[66] Mr O'Dwyer gave evidence of the policy shift and the reasons for it:[83]

[81] Policy 6.16.1.
[82] As FN 10 above, at [26], [27].
[83] As FN 10 above, at [22] – [28]. In this quote the PDP refers to the proposed plan and the ODP refers to the operative plan.

> In contrast to the PDP, the ODP provided for a much wider set of land uses in the Industrial Zone which enabled general office and retailing activities. This has contributed to the distribution of these activities away from the established and planned for commercial and business centres in Hamilton over a 10 to 15 year period, while simultaneously diluting the industrial land resource and making it harder to effectively plan and manage integrated infrastructure development.
>
> Against that background, the most significant elements in the PDP that are relevant to this appeal relate to introduction of a centres hierarchy to proactively manage the location and distribution of office and retail development across the city, and the preservation of industrial land for industrial purposes. ...
>
> The decisions version of the PDP includes objectives, policies and land uses in the Industrial Zone to ensure that Industrial land is primarily preserved for industrial land uses.
>
> The strategic direction of maintaining industrial land for industrial purposes also gives effect to the relevant provisions in the Waikato Regional Policy Statement (WRPS) that are directive about the preservation of the industrial land resource in Hamilton.
>
> The introduction of a centres hierarchy within the PDP is directly linked to the policy position to preserve industrial land and also gives effect to the relevant provisions of the WRPS which is now operative.

[67] The proposed plan gives effect to the RPS through the objectives, policies and methods in chapter 2 Strategic Framework, chapter 6 Business Zones, chapter 7 Central City Zone and chapter 9 Industrial Zone and through the city-wide transportation provisions.

[68] Chapter 1 of the proposed plan is entitled Plan Overview. At 1.1.3 Plan Structure, the following is outlined:

> b) Strategic Chapter
>
> This outlines the strategic objectives and policies for the future direction of the City. It is intended that the Objectives and Policies of this chapter provide a hierarchy of district-wide strategic considerations that **sit over** the Objectives and Policies of specific zones, sites and features.
>
> (emphasis added)

[69] Chapter 2 Strategic Framework of the proposed plan is clear, unambiguous and self-explanatory. We set out the relevant parts of it as follows:

> 2.1 Purpose
>
> a) The principal purpose of this chapter is to provide clear and strong links between the District Plan and the City's Strategies, which are listed in Chapter 1: Plan Overview, Section 1.1.2.2 – Integration of the Plan with Other Plans and Documents. To this end, this chapter sets out the strategic objectives and policies for Hamilton City. Other chapters contain objectives, policies and rules that implement and support this strategic policy framework.
>
> b) One of the key approaches to achieving a compact city and sustainable management of physical resources is to recognise the existing and distinctive business centres that will make up a business hierarchy. The overall aim is to maintain the primacy of the Central City as a viable and vibrant metropolitan centre.
>
> ...
>
> Objective 2.2.4
>
> Establish and maintain a hierarchy of viable and vibrant business centres that provide a focus for retail, commercial and entertainment activities and serve the social, cultural, environmental and economic needs of the community
>
> Policy 2.2.4
>
> 2.2.4a) Business activity and development shall locate in the most appropriate centre for its role, according to the following hierarchy:
>
> i. The Central City is the primary business centre, serving the City and wider region, and is the preferred location for significant office, commercial, retail, entertainment and civic activities.
>
> ii. Chartwell and Te-Rapa North complement the Central City, to serve large parts of the City and adjoining districts, and contain primarily retailing, entertainment and services.
>
> iii. Suburban centres, to provide convenience goods, community services, facilities and employment to service immediate suburban catchments.[84]
>
> iv. Ruakura Retail Centre, to serve the Ruakura Structure Plan area and adjacent catchment.

[84] The suburban centres are noted on Figure 2.1a "Hamilton's Plan at a Glance", p 2-2.

v. Neighbourhood centres, to contain retailing and service activities to serve immediate residential catchments.

2.2.4b) The distribution, type, scale and intensify of activities outside the Central City does not undermine the viability, vitality and vibrancy of the Central City, its amenity values, or role in meeting the needs of the region

...

Policy 2.2.5

...

2.2.5c) Industrial Zoned land shall be safeguarded for industrial purposes.

[70] The strategic framework then drives the other provisions of the proposed plan as referred to above, relevantly here chapter 9 Industrial Zone. Any discretionary or non-complying activity has to consider the strategic framework objectives and policies, which is a strong signal of their importance.[85]

The relevance of the unimplemented supermarket consent

[71] As outlined above, the Trust's intention is to establish a small-scale convenience shopping and service centre to serve the western suburbs and passing traffic, with a supermarket as the "anchor" activity.

[72] Resource consent to allow a supermarket development on the site was granted on 12 February 2013 by the Council. Although Mr Swears (the transport expert for the Agency) did not support the application, the Agency gave affected party approval to the application.[86] If not implemented, that consent lapses within 6 years, which now leaves a life of 2.5 years.[87]

[73] The supermarket consent has not been implemented. Mr King explained that he intends to implement the consent, which will either take the form of a small supermarket (such as a Four Square or Fresh Choice) or an ethnic supermarket.[88] We were told during the course of the hearing that the approved supermarket is 3,600m^2 and covers 75% or 80% of the overlay area. Any change to the size of the supermarket may involve an application to vary the conditions of the existing consent or a new

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[85] As in the proposed plan and stated directly under the heading of chapter 2.2 Objectives and Policies: Strategic Framework.

[86] The Agency's opening at [5.1], [5.3].

[87] The appellant's closing, 13 September 2016 at [88], Agreed bundle of documents volume 2, p 22.

[88] Transcript, p 379.

consent. We were provided with a copy of the decision on the application to allow the supermarket development at the site, but not all of the background documents or plans referred to in the decision.

[74] There are requirements for a suitably qualified person to prepare for approval by the Council a Landscape and Planting Plan before the consent is implemented (conditions 20-22). That plan is to generally screen and soften the carparking area fronting Greenwood Street and Killarney Road with a minimum of 2m wide amenity planting and provide solid or wide screening in a minimum 2m area along the western Amenity Protection Area boundary abutting the Residential Zone. One tree is to be planted for each 15 car parking space.

[75] Conditions (6, 7 and 8) require a minimum of 180 vehicle parking spaces, with four accessible needs parks and loading bays.

[76] There are conditions that relate to access:

(a) left-in, left out, right in access to Greenwood Street, the detailed design of which is subject to approval by the Agency (conditions 10 and 13);

(b) left-in, left-out access to Killarney Road, the detailed design of which is subject to approval by the Council (condition 11);

(c) yellow no-stopping lines along the site frontage on the western side of Greenwood Street (condition 12); and

(d) a heavy/service vehicle exit to the north on Greenwood Street (condition 14) with a sign advising operators not to use Bandon, Smith, Allen and Primrose Streets (condition 15).

[77] Mr Apeldoorn, the traffic expert for the appellant, prepared a Transport Assessment Report (**TAR**) which included two plans showing two possible design layouts which he considered would meet the above conditions. The accesses to the supermarket have never been submitted to either the Council or the Agency for approval. For this reason, it cannot be assumed that either of the layouts will be approved.

[78] The unimplemented supermarket consent has not, in our view, reached the stage where it could be considered as a permitted baseline, which in any event is not a relevant consideration when considering a plan change appeal. In terms of this appeal, however, we do not agree that it should be used as a springboard for further commercial activity, or that the fact that consent was granted for it under a more permissive planning regime means it should be given any particular weight when assessing which proposal is the most appropriate.

The proposed commercial centre

[79] Apart from the strategic framework referred to above (the purpose set out in chapter 2.1, Objective 2.2.4 and its related policies), an issue arose about whether or not the objectives and policies in chapter 6 Business Zones and chapter 9 Industrial Zone would apply to the proposed overlay. We heard a considerable amount of evidence and submission on this topic, and without intending any disrespect to the parties or counsel we have formed the view that the arguments somewhat miss the point. This is because what the Trust proposes does not neatly fit within the Business or Industrial Zones' objectives and policies. The commercial centre is something more than a neighbourhood centre, and considerably less than a suburban centre.[89]

[80] Mr Manning, the planning witness for the appellant, said he based the proposed overlay and particularly the rule regime on the suburban centre provisions (with some exceptions in terms of activity provision) which provided for a supermarket (unlike the neighbourhood centre provisions which did not).[90]

[81] In terms of the Suburban Centres (Business 5 Zone) Mr O'Dwyer said:[91]

> The City's residential neighbourhoods are served by numerous existing suburban centres, being medium sized shopping centres also supporting community services and facilities. Further, new centres are proposed as part of planned residential expansion in the Rotokauri, Rototuna, and Peacocke Structure Plan areas. Some of these centres are zoned at present (such as for Rotokauri) while others are identified and clearly provided for as part of detailed structure plans.

[89] The business centres hierarchy comprises five tiers and is set out in chapter 6 of the proposed plan at 6.1e) listed above.

[90] Chapter 6 Business Zone Suburban Centres Objective 6.6.2 and its accompanying policy; Neighbourhood Centres – Objective 6.2.3 and accompanying policies.

[91] Evidence in chief, at 111-114.

> These centres are medium sized centres (ranging in area from 10,000-20,000m^2 GFA). The centres are dispersed throughout the residential suburbs, and generally (although not exclusively) located on higher order transport corridors (major and minor arterial roads) and accessible to a large vehicle-oriented travelling public. Supermarkets commonly anchor these centres supported by limited office, community and other services to a suburban population

[82] Even if we were to evaluate the proposed overlay against the Suburban Centres objectives and policies, there is still a need to understand the Business 5 zone in the round – its purpose, function and nature and the reasons for the rule framework including its activity mix, and the anticipated outcome. Mr Bartlett QC referred to it not being a "pick and mix" exercise.[92] There was no principled analysis to explain why Mr Manning only selected the items he did, neither was any comparison of the rule framework with the proposed overlay undertaken. Our analysis of the rule framework is that a suburban centre is intended to be more than just retail and offices.

[83] If considered against the Industrial Zone provisions, the overlay would clearly not be the most appropriate outcome, however the reality is that what is proposed does not properly fit with the Business Zone objectives and policies and particularly those that relate to suburban centres. We cannot see how it would therefore, be relevant to evaluate the overlay against these provisions. It is therefore not surprising and indeed we would have thought crucial to the Trust's case for there to be a new objective and policies justifying the inclusion of the overlay within the Industrial Zone. A critical question is, however, how the new objective and policies fit within the strategic framework of the proposed plan. We return to this question after considering the commercial and particularly retail and transportation effects that could arise if the overlay is included in the proposed plan.

Commercial and particularly retail considerations

[84] Mr Robert Speer and Mr Fraser Colegrave for the appellant and Mr Tim Heath, Mr Mark Tansley and Mr Phil Osborne for the Council as retail and economic experts, and Mr Manning, Mr Speer and Mr O'Dwyer as planning experts, gave evidence about potential commercial and retail implications.

[92] Transcript, p 150 (8 September 2016).

[85] We have felt it necessary to record our concern about the retail and economic evidence provided to us. There was little attempt to present the evidence in a way that facilitated evaluation on an "apples with apples" basis, for example by defining a "catchment" and "core catchment" and their physical location. A much sharper identification of the issues and evidence addressing these would have shortened proceedings and been of greater assistance. This lack of focus resulted in considerable time spent in cross-examination on matters that, in the final analysis, we have concluded are not material to our decision, with the result that we do not intend to traverse them in detail.

[86] A large part of the case for the appellant was that the overlay proposal would meet a potential and unfulfilled demand for retail in the western part of the city and that there was insufficient supply of suitably zoned and available land to meet that demand. That would mean the proposal would not conflict with the objective and policies for suburban centres.

[87] While the appellant's witnesses considered the proposed new commercial centre within the overlay to be a suburban centre and their evidence was based on this, as outlined above, we have concluded that it is not. However, we accept that the potential effect of the proposed new commercial centre on suburban centres in the western suburbs is a relevant consideration. It may be that the new commercial centre within the overlay would have potential effects on neighbourhood centres in the western suburbs, but we had no argument or evidence on this point. There was no suggestion that it would undermine the primacy, function, vitality, amenity or viability of the CBD, an important plank in both the RPS and proposed plan policy framework.

[88] Another key issue was the effect on Frankton, the suburban centre in relatively close proximity to the proposed overlay area. The appellant's case was that a new commercial centre within the proposed overlay would not reduce the current trading patterns at Frankton or inhibit the consolidation, or growth of it as a suburban centre. A further key issue was whether there is a shortage of zoned land for retail in the western suburbs.

[89] We understand the evidence to be that the provision of 1,000m^2 GFA of offices is unlikely to have any significant adverse effect on centres in the business hierarchy,

given that there is approaching 1,000m^2 GFA of office available on the site currently.[93] We set this issue aside as it is not determinative.

What are the likely implications for Frankton?

[90] As signalled above, Frankton is zoned as a suburban centre. Mr Heath gave evidence that, from the whole of the western catchment, the Frankton suburban centre derives 13% of its retail trade and attracts 1% of the retail spend from that catchment.[94] It has been dominated by Forlongs department store with its household goods and homeware for many years and most recently at the replacement outlets selling similar products but established under a different business model. It has no supermarket.

[91] The appellant's witnesses gave evidence that the provision of supply to meet the convenience shopping demand from the western suburbs is not one of Frankton's actual roles. Its retail function is to meet the demand from the surrounding workforce and a broader city-wide demand for destination shopping for household goods and homeware, formerly at the Forlongs department store. Mr Speer also considered there are a number of constraints against Frankton as a convenience shopping destination for western suburbs residents, particularly poor accessibility and more easily accessible locations by vehicles to other parts of the city.

[92] The Council's witnesses urged us to look beyond today's snapshot of Frankton and to the future when considering the potential for adverse retail effects on it. Mr Heath and Mr Tansley gave evidence that the Frankton Suburban Centre is an underperforming centre with sufficient capacity to meet any unmet retail demand. Both considered that the failure of Frankton to attract custom from the western suburbs is the product of its current physical state and the specialisation in its retail offering of household goods and homeware. Both had a concern that introducing another "centre" could have an adverse impact on Frankton's ability to perform to the level envisaged for an existing suburban centre. We took from their evidence that Frankton is an appropriate location to promote supply to meet the demand from the western suburbs; there are opportunities for revival and the need to give it a chance. However, our assessment of their evidence is that this will be a challenging prospect, particularly without a supermarket.

[93] Transcript, p 399 (13 June 2016).
[94] Mr Heath, evidence-in-chief, at [77], p 122.

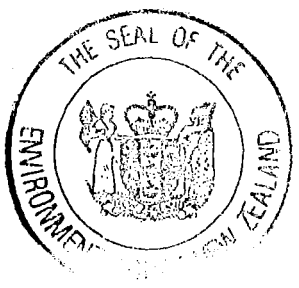
[93] The Council considers that Frankton has the potential and opportunity to regenerate and it has embarked on a planning project to enable it to realize that potential. The Council produced a plan entitled "Discover Frankton: The Frankton Neighbourhood Plan" post-decision making on the proposed plan and we were provided with a copy of it. We take it as no more than an indication of the Council's interest in promoting and regenerating Frankton.

[94] We accept from the evidence that the future area of influence from the overlay proposal includes Frankton. We also infer from the evidence that the potential regeneration of Frankton is likely to take some years and therefore extend beyond the life of the proposed plan. While it may not be set back by the commercial development of the overlay area (even under the most severe of the predictions by the retail witnesses), there is still some uncertainty about that and it raises the question of the need to take that risk.

Is there a shortage of zoned land in the western suburbs?

[95] Mr Heath relied on the existence of the wider western Hamilton catchment's established network of centres designed to accommodate the area's future convenience retail and commercial services requirements as providing an adequate supply. Mr Colegrave was critical of this, pointing out the Marketview data presented by Mr Heath showed that western suburbs retailers currently capture only 22% of total retail spend.[95] Mr Speer's evidence also made much of the under-supply of retail in the western suburbs. Messrs Speer and Colegrove both referred to market research based on vehicle customer surveys at Dinsdale and Newton centres showing a strong fall off in customer support at the railway lines.[96]

[96] None of the witnesses for the appellant made any evidential link to an alleged shortfall of retail supply in the western suburbs with a lack of zoned capacity. No land use study has been undertaken to show that there is insufficient zoned opportunity. Mr Colegrave conceded that his analysis could not be relied upon to conclude that there is a shortage of available zoned land for retailing in the western area[97] and



[95] Mr Colegrave, rebuttal evidence at [78].
[96] Economic – Expert Witness Conferencing Statement, dated 25 February 2016, p 2.
[97] Transcript p 473, lines 6-8.

confirmed that he had no information to suggest a present shortfall of zoned opportunity.[98]

[97] When questioned about his conclusion that there is a lack of available capacity within the suburban centres in the vicinity of the overlay area, Mr Speer acknowledged that he had no objective information or data to support this proposition, other than having walked around and looked at what may happen and what may be available.[99] Furthermore, he had not taken any advice from existing operators within these centres about what they consider to be their long-term options in terms of peripheral acquisitions, building and reconfigurations.[100]

[98] During the hearing the Council drew our attention to the "Suburban Centres Review August 2011", an assessment of the suburban centres and evaluation of the current employment composition, the current and future retail floor space provisions and land requirements of each centre. The Suburban Centres Review estimates the level of provision required or that can be sustained by each localised catchment by 2041, factoring in both the retail and commercial sectors and their estimated growth in demand. The "at grade" suburban centre land area forecasts (said to be more likely than two-storey development for the centres in the western suburbs) involve a forecast land area increase for Dinsdale from 2.4ha[101] to 4.6ha, Nawton 1.2ha to 2ha and Frankton 1.5ha to 3ha.[102]

[99] In closing, Mr Lang submitted that the Suburban Centres Review does not address the question of supply to meet the additional demand, only the predicted future demand. He highlighted Mr Speer's evidence where he said that he had recommended to the Council (in a report prepared for the Council in 2009) that further work needed to be done in relation to suburban commercial locations to address future demand. He submitted that although the review considered likely future demand, it was not specific about how that would be met through expanding existing commercial zones, new commercial zones or other methods. However, we had no evidence about this.

[100] Mr Speer's evidence was that the new commercial centre proposed for the overlay area made sense because it filled what he considered to be a "gap" in the

[98] Transcript p 481, lines 19-23.
[99] Transcript, p 435, lines 1-8.
[100] Transcript, p 435, lines 9-12.
[101] Given the 2011 current retail and commercial estimates, it seems unlikely that the Countdown expansion in Dinsdale of 900m^2 has been factored in.
[102] Suburban Centres Review, August 2011. Table 8 at [19].

centres hierarchy and complemented and helped the hierarchy to be implemented in a full way.[103] There was, however, a lack of thorough analysis by Mr Speer and other witnesses as to the basis for this proposition and no/little systematic identification and review of other potential locations for such a new centre with an analysis of their respective costs and benefits.

[101] Even if there proved to be a shortage of zoned retail capacity (and we did not have evidence to make a finding to that effect), the appellant did not adequately consider the options for meeting that demand. The appellant relied on the existence of the supermarket consent (a matter we have already discussed) and the immediate availability of the Trust's land in one ownership to provide the basis for justifying this location for a new commercial centre.

[102] In our view land could be acquired or otherwise arranged to accommodate such a purpose elsewhere to meet any need.

[103] We conclude that we should not lightly set aside the new approach to the allocation of business/commercial centres and industrial land in the proposed district plan, as this approach has been the subject of considerable focus through Future Proof, the RPS and now the proposed plan. This process has sought to address the issues facing Hamilton about the unplanned dispersal of retail and office development and has developed strategy and policy to deal with them.

Traffic and transportation

General background

[104] The key traffic and transportation issues to be considered are the effects on the road hierarchy, the need to integrate land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors, and consistency with the relevant objectives and policies.

[105] Evidence was provided by the following transport experts: Mr Mark Apeldoorn for the appellant, Mr Alistair Black for the respondent and Mr Robert Swears for the

[103] Transcript p 424, lines 23-30.

Agency. Mr Andrew McKillop from the Agency and Mr Dylan Gardiner (a planner) also gave evidence for the Agency.

[106] The Agency has the sole power to control and manage all state highways for all purposes. This includes the Greenwood Street section of SH1. In addition, the Agency funds 51% of the cost of maintenance and operations, renewals and capital works associated with the Council's local road network. Mr McKillop advised that the Agency has:[104]

> ...a significant interest in seeing that land use planning for the City is integrated with the transport network" and "an interest in present and future land use decision-making to ensure that the public receive value for money transport outcomes from our investment.

[107] The Council is responsible for the local road network, which includes Killarney Road and a number of other local roads in the vicinity of the site.

[108] As we have noted, the site is located on the corner of SH1 at Greenwood Street and Killarney Road. The average current traffic volume on Greenwood Street south of Killarney Road is approximately 25,000 vehicles per day (**vpd**) and this is projected to increase to just over 30,000 vpd in round terms by 2041, with the new Southern Links project (assuming it is built) in place. Average current traffic volume on Killarney Road on the western side of Greenwood Street is 15,400 vpd and this is projected to increase to around 18,600 vpd by 2041 with the new Southern Links project in place.[105]

[109] Much of the evidence presented to us addressed the effects of traffic on the road network and was more aligned to evidence that would be presented at a resource consent appeal hearing than at a plan review appeal hearing.

Overall strategic transport planning framework

[110] It is clear to us from the evidence and from our reviews of the relevant planning documents that comprehensive transport planning in Hamilton has been undertaken in a manner very closely linked to land use planning over a number of years, with input from the Council, the Waikato Regional Council, the Agency and other councils and

[104] Mr McKillop, evidence-in-chief, paragraphs [4.2] and [4.3].
[105] Transport Assessment Report dated July prepared by Traffic Design Group, Mark Apeldoorn, evidence-in-chief, Appendix E.

road controlling authorities in the general locality. This planning has included a progression of inter-related and cascading processes starting with the Future Proof Growth Strategy, the Hamilton Urban Growth Strategy, the Access Hamilton Integrated Land Transport Strategy, the Waikato Regional Land Transport Strategy, the RPS and the proposed plan.

[111] The evidence,[106] particularly that of the Agency, emphasised the importance of the road hierarchy and the significance of SH1 in that hierarchy. The Upper North Island Freight Story:[107]

> ...highlighted the **constraint** to inter-regional freight traffic caused by delays along sections of SH1 through Hamilton, including the western corridor [which includes Greenwood Street], and recognised that the effects of this constraint are felt at an upper North Island scale.

Mr McKillop stated that SH1 is already under significant pressure which will not be relieved by the completion of the Waikato Expressway alone.[108]

[112] The Regional Council is responsible for regional transport planning, and the relevant objectives and policies set out in the RPS place a strong emphasis on the integration of land use and infrastructure and the road hierarchy's role in achieving that outcome.[109] For example, Objective 3.12 states:

> Development of the built environment (including transport and other infrastructure) and associated land use occurs when an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by
>
> ...
>
> c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;
>
> ...
>
> e) recognising and protecting the value and long-term benefits of regionally significant infrastructure.

106 Mr McKillop, evidence-in-chief, at [5.4].
107 "Upper North Island Freight Story", 2013, Upper North Island Strategic Alliance.
108 Mr McKillop, evidence-in-chief, at [5.6].
109 Mr Gardiner, evidence-in-chief, paragraphs [22] and [24].

[113] Along with objectives and policies, the RPS also contains implementation methods directing specific action in district plans. As outlined above, we are required to *give effect to* an RPS or *have regard to* the provisions in a proposed RPS when considering the options for the zoning of this site.

[114] We are also required under s 74 (2) (b) (i) of the Act to have regard to any management plans and strategies prepared under other Acts. The proposed plan identified the need to have regard to the following Waikato region strategies and plans relating to transport:[110]

(a) The Regional Land Transport Strategy (**RLTS**);

(b) The Regional Public Transport Plan;

(c) The Regional Road Safety Strategy; and

(d) The Regional Walking and Cycling Strategy.

[115] We have considered the relevant provisions of the RLTS, as well as the relevant provisions of the RPS and the proposed plan, which we analyse in more detail later in this section, but the remaining documents listed in (b) to (d) above are not material to our decision.

Evaluation

[116] We now evaluate the potential traffic and transportation effects arising from both proposals in light of the strategic transport planning framework we have outlined above.

Existing traffic environment

[117] The existing traffic environment is described in the Transport Assessment Report (**TAR**) dated July 2015, which was prepared by the Traffic Design Group and included as Appendix E to the evidence-in-chief of Mr Apeldoorn.

[118] Table 2 of the TAR shows that the existing activities on the site are generating an estimated 259 to 266 vpd. To provide some context, this represents less than 1% of the existing daily traffic volumes on Greenwood Street and Killarney Road.

[110] Hamilton City Council Proposed District Plan dated 13 November 2012, section 1.1.2.2 f)

[119] The road safety history in the locality of the site was considered in the TAR for the period 2009 to 2013 inclusive. In broad terms, the study area included the Greenwood Street/Killarney Road intersection and both road frontages of the site including the intersections of Killarney Road with Higgins Road and Killarney Lane.

[120] In paragraph 3.1 of the TAR it is noted "...that the Greenwood Street/Killarney Road intersection has a typical crash rate of 1.1 injury crashes per annum and is therefore performing marginally better than typically expected." No other information is provided in the TAR on the relative safety performance of the road network in the locality compared to other localities, other than a note stating "Mitigating the risk of these sorts of crashes has been considered in the access designs that are proposed in the following section."

Future traffic environment

[121] The TAR also considered possible future traffic environments, analysing three possible future scenarios which were described as;

(a) Scenario 1 – the permitted baseline under industrial zoning in the proposed plan;

(b) Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall site taking the permitted baseline; and

(c) Scenario 3 – the proposed Business 5 zone, assumed to have a maximum of 7,000m^2 GFA.[111]

[122] The transport experts agreed the likely range of trip generation associated with each scenario at expert conferencing prior to preparation of the TAR, and these were used as the basis of preparing the TAR. In response to questions from the Court, Mr Swears confirmed that the other traffic experts agreed with the basic predictions of future traffic volumes contained in the TAR.[112]

[111] Traffic Expert Joint Witness Statement dated 23 November 2015, paragraph [16], included as Appendix H to Mr Apeldoorn's evidence-in-chief.

[112] Transcript, p 336.

[123] The projected future traffic growth on Greenwood Street was set out in Table 3 of the TAR. The traffic flows from Greenwood Street and Killarney Road are summarised above.

[124] Extra trips arising from five different development scenarios at the site were set out in Tables 1 and 2 of Mr Apeldoorn's supplementary evidence dated 15 July 2016. We have summarised these below by referring to the scenario's listed in paragraph [122] and two overlay options:

Scenario 1	2,417;
Scenario 2	4,043;
Scenario 3	4, 969;
The proposed overlay	4,004;[113]
Proposed overlay and consented supermarket area only, plus permitted baseline elsewhere	5,028.[114]

[125] The TAR used Scenario 3 with a GFA of 7,000m^2 as the basis to assess traffic effects on the road network. The appellant now proposes that the total GFA on the site with the proposed overlay and remaining areas of the site permitted under the Industrial Zone rules be capped at 7,000m^2 before non-complying activity status would apply. In our view, the bases are broadly similar and the TAR traffic generation figures are indicative of the overlay figures within the current bounds of estimating accuracy. Accordingly, we consider that the TAR provides an appropriate basis for us to assess the overlay proposal.

Traffic effects considered in our evaluation of the proposed overlay in terms of the relevant objectives and policies

[126] While we do not give the existing supermarket consent any particular weight when assessing which plan proposals are the most appropriate, it is useful to consider associated traffic volumes given the proposed overlay provides for a supermarket up to a cap of 3,600m^2 GFA to be assessed as a restricted discretionary activity.

[113] Provides for overlay but does not include traffic from remaining areas of the site permitted under the Industrial rules.

[114] Provides an assessment of the maximum number of vehicles that could be generated with the overlay and from remaining areas of the site permitted under the Industrial rules.

[127] We record the following findings in the TAR and related evidence that we consider to be particularly relevant to our assessment under this topic:

(a) The full overlay development of the proposed site is projected to increase existing traffic volumes by more than the normal average level of variation (set at 4% in terms of existing traffic volumes) between Kahikatea Drive and Massey Street on Greenmount Street and between near Campbell Street and Lake Rotoroa on Killarney Road;[115]

(b) The potential for reductions in access crossings from seven to three on Greenwood Street and from two to one on Killarney Road are agreed as positive by all traffic experts if the traffic volumes are the same;

(c) Traffic growth without either the consented supermarket or the overlay, will result in levels of service at the Greenwood Street/ Massey Road Intersection in 2041 being typically F (lowest level of service) in the evening peak.[116]

(d) Addition of either the consented supermarket or the overlay will increase evening peak delays and 95th percentile queue lengths by 25% (circa 20 seconds and 80 metres respectively) for the southern leg in 2015.[117] By 2041 the total evening peak delays on the same leg will increase by 48 to 63 seconds (to almost four minutes) and by 93 to 117 metres (to almost 800 metres) for the consented supermarket and overlay respectively.[118]

(e) We also took into account paragraph 41 of the joint witness statement by the experts dated 23 November 2015, in which they agreed that "...where a transport network (or portions of a transport network) is operating at a poor level of service, a small increase in traffic volumes can create very significant adverse effects." This was confirmed by Mr Apeldoorn in response to our questions, when he stated that "...when the system, for example the intersection gets close to its operating capacity then very small increments and additional traffic do very quickly ramp up the level of the delay."

[115] TAR paragraph 7.1 and Figures 7, 10 and 12.
[116] TAR Table 13.
[117] TAR Table 15.
[118] TAR Table 17.

[128] There was no evidence to enable us to compare road safety with the reduced number of access crossings and the increased traffic numbers from either the consented supermarket or the proposed overlay. While Mr Apeldoorn considered that design options exist to address safety concerns, Mr Black and Mr Swears identified a number of safety issues that concerned them. We did not get the impression that they considered these concerns to be insurmountable but, in the absence of a firm proposal put to them, they did not feel able to form a view on safety issues.

[129] We infer from Mr Apeldoorn's evidence that a range of options exist to address safety concerns in the vicinity of the Greenwood Street/ Killarney Road intersection and also to ensure levels of service can be maintained or improved at that intersection. However, that is only one of a number of issues we must consider, for example the effects on evening peaks at the Greenwood Street/ Massey Road Intersection.

[130] The appellant advanced the proposition that if a proposal is put forward when the first application restricted discretionary activity consent is made and it fails to address traffic/transportation issues to the satisfaction of the Council (and the Agency in relation to SH1), then appropriate modifications to the proposal could be required or the consent declined by the Council, however there is no certainty that this would be the case. We do not consider that we could or should rely on this submission as providing a solution to the potential problem, particularly in view of the matters we refer to in paragraph [157].

Significance of Greenwood Street and Killarney Road in terms of the road hierarchy

[131] Considerable emphasis was placed on the implications of the various options on the Greenwood Street section of the network (in particular) and also on Killarney Road.

[132] There were references in the evidence to the various descriptions of where Greenwood Street fits within the road hierarchy. It was described as being part of SH1, a major arterial transport corridor; a national road corridor, a significant transport corridor, regionally significant infrastructure and a regionally significant corridor.

[133] Killarney Road was described variously in different planning documents as a minor arterial transport corridor, an arterial road corridor, a significant transport corridor and regionally significant infrastructure.

[134] It is evident to us from the various descriptions and definitions set out in the different planning documents that both Greenwood Street and Killarney Road have considerable importance in the road hierarchy, particularly Greenwood Street with its function as a state highway that extends both within and beyond Hamilton. It is also evident to us from the various planning documents that there is a requirement to manage land use to take into account the road hierarchy.

[135] While we have reviewed carefully all of the definitions for the different road categories referred to above as well as the evidence of different witnesses, we consider the following matters relating to Greenwood Street to be particularly relevant to our decision:

(a) The traffic experts agreed that the principal function of Greenwood Street:[119]

> ...is the movement of significant levels of goods and people between parts of the City and beyond. ....Property access is either non-existent or heavily controlled.

(b) Mr McKillop stated that SH1, of which Greenwood Street forms part, is a transport corridor of national and regional strategic importance.[120]

(c) National road ... corridors are those roads ... that make a significant contribution to the social and economic wellbeing of New Zealand by connecting major population centres, major ports or international airports.[121]

(d) Desired RLTS investment outcomes for Greenwood Street for years 1 to 10 and 11 to 30 of the strategy are, respectively:

(i) Access, travel time reliability, safety and maintenance to improve safety and support economic growth.

and

(ii) Access, travel time reliability, safety and maintenance.[122]

[119] Traffic Joint Witness Statement dated 23 November 2015, at [9].
[120] Mr McKillop, evidence-in-chief, at [4.5].
[121] One Network Road Classification system developed by Local Government New Zealand and the Agency defines Greenwood Street as a National Road Corridor.
[122] Waikato RLTP, Function and desired investment outcome for Auckland and inter-regional corridors, referenced in EIC of Mark Apeldoorn, paragraph 35

(e) Greenwood Street is the sole arterial route carrying traffic through this section of the city and there are no alternatives on the planning horizon.[123]

(f) No physical intervention measures are proposed in Greenwood Street or Killarney Road within the 30 year planning period of the Waikato Regional Land Transport Plan 2015 to 2045.[124]

(g) Mr Swears considered that SH1 in the vicinity of the site is the most vulnerable of any portion of the state highway through Hamilton.[125]

[136] We accept, therefore, that the section of Greenwood Street/SH1 past the Trust's site is a road of both national and regional significance that sits near or at the top of the roading hierarchy. The RPS and proposed plan contain objectives and policies (and in the case of the RPS implementation methods) that require us to recognise this.

Constraints on access to SH1

[137] While the majority of SH1 through Hamilton is a Limited Access Road **(LAR)**, the joint witness statement by the traffic experts confirms there is no LAR control on Greenwood Street.[126] Similarly, there is no LAR on Killarney Road. Therefore, a permitted activity on any of the existing sites within the Trust site can access Greenwood Street under the proposed plan provisions without the need for a resource consent if the land use and traffic generation is within/below the trigger thresholds specified in Rule 25.14.4.3.[127]

[138] Mr Swears placed considerable emphasis in his various briefs of evidence on avoiding or minimising access to SH1 from the site. For example, in paragraph 6.34 of his evidence-in-chief, he stated:

> Although existing properties with direct access to SH1 are entitled to their accesses, I consider it preferable for accesses along the SH1 frontage of the King Appeal site to be minimised and, if possible, eliminated altogether; regardless of the zoning (or Overlay as appropriate) for the Site.

[123] Mr Gardiner, evidence-in-chief, at 56 (a).
[124] Mr Apeldoorn, evidence-in-chief, at 33.
[125] Transport, p 26, (last part of hearing).
[126] At 11.
[127] Mr Apeldoorn, evidence-in-chief, at [26].

[139] Mr Apeldoorn noted that the desired investment outcomes for the Western Corridor (Greenwood Street) in the WRLT are "access, travel time reliability, safety and maintenance to improve safety and support economic growth." He considered it significant that access features as an outcome for Greenwood Street, but no other such nationally significant corridor.[128]

[140] As a result of historical factors, it would seem that Greenwood Street's ability to function as a nationally significant corridor is partly compromised by the inability to fully control access points to and from it. This is not something that can be remedied by us, but it is a relevant factor that we consider should be taken into account when assessing the two options before us. We consider a cautious approach is required given the importance of Greenwood Street (SH1) in the roading hierarchy.

[141] In closing submissions, counsel for the appellant proposed a new rule 9.5.12 b) to address the number of access crossings onto Greenwood Street. The rule proposes that such accesses would be limited to three (from the current seven) once the level of development reached 3,500m^2 GFA. Whilst we acknowledge that this accords with the traffic experts' opinions that the site should be developed comprehensively so that the number of vehicle crossings on each road frontage is minimised,[129] some important questions remain unanswered particularly with regard to traffic safety and what happens until the 3,500m^2 GFA threshold has been reached.

Requirement to undertake an Integrated Transport Assessment (ITA) at the time of assessment of a proposed plan review

[142] Ms Dickey and Mr Bartlett QC submitted that Implementation Method 6.3.8 in the RPS required the Trust to prepare an Integrated Transport Assessment (**ITA**) to support of the proposed overlay, and that the TAR was no substitute for it. An "integrated transport assessment" is defined in the glossary to the RPS as "a comprehensive review of all the potential transport impacts of a development proposal".

[143] As outlined earlier in our decision, Policy 6.3 of the RPS relates to co-ordinating growth and infrastructure. Section 6.3.8 of the RPS is an Implementation Method, not a policy, and states:

[128] Mr Apeldoorn, evidence-in-chief, at [35].
[129] Traffic Joint Witness Statement dated 23 November 2015, at [30].

> Territorial authorities should ensure an **Integrated Transport Assessment**[130] is prepared to support a structure plan, plan change or resource consent application where the development may result in additional major trip-generating activities.
>
> (underline emphasis added)

[144] It is clear that some of the implementation methods attached to Policy 6.3 are mandatory (evidenced by the use of the word *shall*); for example Implementation Method 6.3.1 which we have outlined in paragraph [113] above. However, some of the other implementation methods outlined in relation to Policy 6.3 and some district plan transportation provisions are not mandatory, as evidenced by the use of the word "*should*" and not "*shall*".

[145] Despite the above, Policy 25.14.2.1f of the proposed plan requires an ITA to be undertaken "for new subdivision, use or development of a nature, scale or location that has the potential to generate significant adverse transportation effects".

[146] It is unclear to us if the intent of Implementation Method 6.3.8 is that an ITA *should* be undertaken at the time of a plan change, or as an alternative *could* be undertaken at the time of a resource consent application. Either way, we are satisfied that it was not necessary for the appellant to prepare an ITA in this instance otherwise taken to its logical conclusion, this would mean that an ITA would have had to be prepared for every site or area to support the zoning attached to it in the proposed plan if major trip-generating activities would be the result. There was no evidence to suggest that this was required of either the Council or any other appellant in a similar situation to the Trust.

[147] We are satisfied that the TAR provides sufficient information for us to gain an appropriate understanding of the traffic implications arising from the overlay proposal. Accordingly, we do not see the absence of an ITA at this time as fatal to the Trust's case.

Extent to which the proposed overlay could affect ability to meet relevant transport objectives and policies

The Regional Land Transport Strategy

[148] We have reviewed the RLTS, but consider that most of the objectives and policies in it are not sufficiently specific to assist us. Objectives and policies, which are consistent with and inform our reading of the documents that follow, are:

Policy P8 - Develop, maintain and protect key strategic corridors as defined in section 4 of the plan in a manner consistent with their functions and desired investment outcomes outlined in this section.

Policy P40 - Protect and promote SH1/29 as the preferred strategic road freight corridor for investment between Auckland, Waikato and the Bay of Plenty regions.

The RPS and proposed plan

[149] There are a number of common themes throughout the RPS and proposed plan that are relevant to transport and traffic issues. These can be summarised in broad terms as:[130]

(a) The need to integrate land use and transport planning;

(b) The management of effects on the function of transport infrastructure and the transport hierarchy;

(c) The importance of the safe, efficient and effective operation of infrastructure corridors and regionally significant infrastructure.

[150] The new objective, policy and rules included in the overlay would increase traffic volumes on nationally or regionally transport corridors, which in our view would result in less appropriate outcomes in terms of the overall transportation framework than those that would occur under the proposed plan.

[151] We consider the proposed overlay could have some benefits in terms of Policy 2.2.1b I of the proposed plan which relates to development being designed and located to minimise energy use and carbon dioxide production by minimising the need for private motor vehicle use (reflecting such matters expressed in the RPS). In an overall context, we consider these benefits would be small and not material to our decision.

[130] In particular see Waikato RPS Objective 3.12 c and e and Policies 6.1 b and d and 6.6 a and Implementation Method 6.6.1 a – c; District Plan Objectives 2.1.12, 2.2.2, 2.2.13, 18.2.1, and 25.1.2.1 relating to development suitability and Policies 2.2.1bi, 2.2.13a, 2.2.13c, 18.2.1a, and 25.1.2.2aiii relating to development suitability. In the Transport Chapter 25: City-wide Transportation Objective 25.14.2.1 and Policies 25.14.2.1e, Policy 25.14.2.1f relating to Integrated Transport Assessments, and the transportation Appendix (15) such as under the heading function in section 15.5 and the plan showing the sensitive transportation network in 15.9.

[152] The principal issue of concern from a transport and traffic perspective is the inability of the overlay to pass the "avoid" threshold in Policy 6.16 of the RPS which states:

> **New centres will avoid adverse** effects, both cumulatively and individually, on
>
> ....
>
> iii) the efficiency, safety and function of the transportation network."
>
> (emphasis added)

And Implementation Method 6.16.1 entitled "District plan provisions" requires that:

> Hamilton City Council, Waipa District Council and Waikato District Council district plans shall manage new commercial development in accordance with Policy 6.16."
>
> (underline emphasis added)

[153] The overlay clearly provides for new commercial development by proposing a new commercial centre, but its provisions do not *avoid* adverse effects on the efficiency, safety and function of the transportation network. This is because:

(a) the proposed overlay would adversely affect the efficiency of operation of the Greenwood Street/Massey Road Intersection and possibly other intersections to lesser extents;

(b) any additional local traffic generated from the overlay area would not avoid adverse effects on the principal function of Greenwood Street which the traffic experts agree *"...is the movement of significant levels of goods and people between parts of the City and beyond.* Similarly, any additional local traffic generated from the overlay area does not avoid adverse effects on the function of Killarney Road; and,

(c) effects on safety of the transportation network, while potentially minor, are unlikely to meet the "avoid" test with increased traffic numbers over a number of intersections.

[154] Regardless of the uncertainty relating to safety, there is a real risk that the provisions contained in the overlay would result in development outcomes that are unlikely, in our view, to meet the "avoid" test contained in Policy 6.16 of the RPS. That is an additional reason for concern when contemplating a proposal for a new

commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan.

Overlay policy and rule framework

[155] We now consider the overlay policy and rule framework and its implications, including its workability.

[156] Aside from the additional activities that are restricted discretionary activities (**RD**), the only difference from the Industrial Zone is that all new buildings and activities, or changes to the existing ones, require RD consent at minimum (which means that there are no permitted/controlled activities). That RD consent is in addition to any RD consent that may be required under the Industrial Zone framework or under the City-wide provisions of the proposed plan.

[157] Any RD consenting process would need to consider the objective and policies for the overlay area. It is likely to take the caps provided for supermarket, retail and office activity as indicating that these activities are suitable, given that the overlay applies to a confined area and considering the objective and policies (particularly Policy 9.2.9d referring to the caps). It is unclear as to what the basis for declining consent would be, even for transportation effects.

[158] We accept the Council's submission that the only way to provide certainty that an integrated approach to the development of the site occurs, is to apply for resource consent for the whole area once. That is not required by the rules contained within the proposed overlay. There is nothing to prevent the appellant applying successively for resource consent for different proposals at different stages on the site. If the supermarket is developed, however, and it comprises 3,600m^2 GFA, it would occupy approx 75% - 80% of the overlay area. Even a smaller supermarket than this would mean the possibilities for integration may be limited.

[159] We conclude that the title amalgamation threshold requirement or condition, as presented in the closing stages of the hearing, is uncertain. The Agency questioned whether it was intended to be in perpetuity or until the land is fully developed and also asked what the subdivision rules require. Would the decision-maker be in a position to decline or grant consent to subdivision and for what reasons? We did not have any evidence on these points.

[160] We now consider the additional discretion/assessment criteria offered by the appellant as part of the overlay. We accept the Council's arguments that there are no material benefits gained by the additional discretion/assessment criteria offered.

(a) In the current Industrial Zone the Council can already exercise discretion over transportation matters in terms of trip generating thresholds and RD status that would trigger an ITA and require consideration against the same transport discretion/assessment criterion G. While we accept that there would be benefits in confining the number of vehicle crossings in a new threshold requirement or condition, we also accept the Council's point that it is unlikely that there would be the worst case scenario portrayed by the appellant would arise, because the conditions attached to the consented supermarket require the number of vehicle crossings to be reduced in any event.

(b) The Industrial Zone has design and layout as a controlled activity for new buildings, alterations and additions, light industrial, service industrial and ancillary residential unit as controlled activities. Policy 9.2.3 provides the policy basis and Rule 9.6 constrains the matters of control – assessment criterion B. Mr O'Dwyer gave evidence that there was a deliberate choice by the Council to accept a lower threshold of amenity in the Industrial Zone.[131]

For these reasons we agree that the additional RD discretion/assessment matters proposed are not necessary.

[161] For these reasons, too, we do not find the overlay proposal the most appropriate approach.

Does the proposed overlay give effect to the RPS?

[162] A lot was made of this during the hearing and we have already covered some of the arguments in preceding paragraphs. Mr Lang submitted that we must consider the RPS is a high level document that does not assist in addressing the matters we must consider. We agree with this submission up to a point, particularly given that the centres hierarchy policy (Policy 6.16) is largely directed at protecting the CBD and sub-

[131] Transcript, p 299, lines 1-3.

regional centres as we have identified. However, there is more to the policy in the RPS than that.

[163] We accept that Policy 6.16 does not confine new centres to existing commercial centres or greenfield centres, however there is some support for protecting existing centres in Policy 6.16b). As well, Policy 6.16f) provides that commercial development is to be managed to maintain industrially zoned land for industrial activities unless it is ancillary, whilst also recognising that specific types of commercial development may be appropriately located in industrially zoned land, even though it does not specify what these types of commercial development might be. The most telling provision is Policy 6.16g), which anticipates the prospect of new commercial centres if certain things can be met, but it does not specify where these new commercial centres are to be located. The problem with the appellant's proposed overlay is that it will not "avoid" adverse effects on "the efficiency, safety and function of the transportation network".

[164] When it comes to the question of whether the appellant's proposed overlay gives effect to Policy 6.16 for the future proof area, we simply conclude that it does not. We do not accept there is any certainty in Mr Lang's propositions that the proposed overlay would involve minor or transitory effects on the efficiency, safety and function of the transportation network, or be an enhancement.[132] Neither do we consider that the district plan provisions are sufficient and should be relied on to allow this fundamental matter to be dealt with at a later stage.

[165] As to other provisions of the RPS, our attention was drawn to:

> **Policy 6.1 Planned and co-ordinated subdivision, use and development**
> Subdivision, use and development of the **built environment**, including transport, occurs in a planned and co-ordinated manner which:
>
> a) has regard to the principles in section 6A;
>
> b) recognises and addresses potential cumulative effects of subdivision, use and development;

[132] Mr Lang drew on *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* NZSC38 [17 April 2014] at [145] in his closing: "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."

c) is based on sufficient information to allow assessment of the potential long-term effects of subdivision, use and development; and

d) has regard to the existing built environment.

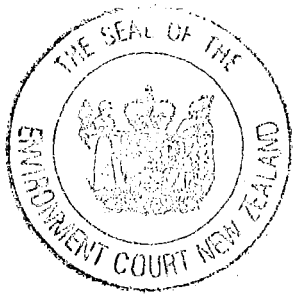
[166] Implementation methods (6.1.1) include local authorities having regard to the principles in section 6A when preparing, reviewing or changing district plans and development planning mechanisms such as structure plans, town plans and growth strategies. We considered the "General Development Principles" set out in section 6A, particularly with reference to transport, but nothing hinges on this policy.

[167] Overall, for the reasons we have expressed, we cannot be satisfied that the proposed overlay gives effect to the RPS. Even if the version of the RPS we were required to consider was the proposed RPS and we had to have regard to it, we could not be satisfied that the overlay provisions, particularly as they relate to transportation effects, would be preferable to those which appear in the Industrial Zone.

Is the proposed overlay the most appropriate approach?

[168] We also conclude that the proposed overlay does not achieve the strategic objectives and policies in the proposed plan. In summary our reasons are:

- It does not achieve Objective 2.2.5 and the associated policies and in particular does not safeguard Industrial Zoned land for industrial purposes and may result in other similar approaches elsewhere in the city;
- It cuts across Objective 2.2.4 and supporting Policy 2.2.4 and the hierarchy of business centres, and has the potential to encourage other such development to adopt similar approaches elsewhere in the city;
- It does not adequately integrate land use and development with the provision of infrastructure under Objective 2.2.12 and has the potential to allow development that compromises the safe, efficient and effective operation and use of existing and planned infrastructure under Policy 2.2.13a, and results in incompatible adjacent land uses under Policy 2.2.13d.



[169] We have also found there are deficiencies in the objective, policies and rules associated with the proposed overlay, including the integrated development proposition. Those would also militate against the proposed overlay achieving efficient use and

development of natural and physical resources, especially land, buildings and infrastructure under Objective 2.2.12 and Policy 2.2.12d on development enabling and encouraging the efficient use of resources.

[170] The Council submitted that the new policy direction contained in the proposed plan should be given a chance on its "first road test". In opening Mr Bartlett QC submitted:[133]

> To summarise, each zone in the PDP has a purpose and a function which is designed to mutually support other centres and implement the centres hierarchy. In turn, the hierarchy seeks to ensure an integrated approach to giving effect to the WRPS and achieving the purpose of the RMA. Undermining the hierarchy at this point in the PDP's development and implementation will not only fail the test in section 32, it will conflict with the function of the Council with respect to its responsibility under section 31 of the RMA.

[171] We take the Council's point. We are mindful that the planning framework of the proposed plan review has been designed to ensure that the poor outcomes resulting from the operative plan, particularly the effects arising from ad hoc commercial development, are not repeated.

[172] As we have said, the overlay does not provide for a suburban centre or neighbourhood centre but creates a new kind of commercial centre. The overlay proposal is not similar in nature to those contained in the Industrial Zone – either the Te Rapa Corridor or the Greenwood Street Corridor which in our view are confined to limited commercial activities largely reflecting the existing commercial activities established within these corridors for some time. While the proposed relief of the 2,000m^2 GFA retail might be characterised as a "drop in the bucket", the potential cumulative effects of the proposal and new type of centre proposed in light of the proposed plan policy present in our view a significant risk to the new centres hierarchy policy approach.

[173] We do not agree with Mr Lang that the history of and (presumably exceptional) reasons for applying the mixed use overlay to the site would be clear. We agree with the Council that there is potential for the proposed overlay to encourage other non-standard approaches to development in the Industrial Zone (and perhaps even a business centre-based approach to something between a suburban and neighbourhood

[133] Council opening, at [35].

centre). The undesirability of that outcome is also based on our consideration of the deficiencies of the proposed mixed use overlay proposition advanced by the appellant.

Outcome

[174] For the reasons expressed above, we have decided that the appellant's proposal for the site, a spot-zoned commercial centre within the Industrial Zone, is not the most appropriate planning method to achieve the objectives of the proposed plan. In particular, the overlay and what is proposed within it do not meet the strategic objectives of the proposed plan. The new objective and policies were introduced late in the piece to fill the gap created by the rule framework provided by the appellant as part of its initial overlay proposal. Whilst we determined that the new objective and policies were within scope of the appeal, they do little to address the wider strategic framework of the plan which we have addressed in this decision in considerable detail. This strategic framework has not been something that has been simply developed by the Council in a vacuum. The genesis for the approach was developed some years ago with input from other significant regional players, who it would seem for a variety of very good reasons recognised the need to collaborate to try and address concerns about the lack of integrated land use and infrastructure planning, ad hoc commercial and industrial development, and the difficulties that are caused as a result. This collaborative approach was led politically, but also included the Regional Council, the Agency and tangata whenua. The strategic approach was publicly consulted upon and was implemented through the RPS. The RPS was also a publicly consulted document.

[175] The reason we have felt the need to mention this is because the strategic direction implemented through the district plan (as directed by the RPS) has been one which has been developed over a lengthy period of time with considerable involvement from others.

[176] We mention the above because the Trust's proposal cannot, in our view, simply be seen as a site-specific proposal, even at a proposed plan review stage. It must be seen within the wider context.

[177] We have decided that the fact of the supermarket consent should not be given any particular weight when considering the most appropriate planning response for this site, and we acknowledge that there is already existing office activity on the site and that the retail component within the scheme of things is not significant. We have found

that the other overlay provisions that have been applied to sites within the Industrial Zone (the Greenwood corridor, Te Rapa corridor and Porters Mixed Use Overlay) are all distinguishable and more limited than that which is proposed for this site.

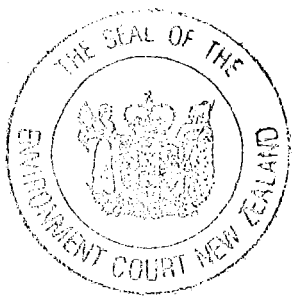
[178] We have also found that, whilst there might be a shortfall of commercial supply in the western suburbs, there is no evidence to support the proposition that there is insufficient zoned land available to meet this need. Furthermore, the strategic policy direction signals any unmet need occurring around existing centres, and we are not satisfied on the evidence before us that this would not be a possibility.

[179] There is also the question of whether this site would be the best option for a new commercial centre. The fact that the site fronts onto SH1 is problematic for the Trust given Policy 6.16 g) of the RPS. Whilst the evidence establishes that a supermarket is likely to be the largest generator of traffic, and despite the fact that there is likely to be some solution to matters of access and design to mitigate adverse traffic effects, this begs the question about whether or not, at this stage, it is appropriate that a new commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan, should be included in the proposed plan. The evidence provided to us was not compelling enough for this to be, in our view, an appropriate outcome.

[180] When considering the law that applies for plan review, we therefore find that the Council-proposed zoning and provisions for the site are the most appropriate way to achieve the objectives of the proposed plan. We are not persuaded that the proposed overlay provisions would be effective or, indeed, efficient. Whilst we can see that there would be benefits to the Trust, and perhaps to local residents, we do not agree that these overall benefits outweigh the strategic objectives of the proposed plan. We do not consider there will be any costs or risks associated with not accepting the overlay that would outweigh the above benefits either.

[181] In conclusion we record that we have had regard to the Council's decision under s 290A of the RMA. That regard has been fleeting given that the proposal before us has significantly changed since the hearing held in respect of the proposed plan.

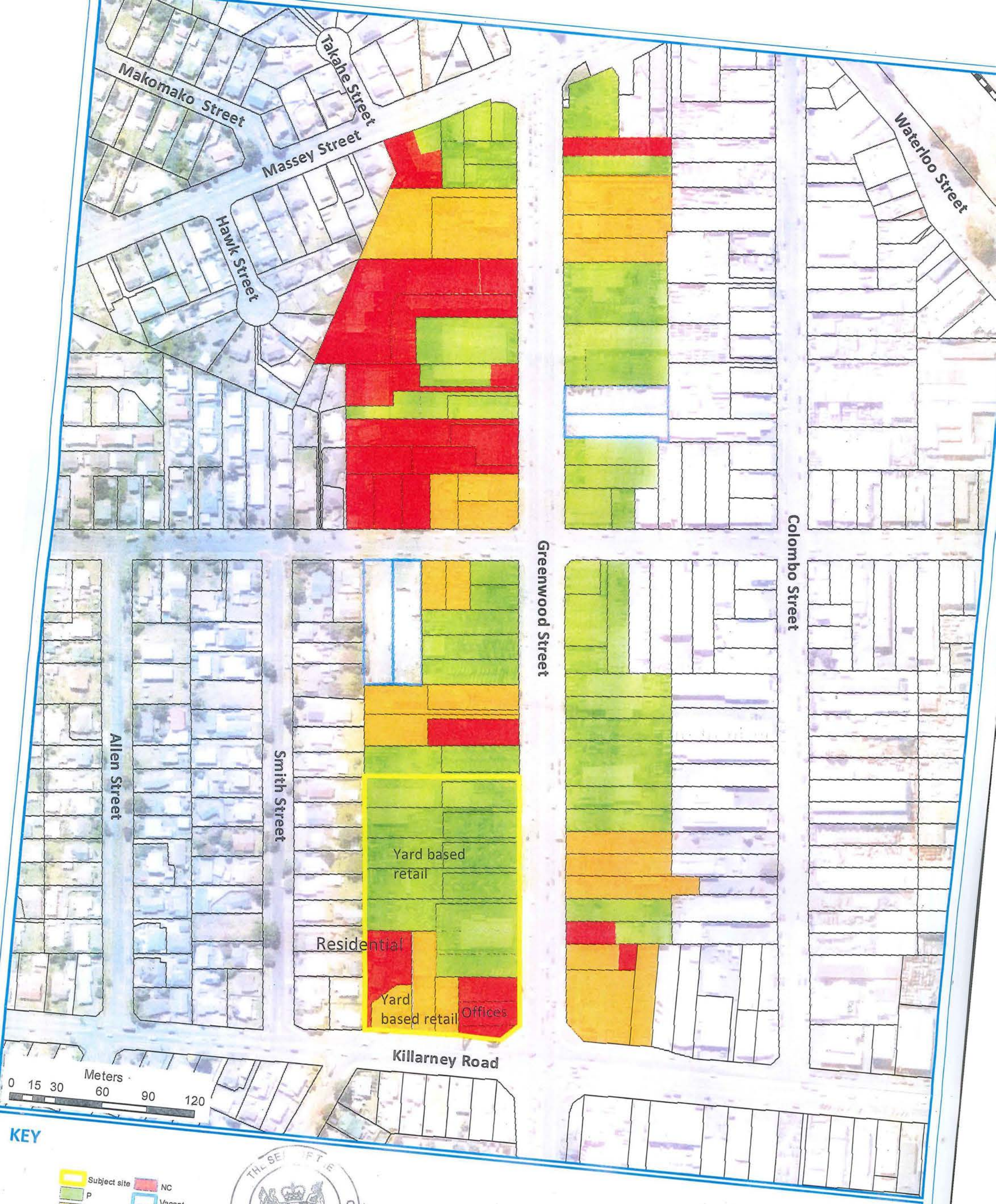
[182] The appeal is dismissed and the Council's decision in relation to the land now subject to this appeal is confirmed.



[183] We do not encourage any application for costs. If costs are sought, any application is to be filed within **10 working days** of the date of this decision, with any reply to be filed **10 working days** thereafter.

For the court:

M Harland
Environment Judge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Hamilton City Council
Te kaunihera o Kirikiriroa
City Planning Unit
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THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND
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Greenwood Corridor - Existing Enviroment Industrial Provisons
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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2016-488-000049
[2017] NZHC 764

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under s 299 of the Act
BETWEEN	TURNERS & GROWERS HORTICULTURE LTD Appellant
AND	FAR NORTH DISTRICT COUNCIL First Respondent
	NORTHLAND WASTE LTD Second Respondent
	FEDERATED FARMERS OF NEW ZEALAND INC Third Respondent

Hearing:	1 December 2016
Appearances:	B S Carruthers and G A Willis for Appellant J S Baguley for First Respondent R B Brabant for Second Respondent R Gardiner for Third Respondent
Judgment:	24 April 2017

JUDGMENT OF GILBERT J

This judgment is delivered by me on 24 April 2017 at 4.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Russell McVeagh, Auckland
Law North Limited, Kerikeri
R B Brabant, Barrister, Auckland
DRF Gardiner, Barrister, Auckland

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Introduction

[1] These are appeals on questions of law from a decision of the Environment Court arising out of a proposed plan change to the Far North District Plan.

[2] Turners & Growers Horticulture Ltd has operated an export fruit-processing facility in Kerikeri for many years. It has been concerned about the potential for incompatible non-rural industrial and commercial activities to co-locate in the Rural Production Zone in Northland since Northland Waste Ltd took steps to establish a waste transfer station on a site adjacent to its *Kerifresh* facility in 2011.

Plan Change 15

[3] The Far North District Plan is "effects-based" meaning that its provisions are directed at the environmental effects created by different land uses rather than the activities that generate these effects. Far North District Council came to recognise, however, that the Rural Environment provisions in the Plan are overly permissive and inadequate to address concerns arising out of incompatible land uses. Accordingly, it initiated a three-stage review of these provisions. The first stage in this process led to *Plan Change 15 – Rural Provisions*. This sought to address these issues principally through the introduction of a *Scale of Activities* rule which would limit permitted activities by reference to the number of persons involved in the activity per site or per hectare depending on the nature of the activity.

[4] Council also proposed a number of amendments to the existing Plan rules as part of Plan Change 15. One of these was a change to the *Keeping of Animals* rule, which would increase the boundary setback for factory farming and boarding kennels from 50 metres to 300 metres (except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, where the minimum setback would remain 600 metres). The setback for catteries was to remain 50 metres.

[5] Plan Change 15 is particularly significant because it applies to a vast area. The area covered by the Far North District Plan is the second largest area covered by any territorial authority in New Zealand. The Rural Environment provisions dealt

with in Plan Change 15 will apply to the entire Rural Production Zone which comprises about 70 per cent of this area.

Turners & Growers' submission on Plan Change 15

[6] After Plan Change 15 was publicly notified in June 2013, Turners & Growers lodged a submission proposing the introduction of activity-based controls in the Rural Production Zone so that industrial or commercial activities, such as a waste transfer station, would be identified as discretionary or non-complying activities requiring consent. Alternatively, Turners & Growers sought various amendments to the existing rules, including a radical change to the *Keeping of Animals* rule by changing its name to *Potentially Incompatible Activities* and extending its scope from factory farming, boarding kennels and catteries to any non-rural industrial or commercial activity, including a waste transfer station.

Council decision

[7] Northland Waste and various other submitters opposed the changes sought by Turners & Growers to the *Keeping of Animals* rule and Council accepted the recommendation of the Independent Hearing Commissioners not to make them. The net result was to increase the setback only for boarding kennels from 50 metres to 300 metres (except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, in which case the minimum setback remained 600 metres). In August 2014, Council confirmed changes to the *Keeping of Animals* rule from that appearing in the District Plan as shown below:

> **8.6.5.1.6 KEEPING OF ANIMALS**
>
> (a) Any building, compound or part of a site used for factory farming ~~or boarding kennels~~ or a cattery, shall be located no closer than 50m from any site boundary, except for a boundary which adjoins a Residential, Coastal Residential or Russell Township Zone, where the distance shall be a minimum of 600m.
>
> (b) Any building, compound or part of a site used for a boarding kennel shall be located no closer than 300 metres from any site boundary except for a boundary which adjoins a Residential, Coastal Residential or Russell Township Zone, where the distance shall be a minimum of 600m.

Turners & Growers' appeal to the Environment Court

[8] Turners & Growers appealed to the Environment Court against Council's decision to reject its proposed amendments to the *Keeping of Animals* rule. This was on the grounds that Council's decision would not achieve the purpose of the Resource Management Act 1991 (the Act), was contrary to Part 2 and other provisions of the Act, and was inconsistent with the purpose and principles of the Act. In particular, Turners & Growers contended that the District Plan does not contain appropriate mechanisms to avoid incompatible non-rural industrial and commercial activities from locating in the District's rural areas, is unable to protect lawfully established activities from adverse reverse-sensitivity effects that can result when non-rural industrial and commercial activities locate in the rural environment, and the rules do not give effect to, and will not achieve, the objective and policies of the Plan.

[9] In its notice of appeal, Turners & Growers sought amendments to the *Keeping of Animals* rule, including changing its name to *Potentially Incompatible Activities* and extending its scope to any "non-rural industrial or commercial activity (such as a waste transfer station, factory or trade processing facility)" but proposed that these activities would be subject to a boundary setback of 100 metres (instead of 300 metres as earlier proposed). However, where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, the minimum setback would be 600 metres. Turners & Growers also sought such further or other relief as the Court considered appropriate to address the concerns raised.

[10] At the hearing of the appeal in the Environment Court, Turners & Growers sought modified relief by proposing the deletion of the *Keeping of Animals* rule altogether, amendments to *Rule 8.6.5.1.4 – Setback from Boundaries*, the insertion of a new rule, *Rule 8.6.5.1.12 – Outdoor Activities*, and the addition of assessment criteria. The detail of these newly proposed amendments were recorded in the Environment Court's decision as follows:[1]

> (a) <u>any building for a non-rural industrial or commercial activity that is proposed</u> to be erected within 100m of any site boundary (other than

[1] At [15].

a road frontage) to obtain resource consent as a restricted discretionary activity; and

(b) the insertion of a new rule 8.6.5.1.12 – Outdoor activities, to require any of the specified industrial or commercial activities undertaken outside consent as a restricted discretionary activity where it is proposed to undertake that activity within 30m of any site boundary (other than a road frontage).

Environment Court decision

[11] The Environment Court dismissed the appeal in a decision delivered on 17 March 2016.[2] The Court considered that it would be difficult to categorise non-rural commercial and non-rural industrial activities as would be required under Turners & Growers' proposed amendment:[3]

> We have a fundamental difficulty in trying to understand how such activity categorisation is going to be able to occur within the context of an effects-based plan that has virtually no method of dealing with the identification and compartmentalisation of activities.

[12] The Court concluded that fundamental changes to the Plan would be required to accommodate the proposed move to a more activities-based plan.[4] The Court was also not satisfied that the introduction of these arbitrary setbacks across such a significant land area was justified or appropriate:

> [87] … it is difficult to see how the significant increase in setbacks will achieve the purpose of the Act. There is no adverse effect that we are satisfied is going to be significantly addressed by the appellant's proposed provisions. Moreover, there appear to be adverse effects from the proposed method, including the fact that many of the sites within the district would require some form of resource consent. … We think the Council was rightly concerned about the addition of further regulatory, and potentially, development costs.
>
> [88] Although we acknowledge that the objectives and policies of the plan now provide for managing the adverse effects of incompatible activities, we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve these objectives or policies.
>
> [89] Furthermore, we cannot see how the proposed increased setbacks would assist the territorial authority to carry out its functions to achieve the purpose of the Act. …
>
> …
>
> [91] What the evidence establishes to our satisfaction is that an increased setback across the district is not the only or the best method to achieve the

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2 *Horticulture New Zealand Limited & Anor v Far North District Council* [2016] NZEnvC 47.
3 At [56].
4 At [59].

> purpose of the Plan as it stands. We accept that more sophisticated and/or different approaches may yield the same or better results, although these are not clearly set out before us as options at this stage. …
>
> …
>
> [93] Accordingly, though a setback provision might achieve the purposes of Part 2, and might achieve the objectives and policies of PC15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.
>
> …
>
> [101] The Council has acknowledged that a change to the status quo is necessary by introducing PC15. Are the provisions of PC15 sufficient or is there still a significant risk if the setbacks sought are not introduced? We conclude that there is no more than poorly defined or inchoate risk. We conclude the risk of acting in such an arbitrary manner over such a large area of land is significant. Given our conclusion that the purpose of the constraint is ill defined, we would be imposing a significant burden on landowners to address far more localised issues around horticulture near Kerikeri. The lack of sufficient information about impacts beyond Kerikeri concerns us. Even in the immediate area the provisions seem to do little to address the risks of adverse effects on Turners & Growers or on the irrigated lands around Kerikeri. We conclude a more focussed approach needs to be taken on these issues in the next phase of the Plan review.
>
> …
>
> [112] Further review of the Plan and the effect of the current provisions may support the need for further or targeted controls, but they are not appropriate at this stage. Much better analysis is required than that produced by any of the parties and their witnesses to justify the changes proposed by Horticulture NZ and Turners & Growers.

Turners & Growers' appeal to the High Court

[13] Turners & Growers appeals against the Environment Court's decision on two principal grounds.

[14] The first is whether the Environment Court erred in its evaluation of the Plan Change under s 32(3)(b) of the Act. That provision requires an evaluation of whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives of the proposed plan. Turners & Growers contends that the Environment Court made the following errors in carrying out this evaluation:

(a) error 1 – the Court wrongly considered Part 2 and Council's functions under s 31 of the Act;

(b) error 2 – the Court failed to evaluate whether the Plan's methods would achieve the objectives and policies;

(c) error 3 – the Court's conclusion that it would be inefficient to impose the setbacks sought by Turners & Growers on the basis that restricted discretionary resource consent would inevitably be obtained for new activities that would breach those setbacks was not in accordance with the Act and was not open to it; and

(d) errors 4 and 5 – the Court wrongly focused on the effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility when considering the appropriateness of the proposed setbacks. In so doing, it failed to take into account a relevant consideration, namely the potential effects of other activities sought to be controlled by the setback across the entire Rural Production Zone (error 4) and it applied the wrong legal test (error 5). Turners & Growers argues that the correct question was whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement.

[15] The second ground of appeal raised by Turners & Growers is whether the Court's conclusion, that the setbacks it sought were not the most appropriate method to achieve the objectives of the Plan as proposed to be amended, was open to it on the evidence.

[16] The respondents maintain that the Environment Court made no error of law in dismissing Turners & Growers' appeal.

Northland Waste's cross-appeal

[17] Northland Waste cross-appeals against the decision on grounds set out in an amended notice of appeal filed without objection during the course of the hearing in the High Court. In its amended notice of appeal, Northland Waste contends that the Environment Court would have had no jurisdiction to grant the relief sought by

Turners & Growers at the hearing because this went beyond the scope of the relief sought in its original submission to Council and was also beyond the scope of the relief sought in its notice of appeal to the Environment Court. In particular, Northland Waste argues that:

(a) Turners & Growers' notice of appeal to the Environment Court impermissibly sought amendments to *Rule 8.6.5.1.6 – Keeping of Animals* in materially different terms to those it proposed in its submission to Council on Plan Change 15; and

(b) the relief sought by Turners & Growers at the Environment Court hearing (deletion of proposed *Rule 8.6.5.1.6 – Keeping of Animals*; amendment to *Rule 8.6.5.1.4 – Setback from Boundaries*; the insertion of a new rule, *Rule 8.6.5.1.12 – Outdoor Activities*; and the addition of assessment criteria in Rules 8.6.5.3.4 and 8.6.5.3.8) was impermissible because these proposed changes were outside the scope of both its original submission and its notice of appeal.

[18] Council and Federated Farmers support Northland Waste's cross-appeal.

Approach on appeal

[19] Section 299 of the Act provides for appeals to the High Court from a decision of the Environment Court, but only on questions of law. To the extent that the appeal challenges factual findings, the appellant faces the very high hurdle of showing that there is no evidence to support the determination, in other words, the true and only reasonable conclusion contradicts the determination.[5]

[20] It is convenient to address Northland Waste's cross-appeal first because it raises a jurisdictional issue.

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5 *Edwards v Bairstow* [1956] AC 14 (HL) at 36, applied in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

Northland Waste's appeal

[21] Although not raised even in the amended notice of appeal filed at the hearing, Northland Waste argued that Turners & Growers' original submission to Council proposing amendments to the *Keeping of Animals* rule was impermissible because, by proposing to change its name to *Potentially Incompatible Activities* and extend its scope to non-rural industrial or commercial activities (such as a waste transfer station, factory or trade processing facility), it went well beyond what could be regarded as a submission "on" Plan Change 15.

[22] The leading authority on whether a submission is "on" a Plan Change is the decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[6] Two aspects require consideration:[7]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

[23] This decision was endorsed by Kós J in *Palmerston North City Council v Motor Machinists Ltd* as remaining applicable following the amendments to the Act in 2009.[8] Kós J explained the significance of the two limbs of the *Clearwater* test:

> [75] Inherent in such sustainable management of natural and physical resources are two fundamentals.
>
> [76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater*.

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6 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
7 At [66].
8 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

> [77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributions Ltd v Waipa District Council*:
>
> > The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.
>
> A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.
>
> …
>
> [80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.
>
> [81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change.
> …
>
> [82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. …

[24] Turners & Growers' submission to Council regarding setbacks appears to fail both limbs of the *Clearwater* test. The change to the relevant status quo concerning the *Keeping of Animals* rule proposed by Council in Plan Change 15 as publicly notified was to increase the normal setback for factory farming and boarding kennels

in the Rural Production Zone from 50 metres to 300 metres. This proposed change would affect only a limited class of person, those having an interest in factory farming or boarding kennels. Turners & Growers' submission involved a radical extension to the reach of this rule, as signalled by the proposed change to its heading from *Keeping of Animals* to *Potentially Incompatible Activities*.

[25] If Council had adopted these changes, anyone wishing to engage in non-rural industrial or commercial activities anywhere in this vast region would be directly affected. This could be a very large group. These parties could well have chosen not to make a submission on the Plan Change having concluded that it would not affect them. To adopt Kós J's expression, they may have been rendered "speechless" if they had learned that "by a submissional side-wind" the Plan Change had "so morph[ed]" that they were no longer able to locate any non-rural industrial or commercial activity within 300 metres of their site boundaries (and potentially up to 600 metres) as a result of changes to the *Keeping of Animals* rule having been made without notice to them and without giving them an opportunity to participate in the decision-making process.

[26] I therefore accept that there is force in Mr Brabant's submission that Turners & Growers' submission to Council regarding setbacks was not a submission "on" the Plan Change. However, this issue is not raised in Northland Waste's amended notice of appeal. There is some irony in Northland Waste asking this Court to determine an issue falling outside the scope of its notice of appeal in the context of its complaint that the Environment Court wrongly failed to determine the scope of Turners & Growers' appeal before it.

[27] The first issue raised in the amended notice of appeal is whether the relief sought by Turners & Growers in its notice of appeal to the Environment Court went beyond the scope of its submission on Plan Change 15. This is correct, but only in one respect. Whereas in its submission on Plan Change 15, Turners & Growers had sought a region-wide boundary setback for non-rural industrial or commercial activities of 300 metres, in its notice of appeal this was reduced to 100 metres except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, in which case the proposed setback was increased to 600 metres. Only the

latter modification was outside the scope of the submission. The other changes to the rule proposed on appeal were the same as, or within, the scope of the changes proposed by Plan Change 15 or as sought in Turners & Growers' original submission on it.

[28] This minor departure in the relief sought in the notice of appeal from that sought in the submission could hardly be regarded as being fatal to the appeal in a jurisdictional sense. It could only be relevant to whether that aspect of the relief could properly be given. The Court did not need to examine the question of relief because it concluded that the appeal had to be dismissed on its merits in any event. The Court made no error of law in failing to address this question.

[29] Northland Waste next contends that the modified relief sought by Turners & Growers during the course of the hearing in the Environment Court could not be entertained because it went considerably beyond the scope of the relief sought in its notice of appeal. That may be so. However, whether or not the precise form of relief sought at the hearing came within the ambit of the notice of appeal would only become relevant if the Court concluded that the grounds of appeal advanced by Turners & Growers had been made out. It was not suggested that Turners & Growers did not have standing to appeal under s 14 of the Act. The Court was required to determine the appeal and, in doing so, it was entitled, if not obliged, to examine the merits of it. Only if the Court concluded that there was merit in the appeal, would it need to address what, if any, relief should be granted.

[30] In summary, while I accept the force of Mr Brabant's submission that the changes originally sought by Turners & Growers to the *Keeping of Animals* rule fell outside the scope of a proper submission "on" the Plan Change, this issue was not raised in the amended notice of appeal to this Court and accordingly it would be wrong to make any definitive finding concerning it. I reject Northland Waste's contention that the Environment Court erred in law by failing to address whether the scope of the relief sought by Turners & Growers on appeal, in the notice of appeal or in its evidence and submissions, was outside the scope of its original submission on Plan Change 15. The Environment Court did not have to determine this because it concluded that the appeal should be dismissed on its merits in any event.

[31] There is a further, more fundamental, difficulty with Northland Waste's cross-appeal. It succeeded in the Environment Court and does not seek to challenge the outcome of that decision in this appeal. It argues merely that the Environment Court ought to have taken a more direct route to the same result. This sort of criticism cannot found an appeal for reasons explained by the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*:[9]

> It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decision-maker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision-maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

[32] For all of these reasons, Northland Waste's cross-appeal must be dismissed.

Turners & Growers' appeal

Ground 1 – Incorrect evaluation of Plan Change proposal under s 32 of the Act?

[33] As noted, Turners & Growers' appeal is brought on two principal grounds. The first of these is directed to the Court's evaluation of Plan Change 15 under s 32 of the Act. This relevantly provides:

> **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 … an evaluation must be carried out by –
>
> …
>
> (c) the local authority, for a policy statement or a plan …
>
> …
>
> (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

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[9] *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25].

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(3A) …

(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.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified …

[34] Turners & Growers asserts that the Environment Court made five errors of law in evaluating the proposed plan change under s 32 of the Act. I now address these.

Error 1 – Did the Environment Court err in considering Part 2 and s 31 of the Act?

[35] Section 74(1) of the Act requires territorial authorities to prepare and change its district plan in accordance with various stipulated matters including its functions prescribed by s 31 of the Act and the purpose and principles set out in Part 2 of the Act. However, Turners & Growers submits that following the Supreme Court's decision in *Environment Defence Society Inc v The New Zealand King Salmon Co Ltd* a simpler approach to the assessment of plan changes is required.[10] It contends that unless the relevant plan is invalid, incomplete or uncertain, or a higher level document has been promulgated since the relevant plan was made operative, there is no justification for going beyond the settled objectives of the relevant plan. Because the proposed amendments to the objectives of the district plan were agreed to be the most appropriate way to achieve the purpose of the Act, Turners & Growers submits that the Court should not have considered Council's functions under s 31 or the purpose and principles under Part 2 of the Act. It simply needed to evaluate whether

[10] *Environment Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

the proposed methods were the most appropriate for achieving the objectives of the plan as proposed to be amended.

[36] On that basis, Turners & Growers submits that the Court fell into error by referring to the purpose of the Act in Part 2 and Council's functions under s 31 in the following paragraphs of its decision:

> [86] The Court also has a duty to consider s 32 in evaluat[ing] proposals before it. … In this case we are only dealing with a method (i.e. standards) … The joint witness statement and counsel agreed we can work on the basis that the objectives and policies generally are accepted and applicable. The question then is which standards are the most appropriate way to achieve the purpose of the Act. …
>
> [87] As we have already noted it is difficult to see how the significant increase in setbacks will achieve the purpose of the Act. …
>
> [89] Furthermore, we cannot see how the proposed increased setbacks would assist the territorial authority to carry out its functions to achieve the purpose of the Act. …

[37] I do not accept that the Environment Court erred by referring to the purpose of the Act or Council's functions under s 31 for the reasons set out below.

[38] First, the position now taken by Turners & Growers is completely at odds with the position it adopted in its appeal to the Environment Court. Turners & Growers contended in the Environment Court that Council's decision failed to achieve the purpose of the Act as set out in Part 2 and was not in accordance with its functions under s 31 of the Act. It now argues the complete opposite on appeal to this Court, contending that the Environment Court was wrong to have regard to Part 2 and s 31 of the Act.

[39] Turners & Growers' notice of appeal to the Environment Court relevantly reads:

> The reasons for this appeal are:
>
> (a) that the Council's Decision:
>
> (i) … will not achieve the purpose of the Resource Management Act 1991 ("Act");
>
> (ii) is contrary to Part 2 and other provisions of the Act;
>
> …
>
> (v) is otherwise contrary to the purposes and provisions of the Act …

> (vi) is inappropriate and inconsistent with the purpose and principles of the Act;
>
> …
>
> (viii) does not represent the most appropriate means of exercising the Respondent's functions, having regard to the efficiency and effectiveness of other available means and are therefore not appropriate in terms of s32 and other provisions of the Act.

[40] Having specifically complained that the Council's decision would not achieve the purpose and principles of the Act under Part 2 and was not in accordance with Council's functions under s 31 of the Act in its notice of appeal, Turners & Growers cannot criticise the Environment Court for addressing those matters in its decision.

[41] Second, it is clear from reading the Environment Court's decision overall that it followed the approach now urged by Turners & Growers. It approached its analysis on the basis that the critical enquiry was whether the methods proposed by Turners & Growers were the most appropriate way of achieving the objectives of the Plan as proposed to be amended. As Turners & Growers accepts, this is evident from the following two passages of the decision:

> [88] Although we acknowledge that the objectives and policies of the plan now provide for managing the adverse effects of incompatible activities, we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve those objectives or policies.
>
> [93] Accordingly, though a setback provision might achieve … the objectives and policies of PC15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.

[42] As Mr Brabant points out, there can be no doubt that the Court understood that the essence of the appeal involved consideration of the most appropriate method to implement the new policies of the proposed plan. This is clear from the Court's observations in the following paragraphs:

> [39] It was common ground that the objectives and policies of the Plan, in the form now modified by PC15, were agreed. …
>
> [51] New Policies 8.6.4.7 – .9 and more particularly the appropriate method to implement them are at the nub of the appeals.

[43] Third, I do not accept the submission that the Court was wrong to consider the purpose and principles in Part 2 and Council's functions under s 31 when

evaluating the proposed rules. Section 74 specifically requires a territorial authority to change its district plan in accordance with its functions under s 31 and the provisions of Part 2 (ss 5 to 8). The Supreme Court did not suggest in *New Zealand King Salmon* that those making decisions under the Act should disregard these mandatory provisions. On the contrary, the Court stated "the obligation of those who perform functions under the RMA to comply with the statutory objective is clear".[11] The Court explained that "[s]ection 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 Part 2, ss 6, 7 and 8".[12]

[44] The issue in *New Zealand King Salmon* concerned the nature of that obligation in the particular circumstances of that case where a higher order planning document, the New Zealand Coastal Policy Statement (NZCPS), required a lower order decision-maker, a Board of Inquiry, to avoid adverse effects of activities on areas of outstanding natural character such as those the subject of the private plan change application it was tasked to consider. The Court concluded that this was a mandatory requirement that had to be given effect to, as required by the Act, when considering the plan change. Consequently, the Board of Inquiry was wrong to disregard this requirement by resorting to Part 2 of the Act and treating it as no more than a relevant consideration. The Court explained:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare any regional plan "in accordance with" (among other things) Part 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 Part 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" Part 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.

[45] The Supreme Court identified three situations where resort to Part 2 might be required in interpreting the policies of a higher order planning document such as NZCPS. These were if there was an allegation of invalidity, incomplete coverage or uncertainty of meaning. Absent any such allegation, the Court strongly rejected "the

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11 At [21].
12 At [25].

notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances".[13]

[46] It will be obvious that the circumstances of the present case are far-removed from those under consideration in *New Zealand King Salmon*. There is no relevant constraint in a higher order planning document to which Council is required to give effect. The suggestion that Council and the Environment Court were wrong to have regard to Part 2 and s 31 when considering the proposed plan change is directly contrary to s 74 of the Act, which requires this. The Supreme Court did not suggest that Part 2 would be an irrelevant consideration in a case such as the present where decision-makers have choice. On the contrary, the Court said this:[14]

> Reflecting the open-textured nature of Part 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 Part 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 Part 2 remains relevant.
>
> (Emphasis added).

[47] The objectives and policies in the plan as proposed to be amended for the Rural Production Zone are expressed at a comparatively high level of abstraction. For example, one of the objectives is to "avoid, remedy or mitigate the actual and potential conflicts between new land use activities and existing lawfully established activities (reverse sensitivity) within the Rural Production Zone and on land use activities in neighbouring zones". One of the policies to achieve that objective is "[t]hat a wide range of activities be allowed in the Rural Production Zone, subject to the need to ensure that any adverse effects on the environment including any reverse sensitivity effects, resulting from these activities are avoided, remedied or mitigated and are not to the detriment of rural productivity". These objectives and policies leave considerable room for choice as to the methods or rules most appropriate to achieve them. It is an extraordinary proposition to suggest that Council, and the Environment Court on appeal, should disregard the purpose and principles of the Act when considering that choice. I reject this proposition.

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13 At [90].
14 At [151].

[48] Finally, Turners & Growers' complaint reduces to one of semantics in the present case in any event. It is difficult to see how the outcome would have been any different if the Court had referred consistently in its decision to the achievement of the objectives and policies of the plan and not to the purpose of the Act as well. The objectives, and the policies to implement them, were not in issue. It was assumed that these appropriately met the purpose of the Act. It follows that when considering the appropriateness of the particular methods or rules for implementing the policies, the Court was inevitably considering whether those methods or rules would (thereby) meet the purpose of the Act. This explains why the Court used "the purpose of the Act" and "objectives and policies" interchangeably, as demonstrated by the following two passages already quoted:[15]

> "… we can work on the basis that the objectives and policies generally are accepted and applicable. The question then is which standards are the most appropriate way to achieve the purpose of the Act.
>
> "… we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve those objectives or policies."
>
> (Emphasis added).

Error 2 – Did the Environment Court err in failing to evaluate whether the methods achieve the objectives of the Plan as proposed to be amended by Plan Change 15?

[49] Turners & Growers makes the following submission:

> Put simply, the Court failed to turn its mind to whether the rules put forward by Council would achieve the policy intent of PC15.

[50] The Court recorded that the *Scale of Activities* provision was the most significant change to the relevant methods in Plan Change 15 to address the potential reverse-sensitivity effects.[16] There was no challenge to this provision which could only be justified if it was an efficient and effective way of contributing to the achievement of the objectives of the proposed plan. The Court was therefore not required to reconsider whether the *Scale of Activities* provision put forward by Council was appropriate as an efficient and effective way of achieving the policy intent of Plan Change 15. Nevertheless, the Court did turn its mind to this issue,

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15 At [86] and [88].
16 At [13].

observing that "the methods adopted currently are the most appropriate at this time to achieve the purpose of the Act and the objectives and policies of the Plan".[17]

[51] Turners & Growers' submission pre-supposes that the objectives and policies of the plan as proposed to be amended are cast in absolute terms with "bottom-line" environmental outcomes stipulated and that these must be achieved by the methods or rules. However, that is not the case. The objectives and policies do not stipulate that reverse-sensitivity effects may not occur; rather, they state that these should be "avoided, remedied or mitigated".

[52] The issue before the Court was whether the further measures proposed by Turners & Growers should also be introduced. The Court appropriately focused its attention on this issue and made no error of law in doing so.

Error 3 – Did the Environment Court err by determining that it would be inefficient to impose the setbacks sought by Turners & Growers on the basis that restricted discretionary resource consent would inevitably be obtained for new activities that would breach those setbacks?

[53] Turners & Growers submits that the Court made an error law in the following passage of its decision:

> [95] Costs and benefits can also be seen in terms of their efficiency and effectiveness. We have concluded that it is highly inefficient to impose a blanket control in circumstances where the outcome is inevitably going to be to grant a dispensation from the standard, but at cost to the Council and parties and with unclear objectives from doing so.

[54] Turners & Growers submits that this statement is wrong because it is not inevitable that restricted discretionary applications will always be granted. However, in my view, this submission is based on a misreading of the paragraph. The Court was not suggesting that consents would be granted in every case, no matter what the circumstances. The Court was simply recognising that significant costs and inefficiencies would result from the requirement for such applications with little corresponding benefit given the likelihood that they would be routinely granted, though not necessarily always.

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[17] At [111].

[55] It is clear that the Court's observation in [95] is drawn from the evidence of one of the expert witnesses, Mr Hodgson, to the effect that "all applications for consent to dispense with setback standards of various dimensions that he has lodged for applicants in other areas have been successful and he anticipated the same would occur here". The Court referred to this evidence at [90]. Ms Carruthers accepts that many applications for restricted discretionary resource consent are in fact granted.

[56] In my view, there is nothing in this point. The Court made no error of law in this paragraph of its decision.

Errors 4 and 5 – Did the Environment Court err by focusing on the effects of Northland Waste's activities when considering the appropriateness of the proposed setbacks?

[57] Turners & Growers submits that the Environment Court erred by taking into account the potential effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility. Turners & Growers claims that this was only referred to during the hearing of the appeal as an example to provide context but the specific issues arising out of that example were not substantively addressed in the evidence. Turners & Growers contends that the Court was therefore wrong to make any findings in relation to this site-specific example, let alone to rely on these as being determinative in dismissing the appeal relating to zone-wide setbacks.

[58] As noted, Turners & Growers categorises the error in two ways. First, it contends that the Court failed to take into account a relevant consideration, namely the potential effects of other activities in the zone sought to be controlled by the proposed setback (error 4). Second, it contends that the Court applied the wrong legal test (error 5). It argues that the correct question was whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement.

[59] I do not accept that the Court made these errors. The Court did not reject Turners & Growers' proposal for a zone-wide setback restriction merely because reverse-sensitivity issues had not been adequately demonstrated at the *Kerifresh* facility as a result of Northland Waste's activities. It is clear that the Court did not

approach the matter as if it was a site-specific rule, but considered the implications of it applying across the entire zone. The Court commenced its analysis of whether such a zone-wide restriction would be appropriate and workable by noting the difficulty of determining which activities in the area would be caught by the "non-rural industrial and commercial" test in the setback rule proposed by Turners & Growers. The Court stated:

> [55] As we drove through the area, we noticed the enormous diversity of activities conducted within the RPZ [and Rural Living Zone] that seemed to encompass almost the full range of human activity. We note, for example, pottery and art studios that seemed to be low scale yet would appear to fit the general meaning of a non-rural commercial or industrial activity. Yet, more troublesome are those in the grey area such as building manufacturers, i.e. Versatile Garages and others; tank manufacturers; depots for raw materials such as metal and the like; and contractors' depots, all of which arguably have a functional need to be located in the rural area or primarily supply that sector.
>
> [56] … We have a fundamental difficulty in trying to understand how such activity categorisation is going to be able to occur within the context of an effects-based plan that has virtually no method of dealing with the identification and compartmentalisation of activities.
>
> …
>
> [59] … If this plan is to move to a more activities-based plan, some relatively fundamental changes in the Plan structure would need to take place.

[60] It appears that the only specific evidence on reverse-sensitivity problems arising out of incompatible activities in the zone concerned the potential adverse effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility. In these circumstances, the Court can hardly be criticised for referring only to this evidence. In any event, the Court looked at the issue much more broadly noting:

> [77] PC15 does not address what it is about non-rural commercial or industrial activities that create concern. Although incompatible activity is cited, the concern appears to be about adverse effects of new non-rural activities on existing farming or forestry activities. These effects seem to resolve to odour, dust and noise. …
>
> [92] We were in even more doubt in the case of Turners & Growers as to what particular issue it was concerned about. If it was odour there was no compelling evidence before us, or any other basis, on which we could conclude than an extra 20 metres or even 100 metres separation would make any significant difference to odour effects. Moreover, we find it curious that Turners & Growers would be suggesting a 30m setback for outdoor activities and 100m for building when it was acknowledged that activities within buildings (including those producing odour) are less likely to have an

> adverse impact. In any event, the Council has changed its District Plan, making air discharge the sole domain of the Regional Council.

[61] In summary, the Court did take into account the potential effects of other activities in the zone sought to be controlled by the proposed setback rule to the extent that this was covered in the evidence before it. That disposes of error 4.

[62] The Court also considered whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement, concluding:

> [93] Accordingly, though a setback provision might achieve the purposes of Part 2, and might achieve the objectives and policies of Plan Change 15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.

This disposes of error 5.

[63] I now turn to Turners & Growers' second principal ground of appeal.

Ground 2 – Was the Court's conclusion, that the setbacks sought by Turners & Growers were not the most appropriate method to achieve the objectives of the District Plan, open to it on the evidence?

[64] Turners & Growers contends that the only evidence before the Court as to whether the proposed setbacks were the most appropriate way of achieving the objectives and policies of the Plan was the evidence of its expert planning witness, Brian Putt. In his written statement of evidence prepared for the hearing in the Environment Court and dated 30 October 2015, Mr Putt stated:

> The key point of analysis under s32 is for the rule amendments proposed by the Appellant to be evaluated under the criteria of s32(1)(b). In respect of the first test, and given the effects-based structure of the Plan, it is difficult to identify any alternative reasonable practical options for achieving the amended objectives which relates to the management of incompatible land uses and the potential for reverse sensitivities. The practical option chosen has been to identify the non-rural industrial or commercial activities as a generic group which, through some manufacturing process, have the ability to create significant adverse effects. The method chosen has been to use a separation distance between the activity and the site boundary. In an effects-based environment this is a simple method that does not rely on a technical process analysis. In my opinion this is the most appropriate way of achieving the relevant objectives.

[65] Even if this had been the sole evidence on this issue, the Environment Court, as a specialist body, would not have been obliged to accept it uncritically.

[66] Moreover, Mr Putt's evidence was not the only evidence available to the Court to enable it to carry out its assessment. For example, Gregory Wilson, a senior policy planner employed by Far North District Council, explained at some length why the setbacks proposed by Turners & Growers would be problematic and undesirable. Mr Wilson observed in his initial brief of evidence dated 29 September 2015:

> [54] Council considered the relief sought resulted in an overcorrection, and would capture unanticipated activities not considered to be problematic. The application of a provision controlling generic commercial and industrial activities is considered problematic in the context of the Far North District Plan. A broad spectrum of activities would be unintentionally captured under the banner of these activity classes.
>
> [55] For example, the application of a 3000m "yard" style rule having universal control on industrial and commercial uses would capture a variety of activities that are important contributors to the Northland economy and that may offer little or no implications for land use incompatibility. This includes, but is not limited to:
>
> - home business and home occupations; and,
> - small retail (such as farm gate sales).
>
> [56] Exempting such activities from a new rule is considered to lie outside of the scope of the Proposed Plan Change as these activities are not currently defined in the District Plan. Also, industrial and commercial activities contained within a building are in many ways likely to have similar effects to farming activities contained within a building. The outdoor components of these activities may offer the more immediate land use incompatibility issues.
>
> [57] The spatial separation of 300m is also considered to be an excessive approach. Even the utilisation of a 50m threshold would result in 41% of sites in the Rural Production Zone not being able to undertake permitted activities. The mechanism is considered to not be proportionate to the issue, and also does [not] take into account further management techniques available through future review processes such as zoning review.

[67] Mr Wilson directly responded to Mr Putt's evidence in his written rebuttal dated 18 December 2015 in which he confirmed his view that the mechanisms proposed by Turners & Growers were not appropriate for use as a District-wide provision. The witnesses were also cross-examined on this evidence.

[68] For these reasons, I reject Turners & Growers' submission that the only conclusion available to the Court was to accept Mr Putt's evidence. That is plainly not so.

Result

[69] Turners & Growers' appeal is dismissed.

[70] Northland Waste's cross-appeal is dismissed.

[71] The respondents have succeeded overall and are entitled to costs calculated on a category 2, band B basis.

M A Gilbert J

ORIGINAL

Decision No: C 12 /98

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of three appeals under section 120 of the Act

BETWEEN **UPPER CLUTHA ENVIRONMENT SOCIETY INCORPORATED**

RMA: 331/97

AND **R S MILLS, N G VALENTINE AND R M McHAFFIE**

RMA: 327/97

AND **I F FARRANT**

RMA: 326/97

Appellants

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Mr R S Tasker
Mrs J Kearney

HEARING at **QUEENSTOWN** on the 11th and 18th days of December 1997

APPEARANCES

P J Page and T J Shiels for the applicant, (R S Mills, N G Valentine and R M McHaffie) and also for I F Farrant
A H Borick and W G Nagle for Upper Clutha Environment Society Inc
N S Marquet for Queenstown Lakes District Council

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

INTERIM DECISION

0. *Synopsis*

1. Background

These are appeals under section 120 of the Resource Management Act 1991 ("the Act") against resource consents granted by the respondent, the Queenstown Lakes District Council (called "the Council"). The applicants Mr R S Mills, Mr N G Valentine and Mr R M McHaffie together with Mrs L D Mills variously own three blocks of land (all part of Mt Aspiring Station) with frontage to Lake Wanaka immediately north west of Wanaka Township. The land referred to in the application is:

A. 36.3400 ha being part section Block 3 Lower Wanaka Survey District (now all Lot 1 DP 24915) and being all CT 16D/979 (Otago Land Registry))
B. 15.0431 ha being Lot 1 DP 21082 and being all the land comprised in CT 13A/332
C. 20.3465 ha being Lot 2 DP 21082 and being all CT 13A/333 (Otago Land Registry).

The total area of the land in the titles which are affected by the application is in Blocks A and C. The applicants wish to excise a 23 lot subdivision containing 3.85 ha (called "the subdivision site") from CT 16D/979 (Block A) where that

land runs down to Lake Wanaka. The land is zoned Rural L (Landscape Protection) in the transitional district plan and zoned Rural Downlands in the proposed district plan with a minimum subdivision area of 20 hectares. The proposal is a non-complying activity both in relation to the subdivision and the land use under both plans.

West of Wanaka township all the land between the Wanaka/Mt Aspiring Road and the lake was formerly owned by Wanaka Station. A succession of subdivisions has seen the urban edge creep north-west along the lakeshore. The present urban limit in fact and in law (the zone boundary) is immediately to the south-east of the proposed subdivision: it is delineated in fact by the boundary with the resort called 'Edgewater Resort' and inside that (closer to central Wanaka) is the Rippon-Lea subdivision. In the middle of Blocks A and B between the lake and the mountains there is a prominent small hill called Larch Hill. The Wanaka/Mt Aspiring Road goes behind that before re-approaching the lake north of Larch Hill. The three certificates of title which are the subject of the formal application bear no relation to the topographical features of the landscape but run roughly parallel to each other from the lake shore over (or past) Larch Hill to the Wanaka/Mt Aspiring Road except that Blocks A and C do in fact share a boundary. This is because although Block B comes between blocks A and C, C has a tongue along the lake reserve (and to the north of Block B) with a vineyard on it.

The subdivision site itself faces roughly east into Roy's Bay. It is bounded by a wide esplanade reserve along its lake frontage. To the south, as we have said, is the Edgewater Resort. To the north (west) is another piece of land (part of Block C) which is included in the application, although only a few square metres of land in that title are relevant. On other parts of Block B and C are areas on which grapes are grown as part of the 'Rippon' vineyard.

The subdivision site, as shown on the subdivision plan, has the following physical features on the ground: from the lake edge, travelling in a south-west direction, there is a 4 metre high rocky bank up to the esplanade reserve which is some 30 metres wide at this point. The reserve and the subdivision site itself are on a rising terrace. Beyond that the slope changes abruptly to a steep grassed slope (with scattered trees) leading up to the crest of Larch Hill. The proposed subdivision covers the terrace between the esplanade reserve and the line where the angle of the slope changes. Access from Wanaka is by Sargood Drive which terminates at the south-eastern end of the subdivision site. It is proposed to continue Sargood Drive along the toe of the terrace with allotments on both sides of the road which will end in a cul-de-sac at the northern boundary of Block A.

The subdivision plan attached to the application is in our view quite misleading. First, it only shows the 23 allotments proposed on Block A and not the remainder of the land in Block A or the relevant part of Block C even though these are each allotments in the subdivision - (see ***An Application by Portmain Properties (No. 7) Ltd*** C121/97). While we appreciate that a detailed plan of the smaller allotments is desirable, in our view it is equally desirable to have a plan showing the overall concept because as will be seen what happens on the balance of Block A is an important consideration in this case. In fact we consider that all the parties and witnesses have been rather misled by not considering what happens on the balance land. Equally, although there is a strip of weeds and kanuka partly on Block C which is also referred to in the subdivision application, that land is not shown on the subdivision plan. Finally, although Block B is referred to in the application, we do not see that it is relevant to the application in any way.

2. *The Appeals*

There are two sets of appeals. The Upper Clutha Environmental Society Inc (called "the Society") has appealed on two substantive grounds: first, that the proposed residential development will have an adverse effect on the landscape especially on the views from Wanaka township to the north-west. Secondly, that the proposal pre-empts decisions about resource management of the area which are to be made in relation to the proposed plan. The Society's concerns here are that there has been urban creep along both shores of the lake for some years. On the south-western side of Roy's Bay there has been the sequence of excisions from Mt Aspiring Station since the early 1980's. It appears the community, and the Society especially, believed that Edgewater Resort was the limit of the urban area. The Council's transitional plan identifies it as such in that the site is the start of the rural land. As we shall see, the Society's stance on that has some force since there are strong objectives and policies in the plan about separating urban and rural land and also protecting the natural landscape which is, in the wider context of the Lake Wanaka Basin, accepted by all parties as being outstanding.

The other appellants, being Messrs Mills, Valentine and McHaffie (called "the Wanaka Station Trustees") and Mr Farrant, the proposed developer of the land in the subdivision, lodged identical appeals with the Court in relation to the conditions of consent to the subdivision granted by the Council. Those issues boiled down to relatively minor technical issues which we shall discuss later in this decision if we need to.

We do not set out the evidence separately because we consider everyone's focus on the subdivision site for the residential allotments lead them in a significant way to mis-assess the situation. Consequently we have assessed the relevant

evidence and set out our findings as we go through the statutory criteria for granting a consent for a non-complying activity in the headings below.

3. The Threshold Tests Under Section 105(2)(b)

Because the resource consents sought were for non-complying activities we need to consider the threshold tests. We hold that on balance the adverse effects of the subdivision and residential use of the land, even as mitigated by the Council's conditions, are still more than minor. However, with other suitable mitigation methods, some of them volunteered at the hearing by the applicant and others which emerged from the appellants' case, the adverse effects of the proposal can be reduced so that they are no more than minor. We do not go into them in any detail here because we will need to discuss the detail later. It is sufficient to say for present purposes that the main issues relate to the effect on landscape and amenity values of:

- subdivision and dwellings on the subdivision site; and also
- the potential for further residences to be erected on Block A.

To mitigate the effects on the outstanding landscape it would be necessary to restrict the density of dwellings and modify the appearance of those dwellings so they fit into the landscape. As for the larger site (balance of Block A) outside the subdivision site but still on the first title, restrictions on further residential development on that part of the first title overlooking the lake and Wanaka are needed to prevent further subdivision with, in our view, clearly harmful effects on the landscape. We should say that the applicants' witness appeared to be of the same view since they stated that no further development was going to occur on the face of Larch Hill. However, until we raised the issue no condition ensuring that would happen had been volunteered by the applicants or imposed by the Council.

A lesser but significant adverse effect unless mitigated is the effect of having a vineyard (on Block C) next door to a 3.85 ha residential subdivision. An issue as to reverse sensitivity arises here: see ***Auckland City Council v Auckland Regional Council*** [1997] NZRMA 205. The issue is that the vineyard does create potential nuisances (negative externalities) from the point of view of residential neighbours. Although we heard evidence that under the current management regime of the vineyard which is run by organic principles, the nuisance level would be low, we cannot assume that the vineyard would always be run in that way and we consider that some mitigation measures would be necessary. There is a thin strip of kanuka on Block C which the applicant volunteered to retain as a buffer strip. We will discuss later whether that is adequate, but in summary we are convinced that enough can be done to reduce this and the other adverse effects so that they are no more than minor.

Since the first threshold test is passed we have no need to consider the second threshold test: ***Hopper Nominees Ltd v Rodney District Council*** [1996] NZRMA 179.

4. Section 104

4.1 In deciding whether or not to grant consent we are to have regard to the relevant matters in section 104 and also our decision must be informed by Part II and the single purpose of the Act which requires sustainable management of natural and physical resources: ***Kapiti District Council v Minister of Conservation*** [1994] NZRMA 385. We will discuss the relevant aspects of Part II shortly, but since we see no conflict between them and the matters to which we are to have regard under section 104(1) we will first consider those. The relevant matters are in paragraphs (a), (c), (i).

4.2 Any actual and potential effects on the environment of allowing the activity [Section 104(1)(a)]

As we said in discussing the threshold tests the key adverse effects to be considered are the effects on landscape, and the reverse sensitivity issue with the adjacent vineyard.

As to the effect on the landscape, we were given by Mr Rackham, the landscape architect called on behalf of the applicant, a panoramic photograph looking north-west across Roy's Bay from Lismore Street in Wanaka. It displays the general context of the subdivision site and one of the most common views of it. In particular, it shows the view across the lake to the lake edge, past the buildings at Rippon Lea and at Edgewater Resort, to the bare hillside of Larch Hill and the conifer covered top of the hill beyond it, all set against the backdrop of the mountain range behind. Except for a house belonging to Mr and Mrs Mills at the northern end of Larch Hill (screened by trees and facing north rather than towards Wanaka township), all the current residential development is on the flat around the lake and below the level of the Lombardy poplars which line the lake edge. The subdivision site proposed to be developed for residential use fills in a small piece of land approximately 150m long between the Edgewater Resort and the Rippon vineyard. The evidence for the applicant was that that land is of no practical value for vineyards (it has the wrong soils) and is too small to be readily used for grazing. Despite the arguments from the Society that the land should be retained as a buffer, we find that a positive effect of the proposal is that it would be used for a more valuable purpose in supplying residences. Of course, against that positive effect the various adverse effects need to be weighed as well.

Mr Rackham's simulation showed the maximum height of houses on the subdivision site and we did not understand anyone to question the accuracy of that. However, as Ms Lucas, the landscape architect for the Society, pointed out

in her evidence, the colours used by Mr Rackham for the houses and their roofs had a fairly limited palette whereas the colours actually allowed by the Council consent include much brighter colours. We accept that to mitigate the visibility of the subdivision from a distance a more limited palette of mid-range non-reflective colours should be used. A condition to that effect should be imposed if consent is granted.

Ms Lucas also pointed out that the roof lines on the simulation were not steep nor broken up by balconies and dormers although that could happen in practice which would punctuate the flat lines of the hill behind the houses. Mitigating measures would include flatter pitches, and prohibiting balconies and dormers. She also observed that because the sections on the lakeside of the proposed Sargood Drive extension are long and thin, the housing will look particularly dense or cluttered from the lake and from Wanaka: there could appear to be a "wall" of houses. We infer from that that some lessening of the density of housing might be desirable. That can be achieved in this case by reducing the number of allotments on the lake side of Sargood Drive by three by amalgamating pairs of smaller allotments into single titles. We consider that will have an incidental advantage that the owners of the allotments between the road and the lake will have more ability to both plant trees and create views on their own properties without having to fight for views and put pressure on the lake front landscaping on the reserve by requiring poplars to be removed.

As for the lakefront reserve, the maintenance of the poplars (or a substitute species) and landscaping of the reserve would also help mitigate the effect on the landscape.

As for the effects of potential development on the face of Larch Hill, this case is similar in the problem it raises to *Kennedys Bush Road Neighbourhood*

Association v Christchurch City Council W63/97. At page 10 the Environment Court stated:

> *"It is our opinion that provided mitigation measures are undertaken and the section sizes remain at a reasonably liberal average, these lower slopes of the Port Hills can accommodate further residential development as proposed without having a great visual effect. We are however of the opinion that any further creep uphill must be discouraged and we will modify the proposed development plan as set forth in the change by ensuring that the land beyond and uphill of the fenceline is not ...* [rezoned] *to prevent any further incursions at a higher topographical level."*

Once we raised the issue of further urban creep the applicant fairly accepted that appropriate conditions should be added to prevent that. Clearly it was not the current landowner's intention to develop the face of the hill.

On the crest of Larch Hill above the steep slope facing the lake, there is a flatter plane with a gentle incline towards the lake. A large house without satisfactory landscaping on that site would cause a harmful effect on the landscape as we understood in the end the applicant to agree. The applicant does not want to foreclose development on that area completely, although Mr Mills considers such development unlikely. We think in view of the fact that none of the parties really referred to the lot comprising the balance of Block A until the issue was raised during the hearing, completely foreclosing development on the crest at this stage would be unfair. However, some conditions should be imposed to ensure that even if building on the balance of Block A is a permitted activity (and one house would be permitted as of right), the neighbouring owners and perhaps representative members of Wanaka township can as covenantors ensure that appropriate landscaping in the form of tree planting is imposed so that the view from Wanaka is maintained. Such a condition would not impose an undue

hardship on any future building on a site on the top of Larch Hill because presumably its owner would wish to orientate towards the north and therefore at right angles to the main view from Wanaka township anyway.

The second set of adverse effects we have to consider relate to the vineyard operation next door. While the applicant volunteered a condition with the kanuka buffer being maintained, that was not shown in the plan and it would need to be identified more clearly. In any event, a question was raised by the Society as to whether that strip would be adequate. This issue was dealt with in some detail by the planner for the Council, Ms R.H.K. Jerram. She referred us to a survey commissioned by the New Zealand Wine Institute (and approved by that Institute) by Ms Adrienne Young-Cooper, a well known planning consultant. Her conclusion was:

> *"The use of a buffer area is likely to be effective to eliminate most spray drift affecting properties outside the vineyard. This buffer area will vary depending on the prevailing wind and the presence of intervening trees. ... A working figure should be between 30 metres and 50 metres ..."*
> (Discussion paper on the wine industry and a resource management strategy for New Zealand A.F. Young-Cooper and G. Pollock, 1997, p.86 and 87).

In the circumstances, since there is kanuka present and more could be planted, we consider that a 30 metre strip is necessary as the Society suggested. We understood Ms Jerram to consider that appropriate. Accordingly, if consent is granted the subdivision plan will need to be amended so that a 30 metre strip is planted in kanuka (or other trees approved by the Council planner) and maintained. That 30 metre strip can be measured from the edge of the nearest strip of vines to the 3.85 ha subdivision. That strip may be amalgamated (to the extent it is not already in Block C), with Block C subject to a covenant

maintaining the strip, such covenant to be in favour of all the allotments in the subdivision.

4.3 Relevant objectives, policies, rules or other provisions of the transitional district plan and the proposed plan [Section 104(1)(c)]

We heard quite detailed argument about how the policy in the transitional plan is to avoid further extension of residential development by increasing the density of housing inside Wanaka itself. We accept the evidence of Mr Garland, the planner for the applicant, that the first policy could not in fact be given effect to because the proposed rules providing for greater density of housing in Wanaka were never actually put in place. Accordingly, we do not consider there is anything about the density provisions that need concern us here. Both the transitional plan and the proposed plan make it clear there should be a distinction between urban and rural areas. We accept the force of that but we consider that this case is a true exception provided that mitigating measures can be put in place avoiding further encroachment on the rural area. We have discussed some mitigating measures above and will do so in more detail below.

We consider that the 3.85 ha subdivision is more appropriately and efficiently used for residential purposes than for any other. Certainly the Society's witness Mr Haworth could not think of any other practical use. However, we are also keenly aware of the strength of the Society's point about urban creep and it is for that reason that we have attempted, in considering the adverse effects above, to find ways in which a clear line can be drawn between Block A and Block C so that urban development cannot occur to the north-west or moving around to the west along Larch Hill. We trust that this small exception will be the last residential extension around this side of the lakeshore and in front of Larch Hill under current policies.

4.4 Any other relevant matters [Section 104(1)(i)]

We have considered the issue of the consistent administration of the district plan and the proposed plan if we confirm the resource consent. We accept that to a certain extent this is allowing another subdivision in apparent contravention of the spirit of the policies of both plans. We have endeavoured to explain above why allowing this limited subdivision together with appropriate conditions as to the balance land on the rural side it will achieve the policies in both plans. Thus we are not concerned that this consent will create any kind of problems with consistent administration of the plan in future. In fact the opposite should be the case: the conditions imposed will ensure that the Society will not be put in a position where it has to make submissions on further residential development along the lakeshore on this side (at least as the plans are at present).

Another matter we need to consider in more detail is the question of the urban/rural interface at the northern end of the subdivision site. The Society outlined the gradual creep of development along the lakeshore in front of Larch Hill. The pattern suggests the development may creep on notwithstanding the policies of the Council in relation to that issue. It seems to us that this case is a good opportunity to impose some constraint so that further urban creep on what is accepted at present to be land that is unacceptable for residential use (the vineyard on Block C) does not occur. We should add that the line between the 3.85 ha site and the vineyard is quite an important landscape and geophysical boundary. That boundary is marked by the row of kanuka we have already referred to. It marks the south-western edge of the schist gravel fan worked off Mt Roy. Viewed from Wanaka there is an obvious fan emerging from the mountains to the right (or north) of Larch Hill. Development of that does not appear to be appropriate, especially on the balance of Block A and Block C (which are, after all, the subject of this application even if no further subdivision of them has been applied for).

The appropriate way to deal with this would be to impose a land use consent condition that covenants entered into by the owners of the balance of the Block A and the owners of the Block B (or part) in favour of the subdivided lots in the 3.85 ha subdivision to the effect that the balance of Block A and Block C visible from Wanaka (that is, excluding the land behind Larch Hill) will not be further subdivided for residential purposes and will not be used for residential purposes (other than as permitted in the Rural Downlands zone).

5. *Section 105(1)(c) Discretion*

In exercising our over-all discretion as to whether to grant consent we need to consider Part II of the Act ***(Minister of Conservation v Kapiti District Council*** 1994 NZRMA 385) - especially if there is a matter of national importance. In fact two paragraphs of section 6 are relevant:

> *"(a) The preservation of the natural character of ... lakes ... and their margins, and the protection of them from inappropriate subdivision use and development.*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development ..."*

Since the Lake Wanaka Basin is clearly an outstanding landscape there is a matter of national importance under (b) to which we are to have regard. However, an issue also arose as to whether this development involves the margins of Lake Wanaka. The Society was of the view that the margins of Lake Wanaka extended to the top of Larch Hill for two reasons. First the Society's witness Ms Lucas who considered that the experience of the lake margins (from a subjective point of view) went that far. Secondly by analogy with the definition of "coastal environment" which is usually held to go to the skyline of the first

ridge from the sea, Mr Borick argued that the subdivision site went to the crest of the nearest hill. However, against that the landscape architect for the applicant thought that margins might be an ecological or physical term so that it related to the land/water interface. That seems to have some merit to us and as Mr Shiels pointed out in his reply some indirect confirmation that a margin of the lake is close to the water is to be derived from section 230(3) of the Act relating to the requirement for esplanade reserves and strips. This subsection states:

> *"(3) Except as provided by any rule in a district plan ... or a resource consent which waives, or reduces the width of, the esplanade reserve, where any allotment of less than 4 ha is created when land is subdivided, an esplanade reserve 20 metres in width shall be set aside from that allotment along the ... margin of any lake ..."*(our underlining.)

That suggests that the esplanade reserve must be on the landward side of the margin. It would defy any sort of sense if the 'margin' of Lake Wanaka was to be seen on top of Larch Hill so that an esplanade reserve could then be created along it. In fact, of course there is already an esplanade reserve along Lake Wanaka's edge. Thus we hold the margin of the lake is the upper limit of wave action (approximately). Thus the 3.85 ha subdivision is not on the margin of the lake, and is separated from it by an existing esplanade reserve.

Having dealt with that technical issue we do have to take into account that the subdivision is in a landscape of outstanding significance. To a considerable extent we agree with the Society that the current proposal is unsatisfactory. But we consider that the mitigating measures discussed earlier mean that the subdivision and residential use are not inappropriate given the particular siting and so long as the conditions are imposed on the much more sensitive land to the north and west of the 3.85 ha site.

In all the circumstances and balancing the relevant factors including the relevant objectives, policies and rules of the two plans as best we may - applying the "test" in ***Caltex v Auckland Regional Council*** 3 ELRNZ 297 - we consider that the single purpose of the Act is best met by allowing the subdivision of the 3.85 ha block into residential allotments approximately as shown on the subdivision plan subject to amended conditions discussed below, especially relating to other parts of the land that are not included in the residential subdivision. The parties will need to look at a number of matters including the assessment of a reserves fund contribution in view of the reduction in number of allotments from 25 to 21 and the restriction on further subdivision which may affect the value of the land.

6. Outcome

Accordingly the appeal is allowed in part. Under section 290 of the Act the resource consents granted by the Council is confirmed for a 21 lot subdivision (plus balance lot) upon the following terms:

(1) The residential allotments are to be increased in size as follows (relating new Lots 1-21 to Lots 1-25 on the subdivision plan (W69(1)) as in the following table:

Lot No.	Lot on Subdivision Plan (Sheet W69(1))	Area (m^2)
1.	1	5006
2.	2 (lake access)	360
3.	3	2933
4.	4 and 5	2060
5.	6	2420
6.	7	1916

7.	8 and 9	2098
8.	10	1823
9.	11 - 13	2905
10.	14	5018
11.	15	1430
12.	16	1485
13.	17	1077
14.	18	1058
15.	19	1071
16.	20	999
17.	21	988
18.	22	1015
19.	23	1028
20.	24	1015
21.	25	970

(2) Leave is reserved to redraw the boundaries for Lots 3 - 11 above if that is desirable in the applicant's opinion.

(3) The conditions imposed by the Council are varied and/or added to with extra conditions along the following lines (to be allocated to the appropriate resource consent):

(i) No further subdivision of any title in the 3.85ha subdivision shall be allowed.

(ii) No roof lines on any residence shall be broken by balconies or dormers; nor shall roof pitches be greater than 1 in 8.

(iii) A colour palette of roofing and walls shall be limited to a mid-range of colours agreed by the parties to this appeal.

(iv) Covenants, easements or consent notices shall provide for the matters in (i)-(iii) above.

(v) A 30 metre wide strip of land shall be defined (being part of the Block A and part of Block C) and amalgamated with Block C but subject to a covenant in favour of the allotments in the 3.85 ha subdivision to the effect that the land will be maintained in kanukas and other trees approved by the district planner as a buffer between the activities of the vineyard and the residences, such buffer to be continuous from the foreshore reserve to the uphill edge of residential development except for the provision of a 3 metre access strip for the purposes of access and egress from Block C to Sargood Drive extension.

(vi) A covenant or easement restricting any subdivision and/or residential development on the face of Larch Hill (which will need to be surveyed and defined by a survey plan) shall be included, such covenant or easement to be in favour of the allotments on the subdivision plus not more than five (5) residences in Wanaka nominated by the Society.

(vii) A further covenant or easement shall be entered into over the balance of the Block A in favour of the residential allotments in the 3.85 ha subdivision plus not more than five (5) residences in Wanaka nominated by the Society whereby:

(a) residential development on the crest of the hill (again as defined by a survey plan) is forbidden except for one house with a north facing alignment and with reasonable landscaping (which need not be effective immediately) to screen any such residential development from Wanaka; and

(b) no residential development shall take place on Lot 1; the terms of such covenant to be in the form agreed by the applicant with the Edgewater Resort with any necessary changes.

(viii) The applicant's planner shall prepare a planting plan for the lakeside recreation reserve to the satisfaction of [the relevant Council officer];

and that planting shall be carried out by the applicant at its expense prior to sale of the allotments on the 3.85 hectare site.

(4) The costs of complying with these conditions and the registration of all necessary covenants and easements shall be borne by the applicant.

(5) Subject to (6), the parties are invited to:

(i) attempt to resolve the wording of the conditions, covenants or easements by agreement (and of course further survey work will be necessary to define the face and crest of Larch Hill);

(ii) consider the appropriate wording for the conditions for each consent (bearing in mind any difficulties raised by ***Bletchley Developments Ltd v Palmerston North City Council*** (No.1) [1995] NZRMA 337 at 347) so that:

(a) consent notices, restrictive covenants or easements may be brought down on the relevant titles; and

(b) the conditions imposed in the Council's consent are consistent with them.

(6) In the event of disagreement as to wording of the conditions, covenants or easements, leave is reserved to the parties to come back to the Court on any outstanding issues.

7. *Other Matters*

7.1 The applicant and the Council sought that costs be reserved, obviously contemplating applications for costs against the Society and indeed the applicant also made an application for costs to be reserved against Mr Harworth personally. However, in view of the fact that the appeal has been successful in part and because a matter of national importance in terms of landscape protection was involved, and further because as we have said the original application was quite misleading in its narrow focus on the 3.85 ha lot subdivision rather than the balance allotment in Blocks A and C, we consider that costs should lie where they fall. We order accordingly.

7.2 We make no decision on the two appeals against conditions by the applicants and Mr Farrant since, in the light of this interim decision, the reserve fund contributions will need to be recalculated anyway.

7.3 These appeals are adjourned to the first list of the Court in Queenstown after 1 August 1998 unless any party requests they be set down earlier.

DATED at CHRISTCHURCH this 26 day of **February** 1998.

J.R. Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 387

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals under Clause 14 of the First Schedule to the Act
BETWEEN	HIGH COUNTRY ROSEHIP ORCHARDS LIMITED AND MACKENZIE LIFESTYLE LIMITED (ENV-2009-CHC-175)
AND	MOUNT GERALD STATION LIMITED (ENV-2009-CHC-181)
AND	MACKENZIE PROPERTIES LIMITED (ENV-2009-CHC-183)
AND	MERIDIAN ENERGY LIMITED (ENV-2009-CHC-184)
AND	THE WOLDS STATION LIMITED (ENV-2009-CHC-187)
AND	FEDERATED FARMERS OF NEW ZEALAND (INCORPORATED), MACKENZIE BRANCH (ENV-2009-CHC-193)
AND	FOUNTAINBLUE LIMITED, PUKAKI DOWNS TOURISM HOLDINGS PARTNERSHIP AND SOUTHERN SERENITY LIMITED (ENV-2009-CHC-190)
AND	R, R AND S PRESTON AND RHOBOROUGH DOWNS LIMITED (ENV-2009-CHC-191)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

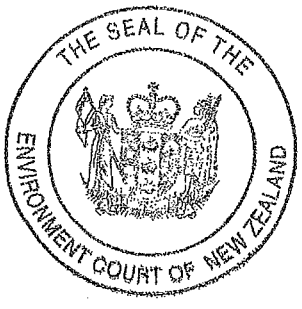
	AND	HALDON STATION (ENV-2009-CHC-192) Appellants
	AND	MACKENZIE DISTRICT COUNCIL Respondent

Court:	Environment Judge J R Jackson (presiding) Environment Commissioner H-A McConachy Environment Commissioner J R Mills
Venue:	Twizel and Christchurch
Hearing:	16 to 20, 23 and 24 August 2010 (Site inspections 30-31 August, 1-2 September 2010, 17 and 18 October 2011)
Appearances:	A Schulte for Mount Gerald Station Limited C P Thomsen for Mackenzie Properties Limited J Maassen for Meridian Energy Limited J Gallen for Federated Farmers of New Zealand (Incorporated), Mackenzie Branch and for The Wolds Station Limited A J Prebble and A J Schulte for Fountainblue Limited, Pukaki Downs Tourism Holdings Partnership and Southern Serenity Limited A Thomas for Haldon Station Limited J G Hardie and D Caldwell for Mackenzie District Council S Newall for New Zealand Transport Agency (section 274 party)
Date of Decision:	12 December 2011
Date of Issue:	14 December 2011

FIRST (INTERIM) DECISION

A: In respect of the general rural zone landscape objective [Objective 3 in section 7 of the operative district plan]:

(1) the Mackenzie District Council is to choose by Friday 30 March 2012 whether it wishes that objective to commence:



"Objective 3A Landscape Values
"Protection of the outstanding landscape values ..."

or

"Objective 3A Landscape Values"
"Protection of the natural character of the landscape ..."

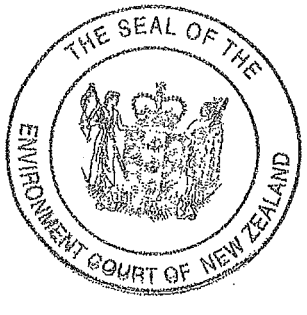
(2) and, if the Council chooses the latter, it should lodge with the Registrar and serve on the parties an application under section 293 of the Act in respect of the change to the operative district plan; or
(3) if the Council wishes Rural Objective 3A to remain the same (outside the Mackenzie Basin subzone) as it is in the operative district plan, then it should advise the Registrar and parties accordingly and that will be recorded in the Environment Court's final decision.

B: In respect of section 293 of the Resource Management Act 1991:

(1) if any party wishes to make submissions to the court on the interpretation of the section or on the exercise of our discretion under that section, they must give notice summarising the argument(s) to be made in writing to the Registrar by 29 February 2012 (and serve copies on all other parties);
(2) if notice is given under (1) all subsequent orders will be suspended until the parties have been heard on section 293 by the court and a decision issued.

C: Leave is reserved until 30 March 2012 to:

(1) Meridian Energy Limited to apply to the Environment Court to remedy any omission from the matters raised under its appeal or to correct any inconsistency in the court's interim decision in relation to the issues raised by Meridian;
(2) any of the owners or lessees of land which contain farm base areas affected by Meridian's flood hazard areas to apply for one or more alternative farm base areas to be approved;
(3) the owners of Ferintosh, Haldon and Mt Gerald Stations or any appellant who sought such relief in their notice of appeal to apply for one or more extra or alternative farm base areas on their lands;
(4) (in respect of wilding exotics in the Mackenzie Basin subzone) any party to lodge and serve written submissions on:
    (a) the legal analysis in the Reasons of the effects of other legislation and the Canterbury Regional Pest Strategy;



(b) the implications of that submission for the evidence and on the findings by the court;
(c) whether or not the court should exercise its powers under section 293 to settle:
(a) rules in respect of wilding control;
(b) areas where ETS forests would be acceptable;
– in the operative district plan in respect of wilding spread;
(d) whether the court should hear further evidence on these issues;

(5) to any:
(a) appellant to apply to the court to deal with any relief claimed in its appeal, not abandoned at, or before, the hearing (subject to the identified exceptions in the Reasons, for example in respect of farm base areas) and overlooked by the court in the other orders;
(b) party to seek that the court resolve any ambiguity or error in the decision;
(c) party to apply to amend or vary any of the other directions in Orders C to K if more time is reasonably needed or for other good reason.

D: Under section 293 of the Act the Mackenzie District Council is directed:

(1) to draw up a topographical map or maps ("the 2012 landscape map") incorporating:
(a) the scenic viewing areas and lakeside protection areas shown in the Mackenzie District Plan as amended by these orders;
(b) the areas of low and medium visual vulnerability as shown in Map 3 (annexed to this decision) together with any amendments the Council considers should be made;
(c) the flood hazard areas identified by Meridian Energy Limited and showing:
(d) the farm base areas provisionally confirmed or approved in this interim decision;
(e) Mr G H Densem's understanding, as landscape architect engaged by the Council, of the Scenic Grasslands provisionally identified under this interim decision and of any improvements or extensions he wishes to suggest as, in his expert opinion, achieving the aim of policy 3B/8;
(f) the "residential" and tourism subzones provisionally approved in this interim decision.

(2) to lodge the map prepared under (1) with the court for provisional approval as to accuracy, completeness and legibility by 30 March 2012.

E: Under section 293(1) of the RMA the court directs:

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(1) the Mackenzie District Council shall prepare a complete draft set of objectives, policies and methods of implementation (including rules and definitions) in accordance with this interim decision, and to lodge this document (together with a cross-referencing to the paragraphs in the Reasons for this decision) with the Registrar by 18 May 2012 (serving copies on the parties).

(2) the Mackenzie District Council is to consult under section 293(1)(b) of the RMA with:

- the parties to this proceeding;
- Te Runanga O Ngai Tahu;
- the Commissioner for Crown Lands ;
- the Department of Conservation;
- the Waimate District Council about exotic forestry near boundaries with that district;
- any other person it considers appropriate;

– about the 2012 landscape map and the draft objectives, policies and rules (together called "PC13(2012)") prepared as a response to this decision;

(3) by Friday 27 July 2012 or such later date as is approved by the court the Mackenzie District Council shall lodge for approval by the Environment Court and serve on the parties a draft public notice which:

(a) introduces the 2012 landscape map and explaining briefly the amended objectives, policies and rules in the PC13(2012) and the changes for which approval is sought by the Council as a result of consultation;

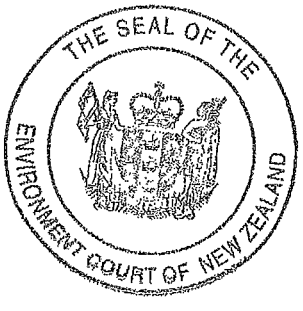
(b) invites any person who considers they qualify under section 274 of the RMA and wishes to call new or further evidence (without limitation other than relevance but especially on any potential ecological effects not considered by the court) on any issue to:

(i) apply for leave to lodge a late notice under section 274 with the Registrar of the Environment Court at P O Box 2069, Christchurch;

(ii) serve the application on the Mackenzie District Council at 53 Main Street, Fairlie 7925 Fairlie by (a date to be settled);

(iii) serve a copy of the application on the persons named in the public notice (being the appellants and existing section 274 parties to these proceedings):

(c) explaining that after receiving the notices and considering any applications to become a section 274 party) the Environment Court will hold a judicial conference to arrange a further hearing into the



relevant issues raised by the parties or the (allowed) section 274 parties before finalising the objectives, policies and rules of PC13;

(4) any party who wishes to make submissions on the form or contents of the public notice and on whether it meets the directions in these orders may lodge a written submission with the Registrar within ten working days of service of the draft public notice on them.

F: If any party wishes to:

(1) be heard on the 2012 map and on PC13(2012) and/or

(2) (in due course) oppose any application to become a party under section 274

– they must lodge and serve a notice of opposition within ten working days of receipt of the relevant application, specifying the grounds of opposition or the changes they consider should be made.

G: By consent the court directs the lakeside protection areas shown in the operative district plan are to be amended on the western side of Lake Pukaki as agreed between the parties to appeal ENV-2009-CHC-190.

H: The court directs that:

(1) the parties to the appeals by Mackenzie Properties Limited (ENV-2009-CHC-183), Fountainblue Limited and its co-appellants (ENV-2009-CHC-190) are to confer about and prepare a complete set of subzone rules for rural-residential subzones on the Ohau River Block and Pukaki Downs respectively as set out in Part 7 of this Interim Decision;

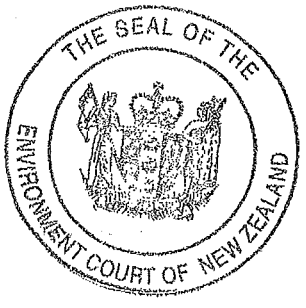
(2) similarly Fountainblue Limited and its co-appellants are to confer with the Mackenzie District Council about and prepare a complete set of subzone rules based on Mr C Vivian's Exhibit CV1 for a tourist accommodation subzone(s) on Pukaki Downs as set out in Part 7 of this decision;

(3) failing agreement on these sub-subzones by 30 April 2012 leave is reserved to any party to apply to the court for directions as to how to settle the subzone rules.

I: Under section 292 of the Resource Management Act 1991 the Environment Court directs:

(1) that in Utilities Rules at p. 15-7 the first unnumbered rule shall be amended by the **substitution of "15" for "14"** so that it reads (strike-out shown):

> The rules contained in this part of section ~~14~~ 15 take precedence over any other rules that may apply to utilities in the District Plan, unless specifically stated to the contrary;



(2) that Schedule A1 para "Activities" be amended so that in the second paragraph the word "or" is substituted for "of" so that it reads (strike-through shown):

> In terms of this schedule the word "Significant" shall have the meaning of : Any modification or addition which results in more than 20 m2 of additional land being utilised ... ~~of~~ or the height of any existing building being increased by more than 2.5 metres".

– unless the Mackenzie District Council or any other party gives notice (specifying grounds) objecting to that course of action by 29 February 2012.

J: (1) Subject to (2), all issues relating to Assessment Criteria in the rules are adjourned, pending resolution of the matters in the orders above, however

(2) the parties are invited to resolve these in the light of the Court's interim decision if they feel able to.

K: The Mackenzie District Council is:

(1) directed to lodge and serve an affidavit by an authorised officer or agent by 29 February 2012 as to what steps the Council has taken to review rule (7)12.1.1.g (Clearance of) Short Tussock Grasslands; and

(2) requested, if it considers the information is relevant, and if the Council is part of the focus group referred to in Part 8 of this decision, to lodge an affidavit detailing what its terms of reference and procedure are, and when (if) a relevant outcome is likely from its deliberations

– by 29 February 2012.

L: Costs are reserved.

REASONS

Maps

Table of Contents

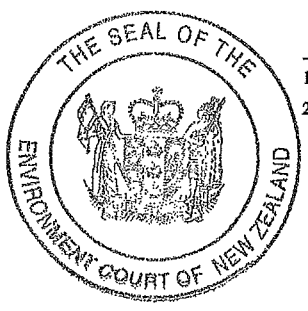
1. Introduction

1.1 Sustainable management of the Mackenzie Basin's landscape(s)

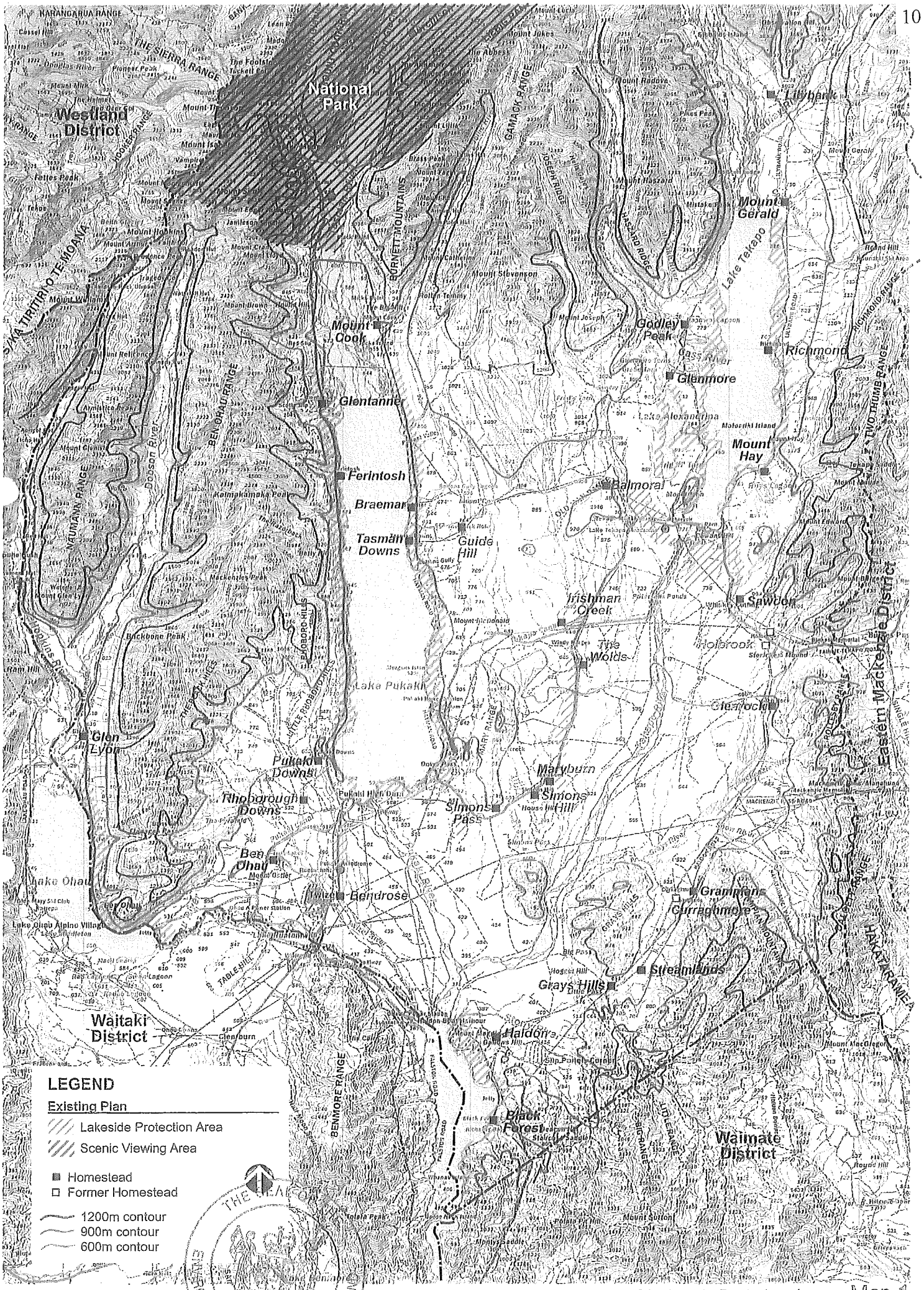
[1] Enabling farmers, tourism operators, hydro-electric generators and the wider community including Ngai Tahu as tangata whenua, and visitors to the district to provide for their wellbeing, health and safety while appropriately avoiding, remedying and mitigating adverse effects on the landscape(s) of the Mackenzie Basin is the issue for these proceedings about Plan Change 13 to the Mackenzie District Plan.

[2] In fact, these proceedings under the Resource Management Act 1991 ("the Act" or "the RMA") are not about the whole of the Mackenzie Basin if that is thought of as including a lower southern area centred on Omarama within the Waitaki District. Rather, the proceedings are about the landscapes of the northern and higher part of the Mackenzie Basin from Te Kopi o Opihi/Burkes Pass to Twizel. That is the part of the basin within the Mackenzie District[1] and which we will call "the Mackenzie Basin" for the purpose of these proceedings. The Mackenzie Basin is as shown in Map 1 "Mackenzie Basin, Topography, Boundaries" on the next page[2].

[3] The appeals are about Plan Change 13 to the Mackenzie District Plan. The most important issues for the court to resolve are:



1 Shown in Appendix E to the Mackenzie District Plan.
2 This is map 1 attached to Annexure "3" to the evidence-in-chief of the landscape architect, Mr G H Densem [Environment Court document 3].



Mackenzie Basin Landscape Map 1

MACKENZIE BASIN, TOPOGRAPHY, BOUNDARIES

December 2007

(1) how is the Mackenzie Basin changing?
(2) is the whole Mackenzie Basin an outstanding natural landscape[3]? or are there different landscapes in the Basin?
(3) what should be the landscape objectives and policies in the district plan for the Mackenzie Basin's landscape(s)?
(4) in particular what objectives and policies should apply to buildings and structures in the Basin?
(5) should there be additional new residential type zones?
(6) what other methods should be used for implementing those objectives and policies?

There are more specific issues arising out of those which we identify later.

1.2 The notification, submissions on and hearing of Plan Change 13

[4] Proposed Plan Change 13 ("PC13") was publicly notified by the Mackenzie District Council on 19 December 2007. The public notice of PC13 stated[4] (relevantly):

> **PUBLIC NOTICE OF PROPOSED CHANGE 13**
> **(RURAL ZONE – MACKENZIE BASIN)**
> **TO THE MACKENZIE DISTRICT PLAN**
>
> CLAUSE 5 OF THE FIRST SCHEDULE OF THE RESOURCE MANAGEMENT ACT 1991
>
> The Mackenzie District Council has prepared Proposed Plan Change 13 Rural Zone – Mackenzie Basin to the Mackenzie District Plan. The primary purpose of this Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use. To achieve this greater acknowledgement of outstanding natural landscapes and features within the District is provided through objectives, policies and rules, particularly as they apply to the Mackenzie Basin.
>
> A new rural residential zone is created for the Manuka Terrace area that lies between the Ohau Canal and Lake Ohau, which recognises recent subdivision of this area into large residential lots. The Plan Change also addresses a number of minor matters and errors and omissions in the subdivision and transportation rules including a limitation on the number of lots that can be served by private rights-of-way and the method of calculating reserve contribution credits.
>
> The main provisions of this Change are set out below:
>
> Rural Issues, Objectives and Policies
> - Split existing Objective 3 Landscape Values into Objective 3A, which focuses on outstanding natural landscapes, and Objective 3B, which deals with general landscape values across the District.
> - New policies to support Objective 3A with residential use and subdivision generally being limited to either existing towns or existing clusters of building usually associated with

3 Within the meaning of section 6(b) of the RMA.
4 Environment Court document 2A.

homesteads. Provision is also made for the establishment of new clusters where they meet stringent standards and have the ability to replicate existing clusters or nodes.

Rural Zone Rules

- Establishing a new Mackenzie Basin Subzone within the existing Rural Zone.
- Identify existing building nodes on maps and provide for the establishment of new building nodes and extension of existing building nodes as a discretionary activity within the Mackenzie Basin Subzone.
- Generally limit buildings and subdivision to within existing or approved building nodes, with all non-farm buildings within nodes being restricted discretionary activities.
- Provide for remote non-farming buildings outside nodes as a Controlled Activity.
- Controlling larger scale earthworks whether or not the earthworks are part of building node development or subdivision.
- Create a new Rural Residential – Manuka Terrace Zone with a maximum building density of one residential unit and minor unit per 4ha, and with control over earthworks, servicing and the external appearance of buildings.
- Delete Lakeside Protection Areas.

Subdivision rules

- Provide as a discretionary activity subdivision with a minimum allotment area of 200ha within the Mackenzie Basin Subzone (but with no provision for building within such a lot).

...

Miscellaneous Amendments

- Requiring access to subdivisions of more than 6 lots to be by way of road and not private way or access lot.
- Amend the calculation method for contributions towards open space and recreation to clarify that the credit for underlying lots is determined by deducting the number of underlying lots from the total number of new lots created.

...

[5] The primary objective introduced by PC13 is[5] "To protect and sustain the outstanding natural landscapes and features of the district". Oddly, the objective does not say where those landscapes (plural) are within the district. The specificity is added by the first implementing policy which is[6] "to recognise the Mackenzie Basin as an outstanding natural landscape and ... to protect the Basin from inappropriate subdivision, use and development ...". The issues to be dealt with in the plan by the addition of PC13 are identified as[7]:

- "rural lifestyle ... and rural residential development ... [which is] too extensive or in the wrong location ...";
- subdivision "... result[ing] in the loss of the former high country ethos and landscape pattern";
- "... more intensive use of the remaining farmed areas" especially with the "... freeholding of former pastoral lease land";
- "... loss or degradation of views from the ... tourist highways";

5 PC13 as notified p. 5.
6 PC13 as notified p. 5.
7 PC13 as notified p. 4.

- "... the extent to which additional irrigation will 'green' the Basin and change land use patterns".

[6] Many submissions on PC13 were lodged with the Council. A summary of the submissions was notified on 3 May 2008 and the closing date for further submissions was 30 May 2008. Commissioners[8] appointed by the Council conducted a hearing of the submissions in September and November 2008. A further hearing was held on 22 May 2009. The Commissioners' succinct decision on PC13 was released on 5 September 2009. However, it left for the future, the identification of any outstanding natural landscapes within the Mackenzie Basin. That is usually an error[9] – see *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* where the court held that it was mandatory to recognise the matters of national importance, and that required identification of "... the boundaries of the areas concerned". There will be few exceptions to that principle.

[7] Other outcomes of the decision on PC13 were:

- to allow some development within what were called "nodes" in the notified change but were renamed as "farm base areas" albeit rather expanded in some cases from traditional farm base areas;
- outside of farm base areas, making all farm buildings controlled activities, non-farming buildings discretionary activities, subdivision for farming purposes restricted discretionary, and subdivision for non-farming purposes discretionary;
- including residential units and accommodation for farm workers and their families in the definition of farm buildings;
- to make specific provision for farm retirement dwellings;
- reintroducing the lakeside protection areas with non-complying status for buildings and subdivision;
- removal of areas to the west and south of Twizel from the Mackenzie Basin subzone. This last matter was not appealed. We record that the Council has since notified and issued a decision[10] on its Plan Change 15 relating to these areas. There has been no appeal on that decision so it is not before us. We comment on its relevance later when considering the area around Twizel.

[8] There are three relevant versions of PC13 for us to consider:

- PC13 as notified – we will abbreviate this to "PC13(N)";
- PC13 as in the Commissioners' version – abbreviated to "PC13(C)";

8 Commissioners D W Collins, G Page and E Williams.

9 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 at para [56].

10 Memorandum of Mr Caldwell, counsel for the Council, dated 17 August 2011.

- PC13 as agreed by most of the parties (except for the appellant Federated Farmers of New Zealand (Incorporated) Mackenzie Branch) which we will call "PC13(V)"[11].

1.3 The appeals, the parties and the evidence

[9] Ten appeals were lodged with the Registrar. Seven appellants appeared at the hearing. The appeal by High Country Rosehip Orchards Limited and Mackenzie Lifestyle Limited (ENV-2009-CHC-175) was withdrawn, as was the appeal by Aoraki Trust Lands Limited (ENV-2009-CHC-182)[12]. However, for tactical reasons relating to jurisdiction, Mackenzie Properties Limited as a section 274 party to the appeal by Rosehip requested that the former appeal (ENV-2009-CHC-175) be kept alive *pro forma*. The appeal by R, R and S Preston and Rhoborough Downs Limited (ENV-2009-CHC-191) was the subject of a consent memorandum[13] between the appellants and the Council. We will consider that memorandum – which give site-specific solutions to the issues raised – when we come to consider individual properties later. The appeal by Mt Gerald Station Limited ("Mt Gerald")[14] was withdrawn[15] in all respects except for the request for a further farm base area of about seven hectares on a sloping terrace above Lake Tekapo and south of the existing homestead and Coal River. The general appeal by Fountainblue Limited and others together called "Pukaki Downs" (ENV-2009-CHC-190) challenging PC13 in its entirety was kept open for jurisdictional purposes. In other words, as we understood Mr Prebble, counsel for Pukaki Downs[16], it only maintained its challenge to PC13 so as to maximise the court's powers in respect of Fountainblue's wish to have a rural-residential and tourism zone(s) on different parts of its land. It may, of course, also enable other changes to PC13 if we consider those are appropriate. The appeal by Meridian Energy Limited ("Meridian") has to protect its interests in the Waitaki power scheme.

[10] Most of the appellants were section 274 parties on other appeals. There were also a number of independent section 274 parties, although most of them withdrew before the hearing commenced. Counsel for the New Zealand Transport Agency, a section 274 party, was given leave to withdraw since it intended to take no further part in the proceedings (consequent upon the withdrawal of the High Country Rosehip appeal). A number of other section 274 parties which had served evidence – Simons Hill Limited, Simons Pass Limited, Pukaki Irrigation Company Limited, Lone Star Farms Limited and Star Holdings Limited – gave notice of withdrawals on 13 August 2010, immediately before the start of the hearing.

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11 It was produced by a planning witness, Mr C Vivian, as his annexure "D" [Environment Court document 25].

12 Withdrawn by notice dated 26 July 2010.

13 Environment Court document 29A.

14 ENV-2009-CHC-181.

15 Mr Schulte's submissions para 5.

16 Mr Prebble's submissions [Environment Court document 21] as amplified orally – see the Transcript at pp 468 to 470.

[11] The remaining appeals by the named appellants raise issues about:

- the existence and extent of outstanding natural landscapes within the Mackenzie Basin subzone;
- the Rural objective(s) as to landscape;
- the implementing policies and landscape;
- hazard provisions;
- some of the implementing rules in section 7 of the district plan, especially in relation to reflectivity and wilding trees;
- land use practices and sustainability;
- specific farm base areas and/or rules;
- proposed new Rural-Residential and Tourist Resort zones.

The evidence

[12] Most of the evidence called by the parties was lodged with the Registrar, served by each party on the others, pre-read by the court's members, and entered into the court's records in the normal way when the witness produced and confirmed it on affirmation (or oath). The evidence was then tested by those parties who wished to cross-examine the witness, or by questions from the court. Some evidence was entered on the record without opposition[17] when no party wished to cross-examine the witness.

[13] Exceptionally, after the hearing we have had (provisional) regard to[18] some further evidence and information which has not yet been tested. Since this decision is interim an opportunity to do so will be given to any concerned party. We now outline the evidence and information we have referred to. First at the end of the hearing we asked for further evidence from Mr G H Densem, the landscape architect called by the Mackenzie District Council. On 8 September 2010 Mr Densem lodged and served with the Registrar a further statement of evidence[19]. We treat this evidence with caution because apart from the fact that none of the parties have had the chance to test its accuracy in court, it was prepared at the time of the first Canterbury earthquakes and so Mr Densem recorded that it had not been checked by him.

[14] Second we have entered the statement of Mr D A Fastier onto the record[20] despite the fact that the appellant for whom he lodged and served evidence withdrew its appeal at the last minute, and Mr Fastier did not enter the witness box to produce it. Mr Fastier is a director of Simons Hill Station Limited and has, for the last 16 years, been a farmer of this land with his partner and his son. We had read his evidence in preparation for the hearing[21]. Our grounds for referring to his evidence are first that his

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17 E.g. that of an ecologist, Dr K M Lloyd, called by the Council [Environment Court document 13].

18 Under section 276 of the RMA.

19 Environment Court document 32.

20 As Environment Court document 35.

21 Briefs were also lodged by experts (Mr C R Glasson, a landscape architect and Mr M J G Garland, a resource manager). We have not re-read these, but copies are on the court file.

evidence about Simons Hill and Simons Pass Stations is relevant, second it is the best evidence available about those stations, third we doubt if any party would object to it, fourth it reads as the statement of someone who has worked with and cared for "his" part of the Mackenzie Basin for some time and is acutely aware of the problems the land faces; and fifth it is a relatively careful and considered statement which is not obviously self-serving. Naturally, any of the facts we recite in reliance on Mr Fastier's statement may be challenged by any of the parties to these proceedings before we come to our final decision.

[15] Third there are a number of references in the evidence of Dr K M Lloyd, an ecologist called by the Council, to a report from the Parliamentary Commissioner for the Environment (Dr J Wright) called "Change in the high country : Environmental stewardship and tenure review"[22]. This was not produced as an exhibit. We record that because of its general relevance to high country issues in the South Island some of the court's members have read it. We have not relied on it in any way in coming to this decision except negatively : it reminds us that we received minimal ecological evidence and so we should reserve leave for any party to call such evidence if they wish to.

[16] Since the map of Mackenzie Basin stations produced to us[23] is quite out of date (it is dated September 2006) we have referred to the Land Information New Zealand website to ascertain which stations in the Mackenzie Basin are still crown pastoral leases. Naturally any of our statements about these may be put right if a party shows it is wrong (and relevant).

[17] Finally, we have referred to a geological map[24] for fundamental geological information; and to topological maps[25] for general information although through oversight only one of these – Dover Pass – was produced as an Exhibit[26].

1.4 Legal issues

The pre-2009 version of the RMA

[18] As a preliminary point we record that the parties agreed[27] that these appeals should be resolved under the Resource Management Act 1991 in its form prior to the Resource Management Amendment Act 2009. That is because PC13 was notified in 2007, well before the 2009 Amendment came into force.

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22 "Change in the high country : Environmental stewardship and tenure review" Parliamentary Commissioner for the Environment, April 2009.

23 G H Densem, Exhibit 28.1.

24 IGNS (2007) Map 15 Aoraki.

25 New Zealand Topo 50 maps -BY16 (Mount Stevenson), -BY17 (Lake Tekapo), -BZ15 (Twizel), -BZ16 (Dover Pass) and -BZ17 (Te Kopi o Opihi/Burkes Pass).

26 Exhibit 16.2.

27 Transcript p. 470.

Matters to be considered

[19] Because these proceedings are about a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[28] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. We now amend the list to reflect the changes made by the Resource Management Amendment Act 2005. The different legal standards to be applied are emphasised, and we have underlined the changes[29] and additions since *Long Bay* (but before the 2009 amendments):

A. General requirements

1. A district plan (change) should be designed to **accord with**[30], and assist the territorial authority **to carry out** – its functions[31] so as to achieve, the purpose of the Act[32].
2. When preparing its district plan (change) the territorial authority **must give effect to** any national policy statement or New Zealand Coast Policy Statement[33].
3. When preparing its district plan (change) the territorial authority shall:
   (a) **have regard to** any proposed regional policy statement[34];
   (b) **give effect to** any operative regional policy statement[35].
4. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent with** an operative regional plan for any matter specified in section 30(1) or a water conservation order[36]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[37];
5. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[38]; and to consistency with plans and proposed plans of adjacent territorial authorities[39];
   - **take into account** any relevant planning document recognised by an iwi authority; and
   - not have regard to trade competition[40];

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28 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

29 Except in A5 below where "not" was already underlined in *Long Bay*.

30 Section 74(1) of the Act.

31 As described in section 31 of the Act.

32 Sections 72 and 74(1) of the Act.

33 Section 75(3)(a) and (b) of the Act.

34 Section 74(2) of the Act.

35 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

36 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

37 Section 74(2)(a) of the Act.

38 Section 74(2)(b) of the Act.

39 Section 74(2)(b) of the Act.

40 Section 74(3) of the Act.

6. The district plan (change) must be prepared **in accordance with** any regulation[41] (there are none at present) and any direction given by the Minister for the Environment[42];
7. The formal requirement that a district plan (change) must[43] also state its objectives, policies and the rules (if any) and may[44] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[45].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[46];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives[47] of the district plan:
    (a) **taking into account**:
        (i) the benefits and costs of the proposed policies and methods (including rules); and
        (ii) 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[48]; and
    (b) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[49].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[50].
12. There are special provisions for rules about contaminated land[51].
13. There must be no blanket rules about felling of trees[52] in any urban environment[53].

E. Other statutes:

14. Finally territorial authorities may be required to comply with other statutes.

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41 Section 74(1) of the Act.
42 Section 74(1) of the Act [added by section 45(1) Resource Management Amendment Act 2005].
43 Section 75(1) of the Act.
44 Section 75(2) of the Act.
45 Section 32(3)(a) of the Act.
46 Section 75(1)(b) and (c) of the Act (also section 76(1)).
47 Section 32(3)(a) of the Act.
48 Section 32(4) of the Act.
49 Section 32(3A) of the Act [added by section 13(3) Resource Management Amendment Act 2005].
50 Section 76(3) of the Act.
51 Section 76(5) of the RMA [as added by section 47 Resource Management Amendment Act 2005].
52 Section 76(4A) of the RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. Strictly, there can be such rules but they will be revoked by section 76(4A) as from 1 January 2012.
53 Section 76(4B) of the RMA.

F. (On Appeal)

15. On appeal[54] the Environment Court must **have regard to** one additional matter – the decision of the territorial authority[55].

[20] From A above items A1, A3(b) , A5 and A7 are relevant. As for A1 : it is expressly within the prescribed functions of the Council to control[56] the actual or potential effects of the use, development and protection of land by establishing and implementing[57] objectives, policies and rules. We outline the relevant provisions in the operative regional policy statement next. We consider B for objectives below and then the policies and rules under C and D. With one possible exception, E (Other statutes) is only peripherally relevant and each such statute will be discussed in the context it arises in. The exception is the Climate Change Response Act 2002 together with subsequent amendments to that statute. We discuss this later. Finally, in relation to F: we have regard to the Commissioners' decision during the course of this decision as we consider each issue (if the Commissioners had considered it). However, we will also bear in mind that, probably owing to the pressure of time in which to reflect and make a decision, the Hearing Commissioners failed in a primary task which was to require whether any or all of the Mackenzie sub-zone is or is not an outstanding natural landscape. In our view that failure then colours most of their subsequent determinations.

The Canterbury Regional Policy Statement

[21] Turning to A3 in the list above : we must give effect to any operative regional policy statement. In this case it is the Canterbury Regional Policy Statement ("the RPS")[58]. In Chapter 8 of the RPS there is a slightly confusing objective for the region which is[59] to protect or enhance the natural landscapes and features "that contribute to Canterbury's distinctive character and sense of identity, including their associated ecological, cultural, recreational and amenity values". The objective is puzzling because it does not refer to outstanding natural landscapes (or features) but to those landscapes which contribute to Canterbury's distinctive character and sense of identity, without actually saying what the latter are.

[22] The implementing policy in the RPS reads[60]:

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54 Under section 290 and Clause 14 of the First Schedule to the Act.

55 Section 290A of the RMA as added by the Resource Management Amendment Act 2005.

56 Section 31(b) of the RMA.

57 Section 31(a) of the RMA.

58 A proposed replacement regional policy statement has been notified in 2011 but we do not refer to that. All references in this decision are to the operative regional policy statement.

59 Objective 8/2 CRPS pp. 106-107.

60 Policy 8/3 CRPS p. 107.

Policy 3
Natural features and landscapes that meet the relevant criteria of sub-chapter 20.4(1) should be protected from adverse effects of the use, development, or protection of natural and physical resources, and their enhancement should be promoted. Activities that may have adverse effects include those involving the clearance or modification of areas of indigenous vegetation (particularly tall tussock), earthworks, alteration to landforms, tree planting, or the erection of structures.

The particular sensitivity of these natural features and landscapes to regionally significant adverse effects in terms of sub-chapter 20.4(2) should be reflected in the provisions of district plans in the region.

Assessments of effects should be made by considering:
(i) aesthetic values;
(ii) expressiveness;
(iii) transitory value;
(iv) natural science factors.

[23] Sub-chapter 20.4(1) specifies that a matter is of regional significance[61] when it concerns[62] (relevantly):

> (e) Landscapes and natural features that are distinctive, unique to, characteristic of, or outstanding within the Canterbury region, including the processes that maintain them;
>
> ...
>
> In identifying ... landscapes and natural features, factors to be considered include whether a site, place or area is:
> (i) Identified as being a regionally outstanding landscape or natural feature in the Canterbury Regional Landscape Study;
> (ii) A geopreservation site of regional significance and/or identified in the Geopreservation Inventory of the New Zealand Geological Society;
> (iii) An area identified as an Area of Significant Conservation Value;
> (iv) An area identified as a Recommended Area for Protection in a Protected Natural Areas Report; or
> (v) In the sub-alpine or alpine zone.
>
> The fact that a particular site, place, or area is listed above will not necessarily mean that the site, place, or area is of regional significance. The Regional Council or other parties should take criteria (a) to (k) into account together with other relevant considerations, in deciding whether or not a site, place, or area is of regional significance. **It is acknowledged that some site information in data bases may have changed or contain inaccuracies and may require verification.**

That document refers to the Canterbury Regional Landscape Study (1993) which assessed[63] the flat areas, lakes and areas with National Parks as "Regionally Outstanding Landscapes" but other hills and mountains as merely "Regionally Significant Landscapes". We accept Mr Densem's criticism[64] of that study as making too sharp a

61 RPS p. 287.
62 RPS p. 289.
63 G H Densem, evidence 13 May 2010 para 2.18 [Environment Court document 3].
64 G H Densem, evidence 13 May 2010 para 2.20 [Environment Court document 3].

distinction between the mountains and the plains, and that in reality they have high "visual coherence"[65]. Further, at the hearing we received copies of an updated study[66] from Dr Y Pflüger, a landscape architect called by the Council, which we will refer to when considering the landscape(s) of the Mackenzie Basin.

[24] Relevant under A5 is the Canterbury Regional Pest Management Strategy[67]. In fact, a new version[68] of this came into effect on 1 July 2011 while we were writing this decision and we will refer to it in due course because of its direct relevance.

The RMA binds the Crown – with some exceptions

[25] Another preliminary legal matter is to note that the RMA binds the Crown generally[69]. However, the Act does not apply to some particular uses of Crown land. Section 4 states (relevantly):

> **4. Act to bind the Crown**
>
> (1) This Act binds the Crown, except as provided in this section.
>
> (2) This Act does not apply to any work or activity of the Crown which –
>
> (a) Is a use of land within the meaning of section 9; and
>
> (b) The Minister of Defence certifies is necessary for reasons of national security.
>
> (3) Section 9(3) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 to that Act (other than land held for administrative purposes) that –
>
> (a) Is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in Schedule 1 to that Act; and
>
> (b) Does not have a significant adverse effect beyond the boundary of the area of land.

A large area of red tussock[70] grasslands on the higher downs[71] between Lakes Tekapo and Pukaki is administered by the Ministry of Defence and we assume section 4(2) applies. Further, much of the land north of Lakes Ohau, Pukaki and Tekapo (to the Main Divide) is a National Park and is managed under plans established under the Conservation Act 1987.

When is a submission "on" a plan change?

[26] In relation to various appeals the Mackenzie District Council challenged some of the relief sought as being beyond the jurisdiction of the court. These arguments mostly

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65 G H Densem, evidence 13 May 2010 para 2.22 [Environment Court document 3].
66 CRC Landscape Study 2010 [Environment Court document 4].
67 Prepared under the Biosecurity Act 1993.
68 Canterbury Regional Pest Management Strategy 2011-2015.
69 Section 4(1) of the RMA.
70 *Chionochloa rubra.*
71 The land is identified as "Defence" on Exhibit 28.1.

relied on a claim that the submissions to the Council seeking the relief were not on the subject of PC13 and therefore the relief was *ultra vires* the Council and (on appeal) the Environment Court. We now summarise the important cases cited to us on this issue.

[27] First Mr Hardie, counsel for the Council, referred to the leading authority which is *Clearwater Resort Limited v Christchurch City Council*[72]. In that decision – and we think it makes no difference that the proceedings were concerned with a variation rather than a plan change – William Young J stated[73]:

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation [plan change] changes the pre-existing *status quo*.
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

We respectfully think that the first point being made by William Young J can be elaborated on by observing that a plan change may be narrow or broad and/or at a high or low level. It may involve objectives, policies and methods of implementation, or only policies and/or methods (it is more difficult to change objectives and not policies and/or methods). Then the point of *Clearwater* is that it is the extent to which the variation or plan change differs from the status quo which sets the scope of the plan change. If the proposed change to the plan is minor, then any submission is similarly limited. For example, if a plan change sought only to amend a rule then a submission seeking to change a policy above that rule would not be "fairly and reasonably" on the subject of the plan change, to adopt the words of the Full Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[74].

[28] Mr Hardie also referred to *Avon Hotel Limited v Christchurch City Council*[75] where the court suggested a third test, being "That the submission should not open up for relitigation aspects of the plan which have previously passed the point of challenge". On reflection we consider that is probably just an aspect of *Clearwater's* first point.

[29] More authoritatively, in *Option 5 Incorporated v Marlborough District Council*[76] Ronald Young J agreed with the approach in *Clearwater*. He also stated that the

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72 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, William Young J, 14 March 2003.

73 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, William Young J, 14 March 2003 at para [66].

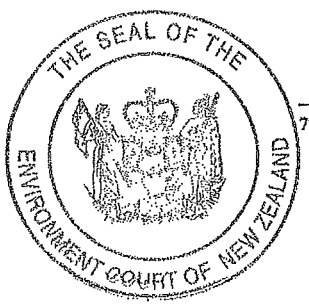
74 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166 where the Full Court held that an amendment to a plan change must not "... go ... beyond what is reasonably and fairly raised in submissions on the plan change".

75 *Avon Hotel Limited v Christchurch City Council* Decision C42/2007.

76 *Option 5 Incorporated v Marlborough District Council* HC Blenheim CIV-2001-406-144, Young J, 28 September 2009.

Environment Court in its decision appealed from was also correct in taking into account the policy behind the variation and the purpose of the variation.

[30] Finally, we accept Mr Hardie's submission that the assessment of whether any amendment sought by a submission as fair and reasonable "... should be approached in a realistic workable fashion rather than from the perspective of legal nicety" using the phrase of Pankhurst J in another High Court decision : *Royal Forest and Bird Protection Society Incorporated v Southland District Council*[77]. We will apply those tests when any relief sought is challenged on this ground.



[77] *Royal Forest and Bird Protection Society Incorporated v Southland District Council* [1997] NZRMA 406 (HC).

2. Descriptions and predictions

2.1 A snapshot of the existing landscape

[31] The district plan[78] identifies the Mackenzie Basin as one of three "... basic landscape units" within the district – the other two being the mountainous chain of the Main Divide, and the farmland east of the Two Thumb, Albury and Dalgety Ranges. Of relevance to these proceedings is the description of[79]:

> The vast tussock grasslands of the **Mackenzie Basin**, enclosed in mountain ranges such as the Ben Ohau, Two Thumb, Hall, Gammack, and Grampian Ranges. The Basin contains the large lakes and canals of the Upper Waitaki Power Development and the townships of Twizel, Mt Cook and Tekapo. The landscapes of these high country areas are vast and spacious with subtle colourings and vegetation patterns, dominated by natural features and extended views. Development in the high country has also been generally unobtrusive with isolated contained settlement and a lack of prominent artificial structures and patterns.
>
> ...

That description is in our view generally accurate. More specifically the basin is a high, dry area surrounded by mountains – it is the largest such inter-montane basin in New Zealand[80]. The floor of the basin is not level. It has a north to south altitudinal gradient – the high point on the State Highway 8 west of Tekapo is approximately at 800 metres above sea level ("masl"), and a low point at Lake Ruataniwha is about 500 masl. There is also a striking rainfall gradient – decreasing from north and west (700 mm/year) to south (less than 450 mm/year). The lower parts of the basin rival Central Otago as being the driest place in New Zealand.

[32] Almost all the floor of the basin is glacial deposits or fluvioglacial outwash deposits. Underlying those Quaternary deposits, the oldest of which are less than 1.8 million years, is late Permian and Triassic bedrock of greywacke[81] interbedded with argillite[82], all about 250 million years old. The underlying greywacke protrudes, forming the Mary Range, Grey Hills and mountains to the east of the Mackenzie Basin. The rock has become increasingly metamorphosed towards the Main Divide – forming semischist and schist.

[33] Landscape characteristics of the Mackenzie Basin were identified[83] by Mr G H Densem, the landscape architect called by the Council. They include long open views[84] over brown grassland, the "dramatic visual backdrop" of the Southern Alps[85] and the

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78 Chapter 7 (Rural Issues).

79 MDP p. 7-10.

80 To the west are the Mauka Atua/Ben Ohau and (hidden behind) Newmann Ranges, to the northwest the Southern Alps including Aoraki/Mt Cook, to the east is the Two Thumb and Rollesby Ranges, and to the south, the Kirkliston and Benmore Ranges.

81 A schistose sandstone : IGNS (2007) Map 15 Aoraki.

82 A siltstone-mudstone : IGNS (2007) Map 15 Aoraki.

83 G H Densem, evidence-in-chief 13 May 2010 para 3.21 [Environment Court document 3].

84 G H Densem, evidence 13 May 2010 para 3.22 [Environment Court document 3].

85 G H Densem, evidence 13 May 2010 para 3.22 [Environment Court document 3].

other encircling peaks and mountains; the grand[86] U-shaped glacial valleys with their blue lakes (Lakes Tekapo and Pukaki), the simple[87] straight lines of the hydro canals and the transmission lines, scattered homesteads and farm bases[88]. The vegetation which creates the golden brown landscape is grass. There are several native tussock species including red tussock[89], hard tussock[90] and snow tussock[91]. Introduced browntop[92] is also widespread. Shelterbelts, plantations and wildings of exotic conifers are scattered through the Basin, and exotic willow and poplar species line many of the larger rivers. We received minimal evidence of the remaining native vegetation and fauna within the Basin. Matagouri and spaniards[93] are obvious in wetter, more fertile areas, but the existence and extent of smaller herbs was not described.

[34] The braided rivers and moraine ponds are important for various native bird species. Most famous is the black stilt which is one of the rarest waders in the world, but other species which live here and are easily observed are black-winged (pied) stilt, south island pied oyster-catcher, double-banded dotterel, and wrybill. The area is also home to black-fronted terns and two gull species, as well as New Zealand falcon and swamp harriers. The habitat of insects and lizards was not described.

[35] Despite the simple immediate perception of a huge brown plain ringed by mountains, areas within the basin vary in their geomorphological, floral and developed characteristics. These areas were described by Mr Densem as different "landscape character areas"[94]. These are shown as Map 2 on the next page : "Landscape Character Areas"[95]. Since the majority of visitors' (and residents') experiences of the Mackenzie Basin as a whole are obtained from State Highway 8, we describe the areas in order that they are seen from that road when travelled from north to south:

1. The Eastern Plain (Mr Densem's "East Basin Landscape Character Area") including the mountains to the east;
2. (Lake) Tekapo[96];
3. The Centre (Irishman and Mary Creeks – south of the Tekapo Canal – and Mt Mary Range – this area is Mr Densem's "Central Basin");
4. The Pukaki River Plain (Mr Densem's "South Basin");

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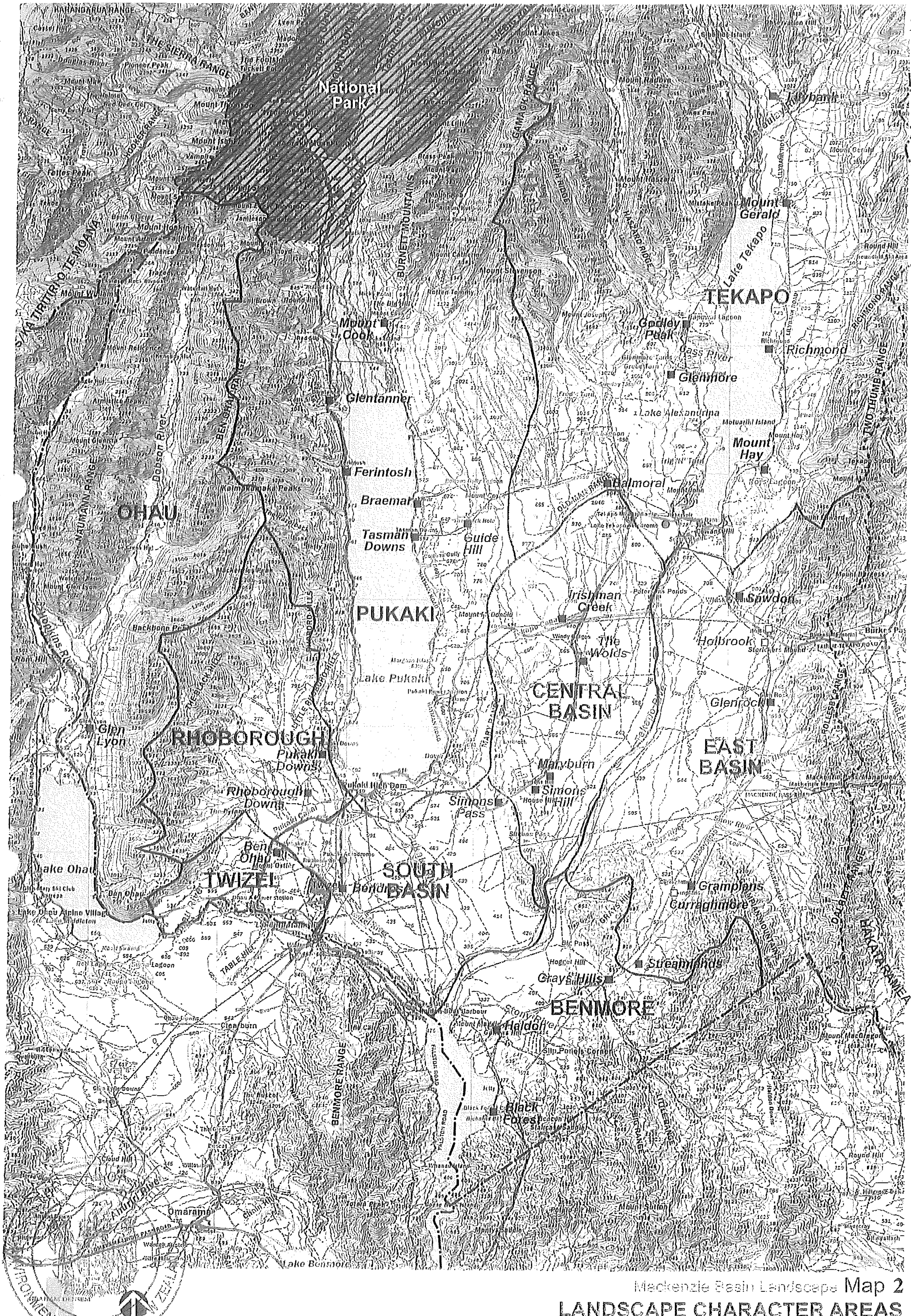
86 G H Densem, evidence 13 May 2010 para 3.22 [Environment Court document 3].
87 G H Densem, evidence 13 May 2010 para 3.22 [Environment Court document 3].
88 G H Densem, evidence 13 May 2010 para 3.22 [Environment Court document 3].
89 *Chionochloa rubra.*
90 *Festuca novaezelandiae.*
91 *Chionochloa rigida.*
92 *Agrostis capillaris.*
93 *Aciphylla* spp.
94 G H Densem, evidence 13 May 2010 Attachment 3 : The Mackenzie Basin Landscape (November 2007) [Environment Court document 3].
95 This is map 4 attached to annexure "3" to the evidence-in-chief of Mr G H Densem [Environment Court document 3].
96 G H Densem, evidence-in-chief photo 1 [Attachment to Environment Court document 2].



Mackenzie Basin Landscape Map 2

LANDSCAPE CHARACTER AREAS

December 2007

5. Pukaki[97];
6. The Twizel River Plain[98] (Mr Densem's "Rhoborough" and "Twizel");
7. The Dobson River Catchment (Mr Densem's "Ohau");
8. Benmore[99].

Some of these areas are only glimpsed from the State Highway (e.g. Te Ao Marama/Lake Benmore) and others are large areas seen at a distance, e.g. most of the Eastern Plains while the Dobson area is not readily visible from within the Mackenzie Basin.

[36] The landscape Issue in the district plan states[100]:

> The landscapes of the District are of significant value to the people who live, work and visit there. Most of this experience of the landscape is gained from within the settlements and the main transport routes. However, an increasing number of people are interested in exploring more remote locations by vehicle or by foot. The high country landscape, in particular, is not only important for its residents and a drawcard for recreation and tourism, it is also part of the identity of New Zealand which can be seen in writings, paintings, songs and advertisements. Many of these landscapes are working landscapes containing farming and forestry elements such as fences, buildings, cultivation, introduced pasture, forestry and livestock. The significance of these elements varies with the intensity of use, the most intensive farming and forestry containing the greatest degree of modification. In many areas these elements constitute the typical rural landscape.

[37] Another relevant passage in the statement of landscape values describes[101]:

> ... the high country [as] a dynamic landscape with ecological changes, including the spread of [hieracium] and wilding trees, and changes as result of agricultural practices, such as shelter planting, ploughing and topdressing. These changes continue to have an impact on the character of the landscape. At the same time there is a growing awareness and appreciation of the many values of largely unmodified areas of the high country. The landscape values of the high country, in particular higher altitude areas, are very sensitive to change by activities, particularly activities involving earthworks, establishment of buildings and structures, the planting of trees and intensification of pastoral and arable use. Changes to indigenous vegetation patterns can also affect the visual qualities of the landscape, as they contribute to the colour, texture and naturalness of an area. The challenge is to find an appropriate balance between land uses and activities and the maintenance of outstanding landscape qualities.

The last sentence largely encapsulates the key issue in these proceedings.

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97 G H Densem, evidence-in-chief photographs 3 and 4 [Attachment to Environment Court document 2].

98 G H Densem, evidence-in-chief photographs 5, 6, 7 and 8 [Attachment to Environment Court document 2].

99 G H Densem, evidence-in-chief photo 10 [Attachment to Environment Court document 2].

100 MDP p. 7-10.

101 MDP p. 7-11.

[38] The statement of issues is not directly changed by PC13, although a new paragraph is added[102] about changes which are affecting the landscape values of the Mackenzie Basin, in particular housing, and the effects of irrigation "greening" the basin.

People in the Mackenzie Basin

[39] As described by Mr Densem[103], many specific areas and landscape features are of cultural significance to Ngai Tahu who are the dominant tangata whenua. These features include trails, archaeological sites, mahinga kai[104] sites, mountains, water and place names (notably Aoraki, Pukaki and Tekapo). Tangibly the visual shafts between the southern shores of the main lakes and the mountains are particularly important[105] to Ngai Tahu to maintain their relationships with those places.

[40] The population of the Mackenzie District was just over 3,800 in the 2006 census although that figure swells over summer. For example, Twizel with a population of a little over 1,000 is reported to treble as holiday homes and camping-grounds fill. We bear in mind that the district has one of the smallest rate-paying populations in the country, so that it is not in a position to fund expensive research into the effects of development, or readily to promote changes to the district plan.

[41] Tourism provides 35% of the employment in the Mackenzie Basin subzone[106]. At 20% the farming, forestry and fishing sector is a distant (but important) second[107]. It is not correct that "Pastoral farming is still the predominant business in the Mackenzie Basin" as stated[108] by Mr J B Murray, a very experienced farmer, owner of The Wolds Station, and Chairman of the Mackenzie Branch of Federated Farmers of New Zealand Incorporated. With respect to Mr Murray, if the importance of business is measured by the number of employees, then clearly tourism is the dominant business of the basin. Or, as we shall see, if importance is rated by the direct contribution to the national economy, that part of the Waitaki hydroelectric power scheme which is within the Mackenzie Basin subzone (we will call this part "the Waitaki Power Scheme") wins hands-down over farming.

[42] However, farming is very important socially and culturally. The Mackenzie Basin contains a number of high country stations[109], some of which – for example Lilybank, Mt Cook, Balmoral, Irishman Creek, Haldon and Black Forest – have become quite famous in New Zealand folklore. An inspection of map 1 shows that a

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102 PC13(N) at p. 4.

103 G H Densem, evidence-in-chief "Cultural Impact Assessment" May 2010 [pp 22 *et ff* of Appendix 2 to Environment Court document 2].

104 Traditional food gathering sites.

105 G H Densem Appendix 2 p. 23 [Environment Court document 3].

106 R A Corbett, evidence-in-chief para 4.1 [Environmental Court document 22].

107 R A Corbett, evidence-in-chief para 4.1 [Environment Court document 22].

108 J B Murray, evidence-in-chief para 10 [Environment Court document 16].

109 The stations are shown on Map "1".

substantial proportion of the Rural zone land is held by a small number of private landowners or lessees under Pastoral Leases. That is important for two reasons : first we are concerned that a disproportionate burden of landscape protection may be borne by a very small number of landowners. What makes that worse is that high country farming is generally an unprofitable activity at present[110]. Secondly, in the opinion of Mr Densem, the existing plan was established with the "leasehold farming system in mind" and tenure review applications under the Crown Pastoral Land Act may change that[111]. The owners of some of the stations are appellants in these proceedings and some are represented by the Mackenzie Branch of Federated Farmers of New Zealand Incorporated which is also an appellant.

[43] Large parts of the Mackenzie Basin are owned by quasi- or public bodies – the Department of Conservation pre-eminently but LINZ, the NZTA and Meridian also hold land in the basin.

Infrastructure : State Highway 80 and the Waitaki power scheme

[44] The basin is divided in two from northeast to southwest by two obvious infrastructure corridors – State Highway 8, and the Tekapo-Pukaki-Ohau canal and power-line systems. State Highway 8 is the only sealed route through the Basin. The road enters the Basin at Te Kopi o Opihi/Burkes Pass and exits at Lake Ruataniwha as the road continues into the Waitaki District and towards Omarama.

[45] The Waitaki valley's hydroelectric power scheme as a whole generates[112] nearly 30% of New Zealand electricity. While extensive, the Waitaki Power Scheme is not large in proportion to the area of the Mackenzie Basin as a whole. Key assets in the (upper) Waitaki Power Scheme are two dams – the Pukaki High Dam and the Ruataniwha Dam, four canals[113], five power stations and the transmission lines. As we have recorded, there is an appeal about PC13 by Meridian, the owner (at the time of the hearing) of most of the infrastructure in the Waitaki Power Scheme. The transmission lines are owned[114] by Transpower, which took no part in the hearing. Meridian's witness, Mr Smales[115], and counsel also emphasised that the Waitaki Power Scheme is a major and ongoing engineering enterprise. It requires maintenance to ensure it continues to run efficiently and indeed to meet resource consent conditions. We will consider the predicted relationships between the Waitaki Power Scheme and both existing and likely new activities in part 2.4 of this decision.

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110 J B Murray, evidence-in-chief para 10 [Environment Court document 16]; A E Tibby, evidence-in-chief [Environment Court document 23].

111 G H Densem, evidence 13 May 2010 Attachment3 : "Landscape Values of the Mackenzie Basin" G H Densem (2007) para 7.2 [Environment Court document 3].

112 Explanation to Policy 11A [Mackenzie District Plan p. 7-38].

113 The Tekapo, Pukaki, Ohau, and Ohau B-C canals: K A Smales, evidence-in-chief Figure 2 [Environment Court document 10].

114 And shown as designations on the district's planning maps.

115 K A Smales, evidence-in-chief para 83 [Environment Court document 10].

[46] These infrastructure corridors have far-reaching consequences in that they have, directly and indirectly, an effect on their containing landscape(s). Further, the road creates the viewing opportunities for many of the visitors to the Mackenzie Basin. It defines what has become an important visual corridor from which the landscape is viewed. Similarly, the canals have changed the hydrological systems – for example, the upper Tekapo River, and the Pukaki and Ohau Rivers have been substantially dewatered (most of the year). No doubt there have been ecological consequences, although we do not know what they are in any detail.

2.2 The changing landscape

[47] In popular perception "the Mackenzie Country" is a land of picture postcard beauty. It is a series of clichés of the picturesque that can still move the viewer : the conifers and tussocks and, in summer, colourful lupin flowers of Te Kopi o Opihi/Burkes Pass; the views north over the sward and lake in front of the cafés and motels at Tekapo, with the Church of the Good Shepherd in the right hand side of the frame; the broad vistas and the encircling brown or 'golden' tussock–covered hills, and later the view up the length of Lake Pukaki to Aoraki/Mt Cook[116]. It has been described as "iconic" and "timeless". In our view the (incorrect[117]) use of the word "iconic" is an attempt to describe the fact that a landscape epitomises or symbolises qualities of a landscape type – "the high country" or simply "the Mackenzie country" – with which many people are familiar and which they admire greatly. Nor is this landscape timeless. The Mackenzie Basin was (probably) mostly forest before humans arrived. There would have been forest in the wetter valleys to the north and west (as in the Dobson and Hopkins Valleys now) and podocarp and broadleaf forest on the plains to the south and east. The Basin has changed much over the last 1,000 years since Maori arrived and the rate of change sped up after James Mackenzie discovered it for Europeans and burning became even more prevalent and exotic grasses and grazing mammals were introduced.

[48] There have also been very significant changes to the Basin as a result of the Waitaki Power Scheme which started in the 1960s. The hotel and settlement at Lake Pukaki was flooded when the outflow was dammed[118] and the lake was raised by 50 metres and as a consequence greatly increased its surface area (and volume). The hotel and settlement at Lake Tekapo was relocated to higher ground, and the new village was commenced. The system of canals was built to move water from Tekapo to the turbines at Pukaki, and then via the Pukaki Canal to the turbines at Lake Ruataniwha. Three transmission lines cross the Basin, and there is a complex web of them south of Twizel.

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116 See G H Densem, evidence-in-chief photographs 11 and 12 [Attachment 1 to Environment Court document 2].

117 It is probably now far too late, and simply pedantic to complain that no landscape is iconic. The very term 'landscape' was originally used to describe a painting of an expansive view. An icon by contrast is properly a painting of a part of a human figure e.g. the Christos Pantokrator of the Eastern Orthodox Church thrown up by a Google search.

118 The Pukaki High Dam.

Again there would have been ecological changes as a result of all these works, but they were not the subject of evidence in these proceedings.

[49] There are a number of other changes[119] to the landscape of the Mackenzie Basin which are continuing, and in some cases accelerating:

(1) increased numbers of buildings;
(2) changes to plant biodiversity – the problem of weeds;
(3) rabbits and other animal pests;
(4) changing land management practices;
(5) soil loss.

We consider these in turn.

Buildings

[50] As PC13's statement of the Issue suggests, one of the primary motivations for the plan change was the proliferation of houses in parts of the Mackenzie Basin – especially around Twizel and near the southwestern corner of Lake Pukaki. After the Commissioners' decision the Council decided to remove the area around Twizel – and especially the area between that town and Lake Ruataniwha – from PC13 and deal with it in a separate plan change. That area is not the subject of this decision. The only remaining issues of residential development which this decision focusses on (later) are:

- residential development on farm base areas;
- farm buildings;
- rural residential blocks;
- visitor accommodation (in a limited way).

Changes to plant biodiversity?

[51] There are questions about the future of the landscape which the Council has recognised but not fully tackled. The golden landscape of myth (principally the golden-brown hard tussock[120] and introduced browntop) is being overwhelmed from three directions – from the south by the dark purple[121] stain of hieracium, and from within by the central spread of irrigated paddocks with green exotic grasses, and from the north by a blanket of dark conifers. Scattered through the basin are various areas of conifers[122], shelter belts and homesteads, shelter and firewood plantings by huts, woodlots for potential timber, experimental plantings in the Ohau and (especially) Tekapo Rivers, and since the Waitaki Power Scheme, amenity planting around the edges of Lake Pukaki. Further, the riverbed of both the two main rivers, totally within the Basin (the Tekapo

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119 G H Densem, evidence-in-chief Attachment 3 : "The Mackenzie Basin Landscape" para 4.1 *et ff* [Environment Court document 3].
120 *Festuca novaezelandiae*.
121 This is seasonal.
122 K M Lloyd, evidence para 25 [Environment Court document 13].

and Pukaki Rivers) is vested in Meridian. Its ownership appears to be defined by parallel private roads either side of the rivers. There are numerous wilding conifers within these riverbeds, especially on the banks of the Pukaki River. The lower Tekapo River also contains considerable areas of willows which appear to have been planted within the last five to ten years.

[52] In respect of vegetation away from the riverbeds a convenient summary of changes in plant distributions within the Mackenzie Basin is given in a paper produced by the Federated Farmers' witness, Mr J B Murray through counsel[123]. In *Influence of pastoral management on plant biodiversity in a depleted short tussock grassland, Mackenzie Basin* the authors wrote[124]:

> Although much of this area was forested prior to human settlement ..., dramatic ecological transformations have occurred with both Polynesian and European settlement ... due to human induced fires, grazing by sheep and cattle, and through the deliberate and accidental introduction of adventive species, resulting in large areas of induced grassland. As a result of these changes it is possible that some of these high country ecosystems are now crossing ecological thresholds that are unlikely to be readily reversed ...

That appears to be especially true of the lower altitude areas, although other areas are also changing quickly.

[53] Mr Fastier wrote that "... with the advent of weeds and especially *Hieracium*, competition for moisture is so severe that the tussock seedlings can not compete and grasslands are unable to recover"[125]. He estimated that on the Pukaki flats (held by Simons Pass and Simons Hill Stations) *Hieracium* cover is approximately 50% of the area[126]. We find that while most of State Highway 8 passes through short tussock grasslands, the lower and drier parts of the basin are a semi-desert of bare ground or introduced weeds – often dominated by hawkweed (chiefly *Hieracium pilosella*).

[54] Conversion of areas of hawkeweed to pasture not only makes the land (potentially) more profitable but also removes the weeds and reduces the number of rabbits. We also understand from our general knowledge of the area that there is some suggestion that several native bird species use cultivated and irrigated pasture in preference to tussock grasslands (where it appears they tend to be confined to the edges

123 As attachments to Mr Gallen's memorandum 27 August 2010 [Environment Court document 30].
124 *Influence of pastoral management on plant biodiversity in a depleted short tussock grassland, Mackenzie Basin* D A Norton, P R Espie, W and J Murray, *New Zealand Journal of Ecology* (2006) 30(3): 335-344 at 335 (Citations omitted) [Environment Court document 30A].
125 D A Fastier, statement 2 July 2010 para 39 [Environment Court document 35].
126 D A Fastier, statement 2 July 2010 para 39 [Environment Court document 35].

of farms and wetlands). We saw black-fronted terns, banded dotterels and South Island Pied Oystercatchers in multiples of ten on cultivated land on Mt Gerald Station during our site inspections.

Wilding conifers

[55] Perhaps the most serious issue is the spread of exotic conifers. Mr Fastier wrote that the scale of the wilding problem is "seldom appreciated"[127] and when describing the Simons Hill clearance work said "... [we] are absolutely staggered at the strike rate of wilding seedlings". He considered that a return to tussock grassland is not going to occur[128] and that if nothing is done on the Pukaki flats "... wilding pine will become the dominant species"[129]. Dr Lloyd, whose brief of evidence[130] for the Council was entered in the record by consent, wrote[131] that in the Parliamentary Commissioner for the Environment's opinion wilding conifers present the greatest weed problem in the South Island high country. The main coniferous species with capacities to spread are: Lodgepole pine (*Pinus contorta*), *Pinus ponderosa*, Corsican pine (*Pinus nigra*), Douglas-fir (*Pseudotsuga menziesii*) and European larch (*Larix decidua*). Dr Lloyd considered[132] that:

> Wilding conifers present a major threat to the sustainable use of extensively-grazed high country lands. They also threaten indigenous vegetation and habitats, particularly montane shrubland and grassland. Left unchecked, wilding trees have the potential to cover much of the Mackenzie District, apart from areas of developed pasture, very dry soils, mountain lands above 2,000 m, and lakes ...

That threat is not unmanaged at present. We understand that pastoral lessees have an obligation to contain wildings under their leases. That is managed in different ways. Stock reduce the rate at which wildings spread - allegedly[133] by up to 90%. Many farmers[134] are making continuous efforts to pull, cut and/or poison wildings on their land. That must be a hard and thankless task, as Mr Densem observed. We understand some government departments, especially the Department of Conservation, contribute workers and/or funds. Everyone who travels through the wide open parts of the Basin should be grateful for the efforts of those individuals and their financial supporters.

[56] Despite those efforts, at present it seems to us that the exotics are winning, conspicuously so on the sides of Lake Pukaki. On three stations at the southern end of the western side – Ferintosh, Pukaki Downs and Rhoborough – there are very extensive areas of mixed exotics. On the northeastern side of Lake Pukaki, Corsican Pine is the

127 D A Fastier, statement 2 July 2010 para 60 [Environment Court document 35].
128 D A Fastier, statement 2 July 2010 paragraphs 34-43 [Environment Court document 35].
129 D A Fastier, statement 2 July 2010 para 44 [Environment Court document 35].
130 Environment Court document 13.
131 K M Lloyd, evidence-in-chief para 16 [Environment Court document 13].
132 K M Lloyd, evidence para 15 [Environment Court document 13].
133 J B Murray, evidence-in-chief para 24 [Environment Court document 16].
134 D A Fastier, statement 2 July 2010 para 58 [Environment Court document 35].

main wilding species in a major infestation on Mount Cook and Braemar Stations[135]. There are various exotics in the margins of Lake Pukaki on what we understand to be Meridian's land. There are signs of some management of those but exotics still appear to be escaping. It is possible that without external assistance, the landscape of the Mackenzie Basin will change irrevocably and become first a coniferous woodland and then, at least in parts, a dense forest (as now along the southwestern edge of Lake Pukaki).

[57] Further, the situation has recently changed again under each Emissions Trading Scheme ("ETS") set up under the Climate Change Response Act 2002 and the Climate Change Response (Emissions Trading) Amendment Act 2008 (together "the Climate Change Response Act") and subsequent regulations. The Climate Change Response Act is very complex. We will try to summarise its relevant provisions. The basic idea is to encourage carbon to be captured by growing trees[136]. A forest owner may register[137] as a participant in an emissions trading scheme to earn carbon credits in respect of defined areas on their land. "Forest land" is defined[138] by the Emissions Trading Act as:

> (a) meaning an area of land of at least 1 hectare that has, or is likely when the forest species[139] reach maturity to have, tree crown cover from forest species of more than 30% in each hectare; and
>
> (b) including an area of land that temporarily does not meet the requirements specified in paragraph (a) because of human intervention or natural causes but that is likely to revert to land that meets the requirements specified in paragraph (a); but
>
> (c) ... not including:
>
> (i) a shelter belt of forest species, where the tree crown cover at maturity has, or is likely to have, an average width of less than 30 metres; or
>
> (ii) an area of land where the forest species have, or are likely to have, a tree crown cover at maturity of an average width of less than 30 metres, unless the area is contiguous with land that meets the requirements specified in paragraph (a) or (b).

[58] In an apparent example of the law of unintended consequences the possibility of an ETS can act as an incentive to a farmer to encourage the spread of wildings as regeneration which takes up carbon. That is because the ETS allows (in its present form) any post-1989 forest to earn carbon credits. All a farmer needs to do is to let the wildings spread until two minimum conditions are met : a coverage of 30% by trees, and total coverage of at least one hectare. Then, as we (imperfectly) understand the scheme the farmer contacts the scheme's administrator – from December 2011 this will be the

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135 K M Lloyd, evidence-in-chief para 34 [Environment Court document 13].

136 There are problems when the trees die, which we need not go into here.

137 Section 188 of the Emissions Trading Act.

138 Climate Change Response (Emission Trading) Amendment Act Section 6.

139 Forest species means a tree species capable of reaching at least 5 metres in height at maturity in the place where it is located. The definition shows that a "reversion" of grassed land to forest species can qualify land as forest land. The Climate Change Response Act provides for various growth rates to be met. Thus, provided a landowner complies with the Canterbury Regional Pest Strategy they can let their wildings go.

Environment Protection Agency – which measures the area and the rate of growth (as a surrogate for carbon capture) and a first payment will be made. So if the current brake within the Mackenzie Basin – compliance with the terms of pastoral leases – is removed, this incentive then presses the accelerator. It is important to recognise that the ETS is not completely harmful in this context : an ETS might provide capital with which a farmer may change their wilding forests over time to more benign (non-spreading) species or otherwise change activities on their land so as to control wilding spread on their property as we heard from Mr A E Tibby, an owner of Pukaki Downs. But that depends on the attitude, goodwill and (we suspect) financial situation of the farmer.

[59] We note that in a limited way the Climate Change Response Act does recognise that establishing carbon forestry might cause ecological problems : any applicant for registration in the Emissions Trading Scheme must make a declaration[140] that any "action" taken by them (after 1 January 2008) complies with the provisions of the RMA and any plan under that statute. However, that provision would have little or no effect in the Mackenzie Basin (and we suspect in many other places) for the reason that carbon forestry of wildings does not require any action : the landowner can simply wait for the wind to blow seeds across or onto his or her land and watch them grow. Further, as we shall see, in the case of the Mackenzie District Plan there are various problems with the rules about wildings which suggest compliance declarations would readily be able to be given.

[60] In Mr Densem's opinion the spread of wilding conifers into open grasslands of natural aesthetic and productive values is one of several modifications (the others are rural-residential subdivision and development, and the development of cultivated paddocks) which[141]:

> ... lessen and detract from the outstanding values ... [T]hese modifications, once extensive enough, come to extinguish the sense of those values and replace them with a less-distinctive lowlands character.

Animal pests

[61] On the issue of pests the district plan describes how[142]:

> Animal pests, and in particular rabbits in the high country, are an ongoing concern because of their contribution towards loss of ground cover. ... the problem of controlling rabbit numbers on a long term basis still exists ...
>
> Predators such as rats, mustelids and cats prey on native river birds and some wild animals threaten animal health through the spread of disease.

140 Section 188(1)(c) of the Climate Change Response (Emissions Trading) Act 2002.
141 G H Densem, evidence-in-chief 13 May 2010 para 3.27 [Environment Court document 3].
142 MDP pp 7-5 and 7-6.

Mr Murray described[143] how rabbits were seriously reduced in numbers for a short period following the introduction of Rabbit Haemorrhagic Disease in the mid 1990s but that numbers are now returning to pre-introduction levels.

[62] In summary, the influence of pests and weeds is huge. As we have found, a large part of the Tekapo, Pukaki and Twizel River Plains and of the Benmore Plain is a bleak semi-arid[144] desert of introduced weeds (hieracium, broom ...) and elsewhere wilding conifers are spreading rampantly. About this issue the operative district plan states[145] (relevantly):

> Over time there have been a wide range of plant and animal pests within the District which have caused damage to existing vegetation and have impaired production options. In recent decades parts of the high country have experienced changes in vegetation. Many of these changes have been into species such as hawkweeds and woody species, which reduce grazing and in some cases threatens nature conservation and landscape values. Some of the changes are thought to be due to structural changes in plant communities as a result of past and present management practices including high rabbit numbers and burning and overgrazing.
>
> ...

But it says little about what should be done about these problems.

Changes in land management

[63] A considerable part of the lower basin is held in pastoral leases, and there are freehold areas too – for example at Braemar on the eastern side of Lake Pukaki, and at Haldon Station on the eastern side of Te Ao Marama/Lake Benmore. Many of the stations have some fields of exotic grasses on the better classes of soils. These appear to have increased in recent years, and some farms have introduced pivot irrigators, e.g. The Wolds in the Maryburn catchment south of the Tekapo canal. In answer to a question from the court Dr M L Steven, an experienced and thoughtful landscape architect called for Pukaki Downs, stated that[146] "... the popular view [is] that the level of dairy farm development that one sees between Twizel and Omarama [is] going to spread throughout the entire basin".

[64] However, due at least in part to the approvals needed under Part 1 of the Crown Pastoral Land Act 1998, the rate of change at least on pastoral leasehold land has been relatively sedate compared with other parts of New Zealand. Still the rate of change has been enough for both the district plan and Mr Densem to raise questions about the effect of the greening of the landscape (and on ecological biodiversity).

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143 J B Murray, evidence-in-chief para 20 [Environment Court document 16].

144 G H Densem, evidence 13 May 2010 Attachment 3, Map 3 (Climate Zones) [Environment Court document 3].

145 MDP pp 7-5 and 7-6.

146 Transcript p. 509 (23 August 2010).

[65] There are two other drivers for change in land management – tenure review under Part 2 of the Crown Pastoral Land Act 1998, and the recent availability of about 15 m^3/sec of water to farmers in the basin from Meridian. Tenure review allows farmers to freehold some of their land, so that they have the flexibility to subdivide and/or develop as they see fit – subject of course to the district plan. That flexibility means that those who have access to some of the released water then have the opportunity to intensify production on their land. Other things being equal, those are highly desirable outcomes. However, the purpose of PC13 was to recognise the level of importance of each of the landscape units in the basin – and its overall importance – and to protect any outstanding natural landscapes. The potential effects of tenure review and of irrigated pasture on the landscape need to be considered.

[66] With his September 2010 evidence Mr Densem lodged a map "Cultural Layers" showing his understanding of locations in the Mackenzie Basin (and beyond in the Ohau Basin) where there are current applications to the Canterbury Regional Council for various discharge permits. It appears that within the Basin irrigation sites for intensified farming activities are currently being considered for the following stations (from north to south):

- Lilybank
- Godley Peaks
- Irishman Creek
- The Wolds
- Maryburn
- Simons Hill
- Simons Pass
- The Grampians
- Curraghmore
- Bendrose
- Haldon

[67] Conversion of land to irrigated pasture is far more than a landscape issue. Such conversion raises other very important issues as to:

- reducing erosion by replacing bare ground and hieracium with a grass sward;
- the effect of conversions on the 'dry-lands' endemic flora and fauna;
- water quality.

We received minimal evidence about those possible effects. Clearly they are issues which the Council (or the Regional Council) should address, preferably before any resource consents for the irrigation are finally issued and (for pastoral lease land) before any tenure review is completed.

[68] A controversy about large winter barns for stock in the adjacent Ohau Basin (within the Waitaki District) has alerted us to the possibility of such large buildings in the Mackenzie Basin. While factory farming is generally a discretionary activity[147] we are concerned that large farm buildings used for such activities are at present subject to few controls (e.g. a height limit of 15 metres but none as to area). We will consider later whether the objectives require tighter management of (especially) large farm buildings which might be associated with more intensive farming activities. There are also issues about the location of large pivot irrigators in the basin.

Soil loss

[69] We have described how much of the river flats of the Pukaki and Tekapo Rivers is a barren plain of bare soil, hieracium and other weeds with some sparse and struggling native plants. The most pressing issues are about erosion control and protecting biodiversity. Except for some figures in Mr Fastier's statement[148], we were not referred to any quantified losses of soil, but it is clear that soil loss is an issue.

[70] Questions of what the landscape of the lower river flats will look like in the future are dependent to a considerable extent on what the land is managed for and how. The paper which we have already referred to - *Influence of pastoral management on plant biodiversity in a depleted short tussock grassland, Mackenzie Basin*[149] concludes:

> That results of our research together with the results of other studies of short tussock grasslands highlight an interesting management conundrum if biological control fails to significantly reduce *Hieracium pilosella* abundance. No-input management ... is likely to result in a decline of conservation values (native biodiversity), as well as production values, as *H. pilosella* mats both deplete soil nutrients and restrict regeneration of native species. However, management input of fertiliser and adventive seeds to increase the abundance and enhance the vigour and persistence of dominant species ..., although resulting in an increase in the vigour and abundance of some native species (mainly tussocks), will also result in a decline in overall native species richness as a few, mainly adventive legume and grass species, dominate.
>
> It is obvious that the type of management input required in short tussock grasslands will depend on the management goals for the grassland concerned. Fertiliser can be used to enhance the vigour and abundance of native tussocks, but will most-likely result in the loss of other native grassland species, especially if applied in conjunction with the sowing of adventive grassland species, although it is less clear what the effect of fertiliser addition without adventive seed addition will be on native biodiversity. Where the management goals are pastoral production, then it seems clear that the only viable management option is to maintain fertiliser and adventive seed inputs, otherwise *H. pilosella* mats will continue to deplete soil nutrients resulting in the declines in soil and vegetation condition that have been well documented in other studies (Martin, 1994). At the whole-property scale it is probable that active management inputs will be required to maintain areas of short tussock grassland where the specific management goal is maintaining high native species diversity.

147 Rule (7)5.1 [Mackenzie District Plan p. 7-47].

148 D A Fastier, statement 2 July 2010 paragraphs 45-46 [Environment Court document 35].

149 D A Norton, P R Espie, W Murray and J Murray, New Zealand Journal of Ecology (2006) 30(3): 335-344 at 342 (http://www.nzes.org.nz/nzje) [Environment Court document 30B].

Not only is there a tension between preservation of biodiversity on the one hand, and conversion to pastoral grasses on the other, but there is a more subtle tension between maximising biodiversity and maximising direct scenic values.

[71] There is no complete current answer to soil loss and/or hieracium spread on the lower plains as far as we know. In the limited areas where there are soils of sufficient depth and water can be supplied, there is a potential solution: to poison the *Hieracium* (and any remnant small native plants), direct drill exotic grasses, and to irrigate. This appears to have been carried out successfully on, for example, parts of Sawdon and Holbrook, The Wolds, Maryburn, Simons Hill, Simons Pass and Haldon Stations. But of course it leads to a "greening" of the Basin, which the extra issues statement in PC13(N) identifies as an issue for the Mackenzie subzone. A similar "improvement" of the land by ploughing, sowing exotic grasses, and irrigation is noticeable in the Waitaki District, where major developments occur on either side of the Twizel-Omarama Road (SH 8) south of Lake Ruataniwha.

Summary : the question about weeds

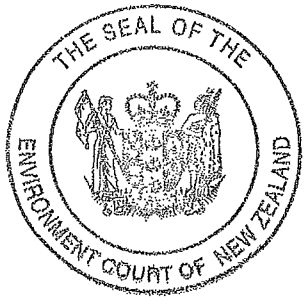
[72] The description of issue 3 (Plant and Animal Pests) in the operative district plan states[150]:

> The increasing spread of wilding trees is a key issue for sustainable management in the District because it is having significant adverse effects on pasture availability, the landscape values and natural conservation values. If unchecked, it is likely to preclude land use options such as ecological restoration, nature conservation, recreation and tourism from large areas of the District, and may also threaten pastoral viability and commercial forestry options over large areas. In some areas wildings are already overwhelming sites of natural significance and spreading into high altitude areas in the Mackenzie Basin.
>
> Notwithstanding that some economic benefits can be derived from mature wilding trees in a few areas of the basin, the quality of trees is likely to be variable. The often random nature of wilding forests also means that it is difficult to apply location and design conditions in order to address visual effects.

In addition to pines, hieracium and broom, other weeds are spreading – notably lupin[151] along the state highways.

[73] The explanation in PC13 states:

> As plant pests and animal pests are almost by definition invasive, control on a small scale, e.g. on individual properties, it is only effective if all property owners are involved in that control. To the extent that weeds and pests have the potential to adversely affect other people's rights to enjoy their own property without interference there is perhaps a responsibility to control these pests.



150 p. 7-6 Mackenzie District Plan.

151 We do not overlook that lupin has food value for grazing animals (and is also a nitrogen-fixer).

The question is : if that is such an important issue in the district plan, what are the objectives, policies and rules for dealing with it? For example, PC13(C) appears to rely on a non-policy approach for managing the spread of wilding pines – grazing and unspecified "... additional control measures"[152]. There is a limited (indirect) policy about Tree Planting in PC13(C)[153] which is to control future planting so conditions about wildings may be imposed. We return to this question later.

2.3 Delimiting the landscape(s)

[74] A fundamental question for these proceedings is whether there is one or more outstanding natural landscapes within the meaning of section 6(b) of the RMA in the Mackenzie Basin. To answer this we need first a definition of "landscape" and then to answer three factual questions:

(1) is there one landscape or more in the Mackenzie Basin?
(2) if so, is any identified landscape natural?
(3) if yes to (1) and (2) for any landscape, then is the natural landscape also outstanding?

[75] On the definition of "landscape" as the word is used in section 6(b) of the RMA, in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[154] the court wrote that:

> ... [A] "landscape" involves both natural and physical resources themselves and also various factors relating to the viewer and their perception of the resources.

The court also referred to a landscape as an "arbitrary cultural lumping"[155] rather than as (necessarily) being "... ecologically significant".

Is the Mackenzie Basin one landscape or more?

[76] Proposed (Rural) Policy 3A as notified was "[t]o recognise the Mackenzie Basin as an outstanding natural landscape". There was therefore no need to map landscapes which qualify as outstanding natural landscapes because PC13 was based on the finding[156] by the Council that the whole of the Mackenzie Basin was one such landscape. That finding was based[157] on a 2007 landscape assessment by Mr Densem which recognises that the Basin is an outstanding natural landscape.

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152 PC13(C) p. 9 (Oddly this explanation comes under the policy heading "Farming Buildings and Subdivision").
153 Policy 30 – Tree Planting – PC13(C) p. 12.
154 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 at (77).
155 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 at (78).
156 PC13(N) p. 1.
157 PC13(N) p. 1.

[77] However, Policy 3A resulting from the Commissioners' decision stated differently: it described the Mackenzie Basin "... as having a distinctive and highly valued landscape containing outstanding natural landscapes ...". That causes problems because the reader of the district plan cannot find whether any particular area is within an outstanding natural landscape or not. The Commissioners' Decision stated that[158] "only a very detailed mapping exercise could really identify areas where it could be confidently predicted that development would have no significant effect on the landscape". With respect, that approach is incorrect for several reasons. First, as we have stated, objectives and policies cannot be set until the relevant facts are established and issues stated[159] – see *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[160] and more recently *Environmental Defence Society Incorporated v Kaipara District Council*[161]. In effect the Commissioners' Decision puts off making a decision on the facts. Second, the recognition of a landscape is a separate and prior exercise to determining what is needed to manage it sustainably. Thirdly, the test is not whether there be "no significant effects" on the landscape[162] but whether the possible effects are inappropriate. Fourthly, and practically, in the meantime landowners and occupiers are entitled to know where they stand.

[78] The Commissioners in their decision[163] concluded that the landscape "values can be better controlled by rules that require assessment of development proposals against specified criteria rather than relying on detailed classification of the Basin, particularly a classification that attempted to distinguish outstanding natural from the rest". That is an interesting passage because it shows, with respect, a further error that has crept into and confused much of the discussion of the witnesses before us. It is the confusion of fact and prediction with the remedies in the district plan. In the simplest terms the Commissioners' Decision confuses what exists, what is the case (or may be in future), with what ought to be as a matter of objective or policy. Further, the case for rules is far weaker if a landscape does not meet the standards of section 6(b) of the RMA. If the Mackenzie Basin is not a single landscape and any component landscape within it is not an outstanding natural landscape then it may be that there should not be any rules to protect whatever other landscape qualities it possesses.

[79] We now turn to consider the evidence on whether the Mackenzie Basin is one or more landscapes. We adopt the approach stated by the court in *Maniototo Environmental Society Incorporated and others v Central Otago District Council and*

158 Commissioners' Decision para 126.
159 Section 75 of the RMA.
160 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 at para 54.
161 *Environmental Defence Society Incorporated v Kaipara District Council* [2010] NZEnvC 284.
162 Whatever "significant" means – since that is a context-driven word.
163 Commissioners' Decision para 128.

Otago Regional Council (the *Lammermoor* case)[164]. There the court stated that to "describe and delimit"[165] a landscape a local authority could usefully consider:

> (1) a reasonably comprehensive (but proportionate to the issues) description of the characteristics of the space such as:
>
> - the geological, topographical, ecological and dynamic components of the wider space (the natural science factors);
> - the number, location, size and quality of buildings and structures;
> - the history of the area;
> - the past, present and likely future (permitted or consented) activities in the relevant parts of the environment; and
>
> (2) a description of the values of the candidate landscape including:
>
> - an initial assessment of the naturalness of the space (to the extent this is more than the sum of the elements described under (1) above);
> - its legibility – how obviously the landscape demonstrates the formative processes described under (1);
> - its transient values;
> - people and communities' shared and recognised values including the memories and associations it raises;
> - its memorability;
> - its values to tangata whenua;
> - any other aesthetic values; and
> - any further values expressed in a relevant plan under the RMA; and
>
> (3) a reasonably representative selection of perceptions – direct or indirect, remembered or even imagined – of the space, usually the sub-sets of:
>
> (a) the more expansive views of the proposed landscape[166]; and
> (b) the views, experiences and associations of persons who may be affected by the landscape.
>
> There is some repetition [between] the sets. For example the objective characteristics of the landscape go a long way towards determining its naturalness. More widely, the matters in the third set influence the perceptions in the second.

[80] In his principal general evidence[167] Dr Steven gave a remarkably similar analysis to sets (1) and (2) from the *Lammermoor* decision although he did not refer to the decision. He even produced two schedules[168] which at first sight correspond to those sets in that they refer to natural science characteristics and community-held values respectively. For all we know those schedules may wholly or partly improve on the

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164 *Maniototo Environmental Society Incorporated and others v Central Otago District Council and Otago Regional Council* Decision C103/2009 at paragraphs [202] to[204].

165 *Maniototo Environmental Society Incorporated and others v Central Otago District Council and Otago Regional Council* Decision C103/2009 at para [204].

166 *Kircher v Marlborough District Council* Decision C90/2009 (Judge McElrea) at para [76].

167 M L Steven, evidence-in-chief [Environment Court document 24].

168 M L Steven, evidence-in-chief Schedules B and C [Environment Court document 24].

Lammermoor lists. In future cases it would be useful to hear more about the derivations and application of Dr Steven's (derived)[169] lists. However his Schedules were not tested in these proceedings and Dr Steven did not apply them in detail to the Mackenzie Basin or constituent parts of it except for the areas around Pukaki Downs and Rhoborough Downs in which his clients were interested. So we take potential improvements to *Lammermoor* no further in these proceedings.

[81] It was only when considering the role of views in landscape assessment that Dr Steven considered the Mackenzie Basin as a whole. He commenced by making the rather simplistic point that views of or to outstanding landscapes should be distinguished[170] from outstanding landscapes in themselves. We agree – and consider that the role of views is, for lack of a better description, adequately set out in the third set of factors in *Lammermoor* quoted above.

[82] Dr Steven wrote that[171]:

> [t]he relatively flat, open character of the Mackenzie Basin and the scale of the enclosing mountains create a situation in which the mountains are pervasive elements in views and vistas throughout the ... [b]asin. However, a view or a vista is not necessarily a singular landscape, as understood for resource management purposes. While at one level, the view can be perceived as a singular landscape, for management purposes it can be regarded as including multiple landscapes.

We accept Dr Steven's first sentence : so far as it goes it accurately describes the basin. However, his second sentence shows that he is using "landscapes" for a specific purpose – as a unit of land for purposes of resource management under the Act. He seems to be implying that if an area can be sufficiently distinguished from a neighbouring area by reference to its elements, patterns and processes then it is a different landscape. We can see why landscape architects might want to take that approach – it makes application of their discipline to the RMA easy.

[83] However, there is little or no other reference to landscapes in the RMA apart from section 6(b). That has caused so much difficulty that we are reluctant to encourage analysis of the whole country in terms of landscapes as units of land. In our view a much more useful and scientifically based unit of land is the hydrological catchment, and that should be the starting point of most analyses. Only when considering areas where there may be an "outstanding natural landscape [or feature]"

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169 His Schedule B came from Mackey, Nix and Hitchcock (2001) The natural heritage significance of Cape York Peninsula. ANU Tech Ltd, Canberra ACT; and his Schedule C from Alessa, Kliskey and Brown (2008) Social-ecological hotspots mapping ... in "Landscape and Urban Planning" 85, 27-39.

170 M L Steven, evidence-in-chief para 49 [Environment Court document 24].

171 M L Steven, evidence-in-chief para 50 [Environment Court document 24].

should the concept of a "landscape" be the starting point for resource management purposes. And when deciding that issue in any case where it is raised, the first question is "what is the relevant landscape?".

[84] Using "landscape" as a management unit, Dr Steven considers there is a number (indeterminate in his evidence) of different landscapes "... of lesser significance"[172] in the Mackenzie Basin. He does not identify where they are in his general statement, although in his later specific evidence[173] he identifies Pukaki Downs as not being an outstanding natural landscape.

[85] As it happens the first two *Lammermoor* lists were derived from two earlier decisions of the Environment Court : *Pigeon Bay*[174] and *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*[175] – and Mr Densem as the only expert witness to give subzone-wide evidence applied those.

[86] In his November 2007 report Mr G H Densem, the landscape architect called for the Council, stated that "... virtually the entire Basin is 'outstanding' in terms of landscape values"[176]. While that statement is consistent with the basin containing more than one landscape, when his 2007 report identifying the basin's landscape values is read as a whole it is clear that he is referring to the basin as a single landscape[177]. For example, when the 2007 report described different landscape character areas (as we noted in part 2.1 of this decision) he did not suggest that any of these character areas are separate landscapes for the purposes of section 6 of the RMA. Certainly that was his 2010 understanding[178] of his 2007 report.

[87] In preparation for the appeal hearing Mr Densem reviewed his 2007 study[179]. He divided the basin into 39 landscape units[180] and concluded[181] that all except three

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172 M L Steven, evidence-in-chief para 51 [Environment Court document 24].

173 M L Steven, evidence-in-chief para 30 [Environment Court document 24A].

174 *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 at (56).

175 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 at 74.

176 G H Densem "The Mackenzie Basin Landscape ..." (November 2007) Attachment 3 to his evidence-in-chief [Environment Court document 3].

177 G H Densem, evidence-in-chief "The Mackenzie Basin Landscape : character and capacities" –

- "... a modified and managed landscape ..." para 3.1;
- "... the landscape value of the Mackenzie Basin ..." para 3.3;
- "... the Mackenzie's landscape value ..." para 3.6;
- "... the Basin was *a very special place*" para 3.9;
- "... the Mackenzie Basin landscape has high coherence levels" para 3.11;
- "My opinion is that at a district level the entire Basin constitutes an outstanding landscape ..." para 3.17

Attachment 3 [Environment Court document 3].

178 G H Densem, evidence-in-chief para 3.1 [Environment Court document 3].

179 G H Densem, evidence-in-chief "The Mackenzie Basin Landscape : character and capacities" – Attachment 3 [Environment Court document 3].

180 G H Densem, evidence-in-chief para 3.2 [Environment Court document 3].

181 G H Densem, evidence-in-chief para 3.5 [Environment Court document 3].

units within the Mackenzie Basin are "outstanding natural landscapes". The unit of least landscape value is the Twizel unit. That has now been removed from the Mackenzie Basin Subzone and so is not subject to PC13 or these proceedings. It is now subject only to the Rural zone provisions. The other two units (S4 Ohau River and P8 Pukaki Outlet) are assessed as "significant" landscapes, because as Mr Densem wrote[182]:

> The landscape values in these areas, while not outstanding, are still important and rural residential subdivision practices of lowland Canterbury have the same potential to cause major change in character by subdivision of the open, natural surfaces. I consider therefore that these landscape units should be subject to a similar or the same regime as outstanding landscapes in terms of managing impacts on their values and character.

That was a convenient outcome since it meant that mapping of the landscapes was not necessary. The difficulty with Mr Densem's later approach is that the units he has distinguished – at Pukaki outlet[183] and Ohau river flats[184] are, we find, far too small and undifferentiated, given the overall scale and homogeneity of the Basin, to be considered as "landscapes" by themselves. In our view this is the only time that Mr Densem has lost sight of the landscape as a whole. We consider that the slide from his 39 "assessment units" to 39 landscapes is unjustified.

[88] We prefer Mr Densem's 2007 report which identifies one landscape(s). That report is consistent with the results of the CRC's recent study which finds that the Basin is a regionally outstanding landscape. Dr Y Pflüger, a landscape architect who was one of the authors of the report "Canterbury Regional Landscape Study Review"[185] was called before us by the Council to produce the report and answer any questions about it. She confirmed[186] that the report has not (yet) been adopted by the Canterbury Regional Council. However, we can give the report some weight as her expert opinion records of the "Mackenzie Basin"[187] that:

> The entire Mackenzie Basin ... has been identified as an Outstanding Natural Feature and Landscape. This landscape contains areas of exceptional legibility, aesthetic, transcient, shared and recognised, very high natural science and tangata whenua and historic landscape values. It is acknowledged that landscape qualities vary across an area of this size, which contains areas of human modification ...

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182 G H Densem, evidence-in-chief [Environment Court document 3].
183 G H Densem's unit P8.
184 G H Densem's unit S4.
185 Environment Court document 4.
186 Transcript pp 152-153.
187 Defined so as to include land in the Waitaki District down to Te Kopi o Opihi/Burkes Pass but excluding the strip of land between Twizel and Omarama. See "Canterbury Regional Landscape Study Review" at p. 142 [Environment Court document 4].

[89] Dr Steven simply assumed that the Mackenzie Basin comprises a number of different landscapes[188]. For example, he wrote that in his opinion[189]:

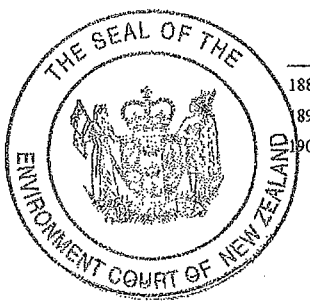
> There is no doubt that the Mackenzie Basin contains outstanding natural landscapes. Indeed it may be fairly stated that the Basin contains the 'gold standard' for outstanding natural landscapes in New Zealand. Most of this land is already protected within the conservation estate (e.g., Aoraki-Mt Cook National Park, Ruataniwha Conservation Park) and needs no further protection through the Mackenzie District Plan. In my opinion there are areas of the Mackenzie Basin that cannot, with any credibility, be regarded as outstanding, particularly when considered in comparison to the landscapes of the Basin as a whole, including those that are already part of the conservation estate.

As we have stated, Dr Steven appears to assume that because areas within the Mackenzie Basin have different characters they are therefore different landscapes.

[90] We have given serious thought to whether the Tekapo and Pukaki Canals divide the Mackenzie Basin in two landscapes – one either side of the infrastructure corridors. However, there is no specific evidence suggesting that is a valid approach, and it does seem to smash the basin into two pieces which are rather less than a whole. Based on Mr Densem's 2007 report and Dr Pflüger's report, we find that the Mackenzie Basin is one large intact basin. From many points within the basin its rim can be seen more or less all around. Obviously the people who first called this area "the Mackenzie Basin" recognised that it is perceived as a unified whole, and the name has stuck. It is impossible to have the bottom (plains) of a basin without the (mountain) sides. We find that the Mackenzie Basin is the epitome of a large landscape which can be and is meaningfully perceived as a whole.

How natural is the Mackenzie Basin landscape?

[91] The next question is "how natural is the Mackenzie Basin's landscape?" Perceptions of the "naturalness" of the basin vary with the beholder. We suspect that many visitors to the Mackenzie Country find the area inspiringly natural. They drive over Te Kopi o Opihi/Burkes Pass from the greenness of the Fairlie area and abruptly enter the dun plains south of Tekapo township, with views of mountains all around. They are then surrounded by this landscape – mainly open, but dotted with conifers or lined with some shelterbelts – for the next two to three hours. Farmers and residents of the townships at Tekapo and Twizel are likely to be more aware[190] of the reductions in naturalness – the energy infrastructure, the wilding pines, hieracium, and the desertification of lower areas. Farmers, of course, are even more aware of how modified the landscapes are since they are at the forefront of controlling the weeds and pests, and of attempts to change ground cover to make their land more profitable.



188 See for example : M L Steven, evidence-in-chief para [17] [Environment Court document 23].
189 M L Steven, evidence-in-chief para [17] [Environment Court document 23].
190 R F W Krüger, evidence-in-chief para 28 [Environment Court document 5].

[92] In his 2007 study leading to PC13 Mr Densem described "... virtually the entire Basin [as] outstanding in terms of landscape values"[191]. He wrote that this was "... particularly from its natural landscape character ..."[192] and despite the modifications[193].

[93] The issues became rather more academic in the evidence of Dr Steven. On the question of the naturalness of landscapes he wrote[194]:

> An explicit, standard scale of naturalness has not been agreed by the New Zealand landscape architectural profession, nor recognised by the Court, and so neither has the naturalness threshold for ONL status been determined.

He proposed this scale[195]:

Natural enough ← → Not natural enough

VERY HIGH	HIGH	MODERATE-HIGH	MODERATE	MODERATE-LOW	LOW	VERY LOW

7-Point Scale of Naturalness, or Natural Character, indicating proposed threshold for ONL

– and introduced it by writing:

> While my scale indicates the threshold as being between Moderate-High and High, the reality is that there is no sharp line of demarcation, rather there is a fuzzy zone of transition between the ranges indicated on the scale. As such, there will likely be landscapes within the Moderate-High range of naturalness that could be regarded as natural enough for ONL status.

We agree with his last sentence and consider its implications below. We should also state that his seven-point scale might work. It is a modified version of a scale he suggested in evidence in proceedings about a golf resort near Wanaka : see *Upper Clutha Tracks Trust v Queenstown Lakes District Council*[196]. His evidence here appeared to be written after he gave his evidence in those proceedings but before the court issued its decision, and showed that he had thought more about the issues in the meantime anyway. In case it is useful to other landscape experts, we provisionally approve his seven-point scale as shown above, but subject to a caveat about naturalness being a cultural construct as pointed out elsewhere, for example in *Upper Clutha Tracks Trust v Queenstown Lakes District Council*[197].

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191 G H Densem : "The Mackenzie Basin Landscape ..." para 3.2 [Attachment 3 to Environment Court document 2].

192 G H Densem : "The Mackenzie Basin Landscape ..." para 3.3 [Attachment 3 to Environment Court document 2].

193 G H Densem : "The Mackenzie Basin Landscape ..." paragraphs 3.1, 3.2 and 3.3 [Attachment 3 to Environment Court document 2].

194 M L Steven, evidence-in-chief para 61 [Environment Court document 24].

195 M L Steven, evidence-in-chief para 63 [Environment Court document 24].

196 *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2010] NZEnvC 432 at paragraphs [57] and [58].

197 *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2010] NZEnvC 432 at para [62].

[94] Of course, when the scale is applied the reader still has the problem as to the difference between "high" and a "moderate-high" naturalness of a landscape. As to indicia of naturalness Dr Steven wrote[198]:

> It is my opinion that values based upon a picturesque aesthetic have an undue influence in resource management and landscape protection within New Zealand. The picturesque aesthetic model, with its visual quality indicators, overlooks more complex and less visible aspects of the landscape, such as the functioning of ecological and geomorphological processes and systems, and the ecological health of the land.

With respect to Dr Steven, while he is correct to analyse all components of landscape – and especially geomorphological patterns and processes and ecosystems and their intactness and health – he is placing too much weight on them when analysing the naturalness of a landscape. More importantly, he is confusing description of the characteristics of a landscape with the more evaluative elements which go towards its "naturalness".

[95] The court has, after the same initial conflation of the analytic tools for identifying a landscape with those used for assessing its naturalness and outstandingness, more recently distinguished those steps – see for example *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[199] or the *Lammermoor* decision[200]. The court pointed out in the *Long Bay-Okura Great Park* case[201] that surveys on naturalness show that criteria of "naturalness" normally include[202]:

- relatively unmodified and legible physical landform and relief;
- the landscape being uncluttered by structures and/or obvious human influence;
- the presence of water[203] (lake, river, sea);
- the presence of vegetation (especially native vegetation) and other ecological patterns.

In other words naturalness needs to be considered in relation to more factors than simply the floral or wider ecological and/or geomorphological character of an area.

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198 M L Steven, evidence-in-chief para 65 [Environment Court document 24].

199 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.

200 *Maniototo Environmental Society Incorporated and others v Central Otago District Council and Otago Regional Council* Decision C103/2009.

201 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008.

202 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [55].

203 In passing we note that these proceedings have highlighted for us that, in relation to the third bullet point, snow is an important form of water. In a landscape such as the Mackenzie Basin the presence of snow may have a dramatic influence in increasing the perception of naturalness.

[96] We apply the indicia of naturalness restated in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[204]. We consider that the landscape(s) of the Mackenzie Basin rates highly under all four criteria. First the physical landform has (with two notable exceptions) been relatively unmodified. The exceptions are the raising of the lake (and the consequent dewatering of the Tekapo and Pukaki Rivers) and the canal and pylon lines of the Waitaki Power Scheme and the roading infrastructure. We accept the evidence of Mr Densem for the council, and of Mr T D Milne[205], a landscape architect called by Meridian, that the Waitaki Power Scheme and its (largely passive) operation are one of the characteristics of the basin's landscape. Second the Mackenzie Basin is uncluttered by structures and obvious human influence. Some structures – especially for the Waitaki Power Scheme – are present but they do not clutter the landscape; and while there is widespread human influence it is not intrusive. Those findings are reflected in the third and fourth considerations to which we now turn. Third – as to the presence of water – there are four large lakes in (or partly within) the basin: Tekapo, Pukaki, Ohau (in part) and Benmore. The latter is man-made but looks natural and Pukaki has been substantially raised but also looks natural, at least when nearly full. Smaller lakes[206] and/or tarns are scattered over the area too. Fourth the dominant vegetation over the basin (except for the lakes' surfaces) and around the lakes' margins are brown tussock-grasses – and even the introduced browntop looks native in both colour and form.

[97] We accept that the introduced trees change the ecology of the landscape, but it is important to realise that they do not, in many eyes, make it less natural or less beautiful. Several witnesses drew our attention to how many photographs of the Mackenzie Basin feature introduced conifers[207]. The appreciation of trees shows how important memory and expectations are in assessment of landscape. For people who have lived in, travelled through, or even merely seen pictures of North American (the Rockies or Vancouver Island) or European landscapes (drier parts of the Alps or the Pyrenees) the views of the conifers in the Mackenzie Basin may evoke associations or memories of those landscapes.

Is the landscape outstanding?

[98] We have already referred to Mr Densem's evidence that the Mackenzie Basin has outstanding landscape values; and to Dr Pflüger's opinion[208] that the basin is a regionally "Outstanding Natural Feature and Landscape". Another very experienced landscape architect, Mr R F W Krüger, when giving the context for his evidence about

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204 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [135].

205 T D Milne, evidence-in-chief paragraphs 17-20 [Environment Court document 11].

206 Notably Lakes Ruataniwha and Alexandrina.

207 See for example : G H Densem, evidence-in-chief para 3.33 [Environment Court document 3].

208 Canterbury Regional Landscape Review at p. 142 [Environment Court document 4].

Mt Gerald Station[209], stated that "... the landscape of the Mackenzie Basin is uniquely special and much valued".

[99] There were two challenges to Mr Densem's 2007 opinion. First, counsel for Meridian said[210] that his client wished "... to state squarely that it considers Mr Densem's assessment of virtually the whole Mackenzie Basin subzone as outstanding is wrong". He relied on the evidence of Mr T D Milne, an independent landscape architect called for Meridian. We have read (and re-read) Mr Milne's evidence carefully and we consider it does not support Mr Maassen's rather simplistic submission. Mr Milne rightly emphasises the modifications made to the Mackenzie Basin by the Waitaki Power Scheme and the fact that they are an integral[211] part of the landscape. But nowhere does Mr Milne conclude that the Mackenzie Basin landscape is not outstanding. To the contrary, in his conclusion he wrote[212]:

> Openness, natural character and aesthetic values form the basis of the outstanding values of the Mackenzie Basin. However, it is not solely naturally derived values that define the Mackenzie Basin's landscape value, the distinctive forms of cultural modification do as well.

We agree : it is well established that a "cultural" landscape (and in fact all landscapes are "cultural" – it is all a question of degree) may still be a natural landscape and even an outstanding natural landscape : *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[213].

[100] Dr Steven was correct that Mr Densem had not separated his analysis of the "outstandingness" of the landscape(s) of the Mackenzie Basin from his analysis of its characteristics. However, we do not consider that is a fundamental flaw in Mr Densem's evidence. Since the question of the value to be given to the landscape relies heavily on a description of its characteristics (using the *Pigeon Bay* factors, or the lists in the *Lammermoor* case, or the landscape architects' "elements, patterns and processes", it is not wrong to identify both at the same time, especially while the conceptual framework for section 6(b) is still being worked out.

[101] For future reference though it may help other landscape witnesses before the court if we record our preliminary agreement with Dr Steven's point that there is a distinction between the analysis of the landscape, and if ensuring it is sufficiently natural, of its outstandingness. This final third step in the analysis required by section 6(b) of the RMA requires assessment of the value to be given to the characteristics already identified. Secondly, Dr Steven correctly pointed out that the third test under

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209 R F W Krüger, evidence-in-chief para 28 [Environment Court document 5]. We note Mr Krüger was writing here of the wider basin from Te Kopi o Opihi/Burkes Pass to Omarama.

210 J W Maassen, submissions para 85 [Environment Court document 9].

211 T D Milne, evidence-in-chief para 18 [Environment Court document 11].

212 T D Milne, evidence-in-chief para 22 [Environment Court document 11].

213 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

section 6(b) – whether a natural landscape is also outstanding – is essentially a value judgement. He was critical of Mr Densem for not understanding this and for not assessing separately the values which go to "outstandingness". We agree that it is conceptually useful to separate out the values which contribute to whether a landscape is outstanding. For example, adopting the list in the *Lammermoor* case[214], one needs to evaluate (in addition to its naturalness):

- how distinctive and important its geomorphological and ecological characteristics (elements patterns and processes) are;
- how legible or expressive the landscape is;
- how important its transient values are;
- how rich a store of shared and recognised values there is;
- how memorable the landscape is;
- how important it is to tangata whenua;
- how important (or not) are any other aesthetic values it possesses.

[102] The same characteristics need to be considered when answering all three questions about whether there is a landscape which is also both (sufficiently) natural and outstanding. We do not think a witness's evidence should necessarily be discounted simply because they conflated their answers to the three questions. In the end the answer to the question whether there is an outstanding natural landscape should be obvious, and not necessarily require experts. So we do not criticise Mr Densem for not considering the values of the Mackenzie Basin separately from its characteristics. As we have shown he did consider a reasonable bundle of characteristics[215] in coming to his conclusions.

[103] In contrast Dr Steven's approach was, in effect, to hold that because the Mackenzie Basin's vegetative cover, amongst some other characteristics, has been drastically changed, its landscape(s) cannot be seen as outstandingly natural. However, that is a wrong legal test. The test is whether there is a landscape which is both (sufficiently) natural and outstanding. As for Meridian's approach, we record that Mr Milne did not express an opinion on this issue[216].

[104] We have considered the question carefully and as objectively as possible. Decisions as to the outstandingness of a natural landscape are not made lightly, and there are areas throughout the South Island where handsome landscapes have been held not to be outstanding natural landscapes, for example:

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214 *Maniototo Environmental Society Incorporated and others v Central Otago District Council and Otago Regional Council* Decision C103/2009 at para [205].

215 Quoted in part 2.1 of this decision.

216 The main thrust of Mr Milne's admirably succinct evidence was to ensure that the changes wrought by the HEPS are recognised as a cultural component in the landscape. We have attempted to do so.

- the middle Waitaki Valley around Lake Aviemore (see *Munro v Waitaki District Council*[217]);
- a section of the Kawarau River Valley (see *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council and Wentworth Properties Limited*[218]), although of course the river and its margins may be an outstanding natural feature.

Equally, most of the Canterbury or Southland Plains would almost automatically not be considered to be outstanding natural landscapes despite their size.

[105] After weighing all the expert evidence on this issue we prefer Mr Densem's 2007 report[219] supported as it is by Dr Pflüger's evidence, that nearly the whole of the Mackenzie Basin (excluding the towns at Tekapo and Twizel) is an outstanding natural landscape. We find that the large Mackenzie Basin is, despite all the modifications to its endemic naturalness, one of the quintessential outstanding natural landscapes in New Zealand[220]. We find that all of the Mackenzie Basin subzone but excluding:

- Tekapo and Twizel townships;
- all of Mr Densem's "Twizel Character Area"; and
- the Dobson River catchment[221]

– is an outstanding natural landscape.

[106] According to the Commissioners' Decision many local residents (mainly farmers) are of the opinion that the Mackenzie Basin is not an outstanding natural landscape. They are likely to find our decision hard to accept. They need to bear in mind that it is difficult for them to be objective about this. There is likely to be a strong self-serving bias in their opinions : owners and occupiers believe sincerely that it is not an outstanding natural landscape because (not without justification) they fear the consequences in terms of policies and rules interfering with management of their land. But looked at as objectively as we can in the light of the indicia developed by the court to explain section 6(b) of the RMA we have found that "the grandeur and openness of the general landscape"[222] of the Mackenzie Basin, of all landscapes in New Zealand's high country, make it an outstanding natural landscape.

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217 *Munro v Waitaki District Council* Decision C98/1997 at p. 16.

218 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council and Wentworth Properties Limited* Decision C135/1997 at p. 23.

219 G H Densem "The Mackenzie Basin Landscape ..." (2007) [Attachment 3 to Environment Court document 3].

220 See G H Densem:
(i) "The Mackenzie Basin Landscape : character and capacities" at para 3.21 – Attachment 3 to his evidence-in-chief [Environment Court document 3];
(ii) evidence-in-chief para 3.20 [Environment Court document 3].

221 This may be an outstanding natural landscape but it is part of the Ohau Basin, not the Mackenzie Basin.

222 R F W Krüger, evidence-in-chief para 31 [Environment Court document 5].

What may be inappropriate development?

[107] A slightly subjective note crept into Dr Steven's conclusion when he wrote[223]:

> There is a significant conflict inherent in the view that the Mackenzie Basin is an outstanding natural landscape that should be preserved and protected in its current state, and the reality that the Mackenzie Basin contains highly degraded and unsustainable landscapes.

Apart from his assumption that the basin comprises more than one landscape, it is unclear whose evidence Dr Steven is describing. In any event he has jumped from someone's opinion that the landscape of the Mackenzie Basin is an outstanding natural landscape to an unattributed view that it should be preserved and protected in its current state. He overlooks that the section 6(b) test is to preserve such landscapes from inappropriate use and development. If the landscape is changing, and we have found that it is – swiftly – then what is inappropriate will have to be considered in that light.

[108] The issue now is to decide where (and what sort of) subdivision, development and use is appropriate in this nationally important outstanding natural landscape. The district plan and PC13 (Commissioners' version) already give some assistance on this in identifying:

- lakeside protection areas;
- Areas of Visual Importance

– where use and development is limited.

With those two exceptions little reliance has been placed, in these proceedings, on the mapping of "visual vulnerability". Some work was apparently carried out by the landscape architect firm of Boffa Miskell in 1992 and it is updated in Mr Densem's map of "Capacity to Absorb Development" which we now annex as Map "3"[224] (on the next page). In many cases about landscape such maps are given too much emphasis, but we find the opposite is true here. We will discuss this further after we have decided the most appropriate objectives and policies. We also record that rather belatedly[225] Fountainblue Limited and Pukaki Downs challenged the accuracy of this map, stating that it shows an area of its land on the western side of the Pukaki River as having high vulnerability to development whereas earlier maps show the area as having medium vulnerability. We record that we accept the map as provisionally accurate, but will reserve leave for landowners and occupiers to challenge it if we consider such a map should in some way be part of the district plan.

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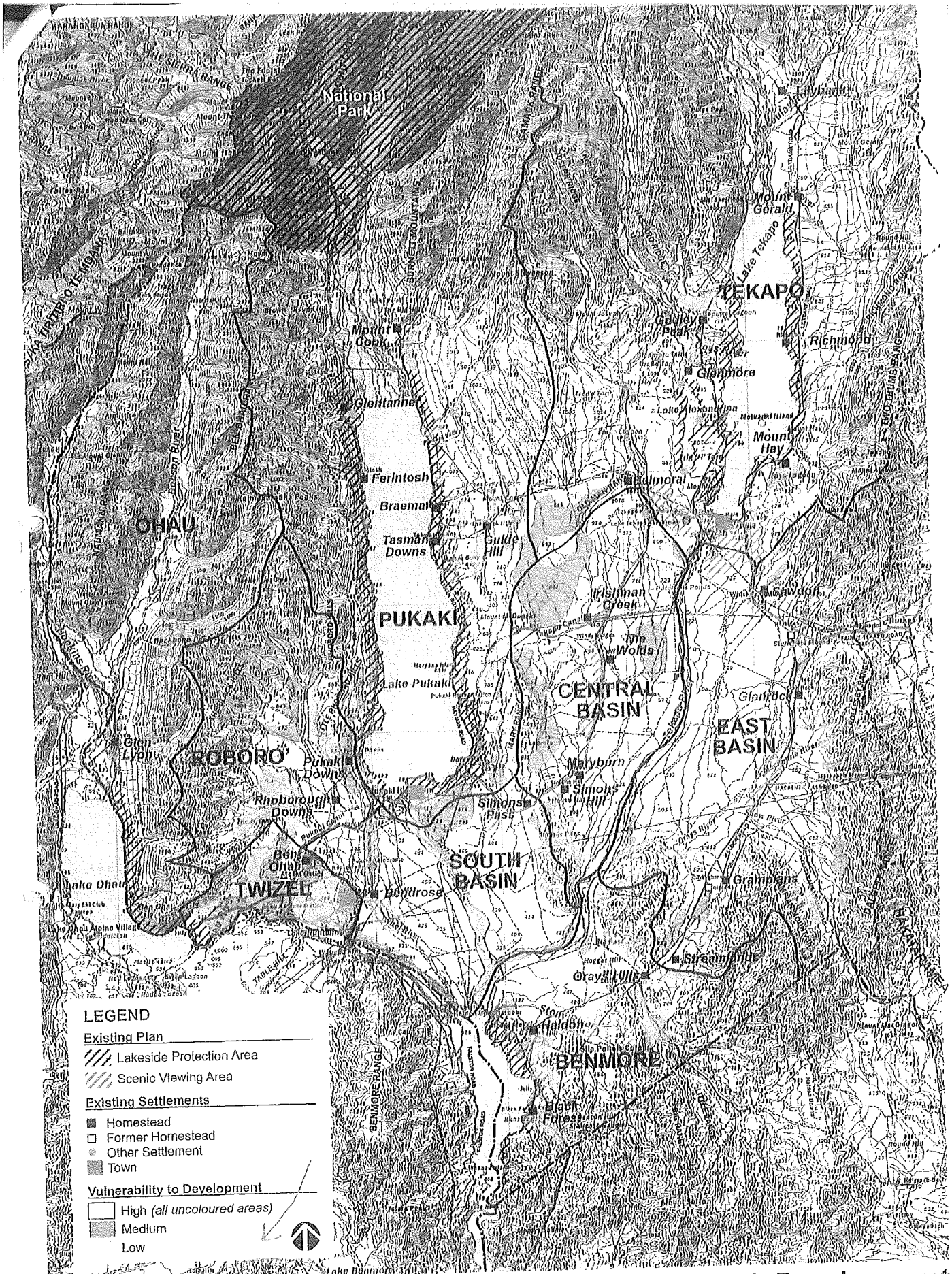
223 M L Steven, evidence-in-chief para 73 [Environment Court document 24].

224 G H Densem, evidence-in-chief Appendix 3 Map 7 [Environment Court document 3]. Unfortunately, the "former homesteads" described in the key do not show up on the map.

225 Memorandum of Mr Prebble dated 9 November 2010 [Environment Court document 32X].



MAP 3: Capacity to Absorb Development

December 4, 2007

[109] As for Meridian's concerns, it was anxious[226] that a map should not be introduced into the district plan identifying whether landscape "... components ... are outstanding or significant"[227]. We have not found it necessary to do that because we have preferred evidence that almost all of the Mackenzie Basin is an outstanding landscape. That finding is not inconsistent with recognition of the need to identify some areas within the landscape, for example to protect the operation of Waitaki Power Scheme as a resource within that landscape, for which we anticipate that some mapping (e.g. of hazards) may be necessary, albeit the mapping is not of the landscape as such.

[110] Obviously the role of the State Highways is important in carrying people into and through the Mackenzie Basin. However, other roads and the views from them are important too:

- the Godley Peaks Road to the Cass River;
- the Takamoana/Lake Alexandrina Roads;
- the Lilybank Road;
- the Haldon Road to the Mackenzie Pass Road and the latter road.

For convenience we call these "the tourist roads". The visual vulnerability map (Map 3) relates to those roads. We agree with Mr Densem that the maps "significantly under-estimate the vulnerability"[228] of the eastern side of Lake Tekapo. We consider there is a similar problem with the Mackenzie Pass Road, given its historical importance, leading as it does to the point where James Mackenzie was arrested at (and escaped from) his camp in 1855. This latter raises particularly difficult problems in respect of wildings since there are several shelterbelts to the east of Haldon Road which are already spreading seedings south and east.

[111] In coming to those conclusions we have taken careful note of the numerous and ongoing modifications to the landscape of the Mackenzie Basin. The fact that those changes are occurring shows, we find, that some further modification can be allowed for – provided it does not get out of control. Equally, the fact that changes to date have led a reputable and thoughtful landscape architect (Dr Steven) to conclude (albeit starting with at least one incorrect legal assumption) that the Mackenzie Basin is not an outstanding natural landscape shows that the thresholds of naturalness and outstandingness are being speedily approached. Given the symbolic importance of the Mackenzie Basin in New Zealanders' idea of the "high country", we consider that all decision-makers (including landowners) need to be cautious about further changes to the basin. Further, we remind ourselves that the (ac)cumulative effect of small changes should be taken into account : for example, retirement houses may cumulatively have a

226 J W Maassen, submissions para 16(a) [Environment Court document 9].
227 J W Maassen, submissions para 11(g) [Environment Court document 9].
228 G H Densem, evidence-in-chief para 3.3.2 [Attachment 3 to Environment Court document 3].

large effect, decreasing the naturalness of a landscape. We bear all these considerations in mind when settling the objectives and policies for the Mackenzie subzone. We first consider some unique features of the Waitaki Power Scheme and its place in the landscape of the basin.

2.4 The Waitaki Power Scheme and its relationships with other activities

[112] We have already recorded the role of Meridian in generating electricity for New Zealand. An important component of the Waitaki Power Scheme is that as a whole it represents 50% of the country's water storage[229] for hydroelectricity. That allows high summer flows to be stored for reliable generation in winter when demand is highest.

[113] Beyond the categorisation (or not) of the Mackenzie Basin landscape, Meridian had three principal areas of concern with PC13(C):

- the impacts of PC13 on the Waitaki Power Scheme;
- reverse sensitivity effects;
- hazards.

As to the first point, Meridian was concerned with whether, and if so, how PC13 might affect Meridian's operations. Most of the Waitaki Power Scheme daily activities are managed under resource consents[230] issued by the Canterbury Regional Council. However, some activities fall within the land uses which are overseen by the Mackenzie District Council. These include[231] erosion protection works around the edge of Lake Pukaki, sourcing and storage of aggregate, modifications to the infrastructure and supporting facilities; and earthworks associated with investigation and remedial work. Second Meridian is concerned[232] with the possibility of residential subdivision and development close to the Waitaki Power Scheme because this raises reverse sensitivity issues, might cause increased traffic on its roads, increase stormwater discharges over its land, and various other effects listed by Mr Smales. For example, an engineering witness called by Meridian, Mr N A Connell, wrote that in his opinion any development should avoid land that may be inundated by Class 2 events associated with the exercise of emergency discharge permits[233]. Meridian and the Council have reached an accommodation on the rules to deal with Meridian's first two concerns, and nobody seeks to challenge those.

[114] Third Meridian raised concerns about hazards arising from the potential for devastating flooding as a result of canal wall failure. Mr Connell produced and described in some detail how the hazard overlay is derived using the potential impacts or

229 K A Smales, evidence-in-chief para 62 [Environment Court document 10].
230 K A Smales, evidence-in-chief para 66 [Environment Court document 10].
231 K A Smales, evidence-in-chief para 66 [Environment Court document 10].
232 K A Smales, evidence-in-chief para 70 [Environment Court document 10].
233 N A Connell, evidence-in-chief Para 11.1 [Environment Court document 12].

consequences (PIC) of a canal failure at any discrete location[234]. The hazards described by Meridian are divided into two classes:

- Class 1 – arising from failure of dam or canal structures, particularly canal structures in fill, caused by seismic activity or other meteorological event;
- Class 2 – arising from the exercise of emergency discharge permits that are part of the overall management of the Waitaki Power Scheme that are the subject of existing resource consents and are integral to the safe and efficient operation of the Waitaki Power Scheme[235] as discussed above.

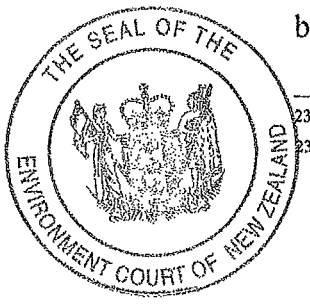
Mr Connell stated in respect of Class 1 hazards:

> Development should be minimised on any land that is liable to inundation as a result of failure of canal embankments in particular; and
>
> That evaluation of development should include an assessment of Class 1 [and Class 2] hazards when determining appropriate locations and scale of development in all areas whether or not in a Farm Base Area.

[115] Risk is usefully defined as the product of a probability of an event and the cost of the consequences. The probability of canal failure is very low. As we understood Mr Connell's evidence, Meridian designs its canals for such low probability events as earthquake-caused failures with a 1 in 10,000 Annual Exceedance Probability ("AEP") for different potential impact classifications depending on the population at risk as shown in the Building (Dam Safety) Regulations 2008. In this case it appears that the principal costs of canal-failure might well be a loss of life, so Meridian's concern was to minimise the number of persons whose lives might be at risk. An obvious way to achieve that is to avoid further residential development in the potential flood paths from canal failures. We accept Mr Connell's evidence that the plans attached to his evidence show that of the farm base areas proposed by the Council six are potentially affected by Class 1 inundation. These are Irishman Creek, The Wolds, Maryburn, Omahau Downs, Bendrose Station, Windy Ridges.

2.5 Summary : identifying issues to be managed

[116] We should pause here to record that Change 13 was designed to identify (recognise) an outstanding natural landscape which is the Mackenzie Basin and then to protect that landscape from inappropriate development – specifically scattered subdivision and residential development. As we have seen, that aim was negated by the Commissioners' Decision which left identification of the outstanding natural landscape to the future. With some amendment the objectives and policies can protect the outstanding natural landscape we have found to exist in the basin from inappropriate buildings. However, we are also concerned that the existing district plan (and PC13)



234 N A Connell, evidence-in-chief paragraphs 18-20 and 41-44 [Environment Court document 12].
235 J W Maassen, submissions para 42 [Environment Court document 9].

identify other threats to the Mackenzie Basin landscape but then do nothing about it. In part 2 of this decision we have identified some of those threats as more than likely and as having high potential to have large adverse effects on the Mackenzie Basin and its occupancy. We refer in particular to:

- potential hazards from failure of dam or canal structures;
- the spread of wilding conifers;
- intensive (irrigated) farming;
- the potential for large-scale farm buildings;
- "retirement" subdivision;
- increasing desertification of lower areas.

[117] The outstanding appeals raised a number of concerns which will resolve in the relevant places. When considering the appropriate objectives, policies and methods of implementation in the next part of this decision we will also attempt to cover the matters identified in the previous paragraph in the relevant places. We consider that is proper because all those matters relate to the broad subject matter of PC13 – the landscape(s) of the Mackenzie Basin. We hold that all the matters identified are "on" PC13 : *Clearwater Resort Limited v Christchurch City Council*[236].

[236] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP 34/02, William Young J, 14 March 2002.

3. The proposed objectives and general policies in the context of the district plan

3.1 The context for PC13 : the operative district plan

[118] PC13 is designed to fit into the operative district plan, so we first set out the scheme of the plan as a whole. We then outline the objectives and policies for the Rural Zone since that covers most of the Mackenzie Basin. We then briefly turn to the two most relevant remaining chapters of the district plan.

[119] The Mackenzie District Plan ("the MDP") became operative on 24 May 2004. It is contained in one volume and comprises 17 chapters (called 'sections'[237]), some appendices and a set of planning maps showing zone designations, and roads amongst other things. The seventeen chapters, with the most relevant in bold type, are:

1 – Introduction
2 – Policy and Legal Framework
3 – Definitions
4 – Takata Whenua
5 – Business (Zone)
6 – Residential (Zone)
7 – Rural (Zone)
8 – Special Purpose (Zones)
9 – Hazardous Substances
10 – Heritage Protection
11 – Signs and Outdoor Lighting
12 – Subdivision and Development
13 – Temporary Activities and Buildings and Environmental Noise
14 – Transportation
15 – Utilities
16 – Waste Management
17 – Natural Hazards

Chapter 7 (Rural)

[120] The most relevant chapter to these proceedings is chapter 7 which deals with the Rural zone – the largest of the district. We list the relevant[238] objectives in turn. The first objective[239] is "To safeguard indigenous biodiversity and ecosystem functioning through the protection and enhancement of significant indigenous vegetation and habitats, riparian margins ...". The second is[240] to preserve the natural character and functioning of the District's lakes, rivers, wetlands and their margins, and to promote public access along these areas. The third objective in the Rural section is at the heart

237 We avoid this term so as not to cause confusion with sections of the RMA.
238 Other objectives deal with Downlands and Plains Soils (objective 5), Public Safety and Aviation (objective 9), Aoraki National Park (objective 10).
239 Rural Objective 1 – Indigenous Ecosystems, Vegetation and Habitat [MDP pp 7-16].
240 Rural Objective 2 – Natural Character of Waterbodies And Their Margins [MDP p. 7-27].

of these proceedings because it relates to the landscape values of the district's rural areas. It states[241]:

> **Rural Objective 3 – Landscape Values**
> Protection of outstanding landscape values, the natural character of the margins of lakes, rivers and wetlands and of those natural processes and elements which contribute to the District's overall character and amenity.

It is this objective which was proposed to be added to by PC13.

[121] Also highly relevant is[242] a "high country"[243] objective to encourage land uses which sustain soil and water and ecosystems and "which protect the outstanding landscape values of the high country, its indigenous plant cover and those natural processes which contribute to its overall character and amenity". Relevant implementing policies for this objective[244] include one requiring that land use should maintain "a robust and intact vegetation cover". We have already described how that is not happening in the lower and drier parts of the basin. Another policy[245] aims to ensure that ecosystems, natural character and open space values are maintained by retaining (as far as possible) indigenous vegetation and habitat, maintaining natural landforms, and by managing adverse effects on landscape and visual amenity. We repeat that there was a disappointing lack of ecological evidence in these proceedings, so that our findings may insufficiently take into account "indigenous plant cover", especially in respect of the smaller native plant species which live in the spaces between tussocks, or which are dry hill/scree specialists.

[122] A further objective aims to maintain rural amenities[246]. It aims for:

> A level of rural amenity which is consistent with the range of activities anticipated in rural areas, but which does not create unacceptably unpleasant living or working conditions for the District's residents or visitors, nor a significant deterioration of the quality of the general rural and physical environment.

[123] An objective relevant to Meridian's concerns in these proceedings aims to minimise losses from natural hazards[247]. There is a particularly relevant implementing policy which reads:

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241 MDP p. 7-21.
242 Rural Objective 4 – High Country Land [MDP p. 7-25].
243 Defined so that in fact all of the Mackenzie Basin subzone comes within the term "High country" – see MDP p. 7-3.
244 Rural Policy 4A – Vegetation Cover [MDP p. 7-26].
245 Rural Policy 4B – Ecosystem Functioning, Natural Character and Open Space Values [MDP p. 7-26].
246 Rural Objective 6 – Rural Amenity and Environmental Quality [MDP p 7-32].
247 Rural Objective 7 – Natural Hazards [MDP p. 7-37].

Rural Policy 7A – Proximity To Waterways
To control the proximity of buildings to waterways to limit potential loss of life and damage to property.

[124] Similarly there is an objective seeking "rural infrastructure"[248] to enable the District and New Zealand ("the wider community") to maintain their economic and social wellbeing. The implementing policy[249] recognises the importance of electricity generation and transmission in the district. The principal infrastructure for the Waitaki Power Scheme is identified in Schedule 1 part 1 of chapter 7 of the district plan and in the attached maps which are part of the Schedule. Rule 7/13 rather clumsily[250] identifies the status of activities listed in that Schedule.

Chapter 12 (Subdivision)

[125] This chapter contains a number of mechanical objectives including a subdivider pays principle[251], a target of supplying necessary services[252], creation of reserves[253] and esplanades[254], and avoidance of natural hazards[255]. It culminates with an objective requiring[256] "... avoidance of adverse environmental effects associated with subdivision design and location". The explanation links back to Rural Objectives 1, 2, 3 and 4 in Chapter 7 (Rural).

Chapter 15 (Utilities)

[126] Utilities are provided for in chapter 15 of the district plan. "Utility" is defined[257] as meaning facilities, structures and works necessary for or incidental to and associated with providing:

- generation and transmission of energy;
- transportation networks and navigational aids;
- the storage, treatment and conveyance of water and sewage;
- the disposal of waste;
- radio- ... and telecommunications;
- the protection of the community from natural hazards;
- monitoring and observation of weather.

In fact, the first of those sets of facilities and works – basically the Waitaki Power Scheme - is identified in the plan as being of "national significance"[258]. The Utilities

248 Rural Objective 11 – Rural Infrastructure [MDP p. 7-37].
249 Policy 11A [MDP p. 7-38].
250 That is unnecessary: the status of activities would be better stated in the rule itself.
251 Objective (12)2 [MDP p. 12-5].
252 Objective (12)1 [MDP p. 12-5].
253 Objective (12)3 [MDP p. 12-6].
254 Objective (12)4 [MDP p. 12-7].
255 Objective (12)5 [MDP p. 12-8].
256 Objective (12)6 [MDP p. 12-8].
257 "Utility" in section 3 [MDP p. 3-11].
258 Section 15 [MDP p. 15-1].

section contains its own set of objectives, policies and rules so that "... most if not all of ... Meridian's normal operational activities would be covered by these provisions"[259] which set out defined activities within the areas identified in Schedule 1 to Chapter 7. None of these are sought to be changed by PC13.

[127] The overall rule structure in the district plan for the Waitaki Power Scheme is complex in that there are three sets of applicable policies and rules:

- the core infrastructure is dealt with in section 4 by Rural Rule 13 and accompanying Schedule A part 1;
- power conveyance lines maintenance and upgrade is dealt with in chapter 15 (Utilities)[260] ;
- erosion-control work around the margins of the lakes or in the rivers is covered by the general Rural rules (e.g. on earthworks).

The rules in chapter 15 are expressly stated to take precedence[261] (generally) over other rules in the district plan.

3.2 Achieving the purpose in Part 2 of the Act

[128] Ultimately the objectives for the Mackenzie Basin subzone must meet the single purpose of the RMA as set out in section 5 of the RMA, so these proceedings are about weighing various possible forms of development and use and protecting and deciding which best enable Ngai Tahu and the farming, fishing, energy generation, forestry, tourism and recreation communities and individuals to provide for their wellbeing, health and safety while achieving three other aims. Those aims are, first, that any landscape objective should, in concert with the other (settled) objectives in Chapter 7 of the district plan, sustain the potential of the natural and physical resources which make up the Mackenzie Basin subzone to meet the reasonably foreseeable needs of future generations[262]; second it should safeguard[263] life-supporting capacity of the air, water, soil and ecosystems of the subzone; and third, to the extent appropriate, the objective should seek that any adverse effects of existing and proposed activities on the existing environment should be avoided, remedied or mitigated[264] .

[129] While section 5(2) acknowledges the importance of the other three forms of capital – physical and financial capital, human capital, and social capital – the RMA is principally concerned with environmental capital. That is, in this case, the natural and physical resources of the Mackenzie District. That is not because the other forms of

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259 K G Gimblett, evidence-in-chief para 40 [Environment Court document 14].

260 Rule 15/1.1.j.

261 First (un-numbered) rule on p. 15-7 of the Mackenzie District Plan. This refers incorrectly to "Section 14" rather than "section 15". We will exercise our powers under section 292 of the RMA to correct this.

262 Section 5(2)(a) of the RMA.

263 Section 5(2)(b) of the RMA.

264 Section 5(2)(c) of the RMA.

capital are any less important – they may be more important in many situations. The primacy is because the social and economic arrangements for dealing with the other forms of capital are largely outside the purview of the RMA : section 5 is designed to enable people and communities to get on with arranging their own wellbeing by using most of their capital as they see fit. It is fundamental to section 5(1) of the Act that as far as possible people and communities should put their own values on the other components of their wellbeing, and that councils should leave those values to individuals to identify[265].

[130] Hazards to human health and safety are a core part of the purpose of the Act : section 5 requires all councils to manage natural and physical resources so as to "enable people and communities to provide for their ... wellbeing, and for their health and safety ...". The philosophy of the Act is to leave people to look after themselves as far as possible. However, there comes a point where risks to health or safety are sufficiently obvious and/or serious that some "paternalistic" action by a local authority may be justified. The RMA is concerned with effects of low probability and high potential impact[266]. If a potential impact is a threat to human life, and the possibility is more than fanciful, then a local authority may, depending on the circumstances, be justified in having a policy and/or method of implementation to manage the risk. Such matters are not seen as automatic matters of national importance[267] presumably because each risk needs to be assessed separately. Some natural hazards might potentially be of national importance – tsunamis/earthquakes/volcanoes. But others will not be.

[131] The matters of national importance in section 6 are values for which markets do not readily provide quantifiable (especially) monetary measures. As it happens almost all of the matters of national importance under section 6 of the RMA need to be recognised and therefore provided for in Mackenzie Basin. They are:

> (a) The preservation of the natural character of ... wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
> (d) The maintenance and enhancement of public access to and along ... lakes, and rivers;
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.

265 The Local Government Act 2002 takes a different approach.
266 Section 3(f) of the RMA.
267 For example, under section 6 of the RMA.

Obviously section 6(b) as to the protection of outstanding natural landscapes is at the heart of these proceedings, but the other paragraphs are all relevant, at least potentially.

[132] The preservation of the natural character of wetlands[268] – for example, we observed a large wetland on The Wolds Station and smaller ones on Pukaki Downs – and of the margins of lakes and rivers are nationally important matters that largely complement the recognition of and provision for the outstanding natural landscape in which those features are set. Similarly, areas of indigenous vegetation[269] and habitats of indigenous fauna exist in the Mackenzie Basin. Regrettably, we heard next to no evidence as to their significance. That is a grave omission on the Council's part since it is usually important to link significant areas of vegetation and significant faunal habitats together with landscape values. We have earlier drawn attention to the loss of soils in the lower and drier parts of the Basin. That is an important issue for the district as the district plan recognises[270], and of course part of the purpose of the RMA is[271] "... safeguarding the life supporting capacity of ... soils and ecosystems".

[133] As for the maintenance of public access[272] and the protection of historic heritage[273], we read and heard little about these values either. Finally, as to the relationship of Maori – here principally Ngai Tahu – and their culture and traditions with the Mackenzie Basin, we have the report by Mr Densem[274]. Consequently this decision will result in changes to the district plan which are likely to be a minimum to protect the landscape values of the Mackenzie Basin. It may be, for all we know, that further section 6 matters need to be better recognised and provided for in the district plan.

[134] Section 7 matters did not loom large in the evidence or submissions. We have particular regard to efficiency of use of resources when we consider section 32 of the Act. We have particular regard to the various "amenities" provisions[275] in section 7 as we carry out our other responsibilities in what follows.

3.3 The issue : landscape values

[135] The operational district plan identifies Issue 7 as "Landscape Values". To the statement about the landscapes of the district quoted earlier, PC13 as notified proposed to add a further paragraph[276]:

> Rural lifestyle developments and rural residential development around existing towns if too extensive or in the wrong location have the potential to alter the extensive open character that

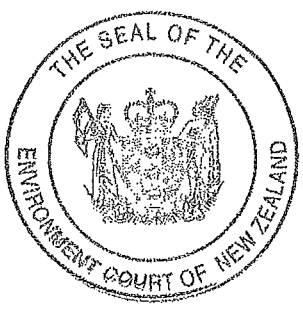
268 Section 6(a) of the RMA.
269 Section 6(c) of the RMA.
270 Chapter 7 – issue 2 [MDP p. 7-4].
271 Section 5(2)(b) of the RMA.
272 Section 6(d) of the RMA.
273 Section 6(f) of the RMA.
274 G H Densem, evidence-in-chief Attachment 2, Appendix 2 [Environment Court document 3].
275 Section 7(c) and (f) of the RMA.
276 PC13(N) para 1.1.

> much of the Mackenzie Basin still offers. Where subdivision and housing occurs, the Basin becomes more strongly an "occupied rural place" as in the lowlands of South Canterbury. This potentially reduces the Basin's unspoiled openness and vastness, which are its main attributes. The breaking up of land through subdivision could result in the loss of the former high country ethos and landscape pattern. It may also result in more intensive use of the remaining farmed areas. This process has the potential to increase with the freeholding of former pastoral lease land, much of it at the lower altitudes and with other pressures for lifestyle housing. Particular landscape values, which could be degraded by inappropriate redevelopment, include visual openness, a sense of naturalness, sense of landform continuity, small well-separated towns and spectacular views such as the iconic views up the lakes, particularly Tekapo and Pukaki. The loss or degradation of views from the iconic views up the lakes, could also occur. Another issue associated with retaining values of the Basin is the extent to which additional irrigation will "green" the Basin and change land use patterns.

That statement about the threats of housing and irrigation to the outstanding natural landscape is accurate. No party challenged its insertion. However, we are concerned that the issue as to the effects of irrigation assisted pastoral intensification have not been addressed adequately despite being identified as an "issue". Further, we are also left with major concerns that another landscape issue which on the evidence is at least as urgent – and already identified in the district plan – is not being dealt with. That is the issue of wilding pines, particularly if tenure review is carried out.

[136] Leaving those issues aside at present, PC13 was principally designed at the implementation level to answer the problems raised by housing in the landscape of the Mackenzie Basin. The original rural objective 3 as to landscape values was proposed by PC13(N) to be broken into two: one dealing with the outstanding natural landscapes of the district, and the other with landscape values generally. The Commissioners' Decision proposed three. A welter of possible objectives flowed through the submission, hearing and appeal process. We will shortcut any confusing description of the various permutations put forward in the process, and simply describe together the objectives and policies of PC13 as they were decided by the Commissioners (for the Mackenzie District Council) and as the parties have agreed they should be amended. The Commissioners' version with the changes agreed by the parties are as follows (strike out viz ~~strike out~~ for deletions and underlining for additions are as in PC13(V)):

> **Objective 3A – ~~Distinctive and~~ Outstanding and Significant Natural Landscapes and Features**
>
> To ~~protect and~~ sustain ~~the distinctive and~~ outstanding and significant natural landscapes and features of the District and to protect them from inappropriate subdivision and development that would detract from those landscapes/features.
>
> ...
>
> **Objective 3B – Economy, Environment and Community**
>
> To encourage a healthy productive economy, environment, and community within, and maintain the identity of, the Mackenzie Country.
>
> ...



> **Objective 3C – Landscape Values**
> Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.
>
> ...

Because the objectives currently go from the most specific to the most general, we consider it is better drafting practice (and more logical) to consider them in the opposite order. Thus PC13(N)'s objective 3C should be renumbered as 3A, reinstating its original position in the (operative) district plan.

3.4 General landscape values : objective 3A and implementing policies

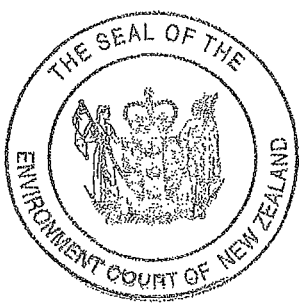
[137] The general landscape objective applies to the landscapes of the district outside the Mackenzie Basin, as well as those within it. As stated in PC13(N)[277] (and renumbered as explained above) it would read:

> **Objective 3A – Landscape Values**
> Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.

We are troubled by that aspect of PC13(N) because while the change as notified is headed "Rural Zone – Mackenzie Basin", this objective actually changes the objective for the rest of the rural zone as well – and that covers most of the district. Whereas before the objective in respect of landscape was to protect the "... outstanding landscape values ..." that has now been changed so that protection of the natural character of the landscape of the entire Rural zone is an aim of the district plan. We have no particular difficulty with that but consider that the Council should make a specific choice as to which wording it wants, and if it seeks to make a change then it should consult individuals and communities outside the Mackenzie Basin before this objective is finalised. The simplest course would be to revert to the wording in the operative district plan. In passing we record that the objective as currently worded in the operative district plan is potentially rather restrictive in a working landscape. However, it is probably too vague to have real teeth where we suspect it is likely to be needed which is in the tourism highway from the Opuha River bridge (on State Highway 79) to Fairlie, and then on State Highway 8 through Kimbell to Te Kopi o Opihi/Burkes Pass. A corridor free of new buildings of about one kilometre either side of those roads (except in the named settlements) merits serious thought. We take it no further.

The meaning of "margins" (of lakes and streams)

[138] In passing, a legal issue arose as to the meaning of "margins" in the objective and in section 6(a) of the RMA. In *Upper Clutha Environmental Society Incorporated*



[277] PC13(N) at p. 12.

v Queenstown Lakes District Council[278] the court said in respect of the margin of a river or lake in section 6:

> ... We hold that the margin of the lake is the uppermost limit of wave action.

The court based its decision primarily on section 230(3) of the RMA which relates to esplanade reserves in (amongst other places) lake margins.

[139] Mr Hardie submitted that approach is at least unduly restrictive, and perhaps illogical once the purpose and context of section 6 is considered. In particular, that a purposive approach to section 3 should lead to a different conclusion. Section 6(a) states:

> 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:
>
> (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 subdivision, use, and development:
>
> ...

Mr Hardie's point was that little development (we can think of jetties and marinas) occurs below the limit of wave action of a lake, so it is unlikely that Parliament was contemplating "margin" having such a restricted meaning in section 6(a). Similarly, not much land is developed or used between the banks of rivers, so "banks" and "margins" are not likely to be intended as synonymous. Counsel submitted that the purpose of section 6(a) was to protect an indeterminate area – dependant on circumstances – from inappropriate use and development.

[140] On reflection Mr Hardie may be correct. "Margin" in section 6(a) may have a different meaning from its use in section 230(3) where it is confined to being used of lakes only as the equivalent of the "banks" of a river. In contrast the "margins" of lakes and rivers must be a wider term. Consequently, we consider that the *Upper Clutha* case was probably wrong in adopting such a narrow interpretation of "margin" : it attempted to find consistency in the RMA in another place where it cannot be found. Margins are likely to be areas beyond the wave action of a lake or extending away from the banks of a river for, depending on topography and other factors, at least 20-50 metres and sometimes more. However, this opinion is obiter : the issue was not argued.

The general landscape policies

[141] The numbering of the policies in the district plan has become very confusing as a result of the Commissioners' Decision. The drafting conventions have changed with the introduction of alphabetical qualifiers for objectives here whereas elsewhere in

[278] *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* Decision C12/1998 at p. 15.

Section 7 of the district plan each new objective is given its own number. The new convention for landscape whereby the objectives are numbered 3 but distinguished by a capital letter (e.g. 3A to 3C) means that it is no longer clear precisely which policies are designed to implement each objective. Accordingly, we consider the implementing policies should be more clearly numbered with the objective they relate to. Thus the policies for objective 3A will be numbered 3A1, 3A2, etc.

[142] The original policies 3B[279] to 3F in the operative district plan were not changed by PC13(N)[280]. Renumbered as explained above so that they go with the zone-wide objective they read:

> **Rural Policy 3A1 – Important Landscapes and Natural Features**
> To limit earthworks on steeper slopes, high altitude areas, and on land containing geopreservation sites to enable the landforms and landscape character of these areas to be maintained.
>
> **Rural Policy 3A2 – Scenic Viewing Areas**
> To limit structures and tall vegetation within scenic viewing areas to enable views of the landscape to be obtained within and from those areas.
>
> **Rural Policy 3A3 – Impacts of Subdivision Use And Development**
> Avoid or mitigate the effects of subdivision, uses or development which have the potential to modify or detract from areas with a high degree of naturalness, visibility, aesthetic value, including important landscapes, landforms and other natural features.
>
> **Policy 3A4 – Tree Planting**
> To control the adverse effects of siting, design and potential wilding tree spread of tree planting throughout the District, to enable forestry to be integrated within rural landscapes and to avoid screening of distant landscapes.
>
> **Rural Policy 3A5 – In Harmony With The Landscape**
> To encourage the use of guidelines for the siting and design of buildings and structures, tracks, and roads, tree planting, signs and fences.
>
> To encourage the use of an agreed colour palette in the choice of external materials and colours of structures throughout the district, which colours are based on those which appear in the natural surroundings of Twizel, Tekapo and Fairlie.

We have omitted former policy 3A – Lakeside Landscapes – from that list because, as mentioned in a footnote, that policy was deleted by PC13(N). It may be reinstated in an amended form (as in the Commissioners' Decision) for the Mackenzie Basin.

3.5 An objective on economy, environment and community?

[143] "Economy, environment and community" was originally Policy 3B in PC13(N). It was not appealed, but we consider it is *ultra vires* the council because it was not

279 We start with policy 3B because policy 3A was deleted by para 23 of PC13(N).
280 Para 2.4 of PC13(N) proposed merely to renumber them.

notified as an objective. It could be revived under section 293 of the RMA, but we consider that is inappropriate. We consider there is a more focussed way to express this policy and to resolve its contradiction between a productive economy and maintaining the identity of the Mackenzie Country. We turn to that when considering policies. We consider objective 3B as given in the Commissioners' Decision.

3.6 A new objective 3B – Mackenzie Basin Landscape

The agreed objective

[144] The wording agreed by most of the parties for the "Mackenzie Basin" objective is:

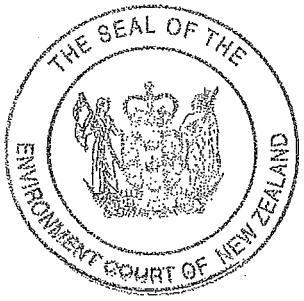
> **Objective X... – Outstanding and Significant Natural Landscapes and Features**
> To sustain outstanding and significant natural landscapes and features of the District and to protect them from inappropriate subdivision and development that would detract from those landscapes/features.

It is immediately obvious that the agreed objective adds nothing to section 6(b) of the RMA because it effectively uses the same words. The agreed objective was worded in that way largely to resolve disagreements with Meridian and Federated Farmers by leaving issues to be resolved in the future on a case by case basis. However, Meridian's own planning witness agreed that the objective merely replicates the words in section 6(b) and is not a "triumph of drafting"[281]. In our view it is a failure. We consider that each party's special interests have led to compromises so that the end result is practically useless. Outstanding natural landscapes should have clear objectives.

What is an appropriate landscape objective for the Mackenzie Basin?

[145] We are sympathetic to the problems facing the Council, local communities and industries. They are not on their own in facing the situation where a large area within the district is an outstanding natural landscape. Some other districts (South Island examples are Queenstown Lakes, Central Otago, and Marlborough) have large areas which are outstanding natural landscapes. The general answer to their management is not simply to have a one-sentence objective – which tends to become very bland as it is watered down to allay the fears of concerned landowners and occupiers that appropriate development will be prevented. In our view it is preferable at least in the Mackenzie Basin's context, to have several objectives in a set. They should provide first a general high standard of protection, but where appropriate some more specific objectives for activities in specific areas within the outstanding natural landscape. Provided these specific objectives are sufficiently focussed – usually by area – they can safely be allowed to over-ride the general outstanding natural landscape objective.

[146] In this case there is little difficulty in finding the attributes to be protected : they are already described in the existing plan's "Issues" as amended by PC13(N). Based on those descriptions and corroborated by our findings in part 2 of this decision we



281 Transcript p. 308.

consider that the objectives should both protect and enhance the following qualities[282] of the Mackenzie Basin as an outstanding natural landscape:

- its unspoiled openness and vastness[283];
- the sense of naturalness[284] given by the golden-brown vegetation;
- the sense of landform continuity[285];
- relative lack[286] of trees, especially windbreaks and plantations;
- lack of structures with unobtrusive development and isolated contained settlement[287];
- the high apparent naturalness and spectacular nature of the views from State Highway 8[288].

[147] The objective should also recognise that within the outstanding natural landscape there are smaller areas which have either already been compromised as to some values and/or are important for others (farming/carbon sequestration) or which (in the case of the Waitaki Power Scheme) are so important to New Zealand that they need to be managed differently. They are:

- the Waitaki Power Scheme in its canal and transmission line corridors and around the margins of Lakes Tekapo, Pukaki, Ruataniwha and Ohau[289];
- some pastoral farm areas;
- the potential for carbon capture forestry from (principally) wilding exotic conifers;
- some production forestry;
- rural residential subdivision and cluster housing (preferably around existing homesteads and/or in areas with high capacity to absorb development);
- (potentially) some areas of high intensity (irrigated) farming.

[148] Meridian was concerned that its operations and their importance were not sufficiently recognised by the Commissioners' Decision and PC13(C). We consider our proposed alternative objective 3B(2) amply recognises the existing Waitaki Power Scheme and its importance. This recognition will flow through by applying the Utilities objectives, policies and methods in Part 15 of the district plan and in our view takes care of many of Meridian's concerns. However, we consider that there should be some limitations on future utilities. First to the extent that any utility operator wishes to go outside its existing footprints it should be subject to the landscape objective, policies and

282 These are largely corroborated in G H Densem's evidence-in-chief at para 3.22 [Environment Court document 3].
283 PC13(N) p. 4 [as given in Environment Court document 6 Annexure B].
284 PC13(N) p. 4 [as given in Environment Court document 6 Annexure B].
285 PC13(N) p. 4 [as given in Environment Court document 6 Annexure B].
286 PC13(N) p. 4 [as given in Environment Court document 6 Annexure B].
287 Issue 7 – Landscape Values [District Plan p. 7-10.
288 Issue 7 – Landscape Values [District Plan p. 7-10.
289 To the limited extent the latter two lakes' margins are within the district.

implementing methods for the Mackenzie Basin subzone. Secondly, those provisions should also apply in respect of management of exotic tree species within the existing footprints of the Waitaki Power Scheme.

[149] Next we briefly[290] consider the issue of the "greening" of the landscape. This visual effect is created in part by the spread of (especially) exotic trees, but principally by cultivation and/or sowing or oversowing of exotic grasses. A limited class of pastoral intensification effects are managed in the operative district plan which manages[291] "subdivisional fencing and/or topdressing and oversowing" on sites of natural significance identified on the planning maps. The definition is oddly worded since it is notorious that cultivation is more harmful to tussock grasslands than merely oversowing. We consider that the definition of "pastoral intensification" should be amended to include "cultivation". Direct drilling should also probably be included. We assume the omission of "cultivation" is because that is regarded as "clearance" of land rather than simply farming – and different rules apply. However, that is to work backwards from the rules. We consider that there should be a more inclusive definition of "pastoral intensification" that includes the most intense as well as less invasive agrarian techniques. The definition of "pastoral intensification" in the district plan would then read more sensibly:

> **Pastoral intensification** means subdivisional fencing and/or topdressing and oversowing and/or cultivation and sowing and/or direct drilling.

[150] Defining "pastoral intensification" more fully, as in the previous paragraph, we consider that, with limited exceptions, it should be confined to lower parts of the basin[292] and in the most highly modified areas. Some care will need to be taken to protect areas for restoration of endemic plant communities that may be hanging on in the lower parts of the basin. We also consider that further pastoral intensification adjacent to, and in the foreground of views from, State Highways and the tourist roads is an inappropriate aim.

[151] Consequently, a more focussed and therefore more appropriate[293] objective for the landscape of the Mackenzie Basin would read:

> **Objective 3B – Activities in Mackenzie Basin's outstanding natural landscape**
> (1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin subzone in particular the following characteristics and/or values:
> (a) the openness and vastness of the landscape;
> (b) the tussock grasslands;
> (c) the lack of houses and other structures;
> (d) residential development limited to small areas in clusters;

290 Brief because we received little evidence on this issue, not because it is unimportant.
291 Rule (7)15.1.1.a [MDP p. 7-65].
292 Generally south and east of State Highway 8.
293 Section 32(3)(a) of the RMA.

(e) the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;
(f) undeveloped lakesides and State Highway 8 roadside;

(2) To maintain and develop structures and works for the Waitaki Power Scheme:
(a) within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing Lakes Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all objective (1) and all implementing policies and methods in this section apply;
(b) elsewhere within the Mackenzie Basin subzone so as to achieve objective (1) above.

(3) Subject to objective (1) above and to rural objectives 1, 2 and 4:
(a) to enable pastoral farming while limiting buildings, fencing and shelterbelts;
(b) to enable pastoral intensification including cultivation and/or direct drilling and high intensity (irrigated) farming in appropriate areas south and east of State Highway 8 except adjacent to, and in the foreground of views from, State Highways and tourist roads;
(c) to enable rural residential subdivision, cluster housing and farm buildings preferably around existing homesteads (where they are outside hazard areas) or in the areas of low visual vulnerability shown on map Z[294] in the district plan;
(d) To enable carbon forests and production forests in:
- the Twizel River landscape unit;
- the area between Hayman Road east to approximately 650 masl contour on the Mary Range;
- mid and lower Tekapo and Pukaki River flats;
- around identified existing farm bases

– whilst ensuring exotic wildings do not escape from these areas and managing a transfer to non-weed species.

That objective was not sought by any party. However, it is within jurisdiction because it comes somewhere between the original objective 3A and some of the original submissions. Further, recognition of the Mackenzie Basin as an outstanding natural landscape was expressly contemplated by policy 3A in PC13 as notified[295]. We consider non-parties are not likely to be prejudiced because an outcome in which areas within the Mackenzie Basin subzone are found to have lesser values (even though they are parts of an outstanding natural landscape) is fairly and reasonably predictable from the submissions.

[152] Obviously our version of objective 3B, which we think – with one reservation, discussed next – better achieves sustainable management of the landscape of the Mackenzie Basin subzone, is different from the equivalent in PC13(N) or PC13(C). Accordingly, we will need to consider whether we should refer this back to the Council under section 293 of the RMA. The Council would then need to consult to the extent it considers necessary with the communities in the Mackenzie Basin and wider district.

294 We anticipate an improved version of Map 3 in this decision will be inserted in the district plan.
295 PC13(N) at p. 5.

[153] Our reservation concerns the proposed objective 3B(3)(b) about enabling pastoral intensification including cultivation and high intensity farming except adjacent to State Highways and the tourist roads (or in the foreground of views from them). We consider that is the appropriate objective on the evidence before us. That leaves the door open for extensive cultivation and (if water is available and water permits are granted) irrigation on the Tekapo and Pukaki plains, which would lead to greening of a large part of the lower basin. However, we stress that the ecological values of those areas have not been taken into account other than to accept the tentative indirect evidence in some scientific papers, which we have quoted, that the desertification of parts of the lower plains is irreversible. We are uneasy about that because we received no evidence on whether mitigation is possible at least in some areas where continuous "top of mountains to lakeside" protected areas can be maintained or recreated. If we decide to take the section 293 route we would request expert evidence on these issues.

4. What are the most appropriate Mackenzie Basin landscape policies?

4.1 Introducing the policies

[154] Having provisionally settled objective 3B we now need to resolve (again provisionally) the policies to achieve[296] it. There is a preliminary point to note which is that the same confusion over numbering of policies arose here that we have already identified for the district-wide landscape policies. We will try to minimise further confusion by adopting these conventions:

- all references to policies 3A, 3B etc will be to the policies as notified in PC13(N) with one exception – 3X – considered first;
- the parties' suggestions will be cross-referenced in footnotes;
- the policies we approve will be numbered 3B1, 3B2 etc (i.e. with a terminal number) so that they are linked to the objective they implement.

Further, all suggested, but unapproved, policies will be italicised.

[155] While we consider that objective 3B is generally within jurisdiction and expresses the balance expected by the parties, we are troubled as to how to implement it. Both the evidence in these proceedings and the issues identified in the district plan suggest to us that the policies in all versions of PC13 so far are inadequate to obtain the objectives. That is particularly the case in respect of PC13(C) which has the effect of allowing residential buildings anywhere in the Mackenzie Basin at the discretion of the Council (but without policies in respect of much of the basin). Mr Densem wrote of this that[297] "... the absence of policy guidance ... leaves the landscape vulnerable to the potential for poorly-located, designed and scaled developments". Mr Gimblett, the planning witness for Meridian, shared[298] "... some of the concerns about the permissible nature of the regime in [PC13(C)] from a landscape perspective".

[156] Ms Harte suggested a "positive"[299] policy as to "well designed and located"[300] development in the Mackenzie Basin that would read[301] as follows:

> ***Policy 3X – Limitations on Non Farming Subdivision and Development***
> *Non-farming subdivision and development outside of farm base areas, and other than for activities provided for in [Renewable Energy] Policy [3J], shall maintain or enhance the significant and outstanding landscape and natural values of the Mackenzie Basin by:*
> *(1) confining development to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki*
> *(2) integrating built form and earthworks so that it nestles within the landform and vegetation*
> *(3) planting of local native species and/or non-wilding prone exotic species and/or management of wilding tree spread*

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296 Section 32(3)(b) of the RMA.
297 G H Densem, evidence-in-chief para 3.43 [Environment Court document 3].
298 K G Gimblett, evidence-in-chief para 32 [Environment Court document 14].
299 P Harte, evidence-in-chief para 96 [Environment Court document 6].
300 P Harte, evidence-in-chief para 96 [Environment Court document 6].
301 P Harte, evidence-in-chief para 96 introducing her policy 3X [Environment Court document 6].

(4) *maintaining a sense of isolation*
(5) *built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing*
(6) *clustering built development to avoid dispersed impacts*
(7) *mitigating, the adverse effects of light spill on the night sky*
(8) *avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance*
(9) *sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.*

This policy was supported generally by Mr Densem, and also, it appears, by Meridian's planning witness, Mr Gimblett[302], so long as it did not interfere with Meridian's operations.

[157] Ms Harte's policy 3X generally seems to implement many of the themes of objective 3B. We see three problems with it. First some elements of the policy seem to be new (e.g. effects of light spill on the night sky) and have not been tested in the consultation and submission processes[303]. Secondly, we consider that the multipurpose nature of the policy, covering both subdivision and development, is liable to cause the problems described by Ms Harte elsewhere in her evidence[304]. The major practical difficulty is that while it is generally easy to distinguish non-farming development (e.g. a house) from farming development[305], it is almost impossible to make a useful distinction between farming and non-farming subdivision. In order to make such a distinction the proposed policies refer to the purpose of the subdivision. However, without being cynical about people's intentions, it is very easy for an applicant to express their purpose as being one thing when applying to subdivide, only to change their mind when an application is granted. Thirdly we consider a portmanteau policy such as Ms Harte's policy 3X is not preferable to specific separate policies. We consider that the relevant aspects of her policy 3X should be inserted in the relevant specific policies. However, we find it significant that Ms Harte felt she needed to advance her general policy as a way of pulling back on concessions she had made elsewhere.

[158] The first problem could be dealt with by the court giving directions under section 293, and we will consider that later. As to the general subdivision/land use dichotomy, perhaps as a consequence of the Commissioners' Decision a number of policies in PC13(C) and in the parties' or witnesses' suggested changes refer indiscriminately to development and subdivision. Based on Ms Harte's evidence[306], we see several difficulties with this approach. For example, if as a consequence of such policies a

302 K G Gimblett, evidence-in-chief (2 July 2010) para 32 [Environment Court document 14].
303 Under the First Schedule to the RMA.
304 P Harte, evidence-in-chief paragraphs 53, 54 and 121 [Environment Court document 6].
305 Except for "retirement houses" Mr K G Gimblett described as "curious" this aspect of PC13(C) : evidence-in-chief para 27 [Environment Court document 14].
306 P Harte, evidence-in-chief para 96 [Environment Court document 6].

farming subdivision is a controlled activity, and a non-farming policy is discretionary or non-complying, then any aspiring subdivider will invent a farming subdivision regardless of their ultimate purpose. Further, it is also preferable for legal reasons to keep development policies separate from subdivision because land use consents and subdivision consents have different governing provisions in the RMA. The district plan generally follows that approach, with subdivision being managed in a separate chapter (12) of the plan and we consider PC13 should be consistent with it. We now turn to the specific implementing policies, bearing in mind that our analysis of each policy is subject to our overall evaluation (under section 32 of the Act) in part 4.13 of this decision.

[159] A further difficulty of these proceedings has been that PC13 has been largely reactive rather than proactive. Arguably innovative proposals such as those by Pukaki Downs have been stifled as we shall see later. Further, as we have predicted on the evidence – and indeed as the district plan already recognises – there is a suite of problems in the Mackenzie Basin which already directly affect its outstanding natural landscape. The most pressing of these problems is that upon freeholding under tenure review landowners will no longer have any obligation to control wildings on their land. To the contrary, as we have described, there is now an incentive to encourage exotic trees (especially pines) to grow. Another urgent issue is the extent to which irrigated pastoral farming is appropriate in the landscape.

4.2 Recognising the Mackenzie Basin landscape

[160] The original policy was "to recognise the Mackenzie Basin as an outstanding natural landscape"[307]. We do not consider that is a policy matter, but a matter of fact and judgement to be recorded in the issues or background to the objectives and certainly in at least one objective. We consider the policy should recognise the distinctive characteristics and diversity of different parts of the basin – as did PC13(C)[308]. However, this needs to be worded in a way that does not undermine the integrity of the basin's landscape as a whole, which is the effect of the Hearing Commissioners' version in PC13(C). We consider the policy should be amended accordingly to read:

> **Policy 3B1 Recognition of the Mackenzie Basin's distinctive characteristics**
> To recognise that within the Mackenzie Basin's outstanding natural landscape there are:
>
> (a) some areas where different types of development and use (such as irrigated pastoral farming or carbon forestry under an Emissions Trading Scheme) and/or subdivision are appropriate, and to identify these areas; and
> (b) many areas where use and development beyond pastoral activities on tussock grasslands is either generally inappropriate or should be avoided
>
> – while encouraging a healthy productive economy, environment, and community within, and maintaining the identity of, the Mackenzie Country.

[307] Policy 3A in PC13(N).
[308] Policy 3B – Landscape Diversity [PC13(C) p. 4].

So amended, the policy includes aspects of two notified policies[309] but also, in the light of the national importance of the Mackenzie Basin's outstanding natural landscape and in order to implement objective 3B, outlines the approach whereby many activities are inappropriate over the basin as a whole, but will be recognised and provided for in appropriate areas.

[161] There will need to be consequential changes to the explanation for the policy.

4.3 Protecting and enhancing openness and ecological values

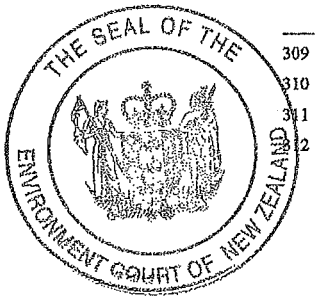
[162] The relevant implementing policy in PC13(N) is policy 3D. The variation proposed by the parties[310] implements neither the objective 3B generally nor objective 3B(1)(a) and (b) in particular because the proposed policy refers to unidentified and therefore unhelpful "significant ... landscape features". We consider it would be more helpful if the policy read as a stronger version of what was originally proposed with additions to cover all buildings and to show that there are exceptions identified in later policies:

> **Policy 3B2 – Adverse Impacts of Buildings and Earthworks**
> To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from residential buildings, domestication, structures, earthworks, tracks and roads except in particular areas under policies below, and to remedy or mitigate the adverse effects of farm buildings and fences.

Meridian sought that the policy should be limited to apply only to buildings and earthworks associated with residential and domestic uses, we consider it is more appropriate, as explained above, that there should be generally restrictive policies with freer policies in specific areas for specific purposes (such as the Waitaki Power Scheme). We consider that the first exception meets Meridian's concerns that PC13(N)'s former policy 3D (Adverse impact of buildings and earthworks) might restrict its operations.

4.4 Lack of houses and other structures

[163] The notified policy was simply proposed to be[311] "To avoid the adverse effects on the environment of sporadic development and subdivision". That did not cover the possibility of development in (approved) farm base areas or in areas with high visual absorption capacity which could be seen as sporadic. The parties other than Federated Farmers put forward an alternative[312] which (renumbered to fit our scheme) reads:



309 Policies 3B [PC13(N) p. 5] and 3F [PC13(N) p. 7].
310 See Schedule A.
311 PC13(N) policy 3C.
312 Policy 3D in C Vivian, evidence-in-chief Annexure "D" [Environment Court document 20].

> ***Policy 3B3 – Adverse Effects of Sporadic Subdivision and Development***
> *To control non-farm buildings and subdivision in the Mackenzie Basin Subzone (outside of approved farm base areas and other than for activities provided for in [the Renewable Energy] Policy 3B8) to ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated and to sustain existing and likely future productive use of farm holdings.*

Meridian sought that the reference to "non-farm buildings and subdivision" be changed to "residential and domestic [development]…".

[164] For the reason discussed earlier – that it is impossible to distinguish a farming from a non-farming subdivision, particularly if the subdivider wants to disguise his intentions – we are very uncomfortable with this proposed policy. The answer is relatively simple. Since we consider that all buildings should be managed subject to minor exceptions (the exceptions should be extended to include farm buildings in the areas of low visual vulnerability) the word "non-farm" should be omitted from the policy. Amended it would read:

> **Policy 3B3 – Adverse Effects of Sporadic Subdivision and Development**
> To control buildings and subdivision in the Mackenzie Basin Subzone (outside of approved farm base areas and other than for activities provided for in [the Renewable Energy] Policy 3B9 and subject to lesser controls on buildings and subdivision in areas of lower visual vulnerability) to ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated and to sustain existing and likely future productive use of land.

Limitations on residential subdivision and housing

[165] As a background to the issue we recall that PC13 adopted what it described as "nodal development" as the most appropriate form of residential subdivision and development within the Mackenzie Basin. It recognised the appropriateness of existing homesteads as nodes centred on "Existing Homesteads"[313]. It allowed for further development within these nodes, with farm buildings being permitted activities and non-farming buildings restricted discretionary activities.

[166] The plan change provided for new clusters of buildings through creation of a new activity referred to as an approved building node. An approved building node had to be able to accommodate at least five building platforms. The maximum number of buildings permitted was 10. Subdivision within a building node (identified or approved) was a restricted discretionary activity. PC13(N)'s policy 3G contained a detailed list of matters to be satisfied before consent could be granted for an approved building node.

[167] PC13(N) did not identify places where new nodes were to be established. It merely set a planning and rule framework for subsequent applications in PC13(N) itself. Outside of identified or approved building nodes, non-farming buildings would be non-

313 G H Densem, Map 8, December 2007 [Environment Court document 3].

complying activities. Remote farm buildings (those which need to locate outside of building nodes) were controlled activities.

[168] Subdivision outside nodes was to be a discretionary activity subject to the minimum lot size standard of 200 hectares. All other subdivisions would be non-complying activities.

[169] The main changes to PC13 provisions as a result of the Commissioners' decision were:

- removal of the activity of approved building nodes;
- renaming identified building nodes as farm base areas and providing for all buildings within these as permitted activities and subdivisions as controlled activities;
- removal of any minimum lot size;
- allowing subdivision for retirement houses;
- rules allowing residential subdivision and houses anywhere within the zone as a discretionary activity.

We consider that to achieve objective 3B, the most appropriate policy is that residential or rural residential subdivision and housing should not occur within the Basin subzone except in farm base areas or special subzones. Mount Gerald originally sought that this policy be amended to provide for development "in other areas where it is appropriate". Rhoborough also requested an amendment to the policy to recognise something similar in form to approved building nodes. Each withdrew those aspects of their appeal at the hearing.

[170] We hold that the appropriate version of this policy[314] is:

Policy 3B4 – Limits on subdivision and housing

(1) Subject to (2) below, to enable residential or rural residential subdivision and housing development in the Mackenzie Basin Rural subzone only within identified farm base areas;

(2) To encourage new residential or rural residential subzones in areas of low or medium vulnerability provided:
  (a) objectives 1, 2, 4, 7, 8 and 11 of the Rural chapter are achieved; and
  (b) the new subzones satisfy policy 3B6 below;

(3) To strongly discourage residential units elsewhere in the Mackenzie Basin.

Other specific issues arising out of the Commissioners' Decision will be considered below.

[314] Originally PC13(N)'s policy 3E.

Farm bases

[171] As we have said, PC13(N) contemplated that the existing homestead clusters and some other clusters of farm buildings should be approved as "Identified Building Node(s)". We have described how the Commissioners' Decision generally approved of that idea but renamed nodes as "Farm Base Areas", and in many cases increased them substantially in size.

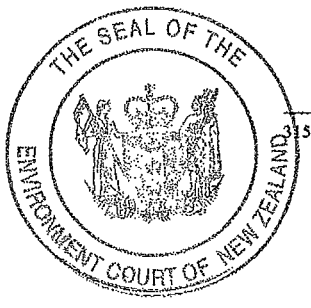
[172] The general scheme of PC13 is to cluster buildings – both residential units and farm buildings – within farm bases, which are to be identified in Appendix 5 of the district plan. Several issues about farm bases are raised by the appeals or the evidence:

(1) should all existing homesteads or clusters of farm buildings be approved as farm bases?
(2) what, if any, controls on buildings are appropriate within farm bases – e.g. should there be rules as to density, number, size, and appearance of buildings, lot size and so on?
(3) what is the best method for identifying new farm bases in the future?

[173] The idea of the farm base area has changed considerably since PC13 was notified. It was originally envisaged (when a "farm node") as a small cluster of perhaps five to ten houses. As a result of PC13(C) a farm base area may be up to 40 hectares or more and residential subdivision is controlled while all buildings are permitted subject to compliance with some minimal standards as to height/setback etc[315].

[174] There is one quite large inconsistency of these proceedings which we consider expert witnesses have not identified or worked through. As we shall see in part 7 of this decision – on rural-residential subdivision – the Council has been quite guarded in its response to rural residential zoning in the Mackenzie Basin – and quite properly too, given that it is managing an outstanding natural landscape. Yet a lot of the farm bases cover areas of up to 40 hectares – in part because the owners/occupiers want space and privacy for future owners of subdivided lots. In effect, the farm base areas are rural residential sub-zonings with minimal controls, regardless of their location.

[175] We consider that the farm base policy neither takes into account the different contexts of existing farm bases nor does it achieve the (amended) objective 3B. We discuss those homesteads which we have found to be in hazard areas in a later policy. Our current concern is with the fact that while some farm bases are in areas of medium or low vulnerability to development, others are in areas of high vulnerability. We consider that development around existing bases in the latter should be allowed but more tightly managed in order to achieve objective 3B.



[315] Proposed rule 3.1.2 [PC13(C) p. 19].

[176] Given the similarity between potential subdivision and development within the extended farm bases proposed by PC13(C) and within conventional rural-residential subdivisions we consider that an amended version of policy 3X suggested by Ms Harte should be used as a policy for any development of more than ten lots within farm base areas. Amended to resolve the problems (discussed earlier) with her version, the policy would read:

Policy 3B5 Development in farm base areas

(1) Subdivision and development of farm base areas which are in areas of high vulnerability to development shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:
   (a) confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road
   (b) integrating built form and earthworks so that it nestles within the landform and vegetation
   (c) planting of local native species and/or non-wilding exotic species and management of wilding tree spread
   (d) maintaining a sense of isolation from other development
   (e) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing
   (f) mitigating, the adverse effects of light spill on the night sky
   (g) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
   (h) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

(2) Subdivision and development in farm base areas which are in areas of low or medium vulnerability to development shall:
   (a) restrict planting to local native species and/or non-wilding exotic species
   (b) manage exotic wilding tree spread
   (c) maintain a sense of isolation from other development
   (d) mitigate, the adverse effects of light spill on the night sky
   (e) avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
   (f) install sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

The exception to subpolicy (1)(a) is for two reasons. First we consider that the two farm bases on the eastern side of Lake Pukaki are exceptional because of their isolation and the distances from which they are viewed. Secondly, we consider that development along Haldon Road would be – given the length of the road, the small number of farm bases and the area's distance from tourist routes – unexceptionable in terms of effects upon the landscape.

[177] Given that we are contemplating directions under section 293 of the Act, we consider that this policy should apply to "approved farm bases" since there would be an

opportunity for persons not before the court to seek such approval, bearing in mind the evidence we have from Mr Densem of areas throughout the basin where further (or replacement) farm bases might be appropriate. Once the district plan is settled new farm bases could only be sought by plan change.

Rural residential subdivision

[178] One purpose of PC13 was to regularise a large-scale subdivision (Manuka Terrace) that got away on the Council. The subdividers had used the complete lack of subdivision controls in the Rural zone to create some rather haphazard rural-residential development to the west of Twizel township. This was sought to be remedied by a policy as follows[316]:

> ***Manuka Terrace Rural-Residential Zone***
> *To manage the adverse effects of existing and further subdivision and development on Manuka Terrace, Lake Ohau through the Rural Residential – Manuka Terrace Zone.*

The notified policy is symptomatic of a reactive approach to resource management within the Mackenzie Basin. A proactive approach – which is probably what the landscape requires given our finding that it is an outstanding natural landscape – would be not only to remedy the problems of past confusions (the Manuka Terrace subdivisions) but also to manage potential future problems and opportunities.

[179] At least two landowners/occupiers had lodged submissions with the Council and/or appeals to the Environment Court seeking rezoning of their land to rural residential:

- Mackenzie Properties Limited ("MPL") in respect of land at the outlet to Lake Ohau;
- Pukaki Downs in relation to land on the terraces of the upper Twizel River.

The Hearing Commissioners attempted to deal with two issues at once by amending the notified policy slightly. Then immediately before the hearing the parties agreed to widen this policy substantially by amending it to read:

> *To mitigate the effects of past subdivision on landscape and visual amenity values in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options such as Rural-Residential where there are demonstrable advantages for the environment.*

[180] There are two sets of jurisdictional issues here : first is whether the rural residential relief sought by MPL and Pukaki Downs respectively is "on" PC13. We hold that in both cases it is, quite comfortably, for these reasons. First PC13 is about building and development in the entire Mackenzie Basin subzone; second PC13 contained an exception to its general proscription of residential or rural residential

[316] Policy 3M in PC13(N).

development outside farm base areas (formerly nodes) : that exception was for rural residential on the Manuka Terrace; third Manuka Terrace is in Mr Densem's Twizel Character Area, as is MPL's Ohau River Block; and fourth the Pukaki Downs site is in the Rhoborough Character Area, immediately to the north of Twizel. Those locations are relevant because a reasonable areal extension of a proposed zone is permissible (although it may need ratification under section 293 of the Act). We hold that in both cases the relief sought is on Plan Change 33.

[181] The second, more complex jurisdictional issue is whether Pukaki Downs could seek some kind of "visitor accommodation"[317] subzone on its land. At first sight that goes too far since nothing in PC13 was aimed at rule 8 (Visitor Accommodation) in Chapter 7 of the operative district plan. Certainly, Mr Hardie, for the Council, submitted that aspect of the Pukaki Downs' relief is not "on" PC13, and that we have no jurisdiction to add it.

[182] However, Mr Prebble in his submissions for Pukaki Downs advanced quite a powerful argument to the contrary. He submitted that the status quo (the operative district plan) is very permissive in respect of visitor accommodation[318] in that in the Rural zone such accommodation for up to 20 persons is a permitted activity[319] subject to certain standards. Since, under the operative district plan, subdivision down to any size is a permitted activity his argument was that visitor accommodation for more than 20 guests could be built as of right simply by subdividing off the requisite number of lots (e.g. 100 guests would require five lots with a residential unit on each). We consider that argument is generally correct although we note that each of the residential units would have to be 40 metres from any other to comply with a setback rule[320], and there would be problems (not insuperable) about legal access[321] to a formed road. Counsel then submitted that since the status quo permitted building development and use of the kind now sought by Pukaki Downs and PC13 removes that right, then "... a challenge to the removal of the building rights" can fairly and reasonably be said to be "on" PC13. He submitted that Mr Hardie's emphasis on the proposed method – a further subzoning – was wrong, and that we should concentrate on the substance – which is the nature and extent of the changes to the status quo. Seen that way, he submitted, the relief sought by Pukaki Downs is not as "out of left field" as Mr Hardie suggested (using the wording of William Young J in *Clearwater* cited earlier).

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317 Designed in part 4 of this interim decision.

318 This term is defined in Chapter 2 of the district plan as meaning (relevantly):

> ... the use of land and buildings for short-term, commercial, living accommodation where the length of stay for only one visitor is not greater than 3 months at any one time. Visitor accommodation may include some centralised services or facilities, such as food preparation, dining and sanitary facilities ...

319 Rule (7)8.1.2 [Mackenzie District Plan p. 7-55] applying rule (7)3.1.1.c(i) [Mackenzie District Plan p. 7-40].

320 Rule (7)3.1.1.c [Mackenzie District Plan p. 7-40].

321 Rule (7)3.1.1.d [Mackenzie District Plan p. 7-41].

[183] We accept that access onto State Highway 80 might require a discretionary resource consent under Transportation Rule (14)2.O(iii)[322] but that seems to be a limited discretionary matter[323] so it is likely to be a matter that would usually be capable of being dealt with by conditions, and does not fundamentally affect Mr Prebble's argument.

[184] On reflection we agree that the tourist accommodation provisions sought are both "on" PC13(N) and fairly and reasonably within the boundaries set by the operative district plan on the one hand and PC13(N) on the other. Thus the relief sought is within jurisdiction. We are reinforced in that by a further consideration. Pukaki Downs was originally identified by Mr Densem as being suitable for up to eight new farm bases (when they were called nodes). Because the subzone sites are, as far as we can tell, within areas of medium (or low) vulnerability to development, they might be suitable as farm bases. If that is so, then Pukaki Downs could under PC13(C) at least build the kind of buildings it seeks for its tourism subzone. This confirms for us that the Council's jurisdictional argument is more one of form than substance. Here as elsewhere there is a concern that the Council is being curiously hard on imaginative developers (and rather easy on farmers) in respect of buildings.

[185] Returning to the proposed policy : a policy creating or authorising further sub-subzone(s) is an unorthodox technique but not illegal. We have (minor) difficulties with the wording of the agreed policy quoted above. The first is that since the policy refers to other (future) residential subzones we consider the heading for the policy (at present "Effects of past large scale subdivision") should be amended. A positive component to the policy should be added. Of course, the policy should also be explicit that any such subzones should be located in areas marked as having low or medium vulnerability to development on Map 3 of this decision. So amended the policy would read:

> **3B6 Potential residential and visitor accommodation activity subzones**
>
> (1) To mitigate the effects of past subdivision on landscape and visual amenity values in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options such as Rural-Residential where there are demonstrable advantages for the environment.
>
> (2) To encourage appropriate rural residential activities in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options (such as Rural-Residential) in areas of low or medium vulnerability to development where there is wilding pine control (in terms of later policies) and other appropriate enhancement of landscape and ecological values;
>
> (3) where such subzones are located wholly or partly in areas of medium vulnerability then any development within shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:
>
> (a) confining development to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki provided that

322 Mackenzie District Plan p. 14-10.
323 Rule (14)(1) [Mackenzie District Plan p. 14-1].

there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Arm Road

(b) integrating built form and earthworks so that it nestles within the landform and vegetation

(c) planting of local native species and/or non-wilding exotic species and management of wilding tree spread

(d) maintaining a sense of isolation from other development

(e) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing

(f) mitigating, the adverse effects of light spill on the night sky

(g) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(h) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

Whether the particular land separately contended for by MPL and Pukaki Downs is appropriate for such a zoning are issues we will consider later. Other landowners seeking to take advantage of this policy will need to make applications for private plan changes.

4.5 Protecting the lakeside environment

[186] To allow for the Waitaki Power Scheme's works[324] we have added subpolicy (c) to the improved version of the operative district plan's policy 3A[325] with one slight modification[326] from PC13(V):

Policy 3B7 – Lakeside protection areas

(a) To recognise the special importance of the Mackenzie Basin's lakes, their margins, and their settings in achieving Objective 3B.

(b) Subject to (c), to avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.

(c) To avoid, remedy or mitigate the adverse impacts of further buildings and structures required for the Waitaki Power Scheme on the landscape values and character of the Basin's lakes and their margins.

(Note : Policy (c) has different objectives to achieve dependent on whether Rural Objective (7)3B or Utilities objective (Section 15)3 is being implemented.)

4.6 Tourism and recreation values

State Highway 8 corridor

[187] It will be recalled that there is a district-wide policy (now 3A2) in respect of scenic viewing areas. In fact, most of the scenic viewing areas listed in Appendix J and identified on the planning maps are in the Mackenzie Basin. They cover, at first sight, a surprisingly small area. That is explained in the district plan by the three factors which went into choosing the scenic viewing areas[327]:

324 See Transcript p. 312.
325 As modified in PC13(C)'s policy 3G (Lakeside areas).
326 We have added the words "their margins" in (a).
327 Explanation to Rural Policy 3C [MDP p. 7-23].

- the "landscapes contained in these areas";
- the views obtained from the areas; and
- the high number of visits.

The third reason is entirely appropriate; the second is also, if rather limited in that it raises the question "what of the views obtained of the areas?" and the first reason shows a fragmenting approach to landscape(s) which may be valid in itself but is not relevant to the outstanding natural landscapes of the basin as a whole. However, we see no need to reduce policy 3A2 but to add to it.

[188] Some protection to some views from roads (over other than scenic viewing areas) was given in PC13(C). The Commissioners' Decision proposed[328] a policy in respect of views from roads which required buildings to be set back from roads, particularly state highways, and encouraged the sensitive location of structures such as large irrigators to avoid or limit screening of views.

[189] After our site inspections it concerned us that along the tourist roads – most importantly State Highway 8 and State Highway 80 (the road to the Hermitage) but also the Lilybank Road and Godley Peaks Road and others – there are, in addition to the scenic viewing areas, other relatively small areas such as tussock-covered[329] flats or hillsides which may not be the foreground to a distant view, but which are, in themselves, important aspects of the overall outstanding natural landscape. After the hearing we requested that Mr Densem (the landscape architect called by the Council) lodge a further statement on this issue. Obviously we worded our request poorly in referring to vistas because in his subsequent statement[330] Mr Densem responded on precisely that point (as he should have). However, on reflection it was not further vistas that concerned us so much – indeed we are reluctant to let that issue be relitigated when the "scenic viewing areas" have already been settled in the planning maps. What does concern us more is the absence of recognition of immediate views where there is little or no vista in the background. In such places the foreground becomes more important because it is the focus of the view. Some of these areas are adjacent to the road (e.g. the land on either side of State Highway 8, south of the Balmoral rise) and they often comprise most of the view on one or both sides of the road. We consider all buildings and other structures and further fences and trees should be avoided in these tussock grasslands. These areas should be identified as "scenic grasslands" (or similar term). Good examples are the areas on either side of State Highway 8 in Mr Densem's photograph 23[331]. Usually the defined area should end on the contour which is three metres vertically down on the reverse of any slope seen from the road. Scenic

328 Policy 3O in PC13(N).
329 Using "tussock-covered" to include some browntop and of course weeds.
330 G H Densem, first statement September 2010 [Environment Court document 32].
331 G H Densem, rebuttal evidence photo 23 "Central Basin, view south on SH 8 ..." [Environment Court document 3].

grasslands would not include Meridian land or other infrastructure under the existing Waitaki Power Scheme although we hope that all earthworks would be planted and maintained in appropriate (usually native) vegetation.

[190] Given the importance of the landscape to users of the State Highways and the tourist roads , we provisionally consider the policy should cover three issues:

- avoidance of buildings, structures, exotic trees and fences in scenic viewing areas and in (new) scenic grasslands;
- setback of buildings from roads and structures as in the Commissioners' Decision;
- management of conversions to and of irrigated pastures adjacent to roads to avoid the greening of the immediate views.

The appropriate policy is therefore:

Policy 3B8 Views from State Highways and Tourist Roads

(a) To avoid all buildings, other structures exotic trees and fences in the scenic grasslands listed in Appendix X and in the scenic viewing areas shown on the planning maps;

(b) To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of structures such as large irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;

(c) To avoid clearance, cultivation or oversowing of all tussock grasslands adjacent to and within the foreground of views from State Highways and the tourist roads;

(d) To minimise the adverse effects of irrigation of pasture adjacent to the state highways or the tourism roads.

(We refer to Appendix X because we are not sure where this new information – a schedule or map of scenic grasslands – should be placed.)

4.7 Storage, generation and transmission of energy

Renewable energy

[191] This policy relates to more than just the storage of renewable energy, but also its generation and transmission. The idea[332] is to recognise and provide for the Waitaki Power Scheme while as far as practicable avoiding, remedying or mitigating the adverse effects on the landscape of the basin. However, the agreed wording of the policy[333] does not achieve the objective 3B(2) set out above.

[192] Meridian sought a reference in the explanation to this policy to Lakes Pukaki, Tekapo and Ruataniwha as being part of the key infrastructure associated with development of renewable energy in the Basin. We do not consider that is necessary since there are references in the objective itself to these lakes.

332 K G Gimblett, evidence-in-chief para 57 [Environment Court document 14].

333 Agreed Version Policy 3J.

[193] To achieve objective 3B it will be necessary to add the words "... within the footprint of current operations or on land owned by infrastructure operators as at 31 October 2011 ...". That will ensure that if Meridian and/or Transpower want to extend their operations in the Mackenzie Basin they will need to meet the same standards as all other landowners and occupiers. We do not consider that should be too onerous a commitment for Meridian – as we understand it the water from the upper Waitaki catchment is over-committed anyway : see *Aoraki Water Trust v Meridian Energy Limited*[334]. As for Transpower, it too will want to keep within its existing footprint as far as possible for the reasons stated in *Fernwood Dairies Limited v Transpower New Zealand Limited*[335]. Beyond that we consider any new structure for the Waitaki Power Scheme should be subject to the same constraints as other landowners in the Mackenzie Basin. Amended the policy would read:

> **Policy 3B9 – Renewable Energy**
> To recognise and provide for the use and development of renewable energy generation and transmission infrastructure and operations:
> (1) within the footprint of current operations or on land owned by infrastructure operators as at 31 October 2011 while, as far as practicable, avoiding, remedying or mitigating adverse[336] effects on the outstanding natural landscape[337] and features of the Mackenzie Basin; and
> (2) elsewhere within the Basin while achieving Rural objectives (5) and 1, 2 and 3B.

4.8 Reverse sensitivity and hazards

[194] Meridian proposed a new policy on the compatibility of activities, which seeks that reverse sensitivity effects from hydro electric power and transmission lines be considered when assessing new subdivision and residential development. Ms Harte, for the MDC, suggested a new policy[338] in order to minimise reverse sensitivity effects on all non-residential activities. We consider that is appropriate with the substitution of some of the words as requested by Mr Gimblett for Meridian[339], so the policy would read:

> **Policy 3B10 – Reverse sensitivity**
> To avoid, remedy or mitigate adverse reverse sensitivity effects of non-farm development on rural activities and activities such as power generation, transmission infrastructure, state highways and the Tekapo Military Training Area.

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334 *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268; [2005] NZRMA 251 at para [15] (HC).

335 *Fernwood Dairies Limited v Transpower New Zealand Limited* Decision C17/2006.

336 Meridian sought insertion of the word "significant" in front of "adverse effects" but that is not consistent with Utilities objective (15)1.

337 We have deleted the plural since we have found the (upper) Mackenzie Basin to be one outstanding natural landscape.

338 P Harte, evidence-in-chief, para 106 [Environment Court document 3].

339 K G Gimblett, evidence-in-chief para 91 [Environment Court document 14].

[195] The next issue for Meridian was how to deal with the serious potential effects (loss of life) from canal or dam failure. While they are potential effects of low probability they have very high potential impact. Under section 5(2) of the RMA providing for the health and the safety of individuals is a fundamental part of the purpose of the Act. However, as we have stated, safety cannot readily be given a crude once-and-for-all assessment of, for example, "no importance" or "of national importance" because each risk needs to be assessed (as to probability and impacts) in its own context. Everyone lives with some risk of natural hazards every day. Some are potentially lethal but very, very unlikely, e.g. meteorites or giant hailstones.

[196] For Meridian Mr Gimblett's mechanism for a policy about hazards was to include it in the reverse sensitivity policy. His proposed policy[340] refers to "... hazards of non-farm development on ... activities such as power generation". We are grateful for his effort but, with respect, we do not consider that is good drafting. The reverse sensitivity aspect of introducing, say, residential uses to a flood hazard is already covered in policy 3B10 above. But his new wording reverses the hazard in our view : the hazard is the potentially disastrous effect of a canal rupture on lower-lying housing. The answer is simply to deal with hazards in a separate policy as follows:

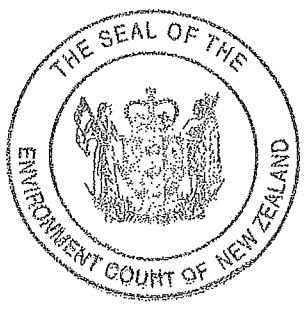
> **Policy 3B11 Hazards**
> To avoid hazards caused by activities such as power generation; and water transport by canal and aqueduct on non-farm development and activities.

However, before we can insert such a policy in the district plan we must be sure we have jurisdiction to do so. (We have not checked but there may be an issue as to whether hazards are already sufficiently covered in Chapter 17 of the plan.)

[197] For the Council its senior counsel, Mr Hardie, submitted that the changes to the policy (and rules) sought by Meridian in respect of hazard were *ultra vires* for two reasons:

- first the submission seeking a policy change was not "on" PC13 under the *Clearwater*[341] tests discussed earlier; and
- secondly the submission did not seek a change to the rules. (We will consider this later, if we need to.)

[198] In this case the purpose of PC13 is to recognise and protect the landscape of the Mackenzie Basin. A key set of policies to implement that purpose is to manage buildings in the basin, and in particular to confine residential buildings to places where they have reduced impacts on the landscape. One set of locations for residential units was proposed by PC13 to be farm bases (nodes), i.e. existing homesteads. We think it



340 K G Gimblett, evidence-in-chief Appendix 1 "Policy Y" [Environment Court document 14].

341 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, William Young J, 14 March 2003.

was within the general scope of that policy for Meridian to say in its submission : "please pause – Meridian is concerned that the Council is focussing residential development in specific areas but some of those areas are precisely those which should not be built on or, at least, not further built on because of the risk to human health and safety through the possibility of catastrophic failure of canals in the Waitaki Power Scheme". Such a submission would, in our view, be fairly and reasonably within the purpose of PC13, especially since that should be read in the context of Chapter 7 of the operative district plan as a whole, including Rural objective (7)7 which is to achieve minimal loss of life from natural hazards. We hold that is the implicit effect of Meridian's submission.

[199] Because PC13 proposes to place restrictions on where buildings may be placed, whereas the status quo is that there are no (or very few) such restrictions, a submission by Meridian seeking to add a further restriction (for reasons of natural hazards) is "on" the subject of PC13, so the first test in *Clearwater* is satisfied.

[200] As to the second test in *Clearwater,* we accept that some submitters (e.g. Mr Murray) have not had a chance to fully participate in the issue of location of farm bases. But it is at this point that a troubling aspect of the High Court decisions emerges – they do not appear to have considered fully the powers of the Environment Court in section 293 of the RMA. Further, that section is now different from the wording in force when the High Court decisions were issued. So it is possible, and we consider the merits of this later, that the lack of participation afforded to Mr Murray and others may be able to be remedied under section 293 of the Act.

4.9 Farming

Enabling pastoral farming

[201] Traditional dry-lands farming on brown grasslands (including browntop) should continue to be enabled. As we have held, the golden-brown landscape enjoyed by tourists and other visitors to, and residents of, the Mackenzie Basin are in considerable part maintained by the every-day farming operations on the stations scattered around the basin. A new policy should be added:

> **Policy 3B12**
> Traditional pastoral farming is encouraged so as to maintain tussock grasslands, subject to achievement of the other Rural objectives and to policy 3B8.

Farm buildings

[202] The notified plan provided for remote farm buildings[342] outside building nodes subject to controls in respect of location, design and external appearance (but not size). The Commissioners' Decision changed that by simply "... providing for farming buildings ... to facilitate farming while limiting their potential adverse effects on

[342] Policy 3J [PC13(N) p. 9].

important landscape values"[343]. We see two problems with those policies. First they do not recognise the outstanding natural landscape of the Basin. Second much of that landscape is sensitive to adverse effects of buildings, even farm buildings. We accept Mr Densem and Ms Harte's evidence and judge there should be controls on all farm buildings, some exceptions being appropriate in areas of low visual vulnerability.

[203] It will come as a surprise (and disappointment) to some farmers to learn that we propose controls over farm buildings. While we can understand a view that a small shed has no or minimal adverse effect on such a vast landscape as that of the Mackenzie Basin, we do not accept it because the accumulative effect of many (even if small) farm buildings may, in the end, be quite harmful to the naturalness of any landscape. Further, there is potential for future landowners to manipulate the unmanaged location and number of farm buildings so as to create a permitted baseline which has more adverse effects than a desired house, for which resource consent is then sought.

[204] We consider this should be at least a two-tier policy : first it should expressly exclude buildings from:

- Lakeside Areas;
- Scenic Viewing Areas;
- Scenic Grasslands;

– and secondly there should be controls as suggested by Mr Densem and Ms Harte. Accordingly, the policy for farm buildings should read:

> **Policy 3B13 Farm Buildings**
> (1) Farm buildings should be avoided in lakeside areas, scenic viewing areas and scenic grasslands.
> (2) Elsewhere in the Mackenzie Basin subzone farm buildings should be managed in respect of location, density of buildings, design, external appearance and size except in areas of low visual vulnerability where only density and size are relevant.

4.10 Intensive farming activities

[205] This is a complex issue, made more so by the lack of ecological evidence. Subject to that important qualification two broad themes emerge from our findings of fact and, tentatively, predictions. The first is that further conversion of brown grasslands to green introduced grasses (whether irrigated or not) is generally inappropriate in the Mackenzie Basin. The second is that because there are extensive – usually lower altitude – areas which are highly (and possibly irreversibly) modified, these may be very suitable for higher intensity irrigated farming.

[206] As Mr Densem pointed out to us, the type of changes to the Mackenzie Basin that might occur as a result of irrigation can be seen immediately south of Lake

[343] Policy 3K [PC13(C) p. 13].

Ruataniwha in the upper Waitaki District. On the long straights on State Highway 8 down to Omarama the adjacent fields are sown in exotic grasses, and very long pivot irrigators line the road or arc away from it. New housing and/or farm buildings are dotted across the flats.

[207] Some similar conversions have already taken place in the Mackenzie Basin proper. The pressing issue is how much more can occur without adversely affecting the outstanding natural landscape of the basin irretrievably. These matters were barely addressed in evidence, although we were shown areas under irrigation and at least one pivot irrigator during our site inspections.

[208] Having said that we must bear in mind that the flats of the lower Mackenzie Basin – much of the Eastern Plain, the Pukaki River Plain as well as the lower Twizel River Plain and part of Benmore – are at present covered in highly modified semi-desert vegetation dominated by green – or in autumn and winter near black – *Hieracium* species. On those areas we judge that change to higher density irrigated farming is not detrimental to perceptions of naturalness. Its colours will change to brighter greens. The scale of modern farming with its very long travelling irrigators ensures that the openness of the landscape will generally be maintained. Of course, if there are areas which should be protected under the other rural objectives then other considerations will come into play.

[209] We consider the policy should be:

> **Policy 3B14 Pastoral intensification**
>
> (1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification meet all the other relevant objectives and policies for the Mackenzie Basin subzone (including Rural Objectives 1, 2 and 4 and implementing policies);
>
> (2) To link management of new areas of pastoral intensification with management of wilding exotic trees and other weeds;
>
> (3) To avoid pastoral intensification in sites of natural significance, scenic viewing areas and scenic grasslands.

4.11 Plantations and wilding trees

[210] There are some difficult issues here. One of the areas where it might be desirable for soil-retention purposes to grow trees is on the Tekapo and Pukaki flats where, at present, the dominant ground cover is the introduced hawkweed (mainly *H. pilosella*). However, even introduced conifers appear to struggle to get started and grow in these stony, dry soils. In contrast, on the deeper soils on the higher terraces to the north introduced conifers find it easier to grow (whether planted or as windblown wildings).

[211] The operative district plan includes these definitions in relation to trees:

- **Tree Planting** : includes forestry, amenity tree planting and shelter belts.
- **Forestry Activity** : means the use of land primarily for the purpose of planting, tending, managing and harvesting of trees for timber production. Forestry does not include shelter belts (refer definition), amenity tree planting (refer definition), or erosion control planting (refer definition).
- **Shelter belt** : means trees or vegetation planted predominantly to provide shelter limited to a maximum width of 15 metres from stem to stem.
- **Amenity Tree Planting** : means tree planting for aesthetic, decorative or amenity purposes, or in the immediate vicinity of buildings.
- **Erosion Control Planting** : means tree planting for river bank and slope stability or protection.

An important conclusion from those definitions is that the spread of wildings does not appear to be included in the definition of "forestry activity" for two reasons : first the trees are not planted – which involves direct human agency – they are self-sown; secondly, the ongoing management of those trees (by benign neglect) under an ETS is expressly not for the purpose of harvesting the trees.

[212] It will be recalled that the operative (but renumbered) district wide Rural Policy 3A3 is[344] related to tree planting and is "To control the adverse effects of siting, design and potential wilding tree spread of tree planting throughout the District, to enable forestry to be integrated within rural landscapes and to avoid screening of distant landscapes". To implement that policy the district plan contains a full set of rules[345] about "tree planting" in the district. Certain tree planting is a permitted activity provided it complies with some general standards (described below) and with any specific standards for that permitted activity. Amenity tree planting[346] and erosion control planting[347] are permitted anywhere. Within the Mackenzie Basin[348] shelter belts are permitted provided that they are either set back 300 metres from (formed) roads[349] or planted at 90° to such roads and at least 1,000 metres apart[350]. Forestry is permitted within the Mackenzie Basin provided it is set back at least 300 metres from any formed road[351], within 900 metres of a homestead and/or a cluster of farming buildings[352], and for new building clusters after 1 April 2001 the maximum area of planting is two hectares[353] (for older buildings the maximum is 50 hectares).

[213] The general standards[354] for tree planting are:

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344 Policy 3D in the operative district plan, now renumbered as policy 3A3.
345 Mackenzie District Plan pp 7-48 to 7-53.
346 Rule (7)6.1.1 [Mackenzie District Plan p. 7-48].
347 Rule (7)6.1.2 [Mackenzie District Plan p. 7-48].
348 Defined in the map Appendix E to the district plan.
349 Rule (7)6.1.4(a) [Mackenzie District Plan p. 7-48].
350 Rule (7)6.1.4(b) [Mackenzie District Plan p. 7-48].
351 Rule (7)6.1.6d [Mackenzie District Plan p. 7-98].
352 Rule (7)6.1.6a [Mackenzie District Plan p. 7-48].
353 Rule (7)6.1.6c [Mackenzie District Plan p. 7-48].
354 Standards 6.1.8.a, 6.1.8.b, 6.1.8.c., 6.1.8.d, 6.1.8.e, 6.1.8.f, 6.1.8.g and 6.1.8.h [Mackenzie District Plan p. 7-49].

- **Setback from Neighbours**
  No tree planting shall be located on, or within 15 metres of the boundary of any site under separate Certificate of Title without prior written permission from the landowner of that site. Where written permission is not obtained, the planting of trees within this zone shall be a discretionary activity.
- **Shading of Roads**
  Trees shall not be planted or allowed to grow in such a position that at any time they would shade the roadway between the hours of 1000 and 1400 on the shortest day of the year.
- **Scenic Viewing Areas**
  No trees shall be planted in Scenic Viewing areas identified on the Planning Maps and scheduled in Appendix J.
- **Sites of Natural Significance**
  No trees other than restoration of native plantings shall be planted within a Site of Natural Significance identified on the Planning Maps and scheduled in Appendix I.
- **Wilding Tree Management**
  There shall be no planting of *Pinus contorta, Pinus sylvestris* (Scots Pine), *Pinus uncinata* (Dwarf Mountain Pine) or *Pinus mugo* (Mountain Pine).
  It shall be the responsibility of forest owners, occupiers, lessees and licensees or other persons responsible for the forestry to eliminate tree spread and growth of wilding trees emanating from that forest on all land within 500 metres of the planted forest edge.
- **High Altitude Areas**
  No trees shall be planted above 900m above sea level.
- **Riparian Areas**
  No forest... shall be planted:
  — within 100m of a lake
  — within 20m of a bank of a river
  — within 50m of a wetland
- **Wetlands**
  No forest... shall be planted in a wetland.

Most of those standards apply to planting in specific situations (e.g. rear boundaries, roads or in sites of natural significance). However, there are two general standards under the heading "Wilding Tree Management". Neither standard is without difficulties. The first standard has the effect that four pine species may not be planted as a permitted activity. (Any such planting appears to be a restricted discretionary activity[355].) That is generally appropriate except that, as we shall see shortly, another list of "tree weeds" in the district plan refers to different exotic conifers.

[214] The second standard – which purports to make forest owners and/or occupiers responsible for elimination of wilding trees – is even more obscure. First, does the standard only apply to the named pine species? What about other problematic species such as Douglas-Fir, larch species, or Ponderosa pine? Secondly, there are already many wilding exotics in the basin which are throwing seed, and yet the rule appears not to apply to them because owners etc only have to eliminate wildings within 500 metres of a planted forest edge. Thirdly, we read evidence from Dr Lloyd that in the right

355 Rule 6.3.4 [Mackenzie District Plan p. 7-53].

conditions seeds can be blown much more than 500 metres. In such a case there appears to be no obligation to eliminate wildings.

[215] Tree planting above 900 metres above sea level[356] and tree planting in Scenic Viewing Areas[357] are discretionary activities. Tree planting, other than restoration of native plantings, in Sites of Natural Significance[358] and "Forestry" in wetlands[359] are non-complying activities. It appears that planting of the weed trees[360] mentioned in the standards for permitted activities is also a restricted discretionary activity[361].

[216] Forestry within the Mackenzie Basin other than that provided for as a permitted activity, discretionary activity or non-complying activity is a restricted discretionary activity[362] as is forestry[363]:

- Within 100m of a lake
- Within 20m of a bank of a river
- Within 50m of a wetland

[217] There is a list[364] of matters over which Council will restrict its discretion:

1. Effects of plantings on landscape values and the means to avoid or reduce those impacts.
2. The spread and growth of wilding trees emanating from the proposed forest.
3. Effects of forestry activities on ecological, habitat, filtering, landscape, land stability, and access functions and natural character of riparian areas and the adjoining water bodies.
4. Effects of plantings on the availability and maintenance of groundwater and/or surface water in the locality having regard to existing uses of land and water.
5. Impact of plantings, management and harvesting on the functioning of infrastructure.
6. Impact of plantings management and harvesting on production and on enjoyment of neighbouring properties.
7. The effects of forestry activities on natural character, indigenous land ecosystems, and water ecosystems.

Clearly management of wilding pines is one of the district plan's main concerns, and yet despite the provisions we have set out wildings are spreading out over the basin at a troubling rate. There are exceptions where owners, lessees or occupiers are making major successful efforts. The Ministry of Defence which administers land on the high downs between Lakes Tekapo and Pukaki (and downwind of the nor'wester from Mt Cook Station) appears to be keeping its land largely conifer-free and is to be congratulated on that. A number of other pastoral lessees appear to be on top of any

356 Rule 6.4.1 [Mackenzie District Plan p. 7-53].
357 Rule 6.4.2 [Mackenzie District Plan p. 7-53].
358 Rule 6.5.1 [Mackenzie District Plan p. 7-53].
359 Rule 6.5.2 [Mackenzie District Plan p. 7-53].
360 *Pinus contorta, P. sylvestris, P. uncinata* and *P. mugo*.
361 Rule 6.3.1 and/or 6.3.4 [Mackenzie District Plan pp 7-52 and 7-53].
362 Rule 6.3.1 [Mackenzie District Plan p. 7-52].
363 Rule 6.3.2 [Mackenzie District Plan p. 7-52].
364 Rule 6.3.1 [Mackenzie District Plan p. 7-52].

problem. As we have stated, of concern are the locations around Lake Pukaki where wildings look to be out of control. They include:

- Southern end of Ferintosh;
- Pukaki Downs and western side of Lake Pukaki;
- Rhoborough Downs;
- Down the Pukaki River;
- the eastern margins of Lake Pukaki.

In most other parts of the Mackenzie Basin small wilding exotics can be found scattered across the landscape.

[218] That is of concern because there is no rule which cuts expansion of wilding conifers from existing wildings. The only things holding back such wildings are in fact the cutters wielded by conscientious land owners and pastoral lessees, and various spraying and cutting programmes run by DOC (and LINZ). While the main enforceable legal protection against further wilding spread is in the terms of pastoral leases, in fact the obligation to remove weed species such as wilding conifers appears not to have been complied with on some farms. There are, as we have just described, some areas where wildings are spreading rampantly. We can imagine there might be a number of reasons – the most obvious is that the rate of growth and the expense of getting rid of the conifers are overwhelming landowners. Of course, canny landowners may also be anticipating the results of tenure review and hoping for a quick start into an ETS. The difficulty for the landscape of the Mackenzie Basin is that even carbon capture forests are unlikely to be appropriate in some of the places where wildings are spreading. Despite the obvious, and long-standing problems the Hearing Commissioners considered that neither PC13 nor the district plan "... is the appropriate vehicle for preventing further wilding spread ..."[365]. They gave no reason for that conclusion.

[219] Even our relatively superficial inspection from roads shows that not all landowners are in fact removing all the wildings from their land (for example, Rhoborough Downs). That may be because the rules are unenforceable. As a result of these proceedings we hope that the rules will be enforceable. If so, the Council has an obligation to enforce its rules[366]. We also point out that any member of the public[367] may take enforcement action to enforce compliance with rules in a district plan[368].

[220] Obviously tenure review of pastoral leases under Part 2 of the Crown Pastoral Land Act 1998 and when and how it is carried out is of no direct relevance to the district plan. However, the potential outcomes of any review are. In our view the district plan

365 Commissioners' Decision para 206.

366 It is interesting that the Regional Pest Management Strategy appears to be (deliberately?) unenforceable.

367 Section 316 of the RMA.

368 Section 314(1)(b) of the RMA.

should assume that full tenure reviews are carried out and give objectives, policies and rules for sustainable management of the land under the RMA as if all the Crown Pastoral Land had been freeholded. For Federated Farmers Mr Murray wrote that it is likely that under tenure review an "... additional 20,000 Ha [will be] protected"[369]. We do not know of course whether that prediction is likely to be correct, or where the "protected" land might be, so we cannot rely on that.

[221] Having said that, it might be useful for the Commissioner of Crown Lands to know that the district council's powers in respect of wilding conifers need reinforcing. We respectfully observe that it would be a useful management technique if the Commissioner reserved covenants under section 97 of the Crown Pastoral Land Act 1998 obliging owners in the Mackenzie Basin to control wilding conifers on their freeholded land. Such covenants would need to ensure that the covenantee (preferably the Council by assignment) could enforce them by giving powers to the covenantee to enter the land and to carry out the work itself (if necessary), and to recover the costs as a charge against the land.

[222] In identifying appropriate areas for such covenanting we hope the outcomes from this decision might be useful. However, we caution that they are bottom-line minima in respect of landscape values – other important, possibly more important under the RMA, values such as ecological values and water yields will also no doubt need to be taken into account by the Commissioner. We have received very little evidence on those matters and therefore cannot give any guidance on them.

[223] If tenure review of a pastoral lease was finalised soon and large areas either side of State Highway 8 were freeholded, a landowner could simply set up an ETS and watch the wildings grow, while accepting payments under the scheme. This is not a wild conjecture on our part : it is exactly what has happened on Pukaki Downs. The fortunate result for the public interest in this case is that the current owners of Pukaki Downs have agreed to set up a scheme which minimises escape of wildings. However, there is no assurance that we can see that such a scheme will be developed in every case.

The Canterbury Regional Pest Management Strategy

[224] We have considered whether the problem of wilding pines can simply be left to the Canterbury Regional Council. As stated earlier, we must have regard to[370] its Canterbury Regional Pest Management Strategy ("the Canterbury Pest Strategy"), a new version of which has come into force since the hearings. In that strategy Douglas-fir and other conifers are declared to be "organisms to be controlled" whereas Lodgepole pine (*Pinus contorta*) is a "pest". The Strategy's objective in respect of wilding conifers is[371]:

369 J B Murray, evidence-in-chief para 15 [Environment Court document 16].
370 Section 74(2)(b)(i) of the RMA.
371 Objective 8.13.4 [Canterbury Regional Pest Management Strategy 2011-2015 p. 81].

> Over the duration of the strategy, protect biodiversity values in targeted areas of the Canterbury region by eradicating all self-seeded wilding conifers, prior to seed dispersal, in targeted high value environmental areas.

In fact, the "target high value environmental areas" have not yet been identified – that is to occur "progressively ... in consultation with land occupiers and community groups"[372]. That relaxed approach can be explained in part by the Regional Strategy's discussion of wilding conifers. It recognises that the effect of wildings in landscape values is not straight-forward[373]:

> ... the question is not a simple trees/no trees preference. Indeed in some situations and for some individuals wildings will enhance the landscape values, while in others they will be viewed detrimentally. Therefore, it is not possible to conclude that all wilding spread adversely affects landscape values.

We respectfully agree with that, especially since these are not merely landscape issues, but carbon and water management issues as well.

[225] The Canterbury Pest Management Strategy also states[374] "... there is a greater risk of wildings impacting negatively on biodiversity values than there is with planned tree planting ...". That is reflected in the Regional Strategy's "strategy rule"[375] about wildings[376]:

> **8.13.6 Strategy rule for self-seeded wilding conifers**
> Land occupiers shall take all steps, in relation to self-seeded wilding conifers on their land, as are reasonably necessary to prevent the communication, release or other spread of those self-seeded wilding conifers.
>
> For the purposes of this rule, communication means passing on, transmitting or transporting in any way.
>
> Land occupiers may apply for an exemption from the above rule in accordance with the procedures set out in Chapter 12. Applicants shall provide evidence to Environment Canterbury in support of an exemption application. Such evidence should at least provide a risk assessment of the spread from any retained area of wilding conifers, the risk of wilding establishment in the surrounding areas and neighbouring properties and a proposed control programme including methods and timelines.
>
> **Explanation**
> The purpose of this rule is to ensure that land occupiers fully consider the implications of utilising "post 1989" self-seeded wilding conifers as a permanent forest land use option, particularly under the ETC. Specifically, adjoining or downwind land occupiers should not have to bear the consequences of wind-borne seed spilling out from such deliberately established

372 Principal means 8.13.5(a) [Canterbury Regional Pest Management Strategy 2011-2015 p. 81].
373 8.13.3 Adverse effects [Canterbury Regional Pest Management Strategy 2011-2015 p. 81].
374 8.13.3 Adverse effects [Canterbury Regional Pest Management Strategy 2011-2015 p. 81].
375 Under section 80B of the Biodiversity Act 1993.
376 8.13.16 Strategy rule for self-seeded wilding conifers [Canterbury Regional Pest Management Strategy 2011-2015 p. 82].

> forest land. However, exemption provisions are available where wilding conifer tree spread can be successfully managed within a property, or it is not a problem to neighbouring land occupiers.

A "strategy rule" under the Biodiversity Act 1993 may specify that its breach creates an offence under section 154r of that statute. However, the Canterbury Pest Strategy rule appears not to do so. The rule looks difficult to enforce in any other way because of its:

- uncertainties (what are "those self-seeded ... conifers" – can they always be distinguished from planted trees?);
- qualifications ("all steps ... as are reasonably necessary"); and
- the possible exemptions from it (all neighbours could agree wilding spread is not a problem).

We are particularly concerned that the rule appears to be inapplicable to wildings from plantations and shelterbelts. It appears to us that a large proportion of the wildings in the Mackenzie Basin derive ultimately from planned tree planting. Further, in any particular case how can any person determine whether new wildings come from other wildings or from planted trees?

Conclusions on wildings

[226] In summary, it appears to us that there is a big gap in the district plan's management of wilding pines. Further, if that gap is not mended soon the whole issue of wilding trees in the Mackenzie landscape is going to become much larger especially now that landowners have a strong incentive to encourage wildings to grow under an ETS. Obviously we have no jurisdiction to fix the problem immediately but we consider that the evidence requires a solution should be aimed for. We will consider later whether we should exercise our powers to place it in the district plan.

[227] The positive externality which is the other side to the worrying spread of wilding exotics is the potential for carbon farming. A policy should encourage this in appropriate places – and those places should be identified. Obvious candidates (subject always to ecological constraints – some of which may be nationally important) include around Rhoborough Downs and along the Haldon Arm Road. There are windbreaks along the latter which are already propagating wildings. Along this road there may be a case for more extensive afforestation. However, that raises inter-district issues, since the Waimate District Council may or may not appreciate a seed source directly upwind of its western boundary. Less obvious places include Mt Cook and Balmoral Stations with their history of forestry. These will need to be subject to very careful controls in respect of wildings.

[228] We consider (provisionally) that an appropriate wilding policy is:

3B15 Wilding trees
To manage wilding tree spread by:
(a) confining it to areas of low or medium vulnerability as shown on Map [-];
(b) requiring landowners to remove wildings of identified tree species from their land (outside of areas identified in (a) before they seed.

We consider that wilding trees should have different land status in areas of medium visual vulnerability, so that adverse effects can be properly managed.

[229] Further, our preliminary view is that there should be an incentive to plant native tree species for carbon farming rather than to rely on wildings. To create such an incentive we consider that, except in the Rhoborough and Pukaki Downs area where the wildings have bolted and possibly to the southeast of Haldon Road, there should be a maximum area for an emissions trading scheme forest of weed tree species as defined in the district plan. That area should be perhaps five or ten hectares per 500 hectares in a title, but we would need evidence on any figure before settling it.

[230] On the other larger areas of sustainable tree species – especially native woody species (or tussock grasses if the emissions trading scheme is extended to them) – should be allowed although even here some thought will be needed as to the role of trees in the landscape having regard to both landscape and water conservation considerations.

4.12 Subdivision

Effects of subdivision on landscapes

[231] Subdivision in rural zones can cause adverse effects on landscapes, such as fencelines to show boundaries, different vegetation patterns, and new roading patterns. In order to minimise such adverse effects on the landscape and identity of the Mackenzie Basin, we consider that there should be a separate subdivision policy. To see why we recall that PC13(N) contained a 200 hectare minimum lot size. The Commissioners' Decision did away with that and relied on a distinction between farming and non-farming subdivision. We have found that distinction to be if not spurious, at least unworkable. We consider that a separate subdivision policy needs to be put in place containing the following elements:

- minimum lot size (outside farm bases);
- precluding subdivision at lakeside protection areas, scenic viewing areas and scenic grasslands;
- linking all lots in a subdivision with covenants or conditions as to wilding exotics management
- recognition of topographical and ecological constraints.

Most of those points have been discussed above in various contexts. One outstanding issue remains.

Should there be ongoing obligations to manage wildings?

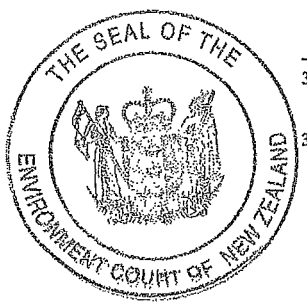
[232] Should there be a link between subdivision (for any purpose) and weed management? The issue is whether a land owner can subdivide off good areas and leave a rump of unprofitable land. We recall that in other nationally important areas such as coastal environments it has become commonplace for subdivision and building rights to be linked by consent notice or by covenants) with management of the rest of the farm being subdivided. The series of decisions before and after the Court of Appeal's decision in *Arrigato Investments Limited v Auckland Regional Council*[377] is perhaps the most well-known case. Perhaps a more relevant analogy is in the Queenstown Lakes District where a subdivision right in another outstanding natural landscape was directly linked to wilding management : *J F Investments Limited v Queenstown Lakes District Council*[378].

[233] We consider that it is proper sustainable management for the future management of what is currently pastoral lease land to be established before much of it is freeholded. That is fairer to existing pastoral lessees in that it does not unduly raise their expectations, and may assist them in their tenure review negotiations. The owners of the Mackenzie Basin – including the Crown and some of its agencies – need to realise that ownership of this outstanding natural landscape comes with obligations to maintain it. Some landowners who gave evidence to the court, such as Mr Tibby, obviously accept that and have grasped the opportunities of an ETS, some farm base development and potentially other tourism and residential development and the challenges it brings. We consider that all residential development rights should be tied to management of some weeds and retention of tussock grasslands where they exist now.

Landscape aspects of subdivision

[234] Accordingly, a new policy should read along these lines:

> **3B16 Landscape aspects of subdivision**
>
> (1) In order to minimise its adverse effects, subdivision in the Mackenzie Basin Rural Subzone will not be encouraged except:
>
> - in farm base areas;
> - in areas of low visual and/or ecological vulnerability;
>
> (2) there should be a minimum lot size of 200 hectares (except in farm bases);
>
> (3) further subdivision of lakeside protection areas (except for existing farm bases), scenic viewing areas and scenic grasslands will not be allowed;
>
> (4) all lots in a subdivision shall be linked by mutually enforceable covenants and conditions (also enforceable by the Council) to remove exotic wildings from each other lot unless the trees are in an approved forest area;
>
> (5) All subdivision should have regard to topographical and ecological restraints.



377 *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323; [2001] NZRMA 481; (2001) 7 ELRNZ 193 (CA).

378 *J F Investments Limited v Queenstown Lakes District Council* DecisionC48/2006.

4.13 Section 32 analysis

[235] Since the Environment Court has the same power, duty and discretion[379] in respect of a decision appealed against as the local authority that made the decision, the court must carry out an analysis under section 32 of the RMA.

[236] We have already analysed the extent[380] to which each of the objectives put forward or reworded by us achieve the purpose of the RMA so we need to consider the objectives no further at this stage. We now have to examine whether[381] having regard to their efficiency and effectiveness, the policies, rules or other methods before us are the most appropriate. We must take into account[382]:

(a) the benefits and costs of policies, rules or other methods;
(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.

Benefits and costs

[237] The benefits and costs which need to be taken into account under section 32 include those given by or imposed on the following activities and/or people:

- the provision of housing (outside Tekapo and Twizel townships);
- the Waitaki Power Scheme;
- farming;
- potential carbon forestry under emissions trading schemes and conventional production forestry;
- tourists and the tourism industry;
- residents of the basin;

– to the extent that the benefits and costs relate to the objectives and, ultimately, the purpose of the Act. Any benefits arising from the policies that do not further the objectives should be disregarded. Any potential costs imposed by activities that do not achieve the objectives should be avoided as reducing the efficiency and effectiveness of the policies.

[238] We did not receive any quantified evidence on the benefits and costs of the various proposed policies. While such an analysis was desirable the court's obligation in its absence is to consider all the evidence we have received and make our decision on that evidence : see *Takamore Trustees v Kapiti Coast District Council*[383], cited with approval and expanded on in *Contact Energy Limited v Waikato Regional Council*[384].

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379 Section 290 of the RMA.
380 Section 32(3)(a) of the RMA.
381 Section 32(3)(b) of the RMA.
382 Section 32(4) of the RMA.
383 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at 513-514.
384 *Contact Energy Limited v Waikato Regional Council* 2007) 14 ELRNZ 128 at [91]-[92].

[239] We take into account the following matters. First, subdivision for housing away from the urban areas would have some benefits to the district compared with subdivision within or adjacent to the existing urban areas. (It is the marginal benefit of these housing options over the alternatives that is relevant.)

[240] In fact, the only benefits we can think of are from the increased population that might be attracted by the different type of housing available – bach-type accommodation in farm base areas, or mountainous rural-residential lots with some space and privacy. Such subdivision would also create some costs, given that the presence of buildings, particularly residential units and associated domestication, is one of the major reducers of naturalness in a landscape. However, it is obvious that the benefits of more housing outside the existing urban areas can be largely retained while the costs are minimised by confining residential units to places where there are likely to be few adverse effects.

[241] It is easier to see that in a few special places – such as Pukaki Downs – where visitor accommodation with a distant view of Aoraki/Mt Cook could be obtained there would be benefits to visitors and landowners, and – on those locations – minimal costs to landscape values.

[242] The importance of the Waitaki Power Scheme to New Zealand as a whole suggests that within its existing footprint (including Lakes Tekapo and Pukaki) the operators should be left to manage their operations with as much flexibility as possible as stated in objective 3B. The policies are worded so as to achieve that. Further, in relation to the hazards issue, if there was not to be a policy preventing residential units or farm bases in the flood hazard areas the evidence[385] for Meridian is that it would increase the Potential Impact Classification ("PIC")[386] of the relevant upstream sections of canal. That might necessitate upgrade of the existing infrastructure in order to reduce the PIC. Even evaluations of how to reduce the PIC can cost hundreds of thousands of dollars[387]. Actually carrying out strengthening could require "... land purchase and construction of earthfill buttressing of [the existing] canal embankment"[388] and, by implication, far larger costs.

[243] We can see that PC13(N) and all the subsequent versions so far would enable freehold farmers to make some one-off profits by selling off relatively small pieces for residential units. If those profits are re-invested in farming operations it may increase the productivity of farming in the district. While there might be short-term benefits to landowners and lessees, we are concerned that the long-term adverse effects to values of

385 N A Connell, evidence-in-chief para 38 [Environment Court document 12].
386 There is a Potential Impact Classification Index developed under the New Zealand Society on Large Dams Dam Safety Guidelines 2000 : N A Connell, evidence-in-chief para 14 and footnote 1 [Environment Court document 12].
387 N A Connell, evidence-in-chief para 38 [Environment Court document 12].
388 N A Connell, evidence-in-chief para 38 [Environment Court document 12].

national importance under section 6(b) will be greater. There are, of course, other section 6 values, the effects on which we cannot assess at this stage.

[244] As for the benefits and costs of higher-intensity (irrigated) farming, we received no evidence about this. We are aware of a Ministry for the Environment report on the issue which, in 2005, recorded[389] that an analysis of the economic impacts of using 14.7 m^3/s of water for irrigation in the Upper Waitaki rather than for power generation had the following results[390]:

- the options for irrigation using the quantity of water specified in the former Order in Council produce considerable surplus in terms of net benefit from agricultural production
- however when the opportunity costs of hydro-generation are taken into account, the results are negative overall in all scenarios using base case assumptions
- the negative outcome is worsened by the inclusion of additional hydro-generation in the lower Waitaki which effectively increases the opportunity cost of water extracted for irrigation.

We can put no weight on that report but mention it for two reasons. First, we are concerned about some potential natural justice issues for the Canterbury Regional Council. The process by which this water has been re-allocated from Meridian, which, according to the High Court in *Aoraki Water Trust v Meridian Energy Limited*[391], has all the water in the Upper Waitaki (and more) allocated to it, to local aspiring irrigators is completely obscure to us. That is not our business in these proceedings, but we are aware from other appeals lodged with the Registrar of aspiring irrigators in the lower Waitaki who should have been made aware (if they are not) that irrigation in the Upper Waitaki is likely to mean less water for them. Secondly, assuming the cost-benefit analysis is in favour of using the water for the Waitaki Power Scheme, then the rational course would be for Meridian and/or the Government to find a mechanism to compensate the upper Mackenzie Basin farmers who have the imputed water permits so that the water stays within the Waitaki Power Scheme at the times it is needed for generation or to refill lakes but taken for downstream irrigation when in surplus. At present the free water to the Mackenzie farmers appears to be creating a perverse incentive to damage some landscape values. (We accept there is also a benefit, at least potentially, by making productive some desertified near wasteland.)

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389 MFE February 2005 Ref ME583 "Environmental, Economic and Social Impacts of Irrigation in the Mackenzie Basin".

390 MFE February 2005 Ref ME583 "Environmental, Economic and Social Impacts of Irrigation in the Mackenzie Basin" at para 3.1.2.

391 *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268; [2005] NZRMA 251 at para [15] (HC).

[245] We recognise that the spreading of wilding exotics produces a positive as well as negative externalities. The positive is the absorption of CO2. The negatives include the adverse effects of wilding exotics on the landscape and ecological values of the basin[392]. Freeholding of land and registration of an emissions trading scheme[393] by the owner (as on Pukaki Downs) will eliminate the positive externality because the landowner would receive payment for the measured carbon capture under the particular ETS for his or her land. At present the size of the positive externality is limited because many pastoral lessees and other landowners are removing the wildings on their land. Pastoral lessees have an obligation to do so. Those actions also limit the size of the negative externalities –there are the adverse effects of wilding exotics on landscape and on ecosystems[394]. After entry into the emissions trading scheme the positive externality will be eliminated but the marginal public benefit of carbon capture (net of payments for carbon credits to landowners) may increase because the possibility of payments under an ETS is likely to encourage an increase in the spread of wildings. Thus the negative externalities may also increase, unless the areas where wildings may spread are chosen carefully, and enforceable controls are put in place to ensure wildings do not spread where they should not. One difficulty with all this is that while the public benefits of carbon capture by wilding trees under an ETS are (at least in theory) easy to measure (value of carbon captured less carbon credits paid out), the costs in terms of effects on the value of the landscape are notoriously difficult to measure. No attempt to do so was made in these proceedings.

[246] At present the costs of managing wildings ultimately come back to the landowner[395] and for much of the Mackenzie Basin that is ultimately the Crown through LINZ. The benefits are available for all to enjoy, as well as accruing to the landholder in increased production. Since the lessee has an obligation under each pastoral lease to manage wilding exotics (as weeds) that cost is (or should be) reflected in the rent that a reasonable lessee is willing to pay. So the cost is ultimately borne by the Crown – even if the sweat is the farmer's – so that responsibility and cost needs to continue with whoever acquires the freehold. Similarly, we consider the costs of wilding control should be borne in value proportions by all subsequent landowners of the subdivided land. If pastoral lessees and freeholders know that under the district plan they will have to bear the full costs of wilding control then that should affect what land they seek to keep in their possession and the amounts to be paid by the Crown to pastoral lessees in the exercise or for freehold land on subsequent sale.

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392 We are principally concerned with the first of those externalities (effects on the landscape) here because we have very little evidence about the latter (effects on ecosystems).

393 Assuming the pre-conditions referred to earlier are met.

394 We are principally concerned with the first of those externalities (effects on the landscape) here because we have very little evidence about the latter (effects on ecosystems).

395 The direct costs are borne by the pastoral lessee but we assume they are reflected in lease benefits.

[247] The costs and benefits of the policies to the tourism industry have not been quantified either. However, given the importance of tourism to the district economy we consider changes to the landscape of the Mackenzie Basin should be managed carefully.

[248] In summary, we consider the policies we have provisionally settled on are closer to those "justified" by the Council's section 32 report (dated 13 December 2007) than those agreed on or proposed by the parties, and are the most appropriate policies for achieving objective 3B and the other objectives in Chapter 7 of the district plan.

Explanations

[249] Many of the explanations in PC13(C) could be carried over with minor changes. Some of course will require greater amendment.

Risks

[250] As for the risk of acting or not acting, we agree with the Council's section 32 report[396] that "There is a real risk that if action is not taken soon that some very important landscape [...] could be degraded by inappropriate development and subdivision". Further, the operative district plan and PC13(N) raise the probability of degradation to the landscape (and also potentially ecosystems) from further areas of intensified farming activities. We consider PC13 barely did enough to reduce the risk of buildings having adverse effects on the landscape; and it did little or nothing about the risks of wildings and intensified farming activities. We tentatively consider that PC13(C) and/or the relief suggested by the parties moves considerably too far back towards the near *laissez-faire* approach of the operative district plan. We consider the risks of not acting are much greater than the risks of proposing amended policies and hearing the parties (and potentially others as new section 274 parties) on them. That is particularly so in respect of wilding exotics : given the high probability of further rapid growth of wilding exotics in much of the basin on our current state of knowledge, we consider the risk of not acting to manage conifers is higher than the risk of leaving wildings free to spread.

[251] In summary, if we take no action in respect of the issues raised there is a strong chance that the Mackenzie Basin's landscape values will be strongly adversely affected. If we take some judicious action then those values will be affected but, we judge, in a way that largely retains the landscape's character. In terms of risk the important point is that if we are wrong, little harm has been done. The district plan can be unwound and further development allowed at a later stage if the evidence warrants it. The opportunity costs of not acting are very high, those of acting are relatively low.

396 Mackenzie District Council Section 32 Report p. 19 (13 December 2007).

5. The options for the rules in the Mackenzie Basin subzone

5.1 Introducing the district plan's rural rules

[252] The district plan's rural rules in Chapter 7 of the plan use the terminology of activities rather than uses, although we consider nothing turns on that. Eleven types of activity are covered. After two introductory paragraphs they are[397] (with important types for these proceedings emphasised):

3. Buildings
4. Earthworks and Tracking
5. Factory Farming
6. Forestry
7. Recreational activities
8. Visitor Accommodation
9. Retail sales
10. Mining ...
11. Home occupations[398]
12. Vegetation clearance
13. Scheduled Activities [primarily the Waitaki Power Scheme]
14. Aviation
16. Other Activities (including farming)

Buildings in the Mackenzie Basin under the operative district plan

[253] Starting with buildings : under the operative district plan the status of buildings – and no distinction is made between farm and residential buildings – in the Rural zone[399] is that most buildings are permitted[400] provided they comply with certain standards[401] as to height and setbacks. Other standards provide for:

- No buildings within Sites of Natural Significance[402], Scenic Viewing Areas, or above 900 m^2 (except for mustering huts);
- No buildings within 20 metres of a riverbank, 50 metres of a wetland or 100 metres of a lake (other than Lake Ruataniwha)[403];

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397 MDP p. 7-39.

398 This rule has been deleted : see MDP p. 7-57.

399 This is, of course, wider than the Mackenzie Basin subzone.

400 Rural rule 3.1.1[MDP p. 7-40].

401
- Height – 9 metres for buildings other than farm accessory or emergency services which can be up to 15 metres (Rural rule 3.1.1.a [MDP p. 7-40]):
- Road setback (Rural rule 3.1.1.b [MDP p. 7-40]):
  50 metres from State Highways;
  20 metres for all other buildings (except emergency services buildings);
  30 metres from all other roads for retail buildings and 20 metres for others;
- Boundary setbacks (Rural rule 3.1.1.c [MDP p. 7-40]): 20 metres for a residential unit (except it is reduced to 2 metres if the allotment size is <2025 m^2 in area : Rural rule 3.1.1.c(i) [MDP p. 7-40] and there are various other minor exceptions : rules 3.1.1.c(ii)-(v)).

402 Rural rule 3.1.1.e [MDP p. 7-41].

403 Rural rule 3.1.1.f [MDP p. 7-41].

- No buildings within the lakeside protection areas[404].

A building that breaches any of those standards is a restricted discretionary activity (with the Council's discretion restricted to the matter of non-compliance)[405]. PC13(C) does not suggest these standards should be changed.

[254] The number of buildings in an area is managed, if at all, only indirectly by lot size. While subdivision is a controlled activity in the Rural zone[406] in the operative district plan, there is no minimum allotment size specified in the zone[407]. Ms Harte described[408] the effect of this as being that prior to notification of PC13:

> ... Council [could not] refuse applications for subdivision, and can [only] exercise control over allotment size in relation to the ability and practicalities of on-site sewage disposal. This rule and assessment matter therefore means that as long as on-site sewage disposal can be achieved without adverse effects, there [was] no practical limit on how small an allotment can be created in the Rural zone, and therefore how dense residential or built development [could] potentially become other than in the areas identified as High Altitude, Sites of Natural Significance, or Lakeside Protection Areas.

In the light of our finding that almost all of the Mackenzie Basin is an outstanding natural landscape, and in order to implement the objectives and policies we have held are most appropriate, the operative rules obviously need to be changed in order to restrict the location and density of buildings. That was the opinion of Ms Harte and Mr Densem for the Council although they made an exception for farm buildings. We find that, because a relative lack of buildings is one of the key indicia of naturalness in a landscape, it is important for the Mackenzie Basin that there be controls on the number and location of buildings within the Mackenzie subzone.

Buildings under PC13(N)

[255] The notified PC13 proposed a large set of changes to the district plan. PC13 as notified proposed to alter that quite radically with a comprehensive scheme[409] which distinguishes between farm buildings and other buildings, especially residential units. We have also described how it created an artificial-sounding concept called a "building node" around existing homesteads and farm buildings.

[256] First, PC13(N) proposed to add a new set of definitions to section 3 of the plan:

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404 Rural rule 3.1.1.i [MDP p. 7-42].

405 Rural rule 3.3.4 [MDP p. 7-44].

406 Subdivision rule 3 [MDP p. 12-12].

407 See subdivision rule 7.1 [MDP p. 12-16].

408 P Harte, evidence-in-chief Annexure A [Environment Court document 6].

409 In all the new rules proposed under PC13 there are standard conditions applying to 'Riparian Areas' – with a reference to MDP rule 3.1.1f and 'Flight Protection Areas' – with a reference to MDP rule 3.1.1n. We will not repeat the references in the new rules.

Farm building or farm accessory building means a building the use of which is incidental to the use of the site for a farming activity (refer definition).

Remote farm accessory building means a farm accessory building, which because of its function requires a location remote from the principal homestead and farm buildings.

Homestead means a residential unit providing the principal permanent residential accommodation for an owner and/or manager of a property.

Identified Building Node means an Identified Building Node contained in Appendix S of this District Plan and any extension to the node approved by resource consent under Rural Zone rule 15.1.2.

Approved Building Node means a building node approved by resource consent under Rural Zone rule 15.1.1.

Then the effect of the proposed rules in PC13(N) was that:

- farm buildings (around homesteads) in existing or approved nodes would be permitted;
- remote farm buildings would be a controlled activity, as would relocation of buildings;
- non-farm buildings within 'homestead' nodes would be limited discretionary;
- new nodes would be discretionary[410];
- all other buildings would be non-complying[411].

[257] Any building which did not comply with the standards would be a restricted discretionary activity[412]. The Council's decision would be limited to the building's external appearance and its location. No limit on the floor area of such a building was proposed. Thus very large farm buildings could be built almost anywhere in the Mackenzie Basin provided they are not more than 15 metres high and not within 50 metres of SH8 (or SH80). Given our findings as to the national importance of the basin's landscape we are troubled by that since first they seem inappropriate so close to State Highway 80 and the other tourist roads, and secondly too many could lead to a marked decrease in the quality of the landscape.

[258] Another change proposed[413] by PC13(N) would be to make any non-farm (i.e. residential) buildings a restricted discretionary activity if located within a 'Building Node". The new rule was proposed to read:

410 Proposed new rule 15 [PC13(N) p. 20].
411 Proposed new rules 3.5.5 and 3.5.6 [PC13(N) p. 19].
412 PC13(N) rule 3.3.2.
413 PC13(N) para 4.8.

3.3.1 Non-farm buildings within Identified Building Nodes or Approved Building Nodes within the Mackenzie Basin Subzone which comply with the following standards:

3.3.1.a **Height of Buildings**
Maximum height shall be 8m

3.3.1.b **Setback**
- i Minimum setback of buildings from the inner boundary of perimeter planting of building nodes shall be 20m
- ii Minimum setback of buildings from state highways shall be 50m
- iii Minimum setback of buildings from other roads shall be 20m

3.3.1.c **Reflectivity**
The maximum reflectivity index of the exterior of any buildings shall be 40%

3.3.1.d **Building Separation**
- i Non-farm buildings shall be a minimum of 100m from any farm buildings other than homesteads.
- ii Non-farm buildings shall be a minimum of 20m from any other non-farm building

3.3.1.e **Number of non-farm buildings**
The maximum number of non-farm buildings (excluding accessory buildings) within any building node shall be 10

3.3.1.f **Building Size**
The maximum footprint (ground floor area) of any single non-farm building and associated accessory buildings shall be 400m^2. This limitation does not apply to homesteads.

...

Status of buildings in Mackenzie Basin Subzone under PC13(C)

[259] The Commissioners' Decision simplified matters to some extent. They renamed "Building Nodes" as the more utilitarian "Farm Bases" and freed buildings of any type within any farm bases from some of the restrictions in the notified version of the plan changes. Generally buildings in the Mackenzie Basin Subzone under PC13(C) would be:

• Within Farm Bases:	All buildings – permitted activities
• Outside Farm Bases:	Farm buildings – controlled activities Non-farm buildings – discretionary activities
• Within lakeside protection areas:	All buildings non-complying activities unless within a farm base area
• Scenic Viewing Areas	Non-complying.

[260] The Rhoborough group of appellants referred in their appeal to the non-complying status of all buildings and extensions within the lakeside protection areas but did not specify a preferred status. In any event it called no evidence on the issue, so we consider it no further.

5.2 Buildings within farm bases

Should all existing homesteads be approved?

[261] We have recorded Meridian's concern about the approval of some of the existing homesteads as farm bases because of the Class 1 hazard caused by a potential canal failure. Specifically, Meridian sought in its appeal that only one additional residential building can be built within the identified farm base areas of listed farms. At the hearing it sought there be no development at all on the following stations because of the flood risk. They are:

- the Wolds;
- Bendrose;
- Black Forest;
- Braemar;
- Ferintosh;
- Richmond;
- Rhoborough;
- Omahau Downs;
- Maryburn; and
- Irishman Creek.

The basis for this request is the proximity of these areas to infrastructure (e.g. lakes, rivers, canals and transmission lines) associated with the Waitaki Power Scheme. Meridian also proposed rules that any further residential building would become a restricted discretionary activity with the matters subject to Council's discretion proposed to be:

- external appearance and location within the landscape;
- effects on water quantity and reliability for existing users arising from domestic supply;
- effects on existing hydro-electricity generation and transmission infrastructure and operations.

[262] Ms Harte wrote[414]:

> These rules were not requested by Meridian in their submissions to PC13, rather they asked, as a matter of policy, that some landscape sub-areas (pink areas) contained in Appendix R be modified and that nodes only be provided for within these modified landscape sub-areas. The approach now sought by appeal is quite different, being rule based rather than policy based, and raises a jurisdictional issue to be dealt with by counsel for Mackenzie District Council.

We accept there are questions of fairness both to parties and to persons not before the court, and we consider later whether they can be remedied.

[414] P Harte, evidence-in-chief para 118 [Environment Court document 3].

[263] Mr Murray from The Wolds was the only party to challenge the Meridian appeal requesting development controls inside these farm base areas. The essence of Mr Murray's concern was the proposed restriction on development within the farm base areas[415] compared to other landowners who have their farm base areas outside of the identified hazard zone. Mr Murray felt that he has "quite a severe restriction"[416] on his ability to build. Mr Murray's evidence was that as part of the plan change process the landowners accepted that non-farm buildings would become a discretionary activity and that building in a lakeside protection area would be changed from a discretionary activity to a non-complying activity. In return the landowners wanted the status quo (controlled activity) to remain inside the farm base areas. Mr Murray argued that had he been aware of such restrictions as proposed by Meridian, he would have requested a new farm base area somewhere safe.

[264] We have no evidence discounting the location or accuracy of the hazard overlay as drawn by Meridian. We consider it would be irresponsible resource management to encourage building where inundation is a possibility. Controlled activity status within farm base areas would be such encouragement. At the least discretionary activity status appears more appropriate. However, we see this as raising issues of natural justice for those affected landowners. It also creates some inequality of opportunity between those affected by the hazard overlay and those that are not. It is our opinion that MDC should consult with the affected landowners to attempt to reach agreement by negotiating the extension, reshaping or in some other way changing the shape and/or location of the affected farm base areas to bring those landowners an opportunity that other stations have.

[265] We consider the appropriate solution is (provisionally) to grant the relief sought in Meridian's evidence, but to send the issue of different locations for farm base back to the Council to consult with the other parties and the public about. Any new farm bases for these specific status should be located in land which is shown on Map 3 [417] as having a medium or (preferably) low vulnerability to development.

What, if any, controls on buildings are appropriate within farm bases?

[266] In its appeal Meridian requested limits on the number of residential buildings within farm base areas of listed stations and the number outside farm base areas on all stations. However, it did not pursue that at the hearing. Instead it sought that there be no farm base areas within the hazard areas and we have dealt with that.

415 NOE p. 348

416 Ibid p. 348.

417 G H Densem, evidence-in-chief Map 7 "Capacity to absorb development" (4 December 2007) [Environment Court document 3].

[267] We have identified as a policy matter concerns about the large size and location of some of the proposed farm base areas which are located in areas of high visual vulnerability to development. We will discuss this issue when discussing specific stations. In the meantime some rules are needed for those properties which will have approved farm base areas.

[268] The rules should provide for:

- farm buildings in all farm base areas[418] as a permitted activity (subject to compliance with the subzone and zone standards);
- non-farm buildings in farm base areas which are in areas of high vulnerability to development are restricted discretionary activities with the Council's discretion limited to the matters in policy 3B5(1);
- non-farm buildings in farm base areas which are in areas of low-medium vulnerability to development are restricted discretionary activities with the Council's discretion limited to the matters in policy 3B5(2);
- non-farm buildings in farm base areas which are in areas of low-medium vulnerability to development are controlled activities with the Council's discretion limited to the matters in policy 3B5(2).

[269] All other relevant standards in Chapter 7's rules shall continue to apply.

Building standards and conditions

[270] The Wolds and Federated Farmers have challenged the inclusion of the reflectivity rule specified for buildings in farm base areas (which are the only permitted activity buildings in the Mackenzie Basin Subzone). The rule requires that the maximum reflectivity index of the exterior of any buildings be 40% (except that extensions up to 50% in area may be clad with the same finish as the existing building).

[271] We accept the evidence of Mr Densem that the Commissioners' Decision is appropriate, and thus no change is necessary.

5.3 Buildings outside farm bases

Location of farm buildings

[272] Haldon requested that farm buildings be permitted "outside nodes" but called no general evidence on the issue. We consider that to implement the policy, farm buildings should be:

- controlled activities within identified areas of low visual vulnerability;

[418] "Farm Base Area" will need to be defined in Section 2 of the district plan as an approved farm base area as shown on a new map "Y" to be attached to the plan.

- limited discretionary activities in areas of medium visual vulnerability with the Council's discretion limited to the proposed building's effect on the landscape values identified in objective 3B
- fully discretionary elsewhere in the Mackenzie Basin subzone.

[273] One of the standards for permitted activities is that no building should be erected on (amongst other areas) Scenic Viewing Areas. Further, since building is defined[419] to exclude fences we consider that the same standard should apply for other structures including fences (except for replacement fences) in these areas. The wording for lakeside protection areas (see below) could gainfully be used here. To implement proposed policies 3B3 and 3B13 a new subrule 3.1.1.e(b) should be added as follows[420]:

> **3.1.1.e Sites of National Significance, Scenic Viewing Areas, ... High Altitude Areas, and Scenic Grasslands in the Mackenzie Basin subzone**
>
> (a) ...
>
> (b) No buildings or extensions to buildings and/or structures (other than replacement fencing) shall be erected on ... any Scenic Grasslands identified on the Planning Map X.

[274] Rule 3.2.2.vi as added by the Commissioners' Decision[421] needs consequential amendment.

[275] We consider there should also be density and footprint standards for farm buildings within the Mackenzie Basin subzone to ensure that small buildings do not proliferate. A new rule should be added along the following lines:

> 3.2.2.x No building should be within one kilometre of any existing building (other than a building in an approved farm base).
>
> xi No building should have a footprint of more than 30 metres x 20 metres.

Houses outside farm bases

[276] Outside farm base areas buildings other than farm buildings are discretionary[422] under the Commissioners' Decision. We consider that should be non-complying. We see no policy justification for excepting retirement houses.

[277] Any building in the lakeside protection area (other than buildings within a farm base area) is non-complying[423].

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419 Section 3 (Definitions) Mackenzie District Plan p. 3-2.

420 The existing rule will now need to be listed as (a) in R.3.1.1.e.

421 Commissioners' Decision pp 14-15.

422 Rule 3.3.3 [as amended by the Commissioners' Decision p. 15].

423 Rule 3.4.5 [as amended by the Commissioners' Decision p. 16].

Pivot irrigators

[278] There is some concern in the evidence over the effects of pivot irrigators. Modern pivot irrigators are very impressive large pieces of equipment (especially if they are maintained in working order). However, they have an undoubted effect on landscapes. Their industrial appearance and length undoubtedly reduce the naturalness of any area in which they are located, as inspection of State Highway 80 between Twizel and Omarama reveals.

[279] Structure is defined in the RMA[424] as meaning "... any building, equipment, device, or other facility made by people and which is fixed to land; ...".

[280] A "building" is defined in the district plan[425] as meaning (relevantly) "... any structure ... whether temporary or permanent, movable or immovable, ...". So a pivot irrigator is a "building" for the purposes of the policies and rules in the district plan. It will therefore be caught by rule 3.1.1.e in respect of sites of natural significance, scenic viewing areas and (now) scenic grasslands.

5.4 Earthworks and tracking[426]

[281] The operative district plan provides that[427] any earthworks which complied with four standards was a permitted activity[428]. The standards related to:

- earthworks in "sites of natural significance"[429];
- slope – no earthworks or tracking on slopes greater than 25°[430] – this is a controlled activity[431] except in specifically identified areas, e.g. areas above 900 metres in altitude or within 10 metres of a river;
- riparian areas[432] - where earthworks were limited to very small quantities (with some exceptions in reserves);
- geopreservation sites and high altitude areas[433].

There are exceptions to the standards for track maintenance[434]. Any earthworks or tracking which is not permitted or controlled is discretionary.

[282] Change PC13(N) proposed to confine the permitted activity status to smaller earthworks by imposing quantitative limits : only earthworks or tracking involving

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424 Section 2 of the RMA.
425 Mackenzie District Plan p. 3-2.
426 Rule (7)4 [MDP p. 7-45 *et ff*].
427 Rule 4 Earthworks and tracking [MDC pp. 7-45].
428 Rule 4.1.1 Earthworks and tracking [MDC pp. 7-45 to 7-46].
429 Rule 4.1.1a Earthworks and tracking [MDC pp. 7-45].
430 Rule 4.1.1b Earthworks and tracking [MDC pp. 7-45].
431 Rule 4.2.1 Earthworks and tracking [MDC pp. 7-47].
432 Rule 4.1.1c Earthworks and tracking [MDC pp. 7-46].
433 Rule 4.1.1d Earthworks and tracking [MDC pp. 7-47].
434 Rule 4.1.1a, 4.1.1b, 4.1.1c, 4.1.1d and 4.2.1.

excavation and fill of 300 m^3 or less, or above exposed soil of 1,000 m^2 or less and which complied with the four standards (or was for track maintenance) was permitted.

[283] PC13(N) proposed[435] to add a *controlled* activity new rule in relation to flatter land. The Commissioners' Decision approved that, with some additions and deletions (struck-through) as follows[436]:

> ...
>
> *4.2.2. Other than in the areas listed below, any earthworks (both excavation and fill) greater than 300m^3 and less than 1000m^3 per site or bare soil exposed greater than 1000m^2 and less than 2500m^2 per site, will be a controlled activity:*
>
> - *areas containing Geopreservation Sites identified on the Planning Maps and listed in Appendix I;*
> - *Sites of Natural Significance identified on the Planning Maps and listed in Appendix I;*
> - *areas above 900m in altitude;*
> - *areas within 10m of a river;*
> - *areas within 50m of a wetland or lake;*
> - *areas within 20m of a river listed in Schedule B to the Rural Zone.*
>
> *This rule shall not apply to earthworks:*
>
> - *Approved as part as part of a subdivision or building node (farm base area) ~~where that subdivision has a resource consent~~*
> - *For routine repair and maintenance of operational tracks, roads and drains*
> - *Levelling of fence lines ~~to a maximum depth of 200mm~~*
> - *For utility services*
> - *Approved as part of a resource consent for a building*
> - *Approved as part of resource consent for a farming building except where the earthworks are for access*
> - *For the installation of pipes and regrading of land for irrigation purposes.*

We have three difficulties with this. First, it appears to us that the second exception, beginning "This rule shall not apply to earthworks ..." is ambiguous. Applying normal principles of interpretation this exception would apply to the primary rule, not to the first exception. That appears to make the list of earthworking activities identified in the second exception default to discretionary activities under rule 4.3.1 and we are not sure whether that was the intention. We are rather baffled by the intention of this rule and would need help redrafting it.

[284] Secondly, we consider there was no jurisdiction to add the final exception relating to earthworks for irrigation, regrading or piping. The Commissioners' Decision was clear[437] that issues relating to "intensive farming activities" were not ones that could

435 PC13(N) para 4.12.
436 PC13(C) pp. 38-39.
437 Commissioners Decision p. 44.

be addressed through PC13. If that is so consistency required that exceptions about this should not be slipped in. Further, without qualification it is not consistent with the objectives and policies as provisionally settled by this decision. Accordingly, the last underlined sentence in the rule in the previous paragraph should be deleted unless we decide to give directions about it (and other matters) under section 293.

[285] Finally, it seems that proposed rule 4.2.2's relationship with rule 4.2.1 should be made straight-forward by demonstrating that the second controlled activity only applies to flatter land[438].

5.5 Forestry (Tree Planting)[439] and Wildings

[286] There is a detailed set of rules about tree planting in the district plan. None were proposed to be changed by PC13. In respect of wildings there is an operative rule which states[440]:

> **Wilding Tree Management**
> There shall be no planting of *Pinus contorta, Pinus sylvestris* (Scots Pine), *Pinus uncinata* (Dwarf Mountain Pine) or *Pinus mugo* (Mountain Pine).
>
> It shall be the responsibility of forest owners, occupiers, lessees and licensees or other persons responsible for the forestry to eliminate tree spread and growth of wilding trees emanating from that forest on all land within 500 m of the planted forest edge.

It appears that if this standard is not met the planting of these trees is a restricted discretionary activity[441]. While there is clear policy justification in the (operative) district plan for the rule in the second sentence we consider it is, as it is currently worded, probably unenforceable. First, in relation to the obligation to remove all wildings on all land (within 500 metres) it is probably illegal to impose an obligation on a landowner or occupier to remove trees from a neighbour's land : see *Coote v Marlborough District Council*[442]. Secondly, how can it be established where wildings emanate from, especially to a standard of beyond reasonable doubt as required for a prosecution?

Trees in farm base areas

[287] PC13(N) did not change the rules as to tree planting – neither as amenity plantings for residential buildings nor more widely in the Mackenzie Basin subzone, despite the objective (now 3B) and policies recognising the basin's outstanding natural landscape and protecting it from inappropriate subdivision and use.

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438 This is simply achieved by starting rule 4.2.2 "Subject to rule 4.2.1 ...".
439 Rule (7)6.
440 Rule (7)6.1.8.e.
441 Rule (7)6.3.1 [MDP p. 7-52].
442 *Coote (Rush) v Marlborough District Council* Decision W96/1994.

[288] Recognising the gap in PC13 the Commissioners' Decision filled it in part by adding[443] a list of prohibited amenity plants[444] in a new rule (7)3.5.1 which states:

> It is a Prohibited Activity for which no resource consent will be granted to plant the following species within a farm base area:
>
> - *Pinus contorta* (Lodgepole pine)
> - *Pinus nigra* (Corsican pine)
> - *Pinus muricata* (Bishops pine)
> - *Pinus sylvestris* (Scots pine)
> - [*Pseudotsuga*][445] *menziesii* (Douglas-fir).

[289] However, they also wrote[446]:

> [A submitter] Dean Smith request[ed] rules to prevent further wilding tree spread. We have recommended additions to the list of prohibited species for planting however we do not consider the Plan Change or the District Plan is the appropriate vehicle for preventing further wilding spread and we therefore recommend this submission be rejected.

We struggle to understand that conclusion: for a start the submission must have been accepted in part because the Commissioners introduced the rule we have quoted; secondly, no reasons have been given for why the plan change cannot be used to help remedy the adverse effects given the problems we have predicted in respect of wildings; and thirdly it seems perverse to restrict the control to within farm bases when the larger problem is outside them.

[290] In our view PC13(C) does not go far enough especially in confining the proposed rule to farm bases. The new rule is inconsistent with the existing rural zone-wide rule as to "wilding tree management"[447] which does not refer to Bishops pine, Corsican pine or Douglas-fir. We consider this issue of wildings below in relation to rule (7)6 "Forestry Tree Planting".

[291] Mr Murray of The Wolds and Federated Farmers requested that Corsican pine (*Pinus nigra*) and Douglas-fir (*Pseudotsuga menziesii*) be removed from the new prohibited Amenity Trees Planting (listed in Rural Zone rule (7)6.5.1) added by the Commissioners' Decision[448]. We accept Mr Murray's point that Douglas-fir in particular is unlikely to spread naturally in the lower basin because the rainfall is too

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443 Commissioners' Decision para 4.11 [p. 38].
444 Some of the usual suspects : Lodgepole, Corsican, Bishops and Scots pines, and Douglas-fir.
445 The text in the Commissioners' Decision [p. 24] states "*Pinus*" but Douglas-fir is neither a pine nor a true fir but in a genus of its own.
446 Commissioners' Decision para [206].
447 Rule 6.1.8.e [MDP p. 7-49].
448 Commissioners' Decision p. 24.

low. Drafting a rule relying on that would require further precise evidence on a number of issues and we do not have that. The Council produced, without opposition, the evidence of Dr Lloyd[449] on this issue. In his opinion Corsican Pine and Douglas-fir are both species with a high probability of spreading and thus control of planting is justified in general terms. No party sought to cross-examine Dr Lloyd.

Wildings

[292] In relation to use of land the general principle in the RMA is that any use is allowed unless it contravenes[450] a rule in a district plan. If it would contravene a rule then the activity may be expressly allowed by a resource consent[451] or allowed as an existing use[452].

[293] Is the growth of weeds a use of land? We heard no argument about this, but we have thought about the issue a little to be comfortable that we have jurisdiction. "Use" of land is defined in section 9(4) as meaning (relevantly):

> ...
> (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals ...; or
> ...
> (e) Any other use of land ...

We are inclined to think that letting weeds grow is "any other use of land" just as growing grass or breeding stock is a use of land. We also consider that allowing weeds to propagate and spread is a use of land in the sense that it causes damage to and/or disturbance of the habitats of other plants or animals. Consequently it is within a local authority's power to impose not only rules as to what tree species may be planted, but also managing the spread of wilding trees.

[294] Given the importance of wilding control outside approved forestry areas (to be established) we consider there should be a new rule (7)6.6 about Exotic Wildings in the Mackenzie subzone as follows:

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449 K M Lloyd, statement of evidence dated 13 May 2010 [Environment Court document 13] and reply 30 July 2010 [Environment Court document 13A].
450 Section 9(1) of the RMA.
451 Section 9(1)(a) of the RMA.
452 Section 9(1)(b) and section 10 of the RMA.

6.6 Prohibited Activities – Exotic Wildings

6.6.1 No wilding trees of the following species

- *Pinus contorta* (Lodgepole pine)
- *Pinus nigra* (Corsican pine)
- *Pinus muricata* (Bishops pine)
- *Pinus sylvestris* (Scots pine)
- [*Pseudotsuga*][453] *menziesii* (Douglas-fir)
- *Larix* (Larch) species

shall be allowed:

(a) to grow more than 1 metre in height;

(b) to fruit/cone

in the Mackenzie Basin Subzone except in approved Exotic Carbon Forestry Areas.

5.6 Visitor accommodation

[295] No change was sought to the rules at the hearing. We discuss the application of the rules later in this decision.

5.7 Farming

[296] Farming is included in the rural rules under the heading "15 Other Activities (including Farming Activities ...)" and is a permitted activity[454] provided it complies with various standards. Most of those are not relevant here. However, it is worth recording that "pastoral intensification" – defined[455] as "subdivisional fencing and/or topdressing and oversowing" – is only restricted[456] on "Sites of Natural Significance" shown on the planning maps. The same restriction should apply on Scenic Viewing Areas and Scenic Grasslands. Further, the wider definition of "pastoral intensification" discussed earlier[457] should be used. Without those changes what this means is that other much larger areas of tussock in the Mackenzie Basin will continue to owe their survival partly to the goodwill of the farmers and partly to the terms of pastoral leases (and no doubt economic forces play a very significant part too), but not to rules in the district plan. That is of concern because, on Mr Murray's evidence, tenure review is continuing, so one leg of the support for indigenous grasses is being whittled away (despite Rural Objective 1 – Indigenous Ecosystems, Vegetation and Habitat).

[297] Nor does the district plan appear to do much for tussock grasslands. One aspect of land "improvement" has traditionally been land clearance by ploughing or discing tussock grasslands. The operative district plan contains some rules about clearance of, for example, riparian areas[458], tall tussock[459], and short tussock grasslands[460]. Interestingly, the last rule is accompanied by a note which states that the (short tussock)

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453 The text in the Commissioners' Decision states "*Pinus*" but Douglas-fir is neither a true fir nor a pine but in a genus of its own.

454 Rule (7)15.1.1 [MDP p. 7-65].

455 Definitions (Chapter 5) [MDP p. 3-7].

456 Rule (7)15.1.1.a [MDP p. 7-65].

457 Part 3.6 of this decision.

458 Rule (7)12.1.1.a [Mackenzie District Plan p. 7-57].

459 Rule (7)12.1.1.c [Mackenzie District Plan p. 7-59].

460 Rule (7)12.1.1.g [Mackenzie District Plan p. 7-61].

rule would be reviewed after three years of operation of the plan. As far as we know that has not happened. In fact, the land clearance rules may not have had much application because, on our understanding, direct drilling and oversowing are currently two of the preferred techniques for land conversion. The latter activities are permitted except on Sites of Natural Significance[461] as shown on the planning maps. We conclude that the greening of the lower parts of the Mackenzie Basin by conversion to exotic pasture can proceed mostly as permitted activities under the operative district plan. PC13(N) did not propose to change that.

[298] Factory farming[462] is discretionary. While the activity is outside the scope of PC13, we have already held that there should be maximum size and density provisions for all large buildings.

5.8 Wind turbines

[299] "Power Generation Facilities" with a maximum output of 25 kilowatts are a permitted activity[463]. In our view the Council should look at the possibility of wind turbines being erected under this rule and consider the consequences for the Mackenzie Basin.

5.9 The subdivision rules

Basic scheme for subdivision

[300] The Hearing Commissioners' decision to introduce a distinction between subdivision for rural purposes and for other purposes, and to add a rule providing for retirement houses is not in our view consistent with the purpose of either PC13 or the RMA itself. A rule in PC13(C) states that[464]:

> Any subdivision within the Mackenzie Basin subzone (excluding ... Farm Base Areas) for the purpose of facilitating farming activity ... shall be a Restricted Discretionary Activity", whereas any other general subdivision is generally discretionary[465].

We consider that is too uncertain to be workable for the reasons given earlier.

[301] Mount Gerald Station sought a number of changes to the subdivision rules:

- that there is no minimum lot size, or at least that subdivisions be based on topography;
- that there should be no land use requirement if subdivision is granted;
- that the most restrictive category for subdivision should be discretionary; and

461 Rule (7)15.1.1.a [Mackenzie District Plan p. 7-65].
462 Rule (7)5 [MDP p. 7-47 *et ff*].
463 Rule (7)15.1.1.j [Mackenzie District Plan p. 7-67].
464 Proposed rule 4A.a [PC13(C) p. 29].
465 Proposed rule 4d [PC13(C) p. 30].

- that there should be provision for subdivision that protects and sustains outstanding natural landscapes.

In fact, Mt Gerald Station withdrew this part of its appeal but those changes were generally supported by Rhoborough and Meridian as section 274 parties. Federated Farmers sought "clarification" regarding controlled activity subdivision for farm building following subdivisions greater than four hectares.

[302] Within approved farm base areas (maximum area 40 hectares) we consider that:

(a) clusters of not more than ten residential units (each in their own lot) in farm base areas should be a controlled activity provided that the area of each lot is not more than one hectare;
(b) rural residential in farm base area – controlled for four hectare minimum lot size and subject to all rural residential provisions.

To complement that we judge that rural residential subdivision (with identified building platforms outside farm base areas) in approved low visual vulnerability areas should be a discretionary activity. Any rural residential subdivision in approved medium visual vulnerability areas would require a plan change.

[303] We consider all other subdivision – for whatever purpose – within the Mackenzie Basin subzone (i.e. excluding subdivision within farm base areas and approved rural residential or tourist subzones) should be a restricted discretionary activity with the Council's discretion limited to the following matters:

- natural and other hazards (as in rule 3a);
- earthworks (as in 3a);
- the effect on the landscape of any lot and associated boundaries;
- the effect on the landscape of any building on any identified building platforms

provided the following standards are met:

(1) a minimum lot size of 200 hectares (restoring the PC13(N) provision);
(2) one building platform for a residential unit is identified on each lot if it does not already contain one;
(3) (a) building platforms must not be on, and
    (b) lot boundaries shall not cross:
    – any lakeside protection area, scenic viewing area or grassland scenic area;
(4) no building platform shall be within one kilometre of any state highway, or the following roads:

- Lilybank Road from State Highway 8 to the Roundhill turnoff;
- Godley Peaks Road from State Highway 8 to one kilometre past the Cass River bridge;
- Haldon Road from State Highway 8 to one kilometre south of the Mackenzie Pass road turnoff;

(5) every lot on a subdivision plan shall have the benefit of and be subject to:

(a) a covenant in favour of the other lots and the Council to eliminate all exotic wilding tree species before they reach one metre in height or fruit (cone), whichever is the earlier; and

(b) an easement or other right to the owner or their agents to enter onto the other lots on foot to carry out exotic wilding tree weed removal upon giving two months' written notice of intention to do so with a right to recover their full reasonable costs for organising cutting and culling the wildings.

For the avoidance of doubt we record that we do not see a policy justification for special rules for retirement house subdivisions within the Mackenzie Basin : that would lead to sporadic development and undesirable accumulative effects over time. In any event, there is ample room in the large farm base areas approved for a retirement house to be erected with space and privacy around it. An exception could be made for the few stations which do not have an approved farm base (or the opportunity to seek one under leave reserved) under this decision.

Access to multiple lots

[304] Standard 2.q.iii in the Transportation Section of the District Plan (Section 14) was inserted by PC13. It specifies that access to more than six lots of residential units is to be by way of public road and not by private way or access lot. This rule applies throughout the district. Haldon Station requested that the rule be deleted. Federated Farmers also seeks that the rule be amended but does not say how. In the absence of any detailed evidence we consider this is a policy matter which should be left to the Council.

5.10 Matters for discretion and assessment matters

[305] Meridian requested that an additional matter[466] of control be included for controlled activity buildings in the Mackenzie Basin Subzone and Manuka Terrace Rural Residential Zone and controlled activity subdivisions, as well as including them as assessment matters for farm buildings and farm subdivisions. The additional matter is the effects of development on hydro-electricity generation and transmission infrastructure operations. We accept that at least the changes in Appendix 1 to Ms

466 Originally Meridian also raised the question of effects on water resources, including quantity and reliability of supply for existing users arising from domestic supply but it withdrew this issue on the ground it is more an issue for the Canterbury Regional Council.

Harte's rebuttal evidence should be made. Further changes are likely to be needed to reflect the amended status of activities as a result of this decision.

[306] Federated Farmers sought to include an assessment matter for farm buildings that reflects the functional requirements relating to the location of these buildings. Ms Harte considered that to be appropriate and suggested the following wording[467]:

> The degree to which the proposed location of the building is required to achieve efficient and effective farming operations on the property.

We accept that is appropriate.

5.11 Definitions

[307] Some new or amended definitions are likely to be required in section 3 of the district plan. One is the definition of "farm base" area:

> **Farm base area** means an area shown on Map Y as an approved farm base area.

Another is the definition of "pastoral intensification" discussed earlier.

[467] P Harte, evidence-in-chief para [125] [Environment Court document 3].

6. The Stations

[308] In order to check whether the proposed farm bases are appropriate and to make an initial assessment of whether it is realistic to allow exotic carbon forests (as compensation for strengthened and ongoing obligations to control wilding exotics everywhere else on their land) we will now identify and consider in turn each of the stations in the Mackenzie Basin. We have only been privileged to inspect a few of these (with the owner's permission). We have not entered any other property. Our tentative findings are based primarily on the evidence including the many maps produced at the hearing, but also on our inspection from roads (to a very limited extent) and our general knowledge of the area. For information on the status and location of Crown Pastoral Land we have also referred to the Land Information New Zealand website[468]. Naturally we will give all parties opportunity to respond on the question of the proper boundaries and status of their land if it is relevant, and more importantly on the location of farm base areas and (if it becomes relevant) of exotic carbon forests.

[309] In addition to any specific issues raised by the parties, the general issues for each station are:

(1) whether it holds one or more appropriate farm base area;
(2) whether it contains a low or medium visual vulnerability area;
(3) whether it includes a potential grassland scenic area;
(4) whether parts of it are suitable for irrigated (intensive) pastoral farming;
(5) whether it holds a suitable carbon forest area.

In assessing the areas of low or medium vulnerability we are relying on Map 3 in this decision (a copy of Map 7 produced by Mr Densem[469]). We realise that map is challenged in some respects, particularly in relation to the land of Pukaki Downs, and we treat it with caution. However, elsewhere our site inspections suggest it is generally reliable, at least for the purpose of setting out provisional findings as below.

[310] For all stations we will suggest where a possible carbon exotic forest (of wildings) might be sited so as to enable an emissions trading scheme. Our suggestions must always be subject to change if the idea of creating an incentive for limited carbon forests[470] at the request of any landowner (if supported by evidence) or even to cancellation if there are ecological grounds for that course brought forward by any existing party or (possibly) any further section 274 party and to any applicable rules (also yet to be finally determined).

[311] In respect of the potential scenic grasslands, the evidence has been even less tested. After the close of the hearing we requested through counsel that Mr Densem prepare some further evidence on a number of aspects of the landscape of the basin.

468 www.linz.govt.nz/crown-property/pastoral-land-tenure-review/status-of-pastoral-land.
469 G H Densem, evidence-in-chief Appendix B Map 7 [Environment Court document 3].
470 In return for proper management of wildings on the rest of the relevant property.

Unfortunately, and obviously through no fault of Mr Densem, his preparation and lodgement of that evidence[471] were interfered with by the first Canterbury earthquake in September 2010. His further statement does contain some expert opinion[472] on the "most important vistas" and we have already referred to that in suggesting the concept of "scenic grasslands". We now rely on that for our provisional findings in respect of the stations below. However, an opportunity should, and will, be given to the landowners or lessees and other parties to respond to this.

[312] Most of the references to farm base areas in what follows are to those shown on the aerial photographs attached to the Commissioners' Decision. Any approval of a farm base area will of course be subject to the standards in the district plan and any subdivision and/or building on them will be subject to the Mackenzie Basin subzone rules as amended by this decision. Further, where any farm base area has been ruled out because it is on a flood hazard area we will consider whether leave should be granted to the owners/lessees to apply under section 293 of the RMA for an alternative farm base area(s).

[313] We now consider the stations[473] within the Mackenzie Basin subzone in alphabetical order.

Balmoral

[314] This pastoral lease station runs from State Highway 8 south of Fork Stream northwest across the Old Man Range to the Braemar Road and west across Irishman Creek to the eastern side of the Mary Burn. There are shelterbelts on the flats to the north of the Old Man Range, and the Balmoral homestead is at the northeastern corner of that hill. As shown on the map produced by Mr Densem[474] the freehold rump of Mt John Station is owned and administered by the owners of Balmoral. We treat this land as one. We confirm the farm base area around the Balmoral homestead as shown in the Commissioners' Decision.

[315] An existing plantation is located on rolling land west of Irishman Creek. That appears to be within the low visual vulnerability area shown on Mr Densem's Map 7 (our Map 3). An exotic carbon forest could be established here. There appears to be another plantation in the Irishman Creek floodplain. For ecological reasons we are unlikely to approve the area around that as an exotic carbon forest.

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471 G H Densem, letter and draft statement dated 8 September 2010 [Environment Court document 32].

472 G H Densem, letter and draft statement dated 8 September 2010 part 4 [Environment Court document 32].

473 As shown on Mr Densem's Exhibit 28.1 (except for "Cox's Downs" which he does not refer to).

474 Exhibit 28.1.

[316] As for intensified farming activities : this property is at higher altitude than most in the basin. Given the extent of tussock cover we consider (despite the higher quality soils and rainfall) higher intensity farming is inappropriate on this land.

Bendrose

[317] Bendrose is (now) a freehold block of land between the Twizel and Pukaki Rivers immediately east of Twizel township, and south of a large reserve administered by the Department of Conservation on the same floodplain. This property has the misfortune to be both largely in an area of high visual vulnerability and to have its farm base (adjacent to the Twizel River) in the hazard zone from a breach of the Pukaki Canal. It appears it cannot have a farm base opportunity in this area for hazards reasons.

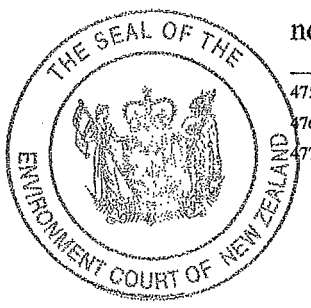
[318] There may be scope for an exotic carbon forest along the Pukaki River boundary of the property if that is also appropriate on Meridian's land. Some co-operation between these landowners would be essential if an emissions trading scheme is to be enabled here.

[319] There may be potential for some higher intensity (irrigated) farming activities in the southern half of the property, well away from the DOC reserve[475].

[320] It appears from Exhibit 28.1 that Bendrose also owns or has a pastoral lease or occupation licence for a summer grazing block in the vicinity of Flanagan Pass between Lake Ohau and Darts Bush Stream (north of Mount Ruataniwha). This block is unlikely to be suitable for a farm base, exotic forestry (except perhaps in the Darts Bush catchment) or for high intensity irrigated farming because of its steepness, tussock cover, and relative remoteness.

Ben Ohau

[321] This station is north of Twizel township and mostly west of State Highway 8. The exception is the Twizel airfield which is (or was) part of Ben Ohau. The triangle of land in the angle between the Pukaki Canal (to the northwest) and Glen Lyon Road (to the northeast) we will call the "Ben Ohau Homestead Block". The area across Fraser Stream but south of the Pukaki Canal we will call the "Dry Stream Block" and the area north and west of the Pukaki Canal "The Pyramid Block"[476]. It is relevant to the Ben Ohau Homestead Block that by memorandum[477] dated 17 August 2011 counsel for the Mackenzie District Council advised us of Plan Change 15 to the Mackenzie District Plan which largely deals with the area around Twizel. However, the memorandum also advised us (very belatedly) of a Variation 1 to PC13 which was – we now learn – notified on 25 September 2010. Counsel's memorandum advises us that:



475 Shown as a green quadrilateral north of the Bendrose land on Exhibit 28.1.
476 After its high point : The Pyramid at 856 masl.
477 Entered into the court record as Environment Court document 33.

> Variation 1 extends the boundary of the Mackenzie Basin Subzone to include a specific area adjacent to Twizel, east of the Pukaki Canal. This is shown on the outline map attached as Appendix 1. The extension results in the incorporation of an additional Farm Base Area which contains the existing homestead for Ben Ohau Station, as shown on Appendix 2 ..."

Variation 1 to PC13 also introduced provisions relating to the Ostler Fault to the west of Twizel by demarcating an Ostler Fault Hazard Area.

[322] PC15 attempts to rationalise management of the miscellany of rural-residential and residential developments that have sprung up around the old carefully-planned Twizel. The contrast between the old core and the new development will be a worthy subject for historians in the future. Variation 1 to PC13 re-introduces to the Mackenzie Basin subzone some land which the Hearing Commissioners' Decision excluded from it. This land is to the south of Glen Lyon Road (and the Twizel River) and includes the Ben Ohau Station. It is zoned Rural. The Farm Base Area defined on an aerial photograph[478] as Appendix 2 to counsel's memorandum extends in a dogleg south from Ben Ohau homestead and then east to a curious little Residential 4 enclave (which is, according to the new Planning Map 33, an island of four or five lots surrounded by Rural land). This looks highly irregular to us – why have completely different rules regimes for residential units on adjacent land? – as does the relationship between the Ostler Fault Hazard Area and the Ben Ohau Farm Base Area. This appears at first sight to be very poor sustainable management of resources and hazards. There has been no appeal on Variation 1 to PC13 so we can take it no further. But it further reduces our confidence in the Mackenzie District Council's capacity to deal completely with the major problems we have identified in this decision.

Black Forest

[323] This has a farm base area by Te Ao Marama/Lake Benmore on which Mr Densem considered development would be appropriate. We therefore confirm the farm base area given by the Commissioners' Decision.

[324] While the hills behind the homestead are high visual vulnerability we consider some afforestation would be appropriate in the valley of Black Forest Stream – although we note that most of this catchment is outside the Mackenzie Basin subzone. That is especially since this station appears to have little prospect of moving to intensive farming activities because it has little flat land.

[478] This corresponds to the "Ben Ohau Farm Base Area" shown on Exhibit 18.1.

Braemar

[325] This station has a freehold area[479] close to the road along the eastern shore of Lake Pukaki, and a large pastoral leasehold area on the downs and mountain slopes above. We confirm the farm base area shown in the Commissioners' Decision despite the fact that it appears to be in the lakeside protection area. We consider that the size of Lake Pukaki, the relative lack of recreational use of its waters, and the lack of residential development along its shores means that here (and at Tasman Downs) an exception may be made to the principle of no building in the lakeside protection area. However, there may need to be a restriction on building close to the lake edge so that Meridian's erosion control works are not interfered with.

[326] There appears to be some scope for afforestation in the vicinity of the existing shelterbelts and (at least) one plantation on the pastoral lease, so we tentatively (subject to checking of ecological constraints and to input from the landowner – if they wish) approve a forest block in this area. There appears to be little scope for irrigated farm land on this property given its altitude.

Curraghmore

[327] This station is on Haldon Road. We confirm the farm base area shown in the Commissioners' Decision.

[328] There is scope for an exotic carbon forest immediately adjacent to the farm base area possibly on the lowest slopes of the Grampian Mountains despite their high visual vulnerability, because of the remoteness of this area from tourist roads. Any forest block should be a minimum of one kilometre from any boundary except for the southern boundary if the owners of Streamlands agree.

[329] Irrigated farm land on the plains would not be inappropriate.

Ferintosh

[330] Ferintosh runs along the western shores of Lake Pukaki for some kilometres[480]. It is a pastoral lease of land on both sides of State Highway 80.

[331] Ferintosh has two identified farm base areas. The first is in the vicinity of the existing Ferintosh homestead on the shores of Lake Pukaki. This homestead was established when the lake was raised in the 1970s. Meridian has concerns[481] about any residential and domestic activities in the lakeside protection areas. Mr Smales explained[482] that the lake shore of Lake Pukaki has been the subject of erosion prior to the two lake raising events in the 1950s and the 1970s. As a result of the lake raisings the lake has had to develop a totally new suite of shoreline landforms, morphologies and

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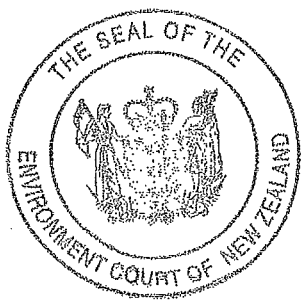
479 Shown on Exhibit 28.1 as a white area close to Lake Ohau.
480 See Exhibit 28.1.
481 K G Gimblett, evidence-in-chief para 82 [Environment Court document 14].
482 K A Smales, evidence-in-chief paragraphs 83 and 84 [Environment Court document 10].

sediment deposits that are totally unrelated to the wave and current regime. This initiated a new evolution sequence of shoreline development that involves the downgrading of the near shore profile into a new profile, resulting in back shore retreat. According to Mr Smales erosion protection works to slow the rate of shoreline erosion are not a feasible option in all locations due to the size of the cliffs and the lake shore profile.

[332] Mr Smales considered it would be prudent to ensure [residential] development is set back a "suitable distance" to take into account medium and long term erosion. No indication of what a "suitable distance" might be was offered. Meridian's planner, Mr Gimblett, wrote that the reintroduction of the lakeside protection area on the shores of Lake Pukaki would appropriately address his concerns. We agree with Meridian to the extent that any new residential development should be located at a safe distance from the lake margin. We do not know what this distance should be in this location although it might be sensible to have no new buildings closer to the lake than a line between the existing cottage and homestead. If there is insufficient area available in the vicinity of the identified node to allow the conservative establishment of new residential development then the Council should consult with the owners of Ferintosh to either redraw the boundaries of the farm base area or to reshape the lakeside protection area in this location. If sufficient suitable area cannot be agreed between the two parties then a new location for the farm base area will need to be found.

[333] We note that Dr Steven[483] had reservations, from a landscape perspective, about the suitability of the identified Ferintosh farm base area. His evidence is that the site is visible from both the surface of the lake and State Highway 80. However, we consider that a cluster of houses here would, because it is constrained by topography, not be inappropriate despite its visibility. The existing shelterbelts and buildings already create a sense of domesticity.

[334] A second farm base area ("Ferintosh 2") was given by the Hearing Commissioners in the vicinity of the shearing shed. This area is to the west and uphill from State Highway 80, and largely obscured from view by the topography. When considering the appropriateness of that there is another question in relation to this property – how to recognise and provide for access to and along the western margin of Lake Pukaki? Normally access along Lake Pukaki would be provided by a marginal strip below State Highway 80. However, owing to the steepness of the lake shores in many places, the fluctuating lake levels as it is operated for the Waitaki Power Scheme and the consequent erosion (and erosion control works by – currently – Meridian) that is inappropriate. In the long term we consider that it would be very desirable for there to be a walking (and mountain-biking) track from Twizel to Mt Cook village, so if access cannot readily be provided along the lake edge[484], we have briefly looked at alternatives.



483 M L Steven, evidence-in-chief 2 July 2010 paragraphs 52 and 53 [Environment Court document 24].

484 Noting this is a matter of national importance under section 6(d) of the RMA.

[335] From Twizel walking tracks already lead across or past Te Rua Taniwha/Ben Ohau and Pukaki Downs Station on existing (and in the latter case – proposed) easements through to the Ruataniwha Conservation Area. There is an easy walking route up the Twizel River and Duncan Stream to a low saddle with Boundary Stream (which rushes downhill to State Highway 80 and under it to Lake Pukaki). There is a legal easement (but not formed track) providing public access up the very rocky and steep Boundary Stream. Boundary Stream crosses the southern end of a series of morainic terraces that (occasionally cut by streams) run all the way from the head of the lake parallel with the lake shore. The terraces are mostly on Ferintosh Station (and the northern end the topography on Glentanner Station is slightly more complex). For much of the length of the terraces there are old farm tracks which provide superb outlooks over most of the Mackenzie Basin. To enable a public track we consider that on any subdivision of Ferintosh there should be an access condition for an easement in gross on foot or bike along the highest terrace.

[336] It is likely that such a track could live with (and be out of sight of) two isolated residential/small accommodation units because there is ample room to tuck such development on lower terraces so as to be invisible from State Highway 80. We will reserve leave for Ferintosh's owner to seek two further small farm base areas (in addition to the Hearing Commissioners' two) to enable such limited development. They would need to have access up the face between State Highway 80 and the first terraces.

[337] We confirm the two farm base areas given by the Commissioners subject to the "building line" for Ferintosh 1, and to the access easement for Ferintosh 2 and any other farm base on the station.

Glen Lyon

[338] For this property on the Dobson River we confirm the farm base area in the Commissioners' Decision. Given its altitude and proximity to conservation areas there is no obvious opportunity for afforestation or irrigated farming.

Glenrock

[339] The northern boundary of this property runs from Te Kopi o Opihi/Burkes Pass to Dog Kennel Corner, and the western boundary is Haldon Road. We approve the farm base area shown in the Commissioners' Decision. We also tentatively (subject to checking of ecological constraints and to input from the landowner – if they wish to give it) approve afforestation in the low visual vulnerability area in the gullies to the southeast of the homestead.

Glenmore

[340] The homestead for this property is north of Takamoana/Lake Alexandrina on the Godley Peaks Road and comprises a strip of land on the south and western side of the

Cass River from its mouth into Lake Tekapo. Glenmore also surrounds the northern end of the Takamoana/Lake Alexandrina Scenic Reserve. The homestead is set back about one kilometre west of the Godley Peaks Road (and north of Takamoana/Lake Alexandrina). To the west of the homestead at the foot of Mt Joseph (1682 masl) there is a complex area of wetland including the Joseph Stream and the Glenmore Tarns.

[341] The Cass River braids and its delta, and most ponds and tarns in the area, are famous[485] as places where some of New Zealand's rarer birds are found and breed : in order of rarity : banded dotterel, wrybill and black stilt. The farm base area is appropriate. There may be limited scope for exotic afforestation northeast of the farm base and for more intensive irrigated farming activities on the existing exotic-grassed paddocks. There may be a need for special standards in respect of sediment management and water run-off upon subdivision given the proximity of the farm base area to Takamoana/Lake Alexandrina.

Glentanner

[342] This property is at the head of Lake Pukaki on State Highway 80. We consider there should not be any exotic carbon forest on this property (subject to existing use rights) because of its proximity to Mt Cook National Park and to the Tasman River flats with their high ecological values. Given the proximity of the Glentanner airfield and accommodation on the opposite side of the State Highway 80, we consider that the farm base area for this property should be reduced by cutting off the southern limb opposite the entrance to the airfield so that there is a rural buffer between the farm base and the commercial operations on the southern eastern side of the highway. The southern boundary of the farm base area should be an extension eastwards of the plantation to the south of (but immediately adjacent to) the southernmost station buildings (and north of the isolated stand).

Godley Peaks

[343] This station runs north along the western edge of Lake Tekapo from the Cass River and up into the Godley River. The homestead is on a terrace a little above the Cass River. The farm base area is appropriate. On the terraces between the Cass River and Mistake River there are irrigated paddocks, extensive exotic shelterbelts and some plantations. Increased irrigation on this area may be appropriate (if water is available) subject to restraints as to aquifer and water quality, but those are matters for the Canterbury Regional Council. There is also a strip of pines or other exotic conifers running northwest from the Mistake River and at the base of the Mistake Peak (1921 masl) ridge. There may be scope for some extension of this on the southeast side towards the farm road up the lake. However, this area is limited because the lakeside protection area should not be encroached on, nor should wildings be allowed to climb the hill to the northwest of the plantation. In particular, any exotic carbon forest should not approach the lake as the hillside squeezes toward the water.

485 "Notorious" is the rather perverse legal word for a generally accepted fact.

Grampians

[344] The Grampians Station is located along Haldon Road. It has freehold land on flats to the west side of the road – stretching as far as Grays River, and also on the sloping outwash plains across which the Te Manahuna/Mackenzie Pass and Hakataramea Pass Roads run. There is (or was) a pastoral lease running up onto the Grampian Mountains. The farm base is acceptable, and some afforestation is provisionally appropriate on the usual terms. There should be no wildings or exotic trees on either side of Mackenzie Pass Road so as to keep the heritage connection between the pass, Mackenzie's 1855 campsite (marked with a pyramidal memorial in three languages[486] and the Tekapo Plain. Any exotic carbon forest should be kept south of the power pylons running through Te Manahuna/Mackenzie Pass. That (interim) decision is made recognising that there are already wildings spreading from the plantation and shelterbelts on the south side of Mackenzie Pass Road.

[345] Subject to any ecological constraints we are not aware of, we see no particular difficulty in landscape terms with further irrigation leading to some more intensive farming activities on the western side of Haldon Road on this station, although some care should be taken with keeping irrigation equipment out of the scenic viewing area on the western side of the road opposite the Mackenzie Pass Road intersection.

Grays Hills

[346] Half of this very extensive property of about 22,000 hectares is a pastoral lease (Run 73) of the river flats between Tekapo River and Greys River. The other half is freehold land over and south of Grays Hills, including much of the lower Tekapo River flats. The homestead is in fact on the southeast side of Haldon Road south of Grays Hills.

[347] The farm base suggested by the Commissioners' Decision is confirmed.

[348] There is an irrigated area (pivot irrigator) close to the Tekapo River southwest of Big Pass[487]. This property has extensive areas on the Tekapo-Grays flats which might be appropriate for more intensive farming activities. We imagine the limiting factor is water. We encourage the proposed irrigation (presumably on better soils) closer to Haldon Road to minimise interference with the wildlife and flora of the river corridors.

[349] As for forest blocks: there is an internal basin on this property between the homestead (on Haldon Arm Road) to the southeast, Hogget Hill to the west, Big Pass to the northwest and the (southern) slopes of the Gray Hills to the northeast. All the lower hill slopes to this basin look inwards and are of low visual vulnerability. We tentatively

486 Maori, English, and ... Gaelic.

487 Visible in the bottom right corner of Mr Fastier's Attachment "G" : D A Fastier, lodged statement 2 July 2010 [Environment Court document 35].

(subject to checking of ecological constraints and to input from the landowner – if it wishes) approve an exotic carbon forest in this part of the station.

Guide Hill

[350] This is a 3,526 hectare station on the sequence of moraine ridges parallel with the eastern share of Lake Pukaki. This freehold property's farm base area is confirmed. There is potential for afforestation in the area of low visual vulnerability to the east of the homestead (if we understand the property boundaries correctly) to the east of a visually important moraine ridge.

Haldon

[351] On the eastern side of Lake Benmore/Te Ao Marama, Haldon Station is a well-managed 22,040 hectare property near the end of the no (public) exit Haldon Road. The collection of farm buildings, homestead and schoolhouse have heritage status in the district plan. The owners requested that their farm base includes all the existing buildings and this was confirmed by Mr Densem as being the intended outcome. There is a lakeside protection area on Haldon Station reaching back up to 1.2 kilometres from the edge of Te Ao Marama/Lake Benmore. Haldon Station does not seek to change that[488].

[352] Three other physical features shape the present farm base: isolated little Mount Maggie (524 masl) rises above the homestead to the northwest and Gallow Hill (457 masl) to the southeast. A water course, Stony River, runs through the farm base.

[353] In its submission and appeal[489] Haldon Station Limited sought an expansion of the current farm base, again using Stony River as the boundary. It stops short of the lake by virtue of a barrier in the form of a legal but unformed road which skirts Te Ao Marama/Lake Benmore. At the hearing Mr P J Boyd, the farm manager, presented a drawing showing a further area which crossed Stony River to join Haldon Road which he suggested might also be included in an expansion of the farm base. He also described the farm's long history of farming intensification. There are 480 hectares currently irrigated via border-dyke irrigation. Pivot irrigation is carried out on the flats adjacent to the lake. There are at present five irrigation resource applications before the Canterbury Regional Council, three for renewal and two for new consents.

[354] Mr Boyd gave evidence that:

- the owner's preference for a farm base area is to use land that is not used for core farming activities;

488 Submissions of counsel (Mr Thomas) para 9(b) [Environment Court document 7].

489 The Haldon appeal had requested a number of farm bases elsewhere in the property but at the hearing confined the relief sought to the current one and its expanded boundary.

- there is little tussock left. The drier soils are windblown and most rabbit prone;
- the property has problems with rabbits, *hieracium* and wildings. Management comes at a considerable cost ($100,000 in 2009)[490];
- sustainable farm practices including water management are key to farming management of the property[491];
- there is tourist infrastructure already on the farm[492];
- the farm has diversified over the years introducing Angus stud cattle and farm tours[493];
- Council acknowledged that tourism employs more people than farming in the district[494] and noted the Hearing Commissioners' support for low impact small scale accommodation and tourist activities for runholders[495];
- subdivision of selected areas of the lakeside is a long term aim[496];
- it is unlikely that farming will be able to continue sustainably on the lake edge and this land has no other uses[497].

We do not understand this last point because even Mr Boyd's diagram of suggested extensions to the farm base area does not extend to the lake edge. Rather it includes the flats on the north side of the Stony River which our site inspection showed have been cultivated and planted in lucerne.

[355] Mr Boyd stated[498] that Haldon Station had fenced off vulnerable lands and waterways where possible. On our site inspection we saw signs of that, although the good impression was negated by clear signs (stock footprints, cow dung, grazed foliage) that cattle had recently been in the willow infested wetlands upstream of the homestead. He also explained[499] that much of the land in the lakeside protection area "... is not able to be irrigated due to concerns over run off ...". We are uneasy about substituting houses for current land use because residential uses can also cause eutrophication in lakes (as the Lake Hayes example in the Queenstown-Lakes District has showed).

[356] Mr Densem's landscape study discussed[500] the possibility of some small-scale linear crib development back somewhat from the Te Ao Marama/Lake Benmore shoreline. He suggested a number of design elements that would help to retain "the Mackenzie character" together with maintaining public access to the lake edge. He did

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490 P J Boyd, evidence-in-chief para 11 [Environment Court document 8].
491 P J Boyd, evidence-in-chief para 5 [Environment Court document 8].
492 P J Boyd, evidence-in-chief para 26 [Environment Court document 8].
493 P J Boyd, evidence-in-chief para 15 [Environment Court document 8].
494 A Thomas, legal submissions para10b [Environment Court document 7].
495 A Thomas, legal submissions para 10a [Environment Court document 7].
496 P J Boyd, evidence-in-chief para 26 [Environment Court document 8].
497 P J Boyd, evidence-in-chief para 22 [Environment Court document 8].
498 P J Boyd, evidence-in-chief para 14 [Environment Court document 8].
499 P J Boyd, evidence-in-chief para 26 [Environment Court document 8].
500 G H Densem, evidence-in-chief para 6.24 [Environment Court 3].

not support the expansion of the farm base area into the Landscape Protection Area nor a further additional area put forward by Mr Boyd. Under cross-examination he agreed that some land to the east could appropriately become part of the farm base.

[357] We accept that some of the land in the farm base area contains a swamp and is unsuitable for housing development. We note also that the wetland is in need of more ecological restoration as is Stony River and the lake margins. Mr Densem considered that there is room for some development at the outer edge of the farm base area at the southwestern extremity. We think this should not encroach on the intensively farmed flats or be situated in the lakeside protection area.

[358] To summarise, we confirm the notified farm base area. We will reserve leave for Haldon to apply for farm base areas elsewhere; or there may be room for an allotment or two on the northern slopes of Mount Maggie (again away from Te Ao Marama/Lake Benmore) if the farm base area is extended to cover part of that hill. We have no evidence on the extent of woodlot forestry on this large station, although some shelterbelts are shown on various maps. There is likely to be scope for an exotic carbon forest east or south of Haldon Road (i.e. away from Te Ao Marama/Lake Benmore).

Holbrook

[359] This property straddles State Highway 80 approximately halfway between Te Kopi o Opihi/Burkes Pass village and Tekapo. There is an extensive area of mainly flat land on the south side of the State Highway, and part of the flanks of the Two Thumbs Range to the north.

[360] On the southern flats there are extensive shelterbelts. The homestead is behind a roadside shelterbelt in the angle between State Highway 8 and Sawdon Stream (on the western side of the stream). We approve the Commissioners' farm base area which is well defined by shelterbelts.

[361] There are exotic pastures running southwest from the Sawdon Stream bridge, culminating in a circular irrigated area about one kilometre from the highway.

[362] Mr Densem in his later evidence[501] identified the views north from State Highway 8 over this land between Dog Kennel Corner and Sawdon Stream as "important vistas". We agree that this view is important, although we hesitate to call it a vista, since it is a small valley running out of the Two Thumbs Range. In any event buildings and exotic trees (and shelterbelts) or even exotic grasses or lucerne would have a harmful effect on the landscape values of the basin. So, provisionally, we consider this area should be a Scenic Grassland. That will complement the area to the south of, and on the opposite side of the road, which is already a Scenic Viewing Area because of the expansive views towards Aoraki/Mt Cook.

501 G H Densem, further evidence September 2010 Map 3 [Environment Court document 32].

[363] As for afforestation, there are only two obvious areas for exotic carbon forest blocks : the first is south of the homestead, and the second is (with Glenrock Station's consent) on the southern slopes of Sterickers Mound (southwest of Dog Kennel Corner).

Irishman Creek

[364] The Commissioners' Decision approved a farm base which we find appropriate, subject to exclusion of Meridian's hazard area, noting that this exclusion reduces the area of the farm base area by about two-thirds[502]. That loss is not quite as drastic as it appears because there are still ten or so hectares in the rump farm base area.

[365] Some of the proposed Scenic Grasslands are on this property on the eastern side of Irishman Creek. The first is the eastern side of the State Highway from the northern boundary of the property to the shelterbelt approximately 2.5 kilometres south. The width of this Scenic Grassland would be to the nearest ridgeline or to the "paper" road[503] whichever is the furthest.

[366] We understand from Mr Densem's map[504] this property's proposed irrigation is located in a Scenic Viewing Area on the Irishman Creek flood plain and adjacent to State Highway 8. In fact, we consider that is not inappropriate on landscape grounds given that in this vicinity the State Highway is raised above the surrounding land in order to cross the Tekapo Canal. That will have the effect that when travelling north the irrigated area will be below vehicles and thus not intrusive in views. From the north the vivid exotic green of an irrigated area will be seen against a backdrop of willows and pines, and again not intrusive.

[367] While part of the Mary Creek catchment as shown on Map 3 is marked as medium vulnerability to development, we consider the tussock cover in this catchment makes an exotic carbon forest inappropriate. Provisionally the only place that appears appropriate to us is immediately west of the homestead so that it appears as an extension of the shelterbelts around the homestead. This is one of the properties which might benefit from an extension of the emissions trading scheme so that the carbon caught up in tussock grasslands qualified for payment.

Lilybank

[368] This remote property on the eastern side of the Godley River was given a farm base area by the Hearing Commissioners which we approve. Given its location and the ecological importance of the adjacent river and riverbed, we doubt if there is any scope for an exotic carbon forest on this property. As for irrigation, that is likely to be

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502 Estimating this from the map of Irishman Creek which is part of Annexure 2 to the evidence of N A Connell [Environment Court document 12].

503 This unformed legal road runs south from State Highway 8 where it first enters Run 343 from the north.

504 G H Densem, evidence September 2010 Map 2 [Environment Court document 32].

appropriate (if ecologically sustainable) in landscape terms only on the existing exotic pasture[505].

Maryburn

[369] This property is one of three that run from the Tekapo River in the east to Lake Pukaki in the west. The others, successively to the north, are The Wolds and Irishman Creek. Maryburn has a green freehold core in a small basin south of Mt Mary. The remainder is (or was – we are not sure where it is under tenure review) a pastoral lease. We consider the Commissioners' farm base is inappropriate as it stands for three reasons. First it is split by State Highway 8 so any potential sense of community is damaged; secondly, the northeastern sector – which includes existing farm buildings – is in a flood hazard zone; and thirdly, the whole farm base area is simply too close to the State Highway. We consider any farm base should be at least 500 metres from the State Highway and towards or at the base of the Mary Range.

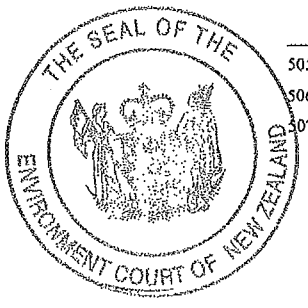
[370] There are important views[506] east and southeast from State Highway 8 over the Tekapo River Plains. They raise the question whether there should be "Scenic Grasslands" on this property. The answer is particularly difficult because, as another of Mr Densem's maps shows[507], Maryburn Station's owners have applied for irrigation water rights over this part of their land. We consider that a reasonable compromise if such rights are granted is to create the Scenic Grasslands only over the areas within this property and on the eastern side of the State Highway which are in remnant tussock, i.e. have not been converted nearly fully to exotic pasture. However, this is one of the most troubling areas within the landscape of the Mackenzie Basin and we will need further evidence on this.

[371] As for exotic afforestation, we consider there is scope for a block of this so tentatively, and subject to checking for ecological constraints and if necessary provision for them, and to input (if sought by them) from the landowner, we approve a block in the morainic area between Lake Pukaki and the western side of Mt Mary.

Mount Cook

[372] The approved farm base area on this property is a blunt-ended boomerang : it looks very awkward to subdivide. We consider the owners should be consulted as to whether they wish to change the shape. Otherwise we would cancel the farm base area.

[373] Afforestation on this property has a long history by New Zealand standards. There are extensive plantations of conifers already – they presumably make up "pre-1989 forests" under the Climate Change Response Act so an emissions trading scheme cannot be set up for them. We consider further wilding plantations for an emissions



505 Where Mr Densem's September 2010 map 2 shows it to be [Environment Court document 32].
506 G H Densem, further evidence September 2010 map 3 [Environment Court document 32].
507 G H Densem, further evidence September 2010 map 2 [Environment Court document 32].

trading scheme may be set up to the south of the existing forest, but the conditions will have to be very carefully observed and enforced.

Mt Gerald

[374] The first farm base area, around the homestead, is appropriate. Mt Gerald sought to create a second farm base area ("the Richmond Run farm base area") – now confined to seven hectares – on a sloping terrace west of the Lilybank Road. We heard quite detailed evidence about this. It is a complex issue because the site is in the lakeside protection area for Lake Tekapo.

[375] Mr Krüger put considerable reliance on his view[508] that "... historically – throughout New Zealand – settlement was located along the coast and the margins of lakes and rivers. Consequentially, appropriate and well designed new development containing built form can be located in similar situations today". By implication he considered that the Richmond Run site could be justified on that basis.

[376] Mr Krüger's general point about patterns of settlement is probably correct. However, Mr Densem said that it was not true of the Mackenzie Basin. In answer Mr Krüger pointed to some historical records[509] showing that wool from the heads of Lakes Pukaki and Tekapo was carried by boat across and down the lakes respectively. We do not find that very convincing : in cross-examination[510] by Mr Hardie Mr Krüger acknowledged that apart from Richmond Station there are no other farm bases situated at or very close to the edge of Lake Tekapo, and that on the west side of Lake Pukaki, the two farm bases close to the lake edge there were a result of the [Waitaki Power Scheme] development in the 1960s.

[377] We accept that there are some good aspects to the Richmond Run farm base proposal : it meets Mr Densem's original concept[511] of a tight homestead or farm cluster[512]; there are proposed covenants[513] over the Richmond Run against further subdivision; commercial activities and other buildings (then the maximum of ten proposed) and some useful landscaping conditions[514] proposed by Mr Krüger.

[378] However, there is already potential for domestication of this area. Cross-examined by Mr Hardie, Mr Burtscher of Mt Gerald Station confirmed that north of the Mt Richmond boundary, approximately half of the land between the Lilybank Road and Lake Tekapo has been subdivided[515] and was sold to the "Adagio Trust" in January

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508 R F W Krüger, evidence-in-chief paragraphs 56-61 [Environment Court document 5].
509 R F W Krüger, evidence-in-chief para 58 [Environment Court document 5].
510 Transcript (18 August 2010) pp 161-162.
511 R F W Krüger, evidence-in-chief para 51 [Environment Court document 5].
512 R F W Krüger, evidence-in-chief para 68 [Environment Court document 5].
513 R F W Krüger, evidence-in-chief para 23 [Environment Court document 5].
514 R F W Krüger, evidence-in-chief para 66 [Environment Court document 5].
515 See Exhibit 27.1.

2010. A resource consent[516] to erect a dwelling has been granted by the Council. Mr Kruger did not assess whether the addition of the Mt Gerald farm base area on "the Richmond Run"[517], together with the Adagio Trust development would lead to specific subdivision and development of the sort frowned on by the landscape policies in PC13. There is an issue as to accumulative effects which he has not considered at all.

[379] In the end we prefer Mr Densem's evidence and consider this farm base area is inappropriate. It would be highly visible development in a lakeside protection area. It would reinforce a pattern of sporadic development along the eastern shore of Lake Tekapo. We refuse to approve a second farm base for Mt Gerald Station – at least in the lakeside protection area, or in the area of high vulnerability to development.

[380] Despite Mr Krüger's one-line doubts[518] we consider there might be scope for an alternative farm base area to the east of Lilybank Road and north of the access to the Roundhill Skifield (especially if buffered by suitable native tree planting). We will reserve leave for an application about that.

[381] Some afforestation may be appropriate to the northeast of the homestead, but not south of it. Further conversion to pasture is inappropriate. In any event there is unlikely to be any more water for irrigated pasture.

Mt Hay

[382] This property is the first station to the northeast of Tekapo along the Lilybank Road. We approve the farm base area. Subdivision here would be particularly attractive given its proximity to Lake Tekapo. Because there are conifers on the northeast side of Tekapo, we consider that some afforestation, including an exotic carbon forest, to the south of the hill called Mt Hay is appropriate. There appears to be little scope for intensive farming activities on this land.

Mt John

[383] We understand that the rump of this station, being the land west of the Godley Peaks Road, north of State Highway 8, and east of the Forks River, is now owned by Balmoral Station, and we have treated it as part of that station.

Omahau Downs

[384] This property has two separated parts, as shown on Exhibit 28.1. The first is an area of river plain ("the Twizel block") between State Highway 8 (south of the Pukaki airfield) and Twizel township. The Twizel block suffers from the same flood hazard problems from a canal break as Bendrose Station. The farm base area is cancelled. Afforestation is inappropriate. However, irrigated pasture would be appropriate on this block.

516 MDC reference RM080031.
517 R F W Krüger, evidence-in-chief para 14 [Environment Court document 5].
518 R F W Krüger, evidence-in-chief para 64 [Environment Court document 5].

[385] The other part of Omahau Downs is the "Omahau Hill" block around the northern end of Te Ruataniwha. The northern boundary of this block is the northern side of Darts Bush Stream. There are some plantations on adjacent land to the north (Ben Ohau Station). *Prima facie* it would be appropriate for an exotic carbon forest to be established on the Twizel side of the Hill Block in the vicinity of that other exotic forest.

[386] It might also be possible to have a farm base area on the Hill Block but we do not know enough about it to say where.

Pukaki Downs

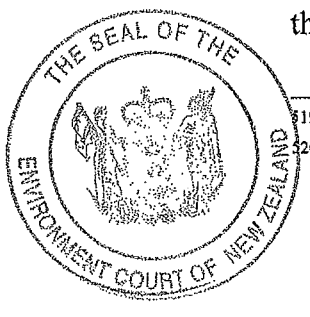
[387] The former Pukaki Downs Station has been freeholded and is now in various ownerships. Three of them are appellants[519] in these proceedings : Fountainblue Limited, Southern Serenity Limited and Pukaki Tourism Holdings Partnership. Since they presented a combined case we will call them collectively "Pukaki Downs". Pukaki Downs' appeal raised issues about:

(1) extension of the farm base area at Pukaki Downs Station;
(2) the extent of the Lakeside Protection Zone along the western edge of Lake Pukaki;
(3) recognition of subdivision application RM060010 by creation of a rural residential zone west of the Twizel River;
(4) the creation of a tourism zone on Pukaki Downs' higher land with views up Lake Pukaki;
(5) withdrawal of PC13 as a whole.

Issues (1) and (2) were all resolved by agreement[520] and, subject to checking, orders will be made in terms of those agreements. Item (5) was effectively withdrawn from a substantive point of view (and only kept alive for tactical, i.e. jurisdictional, reasons by the appellant).

[388] Of the two remaining issues the first is whether the court has power to and if so should create a rural residential zone on wilding pine-infested land west of the Twizel River. We consider that in the context of rural residential subdivision generally in Part 7 of this decision.

[389] We have already held that we do have jurisdiction to consider visitor accommodation on this (or any land) in the Mackenzie Basin subzone and we consider the merits of that in part 7 of this decision also. Regardless of any decision we make there, because we read evidence in some detail on two specific sites on this property,



519 Appeal ENV-2009-CHC-190.
520 Agreed memorandum dated 3 August 2010 [Environment Court decision 21A].

and were shown them on the site inspection, we consider we can approve two further farm bases within the "tourism subzone" footprints. That means that any person could apply for resource consents for visitor accommodation, knowing that there is a permitted baseline for buildings in those farm base areas.

Rhoborough Downs

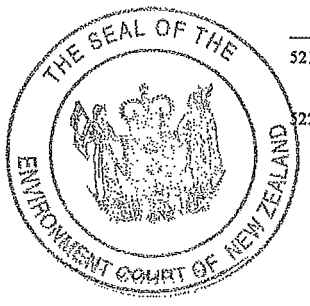
[390] This is a freehold property – it has been through tenure review. This is in the same landscape sub-unit[521] as Pukaki Downs and it gives some context for discussion of the Pukaki Downs property. Rhoborough Downs is northwest of the Pukaki Canal on the plain of the Twizel River. It is conspicuous from State Highway 80 for the number of wilding conifers spreading south across the property.

[391] The appeal by Rhoborough Downs Limited and the Preston family (ENV-2009-CHC-191) was resolved as between the Council and the appellant by agreement to extend the farm base area – already 23 hectares under PC13(C) – by a further 19 hectares up the Twizel River plain as shown on a map[522] produced to the court. We consider the Commissioners' farm base area is acceptable subject to removing some wildings (see next paragraph) but the extension is not. It is simply too large an extension to retain the qualities of the landscape, especially if Pukaki Downs is to be enabled to have its rural residential subdivision (for which an application was lodged some years ago).

[392] Afforestation by wildings is almost a *fait accompli* on this property. We consider that it should be authorised in a limited area so as to protect the land of neighbours and the qualities of the landscape. So any approved exotic carbon forest must be:

- east of the Twizel River;
- north of the 540 masl contour; or
- in the Lake Wardell block (i.e. the land between State Highway 8 and the Pukaki Canal).

That appears still to be quite a large area so that exception may need to be made to any general rule about the size of exotic carbon forests (if there is to be such a rule).



521 Unit 55 "Rhoborough" : G H Densem, evidence-in-chief Attachment 2 [Environment Court document 3].

522 See Annexure "A" to the Consent Memorandum (Environment Court document 29A] and G H Densem, rebuttal evidence para 54 [Environment Court document 3A].

Richmond

[393] We approve the farm base area on this station which is halfway up the eastern side of Lake Tekapo. An exotic carbon forest sourced by wildings from the existing plantations (which are already spreading wildings) would be appropriate.

Sawdon

[394] Despite its name, most of Sawdon Station is not in the Sawdon Stream. The station runs east across the Tekapo River Flats to State Highway 8 and then comprises an area of outwash terraces and plains east of the State Highway in the Edwards Stream and Dead Mans Creek catchments and the intervening ridges. One homestead area ("Sawdon No. 1") is immediately west of the stream on the north side of State Highway 8 (and opposite the entrance to Holbrook). Another enclave of farm buildings ("Sawdon No. 2") is several kilometres northwest on the edge of Edward Stream.

[395] The Commissioners' Decision allotted three farm bases. The first two are shown on the Commissioners' Sawdon No. 1. The larger area is appropriate. The smaller area is isolated and inappropriate and is not confirmed. Sawdon No. 2, on the other hand, is an appropriate farm base.

[396] We see scope for exotic carbon forests for emissions trading scheme purposes in any of three places. We tentatively (subject to checking of ecological constraints and to input – if sought – from the landowner) approve forest blocks:

(1) either side of State Highway 8 in the vicinity of the plantation one kilometre north of the Edward Stream bridge. There are already extensive wildings around this plantation;
(2) on point 794 above Whisky Cut on State Highway 8. Again there are already wildings on the south side of this hill;
(3) (possibly) in the area of medium vulnerability on the eastern side of Edward Stream as shown on Map 3.

Simons Hill Station

[397] Simons Hill is a freehold station totalling 6,282 hectares[523]. It commences on the south side of State Highway 8 shortly after it crosses the Mary Burn when travelling south from Tekapo. The eastern boundary of the property follows the Mary Burn south to the confluence with the Tekapo River except for a conservation area now administered by the Department of Conservation on the steep eastern (Tekapo River) slopes of Big Simons Hill (Point 969 masl). The boundary then appears to follow the Meridian road downstream to the Pukaki River and follows the equivalent road up that river to a point southwest of Simons Pass (proper) whence it runs in a straight line across the wide Pukaki River outwash plain to Simons Pass before zigzagging across

[523] D A Fastier, statement 2 July 2010 para 8 [Environment Court document 35].

Point 663 and the western side of House Hill (701 masl) to the State Highway nearly two kilometres southwest of the starting point.

[398] The old homestead and main farm buildings are set off State Highway 8 behind windbreaks on the flats, and a new farmhouse[524] has been set discreetly on the flanks of House Hill. Some of the paddocks around the homestead appear to be irrigated. They are certainly sown in exotic grasses and/or fodder crops. There is a pivot irrigated paddock south of House Hill and close to the Mary Burn.

[399] We approve the farm base area set by the Hearing Commissioners.

[400] There appears to be an exotic plantation at Simons Pass which is owned by the Mackenzie District Council itself[525]. We do not know what species of conifer is planted there, but it seems to be the key to a wilding carbon forest on Simons Hill Station if the latter wants an emissions trading scheme opportunity. Our initial inclination is that an exotic carbon forest block might be established south and east of that plantation. Special care would have to be taken about the extent of such a block because of the proximity of the conservation area to the east. Such a block would be in an area of low vulnerability if our reading of Map 3 is correct.

Simons Pass

[401] Simons Pass Station Limited comprises 5,658 hectares of pastoral lease land and 774 hectares of freehold[526] land. The homestead is situated immediately west of the un-named pass where State Highway 8 moves from the Tekapo to the Pukaki catchment. The station's freehold land is mainly around the basin east of the Mary Range. On the latter there is 120 hectares of border dyke irrigation[527]. The pastoral lease runs from the homestead freehold area west across the Pukaki flats to the Pukaki River. To the south it is bounded by Simons Pass Station land, and the north Lake Pukaki.

[402] The farm base area is approved. Unlike, say Maryburn, it has a sufficient setback from the State Highway.

[403] Some afforestation might be appropriate in the area of medium visual vulnerability on the pastoral lease north of State Highway 8. In fact, given the wildings behind the homestead, we consider that despite the high vulnerability classification there it might be appropriate (with Maryburn Station's mutual approval) to have an exotic carbon forest running west along the southern end of the Mary Range.

[404] A complex issue for this property will be the extent of pastoral intensification, especially on the terminal moraine of Lake Pukaki which is at the northern end of this

524 D A Fastier, statement 2 July 2010 paragraphs 9 and 19 [Environment Court document 35].
525 D A Fastier, statement 2 July 2010 para 59 [Environment Court document 35].
526 D A Fastier, statement 2 July 2010 para 21 [Environment Court document 35].
527 D A Fastier, statement 2 July 2010 para 25 [Environment Court document 35].

property. We are aware from previous cases in the Queenstown Lakes District that many large terminal moraines have been modified by settlement, e.g. Lake Hawea and Wanaka townships. Kingston in Southland District is another example. Within the Mackenzie Basin, Tekapo township is built on the terminal moraine of the former glacier(s) that formed the lake.

[405] The Pukaki moraine is, we suspect, of considerable importance, not only for the visible native vegetation that occurs intermittently on it, but also for its geology and landforms. Some of those elements are contained in the Lake Pukaki Terminal Moraine Area. However, at present the whole sequence of moraines to lower outwash plains is visible at the western side of Simons Pass Station. Bearing in mind the Parliamentary Commissioner for the Environment's concern (which may or may not be well-founded) that tenure review has not created enough reserves with complete altitudinal sequences it occurs to us that this area may be the last main opportunity to protect the aggregation of landscape and ecological qualities present here. Fortunately, it appears that most of the area[528] which Simons Pass wishes to irrigate is beyond the Lake Pukaki terminal moraine's limit. It must be desirable that some of the outwash plain, however (within reason) degraded, should not be irrigated so as to keep the natural sequence intact.

Streamlands

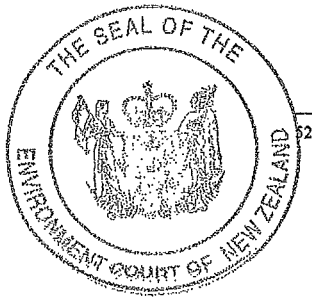
[406] We approve the farm base area in the Commissioners' Decision.

[407] As for an exotic carbon forest block we tentatively (subject to checking of ecological constraints and to input from the landowner – if sought) approve one anywhere west of Moffat Stream provided it is at least one kilometre from any boundary (unless the neighbour affected agrees in writing to allow a wilding forest closer than that).

Tasman Downs

[408] This is a relatively small (500 hectares approximately) freehold property on the eastern side of Lake Pukaki. We approve the farm base area given by the Commissioners' Decision.

[409] An exotic carbon forest appears to be appropriate in the area of low visual vulnerability on Map 3.



[528] D A Fastier, statement 2 July 2010 Attachment "G" [Environment Court document 35].

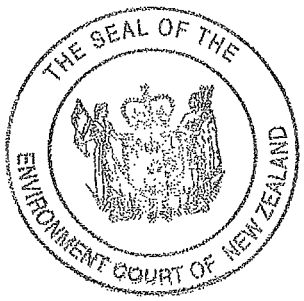
The Wolds

[410] This is one of a number of well managed properties in the Mackenzie Basin. However, The Wolds has some unlucky qualities from a farming point of view because it is so important to perceptions of the landscape of the Mackenzie Basin. The main road farm base ("Windy Ridges") is inappropriate given its proximity to State Highway 80; and we consider the homestead farm base area is inappropriate given the flood hazard. .

[411] However, there are at least two other farm base area candidate sites : one is on the site of the old Mary Hill homestead tucked under the eastern side of Mt Mary. The other is on the moderate visual vulnerability area to the east of the existing homestead – on the terrace above the Tekapo River. Unfortunately, both those sites have some disadvantages – the Mary Hill homestead site is several kilometres from services. In these days of cheaper generators that may not matter, because our site inspection with the owner, Mr Murray, showed that it is a superb site. The Tekapo Terrace site is in the middle of The Wolds irrigated pasture so would be displacing productive land.

[412] There is scope for afforestation on the west side of Mt Mary in the area of low visual vulnerability on Map 3.

[413] There may be another farm base site to the west of State Highway 8 in the lumpy ground beyond a potential Grasslands Scenic Area. There may be some possibility for southwards extension of exotic grasses on the eastern side of State Highway 8 if more water became available. This will need careful examination by Mr Densem (for the Council) and any other landscape experts because there may be remnant tussock grasslands here that are worth retaining as scenic grasslands. Certainly the area is very important visually in terms of avoiding "greening" of this part of the Basin. We need to receive further evidence about scenic grasslands on both sides of State Highway 8. Otherwise it appears there is little scope for further pastoral intensification given that would involve draining wetlands and/or stream margins.



7. Should there be rural residential and other new subzones?

7.1 Manuka Terrace

[414] We are satisfied that the after-the-event rationalisation of the Manuka Terraces is appropriate. The proposed subzone rules in Ms Harte's evidence are approved.

7.2 The Ohau River Block

[415] The Ohau River Block[529] ("the ORB") is about 3.5 kilometres long and up to 1.5 kilometres wide. The block is bounded by a terminal moraine (the end of Lake Ohau) at its western end, a thin reserve along the Ohau River on its long southern edge, the Pukaki Canal at its eastern end, and the Ohau Canal road on its northern side. The block comprises a series of river terraces which slope gently west to east and also towards the Ohau River to the south. The vegetation comprises grasses and sweet briar with some pines, wildings, remnant arboretum planting[530] and some residual tussocks. The site is experiencing desertification also apparent in other parts of the Mackenzie Basin. Soils appear to be high country free-draining yellow brown earth[531].

[416] The zoning options open to us are whether the ORB should be:

- part of the Mackenzie Basin subzone as proposed by the Council?
- excluded and remain as part of the general Rural zone? or
- be included as part of a rural residential subzone as sought by the landowner?

Appeal ENV-2009-CHC-183 and the property's history

[417] Mackenzie Properties Limited ("MPL") is the owner of the ORB. It is a successor[532] to Ruataniwha Farms Limited which was an original submitter on Plan Change 13. Mr A Hocken, a director of MPL, detailed the history of the family-owned company which also owns other property around Twizel. An application to subdivide the ORB was made in 2001 and declined, and then again in 2004 was declined. The current application was lodged on 10 December 2007, before Plan Change 13 was notified, and it was processed as a controlled activity. Although the 2007 application was originally rejected it was granted in May 2010. The Council granted consent to subdivide the ORB into 50 mostly residential allotments ranging between about 4 and 19 hectares, several service lots, and a large balance lot over an area of 790 hectares on a lower terrace at the eastern end of the ORB. While consent for subdivision has been granted, none of the sections have land use consents or certificates of compliance for buildings[533].

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529 The legal description of the Ohau River Block is Lot 3 and 4 75206, Glen Lyon Road, Lake Ohau, Twizel.

530 From the 1960s and 1970s as part of the Waitaki Power Scheme.

531 C Vivian, report, Exhibit cv 5, para 16 [Environment Court document 20]

532 Under section 2A of the RMA.

533 P Harte, evidence-in-chief para 135 [Environment Court document 5].

The parties' positions

[418] MPL accepts that it is appropriate for a lot owner to have to go through a consenting process for the establishment of a dwelling on any lot. What is at issue in these proceedings is the appropriate activity status for such a residential unit. MPL sought that the zone rules applicable to the Manuka Terrace Rural Residential subzone should apply to the ORB, with[534]:

(a) controlled activity status for one residential unit on each lot, with the Council to retain control over location of dwellings in the lot, external appearance of buildings, landscaping, provision of services earthworks and natural hazards;
(b) non-complying activity status for further subdivision and more than one residential dwelling;
(c) policy recognition for the existing subdivision.

As an alternative form of relief MPL promoted a rule whereby the Ohau River Block remains in the Mackenzie Basin sub-zone but the approved lots may be developed for residential use as a controlled activity on the same basis as above.

[419] The Council sought confirmation of the ORB as part of the Mackenzie Basin subzone. The Council does not accept that MPL should become part of the Manuka Terrace zone which has been zoned in recognition of the large-scale development which has already taken place in that area.

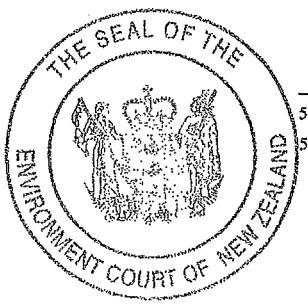
[420] Meridian is a section 274 party to the Mackenzie Property appeal. It opposed the specific relief sought on the notice of appeal, i.e. that the Manuka Terrace Rural Residential zone rules should apply to the ORB. We understand that during the hearing an agreement was reached with Meridian to support the existing residential lots on the Ohau River Block with the proviso that there would be with no further subdivision or development.

The Environs

[421] The site lies within the Ohau Valley which Mr Densem describes as[535]:

> ... aesthetically interesting for its intersecting patterns of natural valley, river terrace, meandering watercourse, moraines, lake shore and hill flanks, and for the dramatic constructed canal forms that intersect(ing) these.

[422] The district plan's maps record the following in the near neighbourhood:



534 Counsel's submission paragraphs 13-14 [Environment Court document 17].
535 G H Densem, evidence-in-chief Attachment 28.7.1(4) [Environment Court document 3].

- Sites of Natural Significance[536] being:
  - the Ohau Riverbed;
  - Ohau Downs Ponds and Tarns;
  - Halls Block on the southeastern flank of Te Rua Taniwha/Ben Ohau ;
- a geopreservation site[537] – the Ostler Fault-Ohau River faulted terraces.

[423] Conservation land administered by the Department of Conservation forms a buffer approximately 50-70 metres wide between Lake Ohau and the west boundary of the ORB. Within this strip there are a distinctive set of terminal moraines part of which lie in a lakeside protection area. Indigenous mixed shrubland and tussock are the dominant vegetation on those moraines. Beyond them is Lake Ohau which is an outstanding natural feature[538].

[424] We have described how the Ohau River forms the southern boundary of the property. The river is also the boundary between the Mackenzie District and the rurally zoned landscape of the Waitaki District. To the east, through a narrow neck is the balance lot[539] which is bordered by Lake Ruataniwha, the Pukaki Canal and the Ohau River. On the northern boundary is the Ohau Canal which separates the ORB from Manuka Terrace. Rising above the valley is the visually dominant backdrop of the Ben Ohau Range.

[425] Energy production under the Waitaki Power Scheme is a defining element in this part of the landscape with the 20-30 metre canal and embankments dividing what was once a continuous set of terraces. This, together with farming, wilding spread and a growing rural residential presence, provide a human overlay to the geophysical and natural elements.

Preliminary issues

[426] There is one further preliminary legal issue in relation to the ORB. Prefigured at the hearing but, pursuant to leave reserved, lodged later there is an application[540] by MPL under section 292 to correct an apparent error in the Mackenzie District Plan. The District Plan planning maps identify a site of significance (the Ohau Downs Ponds) within the Ohau River block. This has implications for the subdivision plans that MPL have for the Ohau River block.

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536 SSI 32, 33, 37 and 38.

537 Geopreservation site 38.

538 Under section 6(b) of the RMA – see G H Densem, evidence 8 September 2010 [Environment Court document 32].

539 Lot 50 (356.66 hectares) – see Sheet 8 of Exhibit 18.2.

540 Made by counsel, Mr C P Thomsen, by Memorandum dated 10 November 2010 [Environment Court document 31].

[427] Mr Thomsen in a memorandum lodged after the hearing informed[541] us that the Te Manahuna Area manager for DOC, Mr Rob Young, had been to the site and confirmed that the Ohau Ponds are located on the DOC-administered terminal moraine[542]. There is no suggestion that the positioning of the ponds on the planning map is anything other than a drafting mistake. No party to this hearing opposed the application. We are satisfied that this was a drafting error; there would be restrictions on development of the Ohau River Block if this error is not corrected; the Council is not opposed to the application and no other party expressed an interest.. Accordingly, we direct rectification to the planning map, correctly identifying the Ohau Ponds.

Is the Ohau River Block within an outstanding natural landscape?

[428] The question arises because the ORB is in Mr Densem's landscape unit S4 (which has significantly reduced qualities) which falls outside the Mackenzie Basin landscape. It is in fact part of the Ohau Basin, most of which comes within the Waitaki District. This unit is bounded on the north by the Mauka Atua/Ben Ohau Range, to the west by the foot of Lake Ohau, to the south by the Ohau River, and to the east by a line along the Ostler Fault (approximately) which is the western edge of the rural residential development around Twizel.

[429] After the hearing Mr Densem supplied, at the request of the court, information regarding any outstanding natural features ("ONF") in the Mackenzie Basin[543]. In this area, Mr Densem identified:

- the Ben Ohau Range;
- Ohau terminal moraines;
- the Ohau River, between Lakes Ohau and Ruataniwha

as having the qualities to be, in his opinion, outstanding natural features. No party has objected to the court receiving those opinions and we consider they are likely to be correct. The issue for us now is what landscape the ORB and its containing unit are in.

[430] Mr Densem's evidence was that the ORB has more in common with the adjacent Waitaki District landscape than the Manuka Terrace to the north despite the ORB being in the Land Types and Assessment Units S4[544] together with the Manuka Terraces. He believed that without the modification taking place in the subdivision already consented (Manuka Terrace) and the wilding spread the area would be considered an outstanding natural landscape. In the end Mr Densem and MPL's landscape architect, Mr Espie,

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541 Memorandum dated 10 November 2010 para 9 [Environment Court document 31].

542 Memorandum of Counsel for Mackenzie Properties Limited, 19 November 2010, Appendix 1 [Environment Court document 31].

543 G H Densem, Draft 1 notes on requested map attached to his letter dated 8 September 2010 para 1.3 [Environment Court document 32]. This was explained by Mr Densem in his covering letter as being a "draft" because its preparation was interfered with by the first Canterbury earthquake in September 2010.

544 G H Densem, evidence-in-chief Exhibit 3.1 [Environment Court document 3].

agreed that the river block lots are in a section 7 landscape when analysed at a district level. The ORB is part of an area excluded in the Canterbury Regional Landscape Study from the wider area regarded as an outstanding natural landscape. The study does not express a view as to the appropriate landscape classification[545]. We hold that the ORB is not within the outstanding natural landscape which is the Mackenzie Basin.

Potential adverse effects

[431] What are the likely effects of development on the Ohau River Block on neighbouring land?

[432] To the north, across the Ohau canal lies the Manuka Terrace development. The effect of a similar subdivision on the Manuka Terrace population would be to reduce the natural quality of their outlook. However, there are three matters which reduce our concern about that. The first and most important is that the reduction is principally in the quality of the outlook, because the Manuka Terrace (which is generally higher) is physically isolated from the MPL land by the Ohau canal. Secondly, the naturalness is very much a perceived quality : in fact the MPL land has been significantly degraded by burning and grazing. Most of the trees scattered on it (which at least some members of the court find very attractive) are either part of the arboretum plantings or wildings. Thirdly, there is an existing subdivision consent so some buildings are inevitable. The issue really is as to how to manage their location and settings so as to enhance other qualities on the land for the benefits of neighbours provided the costs do not exceed the benefits.

[433] There will be views of the ORB from the Glen Lyon Road, a public road which runs along the northern side of the canal. For MPL its landscape architect Mr Espie suggested a 100 metre building setback on the northern boundary. This may accommodate some planting to break up views into the site.

[434] The effect of subdivision on the conservation block of moraine to the west is potentially high because of the introduction of pests which go hand in hand with human habitation.

[435] The balance lot forms a useful buffer between the built-up residential growth areas of Twizel and the subject land. It has been suggested that this is to be reserve.

[436] The effects with which we are most concerned are on recreationalists and users of the Ohau River. There is an unformed legal road along the southeastern boundary of the ORB, as well as an existing right of way with a formed (gravel) track along the top of the terrace which comprises most of the ORB. While the flow in the Ohau River is usually substantially reduced owing to the demands of the Waitaki Power Scheme, it is still a handsome open river with vegetation on its banks, including native shrub species

[545] Mr Thomsen, submissions para 37 [Environment Court document 17].

as well as weeds and exotic conifers. We predict that a row of houses on the riverside lots would substantially reduce the amenities of users of the river and the right of way[546].

[437] In addition, there are strips of various exotic trees across the eastern end of the ORB within the subdivision area. We consider that they may even have some heritage value. Mr Espie considered they had some aesthetic interest[547].

[438] Because MPL's director, Mr Hocken, seemed to accept the desirability of a setback[548] from the Ohau River, the court asked MPL's landscape witness, Mr Espie, to prepare an amended plan. He kindly produced through counsel a further plan[549] which was the western part of the subdivision plan overlaid on an aerial view of the site. It:

- delineated an area to be excluded from controlled activity building as a response to the concerns expressed by Meridian concerning the overland flow path of a possible breach;
- provided a no-build 100 metre setback around the north, south and west of the site but not on the west boundary with the conservation land
- shows an area to the southeast of a black line to be non-controlled activity for buildings.

We will return to that once we have considered another complication alluded to in the first bullet point: flood hazards.

Hazards

[439] We were supplied with a map[550] identifying where possible breaches in the Ohau Canal may occur. The ORB has a Class One hazard overlay flow path traversing the property in two sections covering approximately 50% of the land. Most lots are higher than the canal but lots 9 and 10 are lower. The proposed subdivision plan provided for larger sites in the vicinity of this hazard so that building platforms could be created outside the hazard line. Meridian have maintained that no housing should be allowed in the vicinity. MPL responded to this during the course of the hearing and supplied an updated subdivision plan which provided for a different status for this land. This was accepted by Meridian. As we have recorded the applicants also propose a 100 metre "no build" adjacent to the canal.

[440] There is also flooding risk from the Ohau River which affects the lower parts of lots 54, 11 and 12 . Lot 54 had been proposed as a local purpose reserve and so flooding is not a concern. Lots 11 and 12 could be at risk in a probable maximum flood. MPL

546 See transcript pp 438-439.
547 Transcript p. 439.
548 Transcript p. 430.
549 B Espie, evidence 23 August 2010 [Environment Court document 19A].
550 Boffa Miskell Map C 1 September 2010.

accepted in its settlement with Meridian that issues of flooding and flow path inundation will need to be addressed before lots are available to the public. This may require redesign of allotment sizes. An improved subdivision plan must identify them clearly.

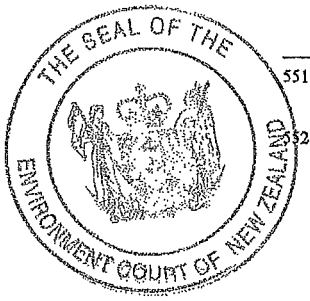
Subdivision yield

[441] For MPL Mr Espie supported the subdivision pattern for which resource consent has been given that allows for a variety of section size with most being eight hectares but some up to 20 hectares, and some as small as 4 hectares. He observed that if the four hectare rule applied across both Manuka Terrace and Ohau River Block then the resulting landscape could become cluttered. He considers the relief sought will not fundamentally change the characteristics and qualities of the landscape.

[442] The Council planner, Ms Harte, theorised that 190 or so lots could be created if the 790 hectares was to become part of the Manuka Terrace zone. She put forward a number of reasons why this would be inappropriate such as : access is across a bridge which is unsuitable to accommodate large amounts of traffic, there have already been infrastructure difficulties within the current Manuka Terrace subdivision, and the dotting of houses, roading and infrastructure across such a large area which have a marked effect on landscape values. The number of houses would be contrary to policies in PC13 and would adversely impact on the viability of Twizel.

[443] MPL's planner, Mr C Vivian, generally agreed with the intent of the Council's subdivision rules. He acknowledged the difficulties arising for both applicant and Council when subdivision and land-use consents are separated, as is currently the case. He opined that these situations were being managed relatively successfully in the Queenstown Lakes District with a rule that allowed subdivision with an identified building platform as discretionary as opposed to non-complying if the building platform is not identified. He suggested some method should be found to provide for the pre-PC13 subdivisions that had been lodged as controlled activities where there was an associated land use anticipated. He suggested buildings should also be provided for as controlled activities rather than requiring a fully discretionary consent. He believed the subdivision assessment matters in the Operative District Plan were adequate except for effects on landscape and visual amenity values. He agreed[551] that the Hearing Commissioners' Decision proposed an additional rule to Section 12 Rule 11.2.u.

[444] We return to Mr Espie's amended plan[552]. We consider that all buildings on the ORB should be placed within the footprint to the north of the black line. Accordingly, we approve a rural-residential Ohau River subzone, generally on the same terms as the Manuka Terrace Rural-Residential subzone but with the rules to provide for subdivision as a limited discretionary activity provided that the following standards are met:



551 C Vivian, evidence-in-chief para 120 [Environment Court document 20] had merit in providing this linkage.

552 B Espie, plan 23 August 2010 [Environment Court document 19A].

(a) there be a maximum of 50 residential lots;
(b) all houses are on approved building platforms (shown on any subdivision plan) north of the black line on map 19A;
(c) there are 100 metre setbacks to building platforms as shown on map 19A;
(d) there are no internal fences on the river side of the black line on map 19A;
(e) there are no buildings in the hazard zone;

– with the Council's discretion limited to:

- weed control (contemplating) covenants and/or consent notices to ensure all lot and house owners are jointly and generally responsible for weed management (including removal of weed species) including over the balance lots (since the Council does not want these as reserves);
- management of the arboretum;
- flood hazards.

7.3 Rural residential subdivision west of the Twizel River

[445] The background to Pukaki Downs' request for a rural residential zoning of its land is that its agents lodged[553] an application[554] for subdivision of 336 hectares west of the Twizel River into 49 lots on 26 January 2006. At that time subdivision was a controlled activity under the operative district plan, and building houses on any resulting lots was permitted[555]. For various reasons we need not go into here the Mackenzie District Council failed to hear Fountainblue's application promptly: it emerged at the hearing through cross-examination[556] by counsel for the Council that access to State Highway 80 for the subdivision might be a restricted discretionary activity (since the subdivision would generate more than 100 vehicles per day[557]) for which consent has not been sought.

[446] In any event, to safeguard its position, Pukaki Downs has become first a submitter and then an appellant in these proceedings. It seeks that subdivision and development of 336 hectares west of the Twizel River and north of Rhoborough Downs be a controlled activity in a special rural residential zone. The Council opposes that relief, first on the jurisdictional ground that it is beyond the scope of PC13(N), and secondly on the merits.

[447] The Pukaki Downs proposed rural residential site is on the western side of the upper Twizel River several kilometres west of State Highway 80. The site is on a very wide sloping river terrace, which steepens upwards to the west (away from the river).

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553 A E Tibby, evidence 2 July 2010 para 47 [Environment Court document 23].
554 Mackenzie District Council reference RM060010.
555 It will be recalled that PC13(N) was notified on 19 December 2007.
556 Transcript p. 531 *et ff* (23 August 2010).
557 Transcript p. 533.

[448] For the Council Mr Densem described[558] it as "... very open and continuous in its land surface and highly natural in character". He was concerned about the visibility of the site from State Highway 8 and from the Pukaki Canal road. He also qualified his evidence by saying that he had not visited the site, only looked at it from at least six kilometres away[559]. In fact, as he accepted in cross-examination, any views would be at a distance of six to ten kilometres[560]. He was also concerned, at least in some of his answers to counsel for Pukaki Downs, about the adverse effects of any rural residential development on users of the so-called "Dusky Trail"[561] which DOC has created (and runs from near Twizel into the upper reaches of the Twizel River around the western edge of Pukaki Downs).

[449] We find the landscape evidence to be unsatisfactory. No landscape assessment of this area was called by Pukaki Downs, and Mr Densem, perhaps because he had not been on site, was unaware that it is covered in wilding pines, as we saw on our site inspection. We agree with Mr Tibby that without management this western side of the Twizel River will soon be a pine forest. Then its quality of openness will have gone completely and its naturalness will be reduced.

[450] The basic idea behind Pukaki Downs' application for resource consent was for a carefully-designed rural residential subdivision[562]. Whereas the Council's witnesses appear to think that the subdivision area is "an area of open grazing", we accept Mr Tibby's evidence that the western side of the Twizel River is "... ravaged by hieracium and wilding pines, both spreading at a mind-boggling rate"[563]. He hoped that the proposed subdivision would not only stop "... this catastrophic spread but create the resources to rebuild this area into its former glory"[564]. We do not think that Mr Tibby was overstating the problem when he referred to a "catastrophic spread".

[451] Ms Harte's main criticisms of the proposed rural-residential zone were jurisdictional. That is a legal issue which we have considered and resolved in part 4 of this decision. On the merits of any rural-residential zoning on this site west of the Twizel River Ms Harte was concerned that if the Manuka Terrace subzone provisions (with their minimum lot size of four hectares) were to be applied to this site (which contains 340 hectares) then up to 85 lots and houses could be established. In response the witnesses for Pukaki Downs confirmed[565] that only 49 lots (and houses) were sought under the careful subdivision plan lodged with its resource consent application.

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558 G H Densem, evidence-in-chief para 8.40 [Environment Court document 3].
559 From the Pukaki Canal road : see G H Densem Photo 4 [Environment Court document 3].
560 Transcript p. 107 (17 August 2010).
561 Not to be confused with the better-known Dusky Track in Fiordland.
562 A plan is attached as "Exhibit CV2" to C Vivian's evidence part C : Site Specific Issues [Environment Court document 25A].
563 A E Tibby, evidence-in-chief para 75 [Environment Court document 23].
564 A E Tibby, evidence-in-chief para 76 [Environment Court document 23].
565 e.g. C Vivian, evidence-in-chief para 35 [Environment Court document 24A].

Further, Mr Tibby accepted[566] the limitations on non-farming subdivision and development proposed by Ms Harte[567] if there was to be a rezoning.

[452] We accept that remaining "ecological and reverse sensitivity matters" can be dealt with as part of the resource consent process. We consider that, provided the proposals for management of exotic wildings are written into the district plan, the zoning of this land to rural residential is appropriate. The parties should now consider the best recipe to ensure that the subdivision consent applied for (with its range of allotment sizes from five to nine hectares[568]) is the limit on rural-residential development.

7.4 Other subzonings on Pukaki Downs

[453] In his evidence for Pukaki Downs Dr Steven wrote[569]:

> In my opinion there are many areas within Pukaki Downs property that are well screened – totally screened in many locations – from public views whether these be from the SH80 or the lake and its margins. These same areas do not possess any attributes that would be compromised by a modest level of sensitively designed and located development. I have inspected two of these areas in the company of Mr Densem on 16 April, 2010. The areas that were subject to our inspection are illustrated in Figure 8 to my graphic appendices. The areas inspected were:
>
> ... An area east of SH80 referred to as 'The Rocks'. This area is located within a glacial landform of shallow basins and raised moraine deposits. The shallow basins provide opportunities for the location of roads and building sites, while the raised moraines provide shelter and screening from the highway, while affording views to the north up Lake Pukaki towards the Southern Alps and Aoraki Mt Cook. A substantial area of dense wilding pines within the margins of the lake provide separation and screening from adjacent areas of Lake Surface.

This area is shown[570] in Mr Densem's photograph 5. We accept Dr Steven's description as generally accurate.

[454] The other area identified by Dr Steven was[571]:

> An area west of SH80 area referred to as 'The Tarns'. This is an elevated site [of] rough glacial moraine featuring a number of glacial tarns. The area has been subject to wilding pine infestation but is currently being cleared. Expansive views across the lake and to the north are possible, but the locality is screened from views from SH80.

We accept that evidence too.

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566 A E Tibby, evidence-in-chief para 81 [Environment Court document 23].
567 Ms Harte's policy 3X discussed above.
568 C Vivian, evidence-in-chief para 35 [Environment Court document 24A].
569 M L Steven, evidence 2 July 2010 para 60 [Environment Court document 24A].
570 G H Densem, evidence Photo 5 [Environment Court document 3].
571 M L Steven, evidence 2 July 2010 para 60.2 [Environment Court document 24A].

[455] Dr Stevens conceded[572] that any development would need to be subject to comprehensive site investigations and analysis to identify and protect significant local biophysical attributes of the landscape, and to ensure visual effects are minimised. He recorded[573] his understanding that Mr Densem agreed that with sensitive planning and design both areas would be capable of accommodating the modest level of development planned by Pukaki Downs. Mr Densem did not dispute that. Initially Mr Densem pointed out[574] that the proposed tourism zone was within the lakeside protection area. However, on our understanding the agreed redrawing of the landscape protection area in this area has the result that is no longer the case.

[456] Mr Densem was critical[575] of the size of the proposed zone and claimed that it would "... be vastly in excess of the level of development that I believe would be appropriate for this Outstanding Natural landscape area". On that we accept the evidence of Mr Vivian and Dr Steven for Pukaki Downs. The latter explained that:

> Mr Densem has confused the extent of the zone with the likely extent and density of built development. The manner in which the zone would serve to protect the Pukaki Downs landscape is detailed in the evidence of Mr Vivian. As Mr Vivian's evidence explains, there is no intention to establish built development over the entire area of the zone, but there is an intention to manage the zone for tourism purposes associated with the spirit and intent of future tourism development. The incorporation of all the proposed land within the zone will enable the objectives, policies, rules and conditions of the zone to extend well beyond the areas proposed for built development. This has advantages for the sustainable management of the property generally, particularly with regard to wilding pine control, ecological restoration, and the general enhancement of the landscape and ecological attributes of the property.

[457] Fundamentally Mr Densem seemed to think that some tourism development is appropriate[576]. We conclude that the proposed tourism zone sought by Pukaki Downs is appropriate, and that PC13 should be amended by insertion of the subzone provisions in the planner Mr Vivian's evidence[577].

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572 M L Steven, evidence 2 July 2010 para 61 [Environment Court document 24A].
573 M L Steven, evidence 2 July 2010 para 62 [Environment Court document 24A].
574 G H Densem, evidence-in-chief para 8.28 [Environment Court document 3].
575 G H Densem, evidence-in-chief para 8.32 [Environment Court document 24].
576 G H Densem, Landscape Report (2007) at para 6.14; attached to Environment Court document 3.
577 C Vivian, evidence part C "Exhibit CV1" [Environment Court document 25A].

8. Conclusions and outcome

8.1 Summary

[458] The basic fact underpinning this decision is that the Mackenzie Basin is one huge open tussock-dominated landscape surrounded by mountains including Aoraki which towers at its northern edge. Beyond that the Mackenzie Basin is a symbol of the high country and mountains. The elected representatives of the district notified Plan Change 13 on the foundation that the Mackenzie Basin was an outstanding natural landscape. Applying a high standard of "outstandingness" we have found on the evidence that is correct.

[459] As we have pointed out, the operative district plan and PC13 between them identify a number of issues (the place of buildings, exotic wildings, intensive agriculture) in respect of sustainable management of the Mackenzie Basin subzone and its outstanding natural landscape. However, the district plan and PC13 between them only purport to settle objectives and policies for one of them – buildings in the landscape and zone. The other important issues are left hanging. That is of real concern because not only are there matters of national importance involved, but several of the core elements of sustainable management are also. In particular, section 5 of the RMA requires that the people and communities of the Mackenzie Basin are enabled to provide for their wellbeing (and health and safety) while sustaining the potential of the natural and physical resources which make up the landscape to meet the reasonably foreseeable needs of future generations. If there is one reasonably foreseeable, in fact obvious, need for future generations of New Zealanders it is that they will wish to experience an outstanding natural landscape as the foreground to Aoraki/Mt Cook.

8.2 The problems with PC13

[460] The fact that these proceedings are about an outstanding natural landscape is crucial because recognising and protecting it from inappropriate development is stated by Parliament to be a matter of national importance. Deciding what is appropriate development, use and subdivision has not been easy for several reasons. The first is that most parties have denied that the Mackenzie Basin is one outstanding natural landscape. That has resulted in complications in that most of the parties did not put forward contingency positions in their evidence in the event they were wrong about the landscape categorisation. Second, the principal objective in PC13(C) as settled by the Hearing Commissioners' Decision and as proposed to be amended by the parties is in our judgment inappropriate. It should be replaced by our more focussed alternative. Third, Meridian has raised important safety issues about the location of some existing homesteads and their proposed extension as farm bases which we consider should be addressed even though the methods Meridian now proposes were raised late in the proceedings. Fourth, the extra paragraph proposed to be added to the statement of issues by PC13(N) refers to the effects of the greening of the landscape but adds no policy in respect of that. And fifth, we are concerned about the potential acceleration of exotic wilding spread in the context of two statutory schemes outside the RMA : tenure review under the Crown Pastoral Land Act 1998 and emissions trading schemes

under the Climate Change Response Act. Finally, we have found there are some difficulties in respect of farm buildings and "retirement" subdivision.

[461] It appears to us that all these matters should have been addressed by the Mackenzie District Council because they all relate to or are "on" the subject of PC13 – the landscape of the Mackenzie Basin. However, the amended and/or additional policies and methods we have proposed in the evidence probably go beyond the submissions and do go further than the appeals on the plan change. Consequently those changes cannot be made without giving both the parties and other potentially interested persons an opportunity to be heard. Normally the court would recommend to a local authority that it fill any gaps not covered by a district plan, and then leave it to the Council to do so by plan change. However, that is both a time-consuming and uncertain process. We are concerned that there are particular circumstances applying to the Mackenzie Basin so that the Council has little time to act. Having such a small rating base it may not have the resources either.

8.3 The court's powers to amend district plans

[462] The Environment Court has powers to amend the subordinate legislation contained in a district plan. The justification for these powers appears to be in one of the very few exceptions to the cornerstone principle that legislation should be enacted by elected representatives[578]. Such exceptions acknowledge the roles of politicians (and their temptation to think short-term) in relation to the capital assets of society. The best known example is in the Reserve Bank of New Zealand Act 1989 in which Parliament has recognised that national politicians cannot trust themselves not to inflate (financial) capital. It dealt with the problem by entrusting the Reserve Bank to deliver "... stability in the general level of prices". There are some similarities in the RMA processes. In the statute which governs us, Parliament has recognised that, at a lower level, elected local (or regional) politicians can usually but not always be trusted to manage a district's (or region's) environmental capital so as to achieve sustainable management of natural and physical resources. For example, short term thinking may be encouraged by the fact that representatives seeking election gain no votes from future generations despite the latter having reasonably foreseeable needs[579] for natural and physical resources. As a safeguard the legislature has given the court the humbler oversight powers in the First Schedule to the RMA. Parliament has then managed the risk of judicial activism by appointing Environment Commissioners to the court, and by directing the court's powers to achieving sustainable management under section 5 of the Act, while subjecting it to the cost-benefit and risk assessment of[580] section 32 of the Act. It is also important to recognise that the Environment Court's role in ensuring the fundamental purpose of the Act – sustainable management – does not extend as far as planning people's welfare : the purpose of the Act is merely to enable people and communities to attain their own welfare.

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578 This is part of the constitutional principle of the separation of powers.
579 According to section 5(2)(a) of the RMA.
580 To which normal legislation from Parliament is not subject.

[463] The Environment Court's choices, like those of the local authority before it, while they involve a broad judgment, are not between competing but equally legitimate open-ended values. The court is bound by the values and their relative scale of importance[581] as fixed by Parliament in the principles set out in sections 6 to 8 of the RMA. As Lord Cooke stated for the Privy Council in *McGuire v Hastings District Council*[582] : "These are strong directions, to be borne in mind at every stage of the planning process". Briefly what has gone wrong in this case is that, while the Council had correctly identified the issues relating to the outstanding natural landscape of the Mackenzie Basin, it failed to follow the directions given by Parliament.

[464] That background is important when the court makes its decision on appeals about a plan or plan change. For, in addition to the powers to amend provisions requested by the parties, the court has a further jurisdiction.

The section 293 jurisdiction

[465] We refer to the Environment Court's powers under section 293 of the RMA. That states (relevantly):

> **293 Environment Court may order change to proposed policy statements and plans**
> (1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to –
> (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court:
> (b) consult the parties and other persons that the court directs about the changes:
> (c) submit the changes to the court for confirmation.
> (2) The court –
> (a) must state its reasons for giving a direction under section (1); and
> (b) may give directions under section (1) relating to a matter that it directs to be addressed.
> ...

[466] The section applies to a proposed plan change because of the definition[583] of "proposed plan" which includes a plan change. The rationale of an earlier form of section 293 was explained by the High Court in *Canterbury Regional Council v Apple Fields Limited*[584] ("*Apple Fields*") as being:

> Despite the best efforts of everyone involved in the process of preparing or changing a plan, the reality is that unforeseen issues or proposals beyond the scope of the [appeal] can arise and that

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581 Section 6 states that certain matters must be "... recognise[d] and provide[d] for"; section 7 that "... particular regard" must be had to other matters; and section 8 that the principles of the Treaty of Waitangi/Te Tiriti o Waitangi must be "... take[n] into account".

582 *McGuire v Hastings District Council* [2001] NZRMA 557 at [21]; [2002] 2 NZLR 577 (PC).

583 Section 43AAC of the RMA.

584 *Canterbury Regional Council v Apple Fields Limited* [2003] NZRMA 508 at para [37].

> in some cases it will be more appropriate for the matter to be resolved at the Environment Court level than by referring it back so that the territorial authority can initiate a variation.

In this case the issues were not unforeseen : they are all expressly identified in the operative district plan or in PC13(N). It is the failure of PC13 to deal with them which has lead to several pressing problems which need resolution.

[467] Section 293(1) was amended by the Resource Management Amendment Act 2005 and (in a minor way) by section 133 of the Resource Management (Simplifying and Streamlining) Act 2009. We consider *Apple Fields* is still applicable. Before 2005 section 293 required that "a reasonable case [had] been presented" for changing a provision in a proposed plan. That requirement has now gone, so the application of cases on the pre-2005 version of section 293 should be exercised with caution. However, the fundamental requirement that a Court of Record acts on the best evidence[585] is still implicit in the section 293 procedure in our view. The difference between the pre- and post-2005 provisions appears to be that now there is no need for a party to present a case for the use of section 293.

[468] Obviously not just "any matters identified by the court" should be the subject of directions under section 293(1). The pre-eminent qualification is that any further matter or issue must be relevant to the subject matter of the proceedings. Thus if a plan change is about one area of land then concerns about another area will not usually be a relevant subject for directions under section 293 : *Hamilton City Council v New Zealand Historic Places Trust*[586]. Similarly, a plan change about heritage provisions (raising section 6(f) matters) is unlikely to justify directions from the court about section 6(c) matters.

[469] Further, just because the court has power to give directions under section 293 does not mean it should : that is obviously a discretionary matter. The power should be used sparingly (*re Vivid Holdings*[587]) partly to save time and money and partly to defer, whenever possible, to local input into the scope of district plans.

[470] The new section 293 is also worryingly unspecific about the procedures to be used if the court does decide to exercise its powers. The former – pre-2005 – section 293 provided for a procedure whereby the court would:

- specify the persons who might make submissions;
- the way in which submissions could be made;
- require the local authority to give public notice of the change and of the opportunities to make submissions and be heard.

585 Subject to some relaxation under section 276 of the RMA.
586 *Hamilton City Council v New Zealand Historic Places Trust* [2005] NZRMA 145 (HC).
587 *re Vivid Holdings* (1995) 5 ELRNZ 264; [1999] NZRMA 467.

In contrast, the current form of section 293 merely states that the court "may give directions under [sub]section (1)". Obviously the obligations on the court to specify who might make submissions have gone. Any directions the court may give must come under its other powers. These include a general power to regulate its proceedings "... in such manner as it thinks fit"[588] except as "expressly provided" elsewhere in the Act. The fundamental principle is always that the court must act fairly both to parties and, if they are potentially affected, to persons not before the court. To deal with the latter situation, where the court is contemplating action under section 293 to amend a plan or plan change, the court may grant waivers[589] to persons who wish, belatedly, to be party to the proceedings[590] in order to be heard on the proposed amendments.

8.4 Can and should we exercise our powers under section 293?

[471] We consider we have jurisdiction to consider the issues raised but not dealt with by PC13(C) – as we have pointed out they all relate to the protection of the outstanding natural landscape which is the Mackenzie Basin from inappropriate subdivision, use and development.

Discretionary factors

[472] Should we exercise our discretion to give directions under section 293(1) of the Act? We have hesitated to do so, because it can be an expensive and time-consuming exercise. However, as we have made our findings and predictions on each issue we have been pushed towards considering that further action is needed now.

[473] We should consider the exercise of section 293 powers separately and cumulatively in relation to each of the following issues:

(1) the amended objective 3B and its implementing policies and rules;
(2) the natural hazards policy and its effect on farm bases;
(3) intensive farming activities;
(4) wildings.

[474] Against giving any directions under section 293 is that the Council does not wish us to. It wants finality both in the provisions of PC13 and in expenditure on the plan change[591]. We understand Meridian to have a similar view.

Changes to objective 3B and implementing policies

[475] In respect of the proposed amendments to objective 3B and its implementing policies, obviously it is relevant to the potential exercise of our section 293 power that, as here, a matter of national importance is involved. In such a case deferring to the local input – as represented here by PC13 as notified and, to some extent, by the

588 Section 269(1) of the RMA.
589 Under section 281 of the RMA.
590 Under section 274 of the RMA.
591 Oral submissions of counsel : Transcript pp 614-616.

Commissioners' Decision – may be inappropriate. That consideration is enhanced where, as here, issues identified in the operative district plan (the threat of wilding conifers) and/or in PC13(N) (the changes caused by irrigated, high intensity farming) are not in our judgment adequately dealt with (if at all) in the proposed policies and methods of implementation.

[476] Other matters to consider are the failure of the Commissioners' Decision to identify the outstanding natural landscape(s) within the Mackenzie Basin; and that it is important that the objectives, policies and rules are settled before any tenure review is completed so that the lessees in particular know where they stand. A factor that strengthens the latter consideration is that the many pastoral lessees in the Basin have fewer property rights than freeholders. It is the obligations under their pastoral leases rather than any rules in the operative district plan and PC13(C) which have kept the pace of change relatively slow in large parts of the Mackenzie Basin. So pastoral lessees should know before completion of tenure reviews that their land may be less valuable on standard financial measures (i.e. not counting environmental capital retained), because of the reduced range of farming options allowed under the Mackenzie Rural subzone restrictions .

[477] Another relevant matter is if objectives and/or policies have been changed by the court, and then the rules are found not to implement them.

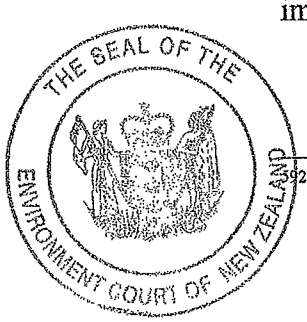
[478] We conclude that there are strong grounds for the court to exercise its jurisdiction in respect of the objectives and policies in respect of the landscape of the Mackenzie Basin.

Hazards

[479] It also encourages the use of section 293 that Meridian has raised hazards issues which we have held are likely to justify changes to the farm base areas. It defies common sense to approve farm bases in areas which are subject to appreciable hazards. But, in fairness, the opportunity should be given to landowners and occupiers to seek alternative farm bases.

Pastoral intensification

[480] We have added some clarifying policies and rules in respect of large buildings and pivot irrigators. We consider more express management of areas suitable for pastoral intensification (and indeed a re-definition of that term) is desirable. While the greening of the basin is expressly raised by PC13 itself as a new issue to be inserted[592] in the district plan it is not adequately dealt with in the policies or methods of implementation.



[592] PC13(N) at p. 4.

[481] We have become aware through unrelated appeals in the Waitaki District and through the media that the "greening" of the landscape has become topical right through the upper Waitaki catchment (i.e. including the Mackenzie, Ohau and Omarama basins) and that a "focus group" has been set up to deal with it. In the circumstances we are reluctant to give directions under section 293 which may cut across any consensus outcome from the local communities. We assume of course that such consensus will be reached under a fair process that commenced with a level playing field (e.g. we doubt that a right of veto should be given to any participant : see *Watercare Services Limited v Minhinnick*[593]) and it is undertaken with reference on its face to achieving the purpose and principles of the RMA. We trust, given the national importance of the Mackenzie Basin's landscape that (at least) some wider community involvement and agreement will be obtained. So, unless we are advised that our assumptions are wrong, we will exercise our discretion not to proceed under section 293 in respect of intensification of farming activities other than restrictions on intensification in landscape protection areas, Scenic Viewing Areas and (new) scenic grasslands.

[482] As a separate consideration : if the Council has taken no action in respect of rule (7)12.1.1.g, which should have been renewed[594] after 24 May 2007 then we should probably give directions under section 293 about that also. Further, our preliminary view is that this rule should apply to pastoral intensification generally and not just to land clearance. That would assist to find appropriate methods of implementation of objective 3B(3)(b) as provisionally determined by this decision.

Wildings

[483] PC13 is also largely silent in respect of policies and implementing methods to deal with the equally if not more pressing issue of wildings. There is a complex set of provisions to consider under the Climate Change Act, the Biodiversity Act, the Crown Pastoral Land Act and the Regional Pest Strategy. So, before we decide whether or not to give any directions under section 293 on the issue of wildings we wish to give the parties in these proceedings opportunity to make submissions on the law. We have attempted to set out our understanding of the law, but we may be wrong. But if we are right then we will be inclined to exercise our discretion in favour of action under section 293.

8.5 Outcome

[484] This decision in final in respect of our finding that the Mackenzie Basin as a whole (excluding Twizel and Tekapo townships, Mr Densem's landscape unit 54 west of Twizel, and the Dobson River catchment) is an outstanding natural landscape. All other determinations or judgements are interim. That is especially so the further down the chain from objectives to policies to methods of implementation we have gone. Our

593 *Watercare Services Limited v Minhinnick* [1998] NZRMA 289 (CA).
594 See the note under the heading to the rule : Mackenzie District Plan p. 7-76.

suggested rules in particular may need changes and certainly need checking by the planners (and counsel).

[485] We are strongly of the inclination to exercise our discretion to make orders under section 293 of the Act to give effect to provisional determinations in the earlier parts of this decision. However, in case there are jurisdictional or discretionary matters we have overlooked we will reserve leave for submissions on these issues.

[486] We cannot emphasise strongly enough that all our suggestions as to appropriate afforestation (and some pastoral intensification – potentially quite extensive on the lower Tekapo and Pukaki plains) are subject to consideration of the ecological constraints. We consider that in many cases ecological issues could be better resolved as matters of ownership in tenure review under the CPLA. That would be achieved by the Crown taking ownership of meaningful reserves[595] to protect the ecosystems that are hanging on in the lower parts of the Mackenzie Basin, and especially in the margins of wetlands, streams and rivers. However, as we have stated, because there is no certainty as to when (if) tenure review of individual pasture leases will take place, and because some properties are freehold, we will require some evidence that possible wilding afforestation and pastoral intensification will meet the purpose of the Act – especially the matters in section 6(a) and 6(c).

[487] Since the concept of approved exotic carbon forest areas proposed in this decision may impact on ecological values (and possibly for section 6(a) and (c) values) we will request that the Registrar send a copy of this decision to the Commissioner of Crown Lands, the Director-General of Conservation and to the Environmental Defence Society Incorporated ("the EDS") so that they can read this decision and consider whether they wish to apply to be involved at any later stage[596]. We have suggested the first two because LINZ and the Department of Conservation each "own" and administer land in and around the Mackenzie Basin. As for the EDS : it appears from media reports in 2010 that the EDS has been interested enough in the Mackenzie, Ohau and Omarama Basins to hold a seminar in Twizel on the future development of the area and its landscapes. Much as some residents of the district might like all decisions about the district's future to be made by locals, Parliament has given the Environment Court a decision-making role – subject to the tight constraints in Part 2 and section 32 of the RMA – and we must carry out our duties according to the law. There are wider communities to consider than those who reside permanently in the Mackenzie Basin, or the Mackenzie District, and the EDS might represent some of those if it chooses to apply to become a party.

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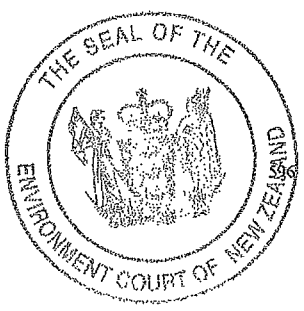
595 The Parliamentary Commissioner for the Environment's report "Change in the high country : Environmental stewardship and tenure review" (April 2009) has some very interesting and potentially useful things to say about this. The suggestion of across altitudinal (mountain to plains) reserves is particularly thought-provoking. A superficial inspection of what has taken place south of Lake Ruataniwha (within Waitaki District) suggests that there may have been inadequate protection of both ecological and landscape values there.

596 Probably as belated section 274 parties.



[488] This interim decision, regretfully, proposes an unusual level of interference with the normal rights of (freehold) farmers. It should not be read as a template that is applicable throughout New Zealand. That is primarily because the Mackenzie Basin landscape is unique and deserves, we judge, special protection (while allowing appropriate activities) under section 6(b) of the RMA when balanced or, more accurately, weighed with all other Part 2 considerations. That protection proposes policies and rules which impinge on the rights of landowners including the Crown as lessor of many pastoral leases to a considerable but still reasonable extent. The protection we have suggested may still be inadequate to protect ecological values (we do not know on the current state of evidence) and is likely to be the maximum extent of exotic forest we can approve as appropriate to recognise landscape values.

[489] If something like the proposals we have outlined cannot be made to work (and if anything we believe we may have erred on the side of too much afforestation and pastoral conversion because there was so little ecological evidence) then the onus will come on the tenure review process. That makes it of concern that, if the Parliamentary Commissioner's Report is to be believed (and we repeat that we make no finding either way), that process has been unsatisfactory in the past.

[490] Possibly in respect of ecological values, and certainly in respect of its landscape values, there is a danger that unless the people of the Mackenzie District and the wider community concentrate on applying the RMA properly, some of the outstanding qualities of the Mackenzie Basin will be lost, effectively for ever. We believe that the solutions in this decision are the most appropriate outcome on the evidence and submissions so far.

The Waitaki Power Scheme

[491] We have attempted to resolve (provisionally) as many of the issues raised by Meridian as we can. However, the changes to the objectives and policies we contemplate mean that much of the careful and detailed work by Meridian's planner, Mr Gimblett, has been rendered redundant. Special leave will be reserved for Meridian to come back on all the rules it seeks to protect the existing and (subject to the general objective and the wilding exotics policy) future operations of the nationally important Waitaki Power Scheme. We particularly seek Meridian's views on how the proposed wilding/exotic trees' policies and methods of implementation might affect its operations.

Mapping

[492] It will be seen from our discussion of provisional policies that some further mapping will be required, specifically of:

- scenic grasslands;

- areas of low visual vulnerability potentially suitable for development and/or forestry;
- areas of medium visual vulnerability;
- approved farm bases.

We consider this should be carried out by Mr Densem as soon as possible to aid the Council's consultation with the parties and other affected persons.

8.6 Afterwords

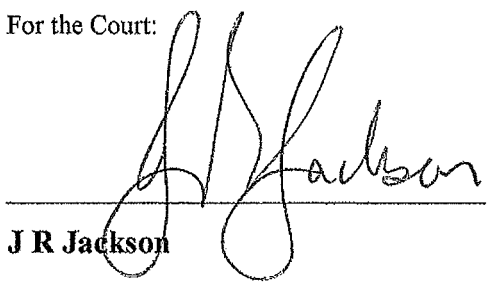
The Pukaki Village subzone

[493] This area to the east of the Pukaki Dam was to be the subject of these proceedings but the relevant appeal was withdrawn. We understand the site can be identified on the ground by a little stone cottage on the uphill side of the road. Its garden has been tactfully planted with native species. However, the Council should reflect on whether this little black spot in the middle of the Mackenzie subzone will necessarily all be developed so sympathetically.

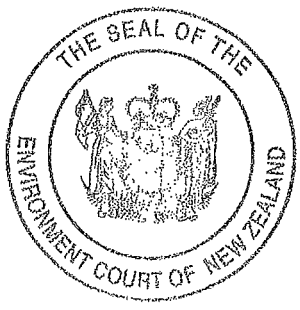
The effects of the Canterbury earthquakes

[494] A principal reason for the extended time it has taken us to issue this decision is the series of earthquakes that have hit Canterbury since September 2010. That has affected this division of the court's work, both directly and indirectly. First, the Environment Court has no one office in Christchurch – like other courts it is working out of several different venues with varying, sometimes very inadequate, facilities. Secondly, an indirect effect of the seismic activity is that the court, as a matter of public policy, gave preference to work on the small contribution it could make to recovery, especially to attempts to hear speedily the appeals on Change 1 to the Canterbury Regional Policy Statement. While we regret the delay in issuing this decision we hope that the people and communities of the Mackenzie Basin will understand the reasons.

For the Court:



J R Jackson
Environment Judge



Schedule A

Provisional changes to Section 7's landscape policies

A : SCHEDULE OF POLICIES 3B1 TO 3B16

Policy 3B1 Recognition of the Mackenzie Basin's distinctive characteristics
To recognise that within the Mackenzie Basin's outstanding natural landscape there are:

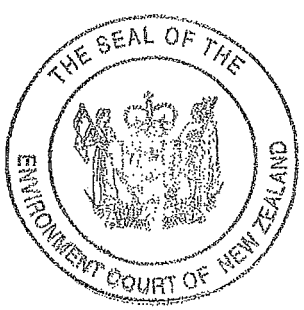
(a) some areas where different types of development and use (such as irrigated pastoral farming or carbon forestry under an Emissions Trading Scheme) and/or subdivision are appropriate, and to identify these areas; and
(b) many areas where use and development beyond pastoral activities on tussock grasslands is either generally inappropriate or should be avoided

– while encouraging a healthy productive economy, environment, and community within, and maintaining the identity of, the Mackenzie Country.

Policy 3B2 – Adverse Impacts of Buildings and Earthworks
To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from residential buildings, domestication, structures, earthworks, tracks and roads except in particular areas under policies below, and to remedy or mitigate the adverse effects of farm buildings and fences.

Policy 3B3 – Adverse Effects of Sporadic Subdivision and Development
To control buildings and subdivision in the Mackenzie Basin Subzone (outside of approved farm base areas and other than for activities provided for in [the Renewable Energy] Policy 3B9 and subject to lesser controls on buildings and subdivision in areas of lower visual vulnerability) to ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated and to sustain existing and likely future productive use of land.

Policy 3B4 – Limits on subdivision and housing
(1) Subject to (2) below, to enable residential or rural residential subdivision and housing development in the Mackenzie Basin Rural subzone only within identified farm base areas;
(2) To encourage new residential or rural residential subzones in areas of low or medium vulnerability provided:
    (a) objectives 1, 2, 4, 7, 8 and 11 of the Rural chapter are achieved; and
    (b) the new subzones satisfy policy 3B6 below;
(3) To strongly discourage residential units elsewhere in the Mackenzie Basin.



Policy 3B5 Development in farm base areas

(1) Subdivision and development of farm base areas which are in areas of high vulnerability to development shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:

(a) confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road

(b) integrating built form and earthworks so that it nestles within the landform and vegetation

(c) planting of local native species and/or non-wilding exotic species and management of wilding tree spread

(d) maintaining a sense of isolation from other development

(e) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing

(f) mitigating, the adverse effects of light spill on the night sky

(g) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(h) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

(2) Subdivision and development in farm base areas which are in areas of low or medium vulnerability to development shall:

(a) restrict planting to local native species and/or non-wilding exotic species

(b) manage exotic wilding tree spread

(c) maintain a sense of isolation from other development

(d) mitigate, the adverse effects of light spill on the night sky

(e) avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(f) install sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

3B6 Potential residential and visitor accommodation activity subzones

(1) To mitigate the effects of past subdivision on landscape and visual amenity values and to encourage appropriate rural residential activities in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options (such as Rural-Residential) in areas of low or medium vulnerability to development where there are demonstrable advantages for the environment;

(2) where such subzones are located wholly or partly in areas of medium vulnerability then any development within shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:

(1) confining development to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Arm Road

(2) integrating built form and earthworks so that it nestles within the landform and vegetation

(3) planting of local native species and/or non-wilding exotic species and management of wilding tree spread

(4) maintaining a sense of isolation

(5) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing
(6) mitigating, the adverse effects of light spill on the night sky
(7) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
(8) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

Policy 3B7 – Lakeside protection areas

(a) To recognise the special importance of the Mackenzie Basin's lakes, their margins, and their settings in achieving Objective 3B.
(b) Subject to (c), to avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.
(c) To avoid, remedy or mitigate the adverse impacts of further buildings and structures required for the Waitaki Power Scheme on the landscape values and character of the Basin's lakes and their margins.

(Note : Policy (c) has different objectives to achieve dependent on whether Rural Objective (7)3B or Utilities objective (Section 15)3 is being implemented.)

Policy 3B8 Views from State Highways and Tourist Roads

(a) To avoid all buildings, other structures exotic trees and fences in the scenic grasslands listed in Appendix X and in the scenic viewing areas shown on the planning maps;
(b) To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of structures such as large irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;
(c) To avoid clearance, cultivation or oversowing of all tussock grasslands adjacent to and within the foreground of views from State Highways and the tourist roads;
(d) To minimise the adverse effects of irrigation of pasture adjacent to the state highways or the tourism roads.

Policy 3B9 – Renewable Energy

To recognise and provide for the use and development of renewable energy generation and transmission infrastructure and operations within the footprint of current operations or on land owned by infrastructure operators as at 31 October 2011 while, as far as practicable, avoiding, remedying or mitigating significant adverse effects on the outstanding natural landscape and features of the Mackenzie Basin.

Policy 3B10 – Reverse sensitivity

To avoid, remedy or mitigate adverse reverse sensitivity effects of non-farm development on rural activities and activities such as power generation, transmission infrastructure, state highways and the Tekapo Military Training Area.

Policy 3B11 Hazards

To avoid hazards caused by activities such as power generation; and water transport by canal and aqueduct on non-farm development and activities.

Policy 3B12

Traditional pastoral farming is encouraged so as to maintain tussock grasslands, subject to achievement of the other Rural objectives and to policy 3B8.

Policy 3B13 Farm Buildings

(1) Farm buildings should be avoided in lakeside areas, scenic viewing areas and scenic grasslands.

(2) Elsewhere in the Mackenzie Basin subzone farm buildings should be managed in respect of location, density of buildings, design, external appearance and size except in areas of low visual vulnerability where only density and size are relevant.

Policy 3B14 Pastoral intensification

(1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification meet all the other relevant objectives and policies for the Mackenzie Basin subzone (including Rural Objectives 1, 2 and 4 and implementing policies);

(2) To link management of new areas of pastoral intensification with management of wilding exotic trees and other weeds;

(3) To avoid pastoral intensification in sites of natural significance, scenic viewing areas and scenic grasslands.

3B15 Wilding trees

To manage wilding tree spread by:

(a) confining it to areas of low or medium vulnerability as shown on Map [-];

(b) requiring landowners to remove wildings of identified tree species from their land (outside of areas identified in (a) before they seed.

3B16 Landscape aspects of subdivision

(1) In order to minimise its adverse effects, subdivision in the Mackenzie Basin Rural Subzone will not be encouraged except:

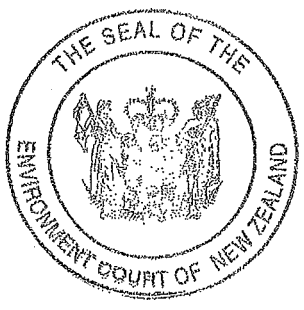
- in farm base areas;
- in areas of low visual and/or ecological vulnerability;

(2) there should be a minimum lot size of 200 hectares (except in farm bases);

(3) further subdivision of lakeside protection areas (except for existing farm bases), scenic viewing areas and scenic grasslands will not be allowed;

(4) all lots in a subdivision shall be linked by mutually enforceable covenants and conditions (also enforceable by the Council) to remove exotic wildings from each other lot unless the trees are in an approved forest area;

(5) All subdivision should have regard to topographical and ecological restraints.



Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd

Supreme Court of New Zealand SC82/2013; [2014] NZSC 38
19, 20, 21, 22 November 2013; 17 April 2014
Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Resource management – New Zealand Coastal Policy Statement – Interpretation – Apparently conflicting policies – Whether balancing approach appropriate – Duty of planning authorities to give effect to NZCPS – Interpretation of NZCPS – "Inappropriate" – NZCPS, policies 8, 13, 15 – Resource Management Act 1991, ss 55, 58.

Resource management – Resource consents – Whether and when requirement to consider alternative sites – Observations. – Resource Management Act 1991, s 32.

King Salmon applied for changes to the Marlborough Sounds Resource Management Plan to change salmon farming from a prohibited activity to a discretionary activity in eight locations and at the same time applied for resource consents to undertake salmon farming at those locations and one other for a term of 35 years. The Minister of Conservation decided that the application involved matters of national importance and should be decided by a Board of Inquiry. The Board considered the New Zealand Coastal Policy Statement and also Part 2 of the Resource Management Act 1991. Policy 8 of the NZCPS was intended to enable aquaculture subject to conditions while policies 13 and 15 required decision makers to avoid adverse effects of activities on the natural character of areas of outstanding natural character, outstanding natural features and outstanding natural landscapes in the coastal environment. The Board considered that these policies conflicted and that it was required to balance their requirements and make an overall judgment. It found that there would be adverse effects on areas of outstanding natural attributes but nonetheless decided to grant the applications for plan changes in respect of four sites and to grant the resource consents for those four sites, subject to conditions. The Environmental Defence Society and others appealed unsuccessfully to the High Court, arguing that the Board had wrongly taken an "overall judgment" approach to balancing the requirements of different policies. EDS and SOS then appealed to the Supreme Court under s 149V of the Resource Management Act.

Held: 1 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) Section 5(2) of the Resource Management Act 1991 was to be read as an integrated whole. The word "while" did not indicate that the section addressed two different sets of interests but had its ordinary meaning of "at the same time as". The word

"avoiding" in s 5(2)(c) had its ordinary meaning of "not allowing" or "preventing the occurrence of" (see [24], [62], [96]).

2 (unanimously) Although a policy in the New Zealand Coastal Policy Statement did not come within the definition of a "rule" in the RMA, it could have the effect of what in ordinary speech would be a rule and prohibit particular activities in certain localities (see [10], [116], [182]).

3 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) The NZCPS gave substance to the principles in Part 2 of the RMA in relation to New Zealand's coastal environment by translating the general principles to more specific or focused objectives and policies. Therefore in principle, when considering a plan change in relation to the coastal environmental, a regional council was necessarily acting in accordance with Part 2 by giving effect to the NZCPS. No party had challenged the validity of the NZCPS or any part of it and there was no uncertainty in the meaning of the relevant policies of the NZCPS which required reference to Part 2 (see [85], [88], [90]).

4 (William Young J dissenting) The word "inappropriate" in the NZCPS emerged from the way particular objectives and policies were expressed and related to the natural character and other attributes that were to be preserved or protected and also emphasised that the NZCPS required a strategic, region-wide approach (see [102], [105]; compare [193], [194]).

5 (William Young J dissenting) Planning authorities were required to "give effect to" the New Zealand Coastal Policy Statement. "Giving effect to" meant "implement" and was a strong directive creating a firm obligation on the part of planning authorities. The NZCPS did not simply identify a range of potentially relevant policies to be given effect as policy makers considered appropriate on an overall judgment in the particular circumstances. Although Part 2 of the RMA did not give primacy to preservation or protection over other interests, this did not mean that the NZCPS could not do so in particular circumstances. There was no conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policy 8 provided for salmon farming in appropriate areas but salmon farming could not occur in breach of policies 13(1)(a) and 15(a) which directed authorities to avoid significant adverse effects on particular limited areas of the coastal region – areas of outstanding natural character, outstanding natural features or outstanding natural landscapes. The use of the word "avoid" in these policies was a strong direction, meaning they are not merely relevant considerations to factor into a broad overall judgment. It followed that given the Board's findings that the Papatua site engaged policies 13(1)(a) and 15(a), the plan change should not have been granted in respect of that site. The overall judgment approach was inconsistent with the process by which an NZCPS was issued, would create uncertainty and had the potential to undermine the strategic, region-wide approach that the NZCPS required planning authorities to take (see [77], [124], [125], [127], [129], [130], [132], [135], [137], [139], [146], [147], [152], [153]).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC) discussed.

Result: Appeal allowed/dismissed.

Observations: (per totam curiam) If consideration of alternatives is permissible, there must be something about the circumstances of particular cases that make it so. Those circumstances may make consideration of alternatives not simply permissible but necessary. In the case of an application relating to the applicant's own land, the RMA does not require consideration of alternative sites as a matter of course but there may be instances where such consideration is required and there may be instances where the decision maker must consider the possibility of alternative sites. The question of alternative possible sites may have greater relevance in cases where application is made to use part of the public domain for a commercial purpose. Whether consideration of alternative sites may be necessary will be determined by the nature and circumstances of the particular application (see [166], [167], [168], [169], [170], [176]).

Brown v Dunedin City Council [2003] NZRMA 420 (HC) discussed.

Other cases mentioned in judgment

Auckland Regional Council v North Shore City Council [1995] 3 NZLR 18 (CA).

Brown v Dunedin City Council [2003] NZRMA 420 (HC).

Campbell v Southland District Council W114/94, 14 December 1994.

Clevedon Cares Inc v Manukau City Council [2010] NZEnvC 211.

Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council [2010] NZEnvC 403.

Foxley Engineering Ltd v Wellington City Council W12/94, 16 March 1994.

Green & McCahill Properties Ltd v Auckland Regional Council [1997] NZRMA 519 (HC).

Hodge v Christchurch City Council [1996] NZRMA 127 (PT).

Man O'War Station Ltd v Auckland Council [2013] NZEnvC 233.

Meridian Energy Ltd v Central Otago District Council [2011] 1 NZLR 482 (HC).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).

North Shore City Council v Auckland Regional Council (1996) 2 ELRNZ 305 (EnvC).

Plastic and Leathergoods Co Ltd v Horowhenua District Council W26/94, 19 April 1994.

Shell Oil New Zealand Ltd v Auckland City Council W8/94, 2 February 1994.

Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402.

Wairoa River Canal Partnership v Auckland Regional Council [2010] 16 ELRNZ 152 (EnvC).

Appeal

These were appeals (SC82/2013) by the Environmental Defence Society Inc under s 149V of the Resource Management Act 1991 from the judgment of Dobson J, [2013] NZHC 1992, dismissing an appeal from a Board of Inquiry set up under s 142(2)(a) of the RMA, supported by Sustain Our Sounds Inc, second respondent, and opposed by New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries,

fourth respondents and (SC84/2013) by Sustain Our Sounds Inc from the same judgment, supported by the Environmental Defence Society Inc, second respondent, and opposed by The New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries, fourth respondents, leave to appeal having been granted by the Supreme Court [2013] NZSC 101, the approved questions on appeal being (SC82/2013):

(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 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; and

(SC84/2013): was the conclusion of the Board of Inquiry that the key environmental effects of the plan change in issue would be adequately managed by the maximum feed discharge levels set in the plan and the consent conditions it proposed to impose in granting the resource consent to King Salmon one made in accordance with the Act and open to it?

DA Kirkpatrick, *RB Enright* and *NM de Wit* for EDS.

DA Nolan, *JDK Gardner-Hopkins*, *AS Butler* and *DJ Minhinnick* for the King Salmon Co.

MSR Palmer and *KRM Littlejohn* for Sustain Our Sounds Inc.

CR Gwyn and *EM Jamieson* for Minister of Conservation and Director-General of Ministry for Primary Industries.

SF Quinn for Marlborough District Council.

PT Beverley and *DG Allen* for the Board of Inquiry.

Palmer for SOS: This case demonstrates the importance of the Resource Management Act 1991. Resources and the uses to which they are put are mediated by the RMA through the principle of sustainable management. Consent authorities often pay lip service to this principle by listing all relevant considerations and then coming to an overall conclusion – a "broad judgment" approach which means that the weight assigned to different considerations cannot be appealed. This approach has not previously been taken to plan changes. Mr Upton said in the third reading debate on the Bill that the concept of sustainable management provided a "physical bottom line" which should not be compromised ((4 July 1991) 516 NZPD 3019) either by plan changes or consents. This is one of the rare cases when we come up against the bottom line. SOS is not challenging Parliament's attempts to streamline and simplify the RMA. The challenge is to the particular decision of the Board which did not have before it the information about the key environmental effects it required. This Court can provide guidance to the courts below and to the increasing numbers of boards of inquiry as to decision making.

SOS is not opposed to salmon farming in general. King Salmon applied for a plan change carving out eight areas from the zone where salmon fishing is a prohibited activity and making it a discretionary activity in those areas. Concurrently it applied for consents (as well as consent for another farm where it was already zoned as discretionary) and the Board of Inquiry agreed to the request for four of them. The Board was set up because the Minister was concerned about water quality, among other factors. Open-cage salmon farming introduces nitrogen and other pollutants from salmon feed and faeces. The ability of the water to deal with this depends on the complex interaction of factors such as water flow, temperature, and pre-existing nutrient levels natural and unnatural, including run off from fertilisers on land. Excessive nitrogen causes eutrophication where dissolved nutrients reduce oxygen levels and increases algal blooms which reduce sunlight. The process is potentially reversible over time but once a certain point is reached, return to a pristine state becomes impractical. It is not just the levels that matter but the degree of change from the pre-existing natural state. The feed discharge from the nine farms applied for would be equivalent to the raw effluent discharge from 400,000 people (BoI report, at [379]). So we need to know the current state of the environment and need good information (not perfect information) as to the effect of an increase in nutrients given the maximum feed quantities allowed by the consent. SOS considers the conditions on both the plan change and the consent inadequate. The applicants had modelled only on the initial stages and not on the maxima.

The Board (Appendix 3) does not amend the objectives of the plan. The Board says that there can be an increase in salmon farming where the effects can be mitigated. The additional rules required would be effected by plan change. Marine farms are discretionary activities within Zone 3 provided that they comply with the standards set out. These relate to water quality: maximum discharges and maximum increases per year. King Salmon proposed that farming for different species would be a prohibited activity but the Board amended this to non-complying.

Water appears in the long Title of the RMA. Section 5 sets out the purpose of the RMA as to promote sustainable development of natural and physical resources, which are all defined terms. Purpose is important in interpreting provisions in an Act (*Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767). Sustainable development is defined in s 5(2) as including the needs of future generations and safeguarding the life-supporting capacity of water and ecosystems, avoiding, remedying or mitigating any adverse environmental effects. If the use of water is not sustainable and life-supporting capacity not supported, the plan change cannot go ahead. Section 6 expands on sustainable management and refers to the preservation of the natural character of the coastal environment, its protection from inappropriate use and the protection of any significant habitat of indigenous fauna. The Rt Hon Simon Upton MP, said that s 5(2) was not a mere manifesto ("Purpose and Principle in the Resource Management Act" (1995) 3 Wai L Rev 17). The trade off on sustainability was made by Parliament. The Act marked a shift in focus from planning activities to regulating effects, so it is necessary to know what the effects will be. Part 3 in general allows activities unless they are controlled, prohibited etc. In respect of the coast, s 12 lists things that one cannot do unless they are expressly allowed by a rule in a coastal plan; s 14 does the same re water and s 15 for discharges. So water is treated differently from land. The coastal and marine areas are the responsibility of the Minister of Conservation under the RMA, not the Minister for the Environment but the use of space in coastal and marine areas is the responsibility of regional authorities as is the use of water. Functions are expressed in light of the purpose. "Integrated management" is a reference to the Bruntland Report from where "sustainable management" also derives. Section 32 requires cost-benefit analysis and s 32(4)(b) in respect of plan changes must include the risks of acting and of not acting if there is insufficient information. The precautionary principle is implicit in the section and implicit in the definition of sustainable management. The Board was not cautious in the face of uncertainty. Part 5 of the RMA sets out the hierarchy of standards and policies and the hierarchy of documents which provide the framework for consents (see ss 63, 65(6), 66 and 84). There has to be a coastal policy statement under s 57 and the CPS refers to sustainability. Each document in the hierarchy must give effect to the document in the hierarchy above. Policies relate to how objectives are to be achieved. The precautionary approach, in Policy 3, underpins all the policies but the Board does not consider uncertainty as to effects. Policy 23 on discharge of contaminants required particular sensitivity to the receiving environments (see also s 108(8) of the RMA), but the Board said it did not have evidence as to the nature of the receiving environment. Regional policy statements are also directed to the integrated management of resources. The Marlborough Regional Policy Statement refers to Agenda 21 and affirms commitment to controlling degradation of the marine environment (chapters 5 and 7). Part 5.3.6 of the RPS refers to problems of limited information. The approach of the statement is to move along the path to sustainable development. Where insufficient information is available, plans will take a precautionary approach (7.2.11). Coastal water quality is to be

maintained at a level which will support the eco-system. Methods of achieving policies include controls in plans to avoid, remedy or mitigate the effects of discharges. The Board did not do this.

King Salmon argues that a discretionary activity has to go through all resource consent steps so it does not matter whether it is potentially harmful. This is not correct. Status as a discretionary activity indicates how an activity is to be thought about when considering applications for resource consent. Discretionary status indicates that the activity may well be desirable provided that conditions are complied with, or may not be. So the result of the application could go either way. A coastal permit is a type of resource consent (s 105). The Board of Inquiry acts as a consent authority (s 149) and a consent authority has a quasi-judicial role (*Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562). On the application for a plan change, the Board must act as if it were a regional council (s 149). Concurrent applications for plan changes and resource consents are dealt with by s 149P(8), (9) and (10). The Board had to determine matters relating to the plan change and only then consider the resource consent application in the light of the amended plan. A plan cannot depend upon a resource consent but at [12.76] the Board purports to apply Part 2 of the Act to plan changes and says that where there are identified adverse effects that overcame the benefits, consent would be refused and where adverse effects could be mitigated, conditions would be imposed on consents. In other words, the amendment to the plan depended upon the conditions in the consents. This is contrary to the scheme and purpose of the Act.

The bulk of the Board's report relates to contested effects. As to water quality and the effect of waste feed and faeces, the Board considered that it had enough information when one added the year of monitoring which would be one of the conditions of the resource consent. The then Minister of Conservation considered that this was insufficient information and submitted that a precautionary approach was warranted, especially as to effects on water quality. There was expert evidence as to the tropic state of the Sounds overall and of individual Sounds. The Board concurred with the experts on the paucity of information on the current state of the Sounds (at [372]). The Board was unable to assess the effect of farm run-off. It refers to sustainable feed levels, but it is not clear whether it is referring to the sustainability of the farming or of the water. The Board was surprised that there had been no modelling of the effect of maximum feed levels, whether locally or overall (at [430]–[435]). So the Board identified numerous problems but then went straight on to consider what conditions should be imposed on the resource consent and failed to consider whether the consents should be granted at all. The conditions imposed are complex. There are 84 conditions ranging from feed conditions up to the maximum to increases in discharges to be allowed if the monitoring shows that they are not harmful. So the conditions on the consents were being used to set standards which should have been in the amended plan.

Granting the plan change on the basis of the maximum feed discharge limits about which the Board itself said it had insufficient information and of the proposed consent conditions to gather that essential information would not adequately manage the environmental effects on water quality. Accordingly, the Board did not fulfil the function for which the Minister established it and its

decision was inconsistent with the principle of sustainable management, with the emphasis on water quality in the RMA and planning regime and the precautionary approach. If these consents were dropped or cancelled, we would still have salmon farming as a discretionary activity in the plan but without the controls on it which the Board considered essential. The plan change creates a zone specifically for salmon farming so we need to know what the effects will be. The words "have regard to" must be interpreted against the purpose of the Act. If after having regard to a matter, it is decided that the proposal is not compatible with sustainable management, consent cannot be granted. If the Board can identify conditions necessary for salmon farming these should be in the plan which the public can make submissions on. Granting the plan change on this basis was inconsistent with *Edwards v Bairstow* [1956] AC 14, [1955] 3 All ER 48 (HL). The Board should have re-appraised matters when it realised it did not have enough information (as in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153). The decision of the Board should be set aside. [Reference also made in printed case to: *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA); *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *Minister of Conservation v Kapiti Coast District Council* [1994] NZRMA 385 (PT); *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC); *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA); *Re Canterbury Regional Council* [1995] NZRMA 110 (PT); *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 (PT); *Unison Networks Ltd v Hawke's Bay Wind Farm* [2007] NZRMA 340 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149; *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475 (HC).]

Kirkpatrick for EDS: Question 1 turns on the interpretation of certain key words and phrases: "give effect to" in s 67(3)(d) of the RMA; "avoid" in Policies 13(a) and 15(a) of the NZCPS; "preserve" and "protect" in Policy 13(1) and "protect" in Policy 15; and "appropriate" in Policy 8. The central point for EDS is that Policies 8, 13, and 15 do not contradict or pull against each other; all three policies may be reconciled on the basis that "appropriateness" in Policy 8 is to be determined in accordance with, among other things, the guidance on areas of natural character and natural landscapes in Policies 13 and 15. That approach is not affected by the other policies of the NZCPS in the circumstances of this case; it is consistent with the objectives of the NZCPS (especially objectives 2 and 6); and is in accordance with Part 2 of the RMA. Part 2 has to be read with other matters such as the NZCPS. Hence the Board erred in saying that the NZCPS contained objectives and policies that pulled in different directions and that therefore a judgment had to be made as to whether the instrument as a whole is generally given effect to. Part 2 does not create extra grounds for refusing restricted discretionary activity (see *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC), Randerson J at [40]–[47]). One applies the relevant detail, rather than resolving tensions on the basis of Part 2. Giving effect to the NZCPS will achieve the objectives of the Act. King Salmon submits that this is to read up the NZCPS; we say that King

Salmon is reading down s 67(3)(b). The purpose of the RMA given in s 5 is a complex statement encompassing the enabling of community well-being while avoiding, remedying or mitigating adverse effects of activities on the environment (see *Judges' Bay Residents Association v Auckland Regional Council* A72/98, 24 June 1998, especially Part 11 of the judgment). Promoting sustainable development is a single objective, no one aim overrides the others.

The RMA relies on the hierarchy of documents to achieve its objectives; the rungs between the Act and the Rules (which are deemed Regulations) are important. In this case, it is a requirement to give effect to the NZCPS. It is not necessary to return to the Act to resolve every tension, only to the relevant rung in the hierarchy. It is routinely argued in the Environment Court that some of the policies in the NZCPS are in conflict but we still have to examine the policies in detail. If the policies are not relevant to the current decision, it does not matter that they conflict. No issues arise as to waste water and so how Policies 8, 13, and 15 apply to waste water is irrelevant. There is no doctrine of precedent in consideration of resource consents (*Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA)) and any arguments about what might happen in other cases is answered by s 6 of the Interpretation Act 1999, that statutes are applied to circumstances as they arise.

The RMA also has a hierarchy of words and phrases relating to how decision makers must deal with various consideration of which "give effect to" is the most directory. "Avoid" and "prohibit" are words of ordinary meaning. "Avoid" is not a step short of "prohibit" as suggested by *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. "Avoid" is something one does oneself, "prohibit" is what authorities do to other people. Hence "avoid" is appropriate to policies and "prohibit" to rules. "Avoid" means to stop something from happening. Policies 13(a) and 15(a) say "avoid" which does not allow taking other matters into account; that would be mitigation, not avoidance. They thus provide non-negotiable baselines. Prohibition is not provided in Part 2 of the RMA but is provided for elsewhere in the Act. Prohibited activity status should only be used when the activity will not be contemplated in that place under any circumstances (*Coromandel Watchdog*). "Veto" means a power to reject a proposal. It hardly ever appears in legislation but does appear in RMA case-law starting with *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA). It is not appropriate here; this is a provision preventing something from happening. The NZCPS does not have direct regulatory effect (*Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 22–23) but it must be given effect to and the Environment Court can order amendment of a plan to give effect to the NZCPS. It determines what goes into plans and the plans contain rules. But the NZCPS cannot be used to prosecute a party for breach.

An applicant for a resource consent is not required to go right round New Zealand looking for alternative sites. We are not seeking a veto but merely that the change for Port Gore be declined. Policy 8 refers to "avoid, remedy or mitigate" unlike Policy 11 which only refers to "avoid" but it applies only where a species is threatened or at risk. Policies 13 and 15 call for mapping but an area can be found to be an outstanding natural landscape without being mapped as such. If the area is found to be an ONL or significant habitat it will be covered by Policies 13 and 15. Policy 16 on natural surf breaks

refers to "avoiding" other activities in the water. A developer has to enable access and use which is not onerous. Under Policy 25 it is increases in risk which are to be avoided, not existing risk from existing activity. Development in ONLs is not forbidden as long as adverse effects from development are avoided (*North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC)).

Enright, following: The Board at [124] found that it had no jurisdiction to consider alternative sites for the purposes of plan changes, referring to *Brown v Dunedin City Council* [2003] NZRMA 420 (HC) but at [127] it quotes *Brown* [16] but misses out an important qualifier in the penultimate sentence. The Board also said at [125] that there was no burden on the applicant for resource consent to consider alternatives but this does not apply to plan changes. In *Brown* it was not appropriate to require the applicant to consider sites over which he had no control but *Brown* did acknowledge that there may be cases where looking at alternatives would be required. In *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) it was said that alternatives should be examined but not too far afield but the ratio of *Meridian* is confined to s 7(b) which does not apply here. Whether there is a requirement to examine alternatives depends on the context including what is being protected. The question is how important is the site and why. The High Court in *Meridian* considered that the Environment Court had overstepped the mark: see *Meridian* (HC) at [92]. Dobson J at [171] said that it was not mandatory to consider alternatives but in this case there are no proprietary rights until consent is granted and so it is appropriate to look for other sites. We seek a decision that it is mandatory in the case of plan changes. Other sites were considered but not in the context of the plan changes. In *TV3 Network Services Ltd v Waikato District Council* [1998] NZLR 360, [1997] NZRMA 539 (HC), Hammond J said that if s 6 applies then alternative sites are a relevant consideration. On s 32 and plan changes, see *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 45 at [68], [84] and [103], *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21] and *Coromandel Watchdog* at [16]). [Reference also made in printed case to: *Green and McCahill Properties Ltd v Auckland Regional Council* HC Auckland HC 4/97, 18 August 1997; *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC)); *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331.]

Gardner-Hopkins for King Salmon: King Salmon has been farming salmon in the Marlborough Sounds since the 1980s. It was a pioneer but has learned a great deal since then. King Salmon was part of the process by which zones were allocated by consent in 1999. At that time King Salmon did not need to reserve any areas for future use and accepted the zone boundaries. It began looking for new sites from 2007 and has reviewed some 500 mussel farm sites but found them unsuitable for salmon farming. It is well known that until 2011, the aquaculture regime hindered the development of aquaculture. The 2011 amendments removed legislative obstacles. In particular, the concurrent application for plan change and resource consent encourages applications for plan changes without creating the risk that someone else will apply for resource consent.

The Board was primarily concerned with sustainable development (see the Board at [75]–[81], [1227] and [1276]–[1278]). The SOS argument fundamentally misconceives the statutory scheme as to the role of regional plans and discretionary resource consents. The plan change itself has no environmental effects. All it does is enable applications for discretionary activity resource consent for salmon farming at four specific locations. For a discretionary activity there is no presumption that consent will be granted. The Act does not require that plans include conditions for resource consents and certainly not the detailed conditions demanded by SOS. For discretionary activities, all relevant matters have to be considered when consent applications are considered. The Board had more than sufficient information to approve the plan change and there was full public participation in the process, including discussions between the parties which led to the conditions. In fact, the amended plan contained more specific standards and assessment criteria than the existing plan. The Board applied the precautionary approach in the plan changes: in declining five of the nine proposed sites; in setting standards for initial feed levels and subsequent increases; and then in the resource consents by imposing robust adaptive management conditions. The approval of the plan change was not predicated on the specific consents; the Board was "aware" of them and SOS does not contest that they were a relevant consideration.

The NZCPS Objective 6 recognises that some uses and developments can only be in the coastal area, this includes salmon farming and Policy 6(2) recognises that appropriate locations have to be found. Policy 8 requires regional policy statements and regional coastal plans to provide for aquaculture in appropriate places, recognising the need for high water quality including ensuring that the water is fit for aquaculture. The Regional Policy Statement states at [3.6] the limitations that we may never fully understand some ecosystems and effects of decisions and the absence of complete information is not necessarily an excuse for avoiding resource management decisions. Discretionary status is precautionary in that consent requires compliance with the purposes of the Act. Under Policy 7.2.10(d) of the Regional Policy Statement, applications for aquaculture consents are considered in the light of adjoining activities, navigation and other factors. Hence it is necessary to prohibit in some areas. The Board clearly had regard to all these matters in its decisions (see [283] and [284] of the Board decision). The Sounds Plan sets out policies, objectives and methods which enable applicants to understand how any application will be assessed. The plan emphasises the importance of assessment criteria and standards which will protect water quality and so on, so discretionary status is sufficient to ensure that the objectives of the Act are met. Chapter 9 "Coastal marine" recognises the importance of marine farming to the regional economy and community. Some Sounds communities have been revitalised by aquaculture. Research is continuing into farming new species which might then require further plan changes. Where there may be adverse effects, rigid controls can be imposed by conditions on the consent. Conditions could be called standards. The scheme of the Plan is that for some discretionary activities there are assessment criteria; for others there are standards. This Plan meets the requirements. Discretionary activities have previously been declined on sustainability grounds. The proposed plan changes go further. Once adaptive management requirements have been imposed on early consents they might not

be required for later consents and so should not be imposed. If the standards were not met under the amended Plan, a discretionary activity would become a non-complying activity. The 14 assessment criteria include assessment of any adverse effects on water and water quality and cumulative effects on habitat. The potential threats to Hector's Dolphin and the King Shag are dealt with. These criteria are more specific than those already in the plan; they are mandatory considerations and a guide to applicants as to the material that must be provided in an application. The consents include specific conditions about the amount of nitrogen in feed, limits on feed discharges, restrictions on when feed limits could be increased, and conditions on benthic effects. Maximum feed levels were not modelled as it was expected that benthic effects would be the limiting factor. Standards were set for the water column: no increase in phytoplankton bloom; no increase in algal bloom; no reduction in oxygen levels; no increase in nutrient levels; and a power to review the consents. The cumulative effects on the water column would be substantially reduced by the fact that five of the nine consents were refused. It is permissible to leave standard setting until later provided that the objectives are clear and achievable. What should be in the plan and what should be in the consents was extensively discussed before the Board. SOS wanted more conditions in the plan change rather than in the consents; the Council wanted the plan not to be cluttered with too much detail. "Assessment criteria" are not mentioned in the RMA but could be considered as parts of rules under s 67(1)(b) or as an "other method for implementing policy" under s 67(2)(b). There is no bright line test to determine the status of activities, the RMA leaves the choice as to activity status to the planning authorities. There was therefore no error of law. The Board was a planning authority and had discretion which it exercised after careful consideration of the relevant matters (see contested effects at pp 94–336: s 32 analysis is at [1224] and water column effects at [1212]). Its discretionary decision cannot be said to be so unreasonable that no reasonable planning authority could have taken it. The Board then considered site-specific issues relating to the plan change, including nitrogen and cumulative effects, ecological integrity and the ability of Port Gore to be serviced separately. This is why only four of the sites were approved for plan changes.

The Board then considered the resource consent applications and grants resource consent for the four plan change sites. Water quality issues were extensively considered, see [405], [411], [412], [421], [456], [458] and [460]. In the contested effects section of its report, the Board was still dealing with the nine applications. Its decision was precautionary: approval only for four sites. There is no need for philosophical debate about how to reconcile the limbs of s 5(2). The Board was aware of the need to "avoid, remedy or mitigate". It did refer to the "balance between" the two limbs but this was a mischaracterisation of its own decision making. At [439], the Board said that consent for increases was conditional on more information and adaptive management. This does not mean that the plan changes depended on the consent conditions, they were referring to the future. The Board was aware of the specific consent conditions, which was appropriate. The Board considered the precautionary approach at [173]–[182] and recognised "adaptive management" as part of the precautionary approach, a way of giving effect to the precautionary approach.

The Board recognised the reduction in adverse effects and benefits from only granting four consents rather than nine. The SOS complaint boils down to saying that this was not precautionary enough. This was a matter of weight, not law.

Nolan, following: The NZCPS and s 67(3)(b) must be interpreted in the light of the purpose of the NZCPS which is to state policies aimed at achieving the purpose of the RMA. The individual policies in the NZCPS are not ends in themselves. There can be tensions between them. Some policies, for example 13 and 15, give more direction than others, but they are not standards or vetos. Section 67(3) requires that effect be given to the NZCPS as a whole, not that every policy has to be achieved individually (*Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [257]–[258]; *Man O' War Station* at [41]–[43]). Documents are interpreted as a whole and policy documents have to be approached with care as they are not drafted with the same precision as legislation (*Beach Road Preservation Society Inc v Whangarei District Council* HC Whangarei CP27/00, 1 November 2000). Nor can any single matter in ss 6 (such as ONLs), 7 and 8 trump s 5 (*New Zealand Rail Ltd*). It would undermine the purpose of the RMA to allow some considerations to trump all other factors. The Board considered all the relevant considerations and applied the correct law and was entitled to reach the conclusions that it did. Policy 15, if read in the manner sought by EDS, would prevent any development that had any adverse effect. "Effect" is widely defined in the RMA, s 3. But the introductions to policies 13 and 15 refer to "appropriate". On EDS's argument, navigation beacons currently in ONLs on the Cook Strait would not have been permitted. Likewise, Policy 11a refers to "any adverse effects"; if this were interpreted in the manner sought by EDS one would never get to social and economic benefits. Several policies in the NZCPS use the word "avoid", so on EDS' argument no development would be possible, even if the adverse effects could be remedied or mitigated.

The NZCPS can direct regional councils to put matters into regional plans (s 55(2)), but these could only be objectives and policies. Provisions of the NZCPS can be put into rule form but are not rules themselves (s 43(a)). A wide range of interests such as recreational boating and fishing (Policy 6) and windfarms (*National Policy Statement on Renewable Energy Generation*) have to be taken into account. Places suitable for salmon farming are places with few inhabitants or holiday homes and with good water flow. It is part of the role of the decision maker to determine what will give effect to the NZCPS and Part 2 of the RMA. Status as an ONL is to be considered in making a decision, but does not require any particular process. The Board discusses all these matters, especially at pp 183–184. The weight to be given to them was a matter for the Board and is not apt for reconsideration on appeal. Matters emerging from Policies 6 and 8 are not determinative but are factors to be considered (Dobson J at [110]). The Board of Inquiry on the current NZCPS referred to giving more weight to the protection of landscape and to providing further guidance: indicates that the policies were not intended to be standards and rules. The Board in the present case had regard to the NZCPS as a whole, focused on effects, assessed those effects and considered the adverse effects along with the enablement of economic and social wellbeing (see [1184], [1185], [1240], [1241] and [1243]). The Board also placed weight on

biosecurity. Currently, New Zealand salmon farms are free from infectious diseases. The Papatua site was seen as safe as it is not connected to the other areas (see [1242]). The Board also considered that the adverse effects on landscape and natural character were less at Papatua than at Kaitira. The answer to the first part of Q 1(a)(i) is "no"; even if the Court answers it "yes", the answers to the remaining parts of Q 1(a) are "yes" and "yes".

As to alternatives, a decision maker may consider alternative sites but there is no mandatory requirement in s 32 to consider alternative sites for a specific plan change (*Brown*). There are express requirements elsewhere in the RMA (for example, ss 168A(3) and 171(1)(b). The title to s 32 refers to alternatives but the text of the section does not and certainly not to alternative sites. Parliament has amended s 32 regularly but has not included a mandatory requirement to consider alternative sites. For a site-specific plan change, s 32 requires consideration of whether the policies and rules proposed for that site are the most appropriate to achieve the purposes of the RMA. Earlier references to alternatives in s 32 were removed. A planning authority would not have evidence before it of all the effects of the activity at an alternative site. Section 105(1)(c) refers to alternative methods of discharge. *McGuire* referred to a notice of requirement not to a plan change. King Salmon produced evidence as to why the existing plan provisions did not adequately provide for salmon farming (see Board at [1204]). No other party gave evidence of any alternative biosecure site. In any case, the Board did consider alternatives. King Salmon's application contained detailed descriptions of alternatives and the analysis by the Board included consideration of alternatives (see Board at [136]–[158]). [Reference also made in printed case to: *Auckland City Council v John Woolley Trust*; *Brown v Dunedin City Council*; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363; *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211; *Director-General of Conservation v Marlborough District Council* EnvC Christchurch C113/2004, 17 August 2004; *Dye v Auckland Regional Council*; *Gisborne District Council v Eldamos Investments Ltd* HC Gisborne CIV-2005-485-1241, 26 October 2005; *Graeme v Bay of Plenty Regional Council* [2013] NZEnvC 173; *Man O'War Station Ltd v Auckland Council*; *McGuire v Hastings District Council*; *Meridian Energy Ltd v Central Otago DC*; *Moturoa Island Ltd v Northland Regional Council* [2013] NZEnvC 227; *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZRMA 293 (HC); *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 (PT); *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA).]

Gwyn for the Ministry: The Ministry appears only in respect of Q 1(a). The purpose of the 2010 amendments was to encourage aquaculture and reduce costs, delays and uncertainty. The NZCPS does not state policies which have the effects of rules and there is no need to read up the NZCPS as other tools are available, for example ss 25A, 25B and 360A. There are no national priorities stated in the NZCPS and it is well established that the preservation of the natural character of the coastline is subordinate to the primary purpose of promoting sustainable development (NZ Rail). Policies in this context may be inflexible (*Auckland Regional Council v North Shore City Council* [1995] 3

NZLR 18 (CA) at 20–21) but the current NZCPS is not intended to state inflexible policies. The wording of Policies 13 and 15 indicates that they are not intended as rules or absolute directions to planning authorities. There are not only tensions between policies within the NZCPS but also between the NZCPS and other documents, for example, the policy statements on electricity, on renewable energy and on freshwater. Windfarms for example may have significant adverse effects on the landscape but must be put where a source of energy is available. Many of the policies are written in the imperative voice, there is no indication that some sentences are more important than others. "Avoid" is a step short of prohibition, see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] NZEnvC 309 at [15]–[16] and *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZRMA 143 at [178]–[179]. "Appropriate" must be defined with regard to Policies 8, 13 and 15. [Reference also made in written submissions to: *Auckland City Council v John Woolley Trust*; *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC); *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA); *Crest Energy Kaipara Ltd v Northland Regional Council* (2011) NZRMA 420; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *McGuire v Hastings District Council*; *Man o' War Station Ltd v Auckland Regional Council*; *Meridian Energy Ltd v Central Otago District Council* HC Dunedin CIV-2009-412-980, 16 August 2009; *New Zealand Rail Ltd*; *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council* HC Wellington, 25 June 2001 AP6/01; *Ngati Ruahine v Bay of Plenty Regional Council* (2012) 17 ELRNZ 68 (HC); *Rational Transport Society Inc v New Zealand Transport Agency* HC Wellington CIV-2011-485-2259, 15 December 2011; *S & M Property Holdings Ltd v Wellington City Council* HC Wellington CP257/01, 7 August 2002; *Tait v Hurunui District Council* EnvC Christchurch C106/2008, 29 September 2008; *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Watercare Services Ltd v Minhinnick; Whistler v Rodney District Council* EnvC Auckland A228/02, 19 November 2002.]

Palmer, replying: SOS accepts that the Board thought that the initial limits were sustainable in terms of its own assessment of what that meant. But it has become clear that there are issues over the interpretation of s 5. The Board's overall assessment approach did not accord with the correct approach under s 5. The plan change limits were not sustainable in the sense required by a proper interpretation of s 5. Even the initial discharge limits decision did not accord with proper process under s 5. The Board makes frequent references to competing principles, balancing factors, and the balance between the limbs of s 5(2). It adopted an overall balancing approach which is also regularly applied in the Environment Court.

The Board thought that the maximum limits were not sustainable and was not using a proper definition of sustainable. The Board changed the plan to classify salmon farming as a discretionary activity at four sites despite "a paucity of data" (at [373], [406], [407] and [461]) and when the only constraints were an unconstrained annual increase to the proposed maximum discharge levels that it had expressed concern about. The Board should have taken a proper precautionary approach and retained the prohibited status until

the information deficiencies were remedied (*Coromandel Watchdog* at [45]). Adaptive management is not "prudent avoidance" and is not precautionary in these circumstances and not consistent with what the Board was set up to do: s 149P(1)(a). The Board's evaluation of contested effects for both the plan change and the resource consent applications led it to conflate two different decision-making processes. A fair reading of the report shows that the plan change was predicated on the conditions in the consents ([1185], [1209], [1277(b) and (c)] and [1278]). The assessments of the resource consent applications do not mention the mandatory relevant consideration of "assessment conditions" it put into the amended plan. Given the Board's findings, it should not have classified salmon farming as a discretionary activity at the maximum feed discharge levels. That is what it did do and so its decision in relation to the four approved sites should be set aside.

Kirkpatrick, replying: Aids to navigation are provided for under the Maritime Transport Act 1994, not in the Regional Plan. A lighthouse may not be adverse to the landscape, for example, at Cape Reinga. "Appropriate" in policy 8 does not mean appropriate for salmon farming; policies 13 and 15 help identify what was appropriate in policy 8. As to alternatives, see *Coromandel Watchdog* at [16]. If *Brown* is not treated as a rule, s 32 analysis should give submitters the opportunity to discuss alternatives. Plan changes do have environmental effects. The change from prohibited status to discretionary status is enabling and so the planning authority must consider the effects of enabling change. As to mootness, the issue of alternatives under Q 1(b) is important and it would be beneficial to have guidance.

Cur adv vult

Reasons

The reasons of Elias CJ, McGrath, Glazebrook and Arnold JJ were given by **ARNOLD J.**

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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

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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 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].

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]

[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 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 Part 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that

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6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents,* 22 February 2013 [*King Salmon* (Board)]. At [1341].
7 At [1341].
8 RMA, s 149V.
9 *King Salmon* (HC), above n 2.
10 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].
11 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 41.
12 *Sustain Our Sounds Inc v 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].
14 *King Salmon* (Board), above n 6, at [1235]–[1236].

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 washe 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 Part 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

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15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.
16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.

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 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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18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).
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 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,

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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 Part 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).
40 See s 87A.

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 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

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

> 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.
>
> [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 – Part 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:

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

[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 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]–[97] below, in the sequence "avoiding, remedying, or mitigating" in subpara (c),

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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.

43 RMA, s 3.

44 Section 2.

45 Section 2.

"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. The definition is sometimes viewed as having two distinct parts linked by the word "while".[47] 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 subparas (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 and cultural well-being as well as health and safety. The use of the word "protection" links particularly to subpara (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 subparas (a) and (b). As we see it, the use of the word "while" before subparas (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 subpara (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

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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 s 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

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 Part 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 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 s 6(c)–(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.

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48 Resource Management Bill 1989 (224-1), explanatory note at i.
49 RMA, s 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

[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 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, s 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of s 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

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52 Emphasis added.
53 See [40] below.

necessarily a protection against *any* development. Rather, it allows 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 Part 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 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 47–52 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

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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).
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.

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 Part 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 Part 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]

> [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.
>
> ...
>
> [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.
>
> [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

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62 NZCPS, above n 13, at 5.
63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> 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 Part 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 Part 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 Part 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that 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 s 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 ... .

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

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.

[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 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 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

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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.

> 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 s 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 irreconcilable in the context of a particular case.[81] No

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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].

81 At [258].

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 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

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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.

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)–(c) and 75(1)(a)–(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".

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]

[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;

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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.

- 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**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (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;
  (vii) whether the values are shared and recognised;
  (viii) 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;
  (ix) historical and heritage associations; and
  (x) 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 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.

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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.

89 RMA, s 59.

90 Section 62(1).

91 Section 62(3).

92 Italics in original.

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.

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

93 Italics in original.

> *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.*

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. ...

[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

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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.

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 s 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 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.

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

[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.

[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

108 RMA, s 293(3)–(5).
109 *King Salmon* (Board), above n 6 (citations omitted).

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.

[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]–[148] below whether this approach is correct.

[84] Moreover, as we indicated at [34]–[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 Part 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) Part 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 Part 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" Part 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 Part 2 and not the NZCPS. The more plausible view is that Parliament considered that Part 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 Part 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that Part 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which Part 2 is given effect in relation to the coastal environment.[110]

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of Part 2. He submitted that the purpose of the RMA as expressed in Part 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 Part 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether Part 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 Part 2 may well be justified to assist in a purposive interpretation. However, this is against the

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

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 Part 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 Part 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 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.

[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 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 (that is, 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]

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111 *Man O'War Station,* above n 46, at [48].
112 *Wairoa River Canal Partnership*, above n 46.
113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

[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 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 Part 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]–[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 Part 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.

117 (28 August 1990) 510 NZPD 3950.

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 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.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

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118 (4 July 1991) 516 NZPD 3019.
119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

(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 Part 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 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".

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122 RMA, s 58(a).
123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
124 At 19.
125 At 22.

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]

> 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

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126 At 23.
127 At 23.

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 (s 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 s 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:

> (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: ...

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with s 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

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128 Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

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 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 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 1 5 provided "more guidance" than other policies or constituted "starting points", but argued

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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).
140 *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

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 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.

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141 See [16] above.

[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 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 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

142 Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

> 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

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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].

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 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 Part 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 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

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146 See [63] above.
147 *New Zealand Rail Ltd*, above n 71, at 86.
148 At 86.

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 Part 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) ("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.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular s 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 s 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. Section 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 s 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

149 At 85.

the principles contained in Part 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 Part 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 Part 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 Part 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 Part 2 remains relevant. It does not follow from the statutory scheme that because Part 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 Part 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.

[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 Part 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

150 At 86.

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 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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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].
153 *King Salmon* (Board), above n 6, at [121]–[172].

> ...
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
> (2) A further evaluation must also be made by—
> (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 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

154 At [124].
155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).
156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

> 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 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

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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]).

158 *King Salmon* (HC), above n 2, at [174].

159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).

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 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

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160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

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

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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).

domain for a private 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

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165 *King Salmon* (HC), above n 2, at [171].

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.

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:

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 s 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 s 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,

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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.

this would 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 [unhandled character] development" in the NZCPS is taken directly from s 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 s 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:
>
> (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

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172 At [98]–[105] of the majority's reasons.

"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 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.

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173 Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

174 The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

[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 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.

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.

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175 At [144] of the majority's reasons.
176 See above at [195].

[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.

Orders

(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.

Appeal allowed/dismissed.

Solicitors for Environmental Defence: *DLA Phillips Fox* (Auckland).
Solicitors for King Salmon: *Russell McVeagh* (Wellington).
Solicitors for Sustain Our Sounds: *Dyhrberg Drayton* (Wellington).
Solicitors for Marlborough District Council: *DLA Phillips Fox* (Wellington).
Solicitors for Minister of Conservation and Director-General for Primary Industries: *Crown Law Office* (Wellington).
Solicitors for Board of Inquiry: *Buddle Findlay* (Wellington).

Reported by: Bernard Robertson, *Barrister*

ORIGINAL

Decision No. A 099 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of five references under clause 14 of the First Schedule to the Act regarding Variation 12 – Lakes A zone to the Rotorua Proposed District Plan

BETWEEN **TE ROOPU MANAAKI O TARAWERA** on behalf of **TUHOURANGI-A-IWI**

(RMA 404/02)

AND **RUAWAHIA 2B TRUSTEES**

(RMA 436/02)

AND **TE ARAWA MAORI TRUST BOARD**

(RMA 396/02)

Referrers/Appellants

AND **THE DIRECTOR-GENERAL OF CONSERVATION**

AND **THE BAY OF PLENTY REGIONAL COUNCIL**

Section 274 and 271A parties

AND **H D W MEROITI AND OTHERS**

(RMA 418/02)

Referrers/Appellants

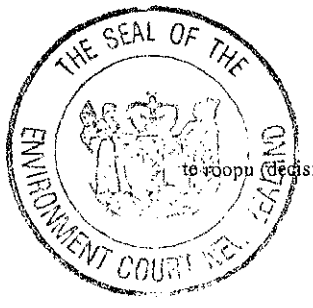
THE SEAL OF THE ENVIRONMENT COURT

AND	**TARAWERA LAKES PROTECTION SOCIETY INC**
	(RMA 293/96 and 390/02)
	Referrer/Appellant
AND	**LAKE OKAREKA RESIDENTS AND RATEPAYERS ASSOCIATION INC**
	Section 271A party
AND	**R H McLEAN**
	(RMA 375/02)
AND	**K ROYAL**
	(RMA 389/02)
	Referrers/Appellants and s.271A parties in RMA 390/02
AND	**THE ROTORUA DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R J Bollard (presiding)
Environment Commissioner A H Hackett
Environment Commissioner I G McIntyre
Environment Commissioner K Prime

HEARING at Rotorua on 9, 10, 11, 12, 13, 16, 17 and 18 February; 20, 21 and 22 April, 2004 (further submissions for appellant in RMA Nos. 293/96 & 390/02 lodged with leave on 10 May 2004, and draft consent order proposed to resolve in part RMA Nos. 404, 436 & 396/02 lodged on 28 June 2004)



APPEARANCES

P J Kapua and G A Rangi for Te Roopu Manaaki O Tarawera on behalf of Tuhourangi-A-Iwi, Ruawahia 2B Trustees and Te Arawa Maori Trust Board
D A Kirkpatrick for Tarawera Lakes Protection Society Inc
H B W Meroiti for himself and others
D M Simpson for Lake Okareka Residents and Ratepayers Association Inc
M Bodie for the Director-General of Conservation
P H Cooney and S P Ward for the Bay of Plenty Regional Council
H Nathan for R H McLean and K Royal (leave to withdraw on 9 February 2004 as s.271A parties in RMA 0390/02); T S Richardson for same parties at hearing of their own appeals in April 2004)
A M B Green and J D Young for the respondent

DECISION

Introduction and background

[1] These various proceedings have been brought by persons or bodies who lodged submissions with the Rotorua District Council in relation to proposed Variation 12 to the Council's proposed district plan regarding that part of the district known as the Tarawera Lakes area.

[2] The plan was notified originally on 17 December 1993. Numerous submitters sought significant alterations to the plan as it related to various lakes of the district and their catchments.

[3] The Council took the view that although an urgent need existed to develop new planning provisions for the lakes, the priority focus lay on progressing the plan to operative status, with a change to be introduced subsequently within a 2-year period as to the Tarawera Lakes area. Tarawera Lakes Protection Society Inc (the Society), under its former name Kaitiaki Tarawera Inc, was a devotedly concerned submitter at the time. The Society sought relief on appeal, contending that an appropriate resource management regime for the lakes area was too important a matter to undergo deferment as contemplated by the Council.

[4] The Society's case was heard before this Court in November 1997. Its position was upheld in essence; refer ***Kaitiaki Tarawera Inc v Rotorua District Council*** 4 ELRNZ 181. Deficiencies were identified in the plan concerning (amongst other things) inadequate recognition of issues under s.6 of the Resource Management Act 1991 (RMA). In declining the Council's request for a delayed programme, in preference to introducing a variation to the plan forthwith, it was observed (187):

> After due deliberation, we are confirmed in the view that revision of the plan as regards the defined area of concern to the appellant should not be left until after the plan becomes operative ... . As the first plan for the district under the RMA, we would be failing in our duty as an appellate body if, in effect, we were to do no more than to acknowledge that the plan requires significant amendment, while simply leaving it to the Council to address the plan's shortcomings once it is operative.

And later (192):

> ... the lakes' environment is a precious heritage to be cherished and protected. The RMA, properly invoked and applied, demands no less. At the district planning level commensurately careful consideration must be afforded because of the environment's fragile nature, the ease with which the natural character of the general area can be altered (whether by development sporadically located or by on-going expansion of existing settlements), and the comparative difficulty of stemming, let alone reversing, established changes and accompanying trends. By these remarks we do not mean to convey that a dead hand must be placed on the Tarawera Lakes and their catchments designed to maintain the status quo at all costs. What must be done, however, is to analyse and determine the degree of change that can be accommodated within the planning period so that the natural and physical resources of the area will be sustainably managed. The inherent attributes of the area must not become eroded, either in character or by degree, with an outcome evidencing non-sustainability and a discounted legacy for future generations.

And later again (199):

> It may be that part of the difficulty of the plan's structure in relation to the lakes relates to the plan's prescriptive framework, reflective of its similarities with the transitional plan prepared under the former Act. Had the new plan contained greater emphasis upon the meeting of performance standards to avoid, remedy or mitigate identified concerns within the plan's policies, it may very well have better met the ends of protecting and maintaining the lakes' environment, while providing suitable direction for sustainable growth.
>
> We do not propose to analyse the plan at further length because that would mean moving too far beyond matters traversed during the hearing, and it would run the risk of advancing a plethora of views or ideas liable to shape or influence the variation too greatly, when the responsibility for preparation must be left to the Council. We need only add that we have every confidence that the Council

will approach its task with due care in the light of this decision and with due regard to the RMA's dictates.

[5] The 1997 proceedings were adjourned pending notification of a variation to the plan in the light of this Court's findings. It was directed that the appeal be "listed for further hearing in due course in conjunction with any appeals that the variation may produce".

[6] The hearing of the current references occurred over two phases – the first in February this year, followed by the second in April. At the outset of the February sitting, Mr Kirkpatrick confirmed, as counsel for the Society, that the Court's determination of the Society's subsequent reference concerning Variation 12 "will effectively deal with any legal or substantive issue that might remain from the original proceeding". There is no outstanding costs issue in relation to the 1997 hearing, but the Society's original proceedings are still extant, inasmuch as the decision on those proceedings was expressed to be interim. However, with the Council having proceeded to bring down the variation, the relief sought under the earlier reference is effectively satisfied, with the earlier proceedings having no real continuing purpose. In effect, the focus is now shifted to the concerns raised in the later reference bearing on particular provisions of Variation 12 as propounded, while taking into account the Council's decisions on submissions.

Appeals on behalf of Tuhourangi and others

[7] Counsel for Te Roopu Manaaki O Tarawera (on behalf of Tuhourangi-A-Iwi), Ruawahia 2B Trustees and the Te Arawa Maori Trust Board indicated at the first hearing phase that a basis of settlement in principle had emerged through discussion between her clients' representatives and officers of the Council, albeit late in the day. This was an unexpected development, given the very lengthy period earlier available for consultation and negotiations between the parties. Be that as it may, on receiving confirmation from counsel for the Council as to the likelihood of settlement, the proceedings were adjourned by consensus in the expectation that a draft consent order would be submitted at the second hearing phase. Counsel for the Society acknowledged that his client had no wish to be heard, let alone introduce any note of dissent over the references concerned. In short, it was common ground that the concerns of other parties in the various proceedings before the Court were not in conflict with the prospect of agreement being achieved as to

the particular blocks of land of specific interest to the iwi appellants within the lakes' environment.

[8] A draft consent order was submitted for the Court's consideration on 28 June 2004. Unfortunately, the proposed order did not embrace all matters at issue to enable the relevant references to be finally disposed of. We confirm, however, having considered the draft order and accompanying memorandum of counsel, that the terms of the draft appear appropriate in better describing and providing for relationship of Maori with the lakes area. The proposed consent order is thus upheld and formally issued contemporaneously with this decision.

[9] The remaining issue outstanding under the relevant references relates to the basis of providing for a structure plan approach to the future land use of particular sites under the referrers' ownership, interest or control. We reserve that issue for specific consideration under a separate decision in due course (should the parties' continuing negotiations fail to produce agreement).

Appeal of H B W Meroiti and others

[10] On 22 May 2002, Mr H D W Meroiti, a submitter to the variation, filed a reference on behalf of the Ngati Tutenui trustees. The trustees are mana whenua owners and beneficiaries of various blocks of Maori freehold land within the scenic environs of Lake Okataina.

[11] In a broad sense, the reference appeared to seek the exclusion of all ancestral lands and resources from the variation, having regard to ancestral mana whenua and customary rights of ownership, and the Treaty of Waitangi. During the hearing, however, it became evident that the reference was actually directed to two central issues - the first concerning the adequacy of consultation undertaken by the Council during preparation of the variation; and the second, in relation to the transfer or delegation of powers under ss.33 and 34 of the Act. We address each in turn.

Consultation

[12] Evidence was adduced for the Council as to the consultation undertaken with iwi authorities, tribal runanga and the general public. We accept that the variation's

preparation was made known on a wide front, with the Council wishing to consult with various sectors of interest within the community, including particularly, relevant Maori interests in accordance with clause 3 of the First Schedule to the RMA. The Council understood that the Maori Trustee was the appropriate person to be notified in relation to the land blocks at issue under the present reference. But Mr Meroiti's concern in response was that the persons actually involved in administering the blocks of land in question did not receive notice, either directly from the Council or through the Maori Trustee.

[13] Mr S G Colson, a Council planning witness, commented in cross-examination that the Council had made other efforts to contact tangata whenua interests concerned with the lakes, without relying merely on the written communication sent to the Maori Trustee and other addressees. It was pointed out that contact had otherwise been made with representative Maori bodies or interests involved with the area, such as the Te Arawa Maori Trust Board and Tuhourangi. Consultation was also undertaken with members of the Lake Okataina Scenic Reserve Board who appeared generally supportive of the variation.

[14] Mr Meroiti proceeded to claim that, as a beneficiary in respect to the blocks of land in question, he, and indeed all others with beneficial interests in the blocks, should have been directly notified or consulted by the Council with regard to a meeting over the variation, attended by different Maori interest representatives, but not by the trustee owners of the relevant blocks, nor by himself as a beneficiary.

[15] In the course of his evidence, Mr Meroiti referred to the difference between a trustee owner and a beneficiary in relation to the same block of land. As he put it, an owner's name, including owners by succession, may be shown on the list of owners held by the Maori Land Court, but a beneficiary is someone with genealogical roots back to an eponymous or founding ancestor connected with the land concerned.

[16] Against that definition or background, it was apparent that a comparatively large number of beneficiaries was likely to exist, by contrast with the trustee owners. Indeed, Mr Meroiti went on to state that "... the tangata whenua or beneficiaries may now number into thousands, and most of Te Arawa who whakapapa to the eight sons of Rangitihi could be eligible to be a beneficiary to Tarawhai, the ancestor to the lakes and lands in ... Okataina". And he acknowledged that various beneficiaries could be

overseas or elsewhere in the country, and that it was most likely that only the trustee owners themselves could identify the persons entitled to claim status as beneficiaries, and have the means of ascertaining their whereabouts.

[17] It was submitted for the Council that the letter sent to the Maori Trustee advising of the meeting to discuss the variation was reasonable in the circumstances, on the basis that the Maori Trustee was in a position to notify the trustee owners who, in turn, could notify the beneficiaries.

[18] Plainly, it was quite unrealistic to expect the Council to contact every individual beneficiary of the blocks of land concerned. However, it may be that the Council should have obtained details from the Maori Trustee concerning the names and whereabouts of the trustee owners, rather than simply rely on the Maori Trustee to act as the conduit.

[19] Be that as it may, at the end of the day, despite Mr Meroiti's concerns and misgivings, it was evident that he was representing the interests of the trustee owners and beneficiaries of the land concerned, and that he was fully apprised of the issues relating to the land and the variation in presenting detailed evidence on behalf of all sectors of interest.

Transfer and Delegation of Powers

[20] All land is subject to the RMA, save for exceptions provided for in s.4 as follows:

> (2) This Act does not apply to any work or activity of the Crown which –
>
> (a) Is a use of land within the meaning of section 9; and
>
> (b) The Minister of Defence certifies is necessary for reasons of national security.
>
> (3) Section 9(1) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act (other than land held for administrative purposes) that –
>
> (a) Is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act; and
>
> (b) Does not have a significant adverse effect beyond the boundary of the area of land.

[21] No exception under s.4 applies to the blocks of land in the present case. Hence the blocks are subject to land use controls under the procedures and processes of resource management provided for under the Act.

[22] There are various avenues for the involvement of Maori interests in the development of a proposed district plan (or in this case the variation), thus enabling the views of tangata whenua to be advanced and values assessed and provided for. On the other hand, none of the available means provides that an iwi authority may simply elect to take over the Council's resource management function in respect to Maori owned land such as the subject blocks. No mechanism exists under which an iwi authority can unilaterally opt to assume responsibility for decision-making and management of resources under the Act.

[23] Mr Meroiti drew attention to ss.33 and 34 of the Act as to the transfer and delegation of powers in certain circumstances. And he sought that such a transfer or delegation of powers be made to an iwi authority or authorities within the lakes area.

[24] Sections 33 and 34 provide as follows:

> **33. Transfer of Powers -**
> (1) A local authority may transfer any one or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.
> (2) For the purposes of this section, "public authority" includes any local authority, Iwi authority, Government department, statutory authority, and joint committee set up for the purposes of section 80.
> (3) Repealed, as from 1 August 2003, by s 12(2) Resource Management Amendment Act 2003 (2003 No 23).
> (4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—
> (a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and
> (b) Before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and
> (c) Both authorities agree that the transfer is desirable on all of the following grounds:
> (i) The authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty:
> (ii) Efficiency:
> (iii) Technical or special capability or expertise.

(5) [Repealed, as from 1 August 2003, by s 12(2) Resource Management Amendment Act 2003].

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

34. Delegation of functions, etc, by local authorities

(1) A local authority may delegate to any committee of the local authority established in accordance with the [Local Government Act 2002] any of its functions, powers, or duties under this Act.

(2) A territorial authority may delegate to any community board established in accordance with the [Local Government Act 2002] any of its functions, powers, or duties under this Act in respect of any matter of significance to that community, other than the approval of a plan or any change to a plan.

(3) Subsection (2) does not prevent a local authority delegating to a community board power to do anything before a final decision on the approval of a plan or any change to a plan.

(4)-(6) [Repealed, as from 1 August 2003, by s.13 Resource Management Amendment Act 2003[.

(7) Any delegation under this section may be made on such terms and conditions as the local authority thinks fit, and may be revoked at any time by notice to the delegate.

(8) Except as provided in the instrument of delegation, every person to whom any function, power, or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, or duty in like manner and with the same effect as the local authority could itself have exercised or performed it.

(9) Every person authorised to act under a delegation under this section is presumed to be acting in accordance with its terms in the absence of proof to the contrary.

(10) A delegation under this section does not affect the performance or exercise of any function, power, or duty by the local authority.

[25] No functions or powers of local authorities (as far as this Court is aware) have been transferred to iwi authorities under s.33 to date. Potentially, it would be possible for an iwi body to assume responsibility of the kind urged by Mr Meroiti, subject, of course, to due satisfaction of the section's requirements. Importantly, however, the repeal of s.33(3), (which provided that a local authority that transferred any function, power or duty under the section continued to be responsible for the exercise thereof), means that

the exercise of any transferred function or power will carry with it full responsibility, including cost liability.

[26] It was submitted for the Council that a decision to transfer powers would be a decision of the Council of an executive kind, rather than a matter for determination within the submission and appeal process under the variation. In short, it was contended that such a decision would essentially relate to the governance structure of the Council and call for a related policy decision.

[27] We agree that for the purposes of the present appeal it is beyond the jurisdiction of this Court to direct the Council to transfer its function as planning authority as sought by Mr Meroiti. We also consider that the Council itself was not obliged to deliver a decision on Mr Meroiti's original submission for himself and others, dealing with policy issues as to when and what basis the Council might invoke the section in promotion of a transfer. Nevertheless, it was indicated before us that the Council is open minded to the possibility of transferring carefully selected and circumscribed functions or powers to an iwi authority or authorities at some future point, but that the transfer process is a lengthy one demanding full consultation and public consideration.

[28] In commenting upon this Court's jurisdiction, Randerson J had this to say in ***Hauraki Maori Trust Board v Waikato Regional Council*** (HC, Auckland Registry, CIV 2003-485-999, 17 December 2003) at paragraph [21] of the judgment:

> It is beyond the jurisdiction of the Environment Court to direct that a local authority (whether a regional council or a territorial authority) must transfer its powers under this section. Apart from anything else, an essential pre-requisite to the transfer of powers is the agreement of the transferor and transferee. The Environment Court has no power to force an unwilling local authority to transfer its power. Here the proposed Regional Coastal Plan as notified in 1994 provides in section 17.1.2 that the Council will "consider the transfer and/or delegation of RMA functions or the powers or duties in relation to the management of those characteristics which have been identified in the CMA as being of special value to the tangata whenua". A provision of that kind is lawful but I have no doubt that the Trust Board's proposition in the present case is beyond the power of the Environment Court to grant. No transfer of powers is possible until all the conditions of s.33 are met.

[29] For the reasons advanced by His Honour, we reject the relief sought based on s.33 of the Act. Turning to s.34, regional and territorial authorities generally have not chosen to delegate RMA functions to council committees comprising iwi representatives,

although there is a precedent example, with the West Coast Regional Council having delegated some form of decision-making rights to the Komiti Rangapu o Te Tai Poutini: see *Proposed Guidelines for Local Authority Consultation with Tangata Whenua,* Parliamentary Commissioner for the Environment (June 1992) pp.10-11.

[30] Under the variation, the Council has indicated its willingness to consider the transfer or delegation of powers under ss.33 and 34, in Section 6 (Methods other than Rules) which states:

> M1.0 Tangata Whenua
>
> M1.1 To consider transferring, where appropriate, functions, powers and duties to Iwi authorities in terms of section 33 of the RMA
>
> M1.2 To consider delegating, where appropriate, functions, powers and duties to a Committee of Council comprising the relevant Tangata Whenua representatives in terms of section 34 of the RMA.

[31] The Council formed a Committee called the Te Arawa Standing Committee in 1993, which was formally elected to assist with matters such as the transfer or delegation of powers and functions in a policy advisory capacity. We gather that the Committee is intended to facilitate greater involvement of Te Arawa in particular, and Maori in general, in the Council's decision-making processes. That Committee was involved in regular meetings to consider reports detailing the Council's approach in providing for matters under ss.6(e), 7(a) and 8 under the variation. The Committee also provided a forum through which representatives of Maori were informed of the variation process and its intended outcomes.

[32] The Council's position over possible delegation is as follows. Although the Committee is an integral part of the Council's governance structure, thus far no formal decision has been made to transfer or delegate decision making-powers to the Committee under ss.33 or 34 of the Act. However, the Council is prepared to consider the possibility of transfer or delegation as recorded in Section 6 of the variation. In those circumstances, we do not consider that we should dictate to the Council over the delegation aspect, even if that matter, in the light of the Committee's existence, is distinguishable from the transfer issue. In essence, the question is one of governance policy within the province of the Council rather than this Court.

[33] Mr Meroiti did not identify a specific iwi authority or authorities to which powers could be transferred, but he did point to iwi management plans as a suggested means through which the Council could delegate or transfer functions or powers under the RMA. In response to questions by the Court, Mr Meroiti explained that the powers sought to be transferred were those relating to the sustainable management of Maori-owned land within the Lakes A zone established under the variation.

Iwi Management Plans

[34] Both regional councils and territorial authorities are required to have regard to any relevant planning document recognised by an iwi authority in the following cases:

(a) The preparation or change of a regional policy statement; s.61(2)(a)(ii);

(b) The preparation and change of regional plans (including regional coastal plans); s.66(2)(c)(ii);

(c) The preparation and change of a district plan; s.74(2)(b)(ii).

[35] Those are the only references to iwi planning documents in the Act. Although such documents could form an important facet of planning, the Act does not prescribe a framework for their preparation, content, or scope. Mr Meroiti contended that it was the Council's function and task to undertake the preparation of an iwi management plan. However, we are unable to identify the imposition of any such duty and responsibility upon the Council under the legislation. Rather, we accept the position espoused on behalf of the Council that there is good reason in principle for iwi to be free to prepare and develop iwi management plans, bearing in mind that it is iwi themselves who fully understand their special concerns, needs, interests and aspirations, and how iwi management plans can suitably recognise and provide for them.

[36] The Ministry for Maori Development has published a guide to assist Maori to develop plans: *Mauriora Ki Te Ao: An Introduction to Environmental and Resource Management Planning* (1993). This details a process for development of an environmental inventory as a first step to the preparation of a full plan. Furthermore, through the Ministry for the Environment's 'Sustainable Management Fund', a toolkit under the description 'Te Raranga A Mahi', is available to assist whanau, hapu and iwi to develop environmental management plans.

[37] Not many iwi management plans have been prepared to date. An example of such a plan, wide-ranging in scope, is that prepared by Ngai Tahu for the Canterbury region: Tau, Te Maire et al, *Te Whakatau Kaupapa Ngai Tahu: Resource Management Strategy for the Canterbury Region* (Aoraki Press, Wellington, 1990), which describes the runanga's association with freshwater resources, the ways in which participation is sought in freshwater management, and the desired environmental outcomes.

[38] The variation includes the following policy specifically directed towards iwi management plans:

> Policy P3.5
>
> To support the development of Iwi management plans and have regard to any resource management provision included in them in preparing future plan changes or reviews of this plan.

[39] It is the Council's case that a proactive approach has been adopted for facilitating the development of iwi management plans within the lakes area, evidenced by the provision of funding assistance for iwi seeking to develop such plans. In this connection the Council has been mindful of the impeding factor of financial constraints liable to affect iwi. Local Maori interests have been invited to put forward proposals for funding the development of iwi management plans, with the Council having received four applications for funding (at the time of our hearing these proceedings), three of which have been accepted.

Conclusion

[40] Against the foregoing reasons, explanatory discussion, and analysis, we are not persuaded that there is justification for this Court to intervene. The Council has shown in various ways, such as the provisions of the variation earlier cited, the existence of the Te Arawa Standing Committee, the provision of funding for iwi management plans, and through evidence (which we accept) of its open-mindedness concerning future possibilities of transfer or delegation (subject to appropriate process), that its overall approach is appreciative of, and geared to have regard to, the issues raised by Mr Meroiti.

[41] In practical terms, we are without jurisdiction to require the Council to take action under s.33. And for reasons earlier given, we decline to dictate to the Council over the timing and extent of any delegation to the relevant Standing Committee under s.34. As to the development of an iwi management plan or plans for the lakes area, we find that the stance of the Council is reasonable and proper, incorporating, as it does, provision for support funding.

[42] As a footnote, we observe that in *Whakarewarewa Village Charitable Trust v Rotorua District Council* W61/94 (PT), a view was expressed that, owing to special circumstances prevailing at the village, control ought ideally be vested in an iwi authority under s 33. However, because no such authority had been established, a kaitiaki role had to be exercised by the Council. The circumstances which would have made such a transfer particularly suitable were said to include the nature of the land interests held, the existence of areas of common ownership, and "a people with a bond of common ancestry". Nevertheless, the Planning Tribunal (now this Court) recognised that a decision to initiate an iwi management plan was not one for the Tribunal to determine.

Appeal by Tarawera Lakes Protection Society Inc.

[43] The Society's reference bearing on Variation 12, in the form originally lodged, was wide-ranging and imprecise as to the relief sought. After considerable discussion and negotiation, it became apparent to the Council, through its counsel, that the matter basically at issue was the appropriateness of provisions in the variation bearing on Bush Settlement areas in proximity to existing settlements at Lakes Okareka and Tarawera. A proposed new Settlement Extension area at Okareka was also challenged. Thirdly, the Society considered that the variation suffered from the lack of a "vision statement", which it was thought was needed to encapsulate the outcomes which the variation, as part of the plan, would seek to achieve.

[44] The Society's concerns on these matters was summarised in Mr Kirkpatrick's opening thus:

> The Bush Settlement areas and the additional Settlement area would effectively increase the area of the Okareka and Tarawera settlements, contrary to the

> Objectives and Policies of the Variation and the evidence of both the Council and the Society which stress the preservation of the natural character of the Lakes area and the containment of the settlements as the purpose of the Variation's provisions.
>
> A vision statement should be included in the Plan to give clear guidance on the approach to be taken to discretionary and non-complying activities. That statement would preferably be a stand-alone passage at the front of the Lakes Area provisions which clearly articulated the outcome which the Council envisages for the area: what one may reasonably expect the area will look like in 20 years' time.

[45] Support was evinced for the Society's position as to the Bush Settlement and Settlement Extension areas at Okareka by the Lake Okareka Residents and Ratepayers Association Inc (the Association), represented by Mr Simpson. As stated in counsel's opening:

> (The Association) supports the policies and objectives of the Variation but not this specific outcome at Okareka, namely two Bush Settlement areas and the proposed Settlement Expansion Area. The opposition to the specific areas identified for development are opposed on the basis:
>
> (a) that further settlement where proposed would prejudice important landscape values and is thereby inherently inconsistent with the planning objectives and policies being proposed;
>
> (b) that no further development should take place until such time as water quality issues have been resolved.

[46] In our hearing of submissions and evidence for the Council, the Society, and the Association at the February hearing phase, it became apparent that, if the Court were to uphold the appellants' contentions as to the areas concerned at Tarawera and/or Okareka, that would bear upon the determination of two other references concerned with certain aspects of the proposed Bush Settlement area provisions – namely, proceedings lodged by R H McLean (Tarawera) and K Royal (Okareka). Counsel for the latter parties had sought and been granted leave to withdraw from participation in the hearing of the Society's reference. Even so, it became evident that the McLean and Royal references would need to be heard before arriving at a concluded view over the appropriateness of the Bush Settlement area provisions, both in terms of their planning framework and their particular locations. Those references were thus scheduled for hearing at the April sitting, so that all relevant interrelating issues could be considered in context. Our views and determinations of those proceedings are later expressed.

Broad strategy of the Variation

[47] Evidence was called for the Council, designed to elucidate the depth of investigation and analysis in preparing the variation; also to explain its detailed framework. As acknowledged in evidence, the variation is a complex document, reflective of the significance of the lakes area. All parties were at one over the area's special character and high scenic attractiveness from a general perspective. And they were thus supportive of the broad thrust and intent of the variation against the background of this Court's decision in 1998.

[48] The Council has successfully settled all other references challenging various aspects of the variation, the major outstanding issue being the retention or otherwise of the Bush Settlement areas so-labelled. Before passing to discuss the bush settlement concept, it will be helpful to reproduce the summary provided by Mr M S Kivell, an independent resource management consultant called for the Council, as to the variation's strategic approach for achieving the Act's purpose:

> Proposed Variation 12 is a comprehensive resource management planning document. Taken as a whole the provisions seek, in the context of Part II of the RMA to recognise, protect and enhance the natural and physical resources that are significant, while maintaining the ability of communities to provide for their social, economic and cultural wellbeing. The Plan is modelled on the pressure-state-response model that comprises the key components for District Plans required by section 75 of the RMA: namely:
>
> | | |
> |---|---|
> | The pressures on the environment: | Significant Resource Management Issues |
> | State of the environment: | Anticipated Environmental Outcomes and Monitoring |
> | | Objectives |
> | | Explanation and Principal Reasons |
> | Response: | Policies, Methods and Rules |
>
> In this context the mechanisms adopted in the Variation to achieve the promotion of sustainable management are:
>
> - Delineating Policy Areas, with the "Sensitive Landscape" Policy Area defining the outstanding natural features and landscapes within the Lakes A Zone.
> - Providing generic environmental policies that contain environmental imperatives relevant to the entire Lakes A Zone.

- Defining Management Areas (Settlement, Bush Settlement, Sensitive Rural, Less Sensitive Rural, and Protection) with detailed supporting policies; and

- Providing rules, standards and assessment criteria that set specific and therefore definable thresholds, and criteria to aid decision making so as to maintain and enhance the contributing values of the catchments that make up the Lakes A Zone as an area of outstanding natural features and landscapes. This framework also seeks to enable communities to provide for their social, economic and cultural well being.

The built development is confined to the nominated settlements of Tarawera and Okareka. Built development outside these settlements is limited to selected locations (Bush Settlement or Rural heartland) where the landscapes can absorb change and for this development to be in a cluster rather than in dispersed form.

[49] Mr Kivell went on to describe the Council's statutory obligations in preparing and propounding the variation, including the need for integration with other hierarchical policies and planning instruments. From his evidence and that of others adduced for the Council, extensive in the totality, including the detailed s.32 analysis report produced, we find that the Council has been thorough and systematic in the variation's process. Subject to our determination of the specific outstanding issues under the headings below, the variation warrants this Court's endorsement, bearing in mind the significant effort entailed in its gestation and promotion.

The concept of Bush Settlements

[50] In the light of the 1998 decision, and the investigative analysis undertaken during the variation's formation, the following characteristics of the lakes area became evident:

- The overwhelming high level of natural character, given the number of inhabitants;

- The outstanding nature of the landscapes and natural features;

- The strong patterns of indigenous vegetation;

- The relatively low impact nature, both ecologically and visually, of settlements within the area.

[51] With those qualities in mind, the possibility of a new zone within the lakes area emerged under the label "Bush Settlement". Essentially, the aim was to encourage revegetation with indigenous species appropriate to areas so zoned, in order to enhance the landscape and promote the reduction of pastoral runoff, thus assisting water quality.

[52] Areas in proximity to the two main settlements at Lakes Tarawera and Okareka were analysed under the s.32 report accompanying the variation as notified. A series of landscape patterns or visual layers was identified as follows:

> (a) The lake edge – generally represented as a layer of tall vegetation on the esplanade reserve or the edge of properties extending to the lakes,
>
> (b) The settlement – itself comprising houses and associated buildings, hard stand areas, and curtilages associated with the settled parts of the lake shores;
>
> (c) The vegetated backdrop – areas behind the settlements (when viewed from each lake) dominated by vegetation, predominantly indigenous. This layer provides a dark green background to the settlement, while the height of the vegetation in conjunction with vegetation within the settlement areas, casts shadows, thus reducing the visual prominence of any development within the vegetated areas.
>
> (d) The predominantly pastoral backdrop, in many cases to the skyline. The pastoral areas behind the vegetation backdrops are also scattered with areas of vegetation, both exotic and indigenous, and provide a reasonably consistent land use pattern for the skyline behind the settlements. The pastoral land cover is generally associated with the flat tops of rhyolite domes and ignimbrite plateaus within the Tarawera, Okatiana and Okareka catchments, offering further consistency and the patterning of the landscape.

[53] The "layerings" as above are recognised under the variation as contributors to the coherence of the landscape, and to the inherent qualities along the lake edges, in turn extending through the settlement layer, then to the vegetated layer above each settlement, and finally to the open pasture areas beyond.

[54] In essence, the bush settlement concept is founded upon a perceived opportunity to protect and enhance the indigenous vegetation layer within the wider layered landscape as described, while allowing for a limited degree of low density built development designed to blend in with the vegetated surrounds. In instances where the "layer pattern' is fragmented, the aim is to improve continuity and consolidate the vegetated layer effect. Enhancement is sought, both visually on the one hand, and on the other hand as between sensitive lake margins and areas of rural land beyond liable to generate pastoral run-off.

[55] In order to maintain the general pattern of lower density development at limited elevations, incorporating a relationship with the existing settlements rather than with higher more remote slopes beyond stretching as far as the skyline, any buildings above

what was termed the 380m contour are to be avoided as a matter of policy. We return to this aspect later.

Should the concept be adopted under the variation?

(a) Lake Tarawera

[56] Extensive evidence was called for the Council, supportive of the Bush Settlement areas proposed for Tarawera. It became plain as the hearing progressed that substantial work had been devoted to the identification of the location and extent of the areas concerned – such that we are persuaded that, with the comprehensive performance standards to be applied, the concept merits endorsement. Witnesses for the Council addressed each of the Bush Settlement areas in detail, including the rationale supporting each area's selection, and the need for the framework of rules designed to support and bear out relevant polices and objectives (subject to various suggested amendments that emerged during the hearing as contained in the Appendix to this decision). With those various amendments imported, we consider that the Council has made out a good case for maintaining the proposed zoning provisions at Tarawera, despite the Society's staunch case in opposition.

[57] The Society was particularly concerned about the possibility of "failure to perform" as regards intended planting, with the result that development could occur (albeit below the 380m contour) without a properly established vegetated surrounding backdrop to achieve the outcome intended. We are satisfied, however, that the Council has been very mindful of the nationally important attributes of the lakes area in the conception and detailed planning of the Bush Settlement areas; furthermore, that it is committed to ensuring that the pivotal aim of bush establishment is met as a prerequisite, so that due protection is afforded from inappropriate subdivision, use and development within the meaning of s.6(a) and (b) of the RMA.

[58] According to the Society, the Bush Settlement areas would be susceptible to pressure through consent applications by landowners seeking to go marginally or incrementally beyond the variation's parameters. In particular, concern was expressed that a proposed policy of avoiding buildings and structures above the 380m contour would not be robust enough to ensure that the non-presence of buildings at higher elevations would be reasonably assured – it being common ground that such a result

would not be consistent with the variation's intent based on recognition and consolidation of a vegetated layer effect, such layer incorporating a carefully controlled level of development within the 380m contour, and with buildings being avoided at higher elevations within the panorama observable from the lake.

[59] The "lack of strength" argument was challenged on behalf of the Council, bearing in mind the following passage from ***Auckland Regional Council v North Shore City Council*** [1995] 3 NZLR 18 (CA) where the Court stated at 23:

> 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 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. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of "policies". In our opinion they all fall within that term and are intra vires the regional council.

[60] In the light of that passage, we consider that the policy proposed in evidence for the Council, "to avoid the presence of buildings and structures above the 380m contour", is appropriate. We do not overlook that the variation does not seek to prevent revegetation above the 380m contour. Rather, it requires, as a minimum, revegetation to that limit. Were some revegetation to be extended beyond the contour, but without the presence of buildings above the limit, that would not, in our view, be visually unacceptable. While the layering effect is expected to be consolidated and enhanced with greater vegetation presence within the contour, some extension of vegetation beyond that limit will still marry with the vegetation generally below the contour. In fact it is unlikely that there will be any pronounced desire to plant within areas lying much beyond the contour given the cost associated, when any buildings above the limit are to be avoided under the policy mentioned.

(b) Lake Okareka

[61] As far as the issues regarding Bush Settlement and Settlement Extension areas at Lake Okareka are concerned, we consider that the proposed Lake Okareka Catchment Management Action Plan, promulgated by the Bay of Plenty Regional Council in December 2003, to be a document of fundamental strategic significance for the future of the lake and its catchment.

[62] In discussing the causes of water quality deterioration of the lake, the proposed plan for managing the lake's catchment states:

> Development within the catchment has resulted in the build up of nutrients in the lake waters and sediments. Sources include septic tank effluent, runoff and leaching from pasture and forest, stormwater runoff, rainfall and the internal Lake load that is released from the bottom sediments. This sediment load (has) built up over time. The majority of activities in the catchment will contribute to this load.

[63] In our view, until the governing parameters of the proposed plan are settled and, in turn, fed into the long-term community plans of both the Regional Council and the District Council, the Bush Settlement and Settlement Extension areas ought not be introduced at this point. Rather, planning for additional development at Lake Okareka (whether through Bush Settlement areas or otherwise) should proceed from the regional to the district planning level, not the reverse. It is important that the options set out in Chapter 2 of the proposed plan be carefully worked through, bearing s.6(b) of the RMA particularly in mind. For example, if the "Full Sewerage Reticulation and Treatment" option is approved, it could mean that some additional zoning of the kind applicable to the existing settlement and carefully located in relation to it, would be appropriate to promote the purpose of the RMA, as opposed to providing for Bush Settlement areas. Other options are raised as well in the proposed plan, which again may lead to other land use possibilities being considered for district planning purposes.

[64] In summary, the proposed Bush Settlement and Settlement Extension areas at Lake Okareka are not presently supportable in our view, given the need to address the broader issues under the proposed Catchment Management Action Plan. It is important that a logical path be followed as between the Regional Council's planning strategy concerning the catchment and its wellbeing, and the provision for any new zonings at the district planning level, such as those at issue in these proceedings.

[65] We particularly note the points made by Mr J J McIntosh, the Regional Council's Manager of Environmental Investigations, as follows:

> Dissolved oxygen in the bottom waters of Lake Okareka has become increasingly depleted over the period of the annual stratification (October – June). This will lead to increases in nutrient being released from the sediment if not addressed. There are indications that Tikitapu is also following this path.
>
> Increased nutrient inputs to Lake Okareka over decades have allowed an increase in the biology of the Lake, which is based on the single celled algae at

the bottom of the food chain. The Lake is still of good quality but if the sediments start returning nutrients back into the water at the June mixing then the quality will begin to become noticeably worse. Steps are being proposed in the Lake Okareka Action Plan to reduce the nutrient content of the Lake.

[66] We do not perceive the proposed Bush Settlement areas at Okareka as having comparable justification in relation to the concept of bush consolidation and "layering" as at Tarawera, having had the advantage of a comprehensive inspection of both areas following the hearing. We also perceive some force in the evidence of Mr RWS Stace on behalf of the Association, inasmuch as he was critical of the overall extent of the Bush Settlement areas proposed, given the size and nature of the existing settlement. We note, too, that while the Council undertook the investigation and analysis required under s.32 of the RMA prior to propounding the variation, not all Bush Settlement areas at issue before us were included in the notified version, but became added as the result of the allowance of submissions by individual landowners. Weighing the evidence for and against, we are not convinced that the proposed zoning of the largest area so added, located in the main not immediately adjacent to the settlement, was warranted.

[67] In the result, we find ourselves in agreement with the Society, supported by the Association, that the Bush Settlement and Settlement Extension areas proposed at Lake Okareka should be deleted from the variation – although we recognise that some bush settlement and/or settlement extension provision could be promoted in the future, provided such provision accords with the Act's purpose and principles, and marries with confirmed regional planning initiatives for the catchment.

Roading amenity issue

[68] In giving evidence for the Association, Mr Stace supported a reduction in the extent to which native vegetation may be removed from roadsides as a permitted activity. He spoke of the existence of such vegetation close to roads as "an attractive and valued feature of the zone, particularly within the settlements, where it contributes significantly to their special character". In the upshot, he expressed the view that the width of permitted vegetation clearance should be reduced by at least 1.4m.

[69] The witness called for the Council in response was the Council's Works Manager, Mr P D Dine. His responsibilities include management of the district's local roading network. Mr Dine pointed to objective and policy provisions relating to infrastructure

and utility services, with particular reference to public roading. On the one hand, the provisions indicated a concern for avoiding, remedying or mitigating adverse effects on the environment's natural character in the establishment and maintenance of public roading. On the other hand, the need was recognised for a safe and efficient roading network in terms of traffic movement, including provision for separate pedestrian and cycle traffic where appropriate.

[70] Mr Dine was of the opinion that a balance between those competing considerations had been achieved in the variation. He went on to opine that any reduction in dimensions shown on a diagram annexed to his brief of evidence would be likely to have an adverse effect on traffic safety. More specifically, he pointed out:

- Overhanging vegetation limits the forward sight distance restricting the ability of drivers to see oncoming vehicles. This is particularly important on narrow winding roads typical of some of the roads in the Lakes A Zone.
- Overhanging vegetation can also result in icing of roads particularly where shading prevents drying.
- Lack of drying of roads also causes premature failure resulting in higher maintenance costs.

[71] Mention was further made of the Council's responsibility under s.353 of the Local Government Act 1974 as to the taking of "all sufficient precautions for the general safety of the public and traffic and workmen employed on or near any road". We agree that this responsibility should not be discounted, let alone disregarded, in striking a balance for present purposes between safety concerns and the retention of roadside vegetation.

[72] We accept Mr Dine's evidence that, in the drafting of the variation, the particular character of the roads in the Lakes A zone, and the degree of permitted vegetation disturbance alongside them, was considered. The result was a dimensional diagram in rule 2.0 of the variation which differs from the standard applying elsewhere in the district. In particular, the "service corridor" for local roads within the settlements in the lakes area has not been liberally designed. Rather, it is minimally designed to meet present and foreseeable future requirements, given the environmental sensitivities bearing on natural character retention and enhancement.

[73] In the upshot, we conclude that Mr Dine's views, for the reasons he gave, were sound. His evidence amply sufficed to resolve any doubts or concerns raised for the Association.

[74] As a footnote, we observe that because of topographical constraints on Spencer Road, the Council proposes to construct a walkway on one side of that road only. The walkway is intended to cross from one side of the road to the other, save that at the crossing points it will, in a technical sense, be located on both sides of the road. Mr Dine thus proposed that a new rule 12.1.1(d) be introduced as follows:

> Any walkway on Spencer Road shall be on one side of the road except for any crossing points.

There being no good reason advanced in opposition to the foregoing, the proposed rule is upheld.

[75] We also endorse the diagram produced by Mr Dine as Attachment 2, under which all measurements are shown in metres in preference to a combination of metres and millimetres. Counsel for the Council is requested to submit a fresh annexure incorporating the amended diagram for inclusion in the proposed consent order in other proceedings concerning Environment BOP (RMA 0379/02) and other interrelated appeals.

The McLean case

[76] This reference is connected with a site specific development proposal at Lake Tarawera. The relevant land is of rural character at the eastern extremity of the proposed Bush Settlement area on Spencer Road. The referrer does not challenge the general approach of the variation in providing for Bush Settlement areas. Rather, the reference is directed to the 380m contour limit and seeks that development be permitted to occur on the referrer's land above the limit, but otherwise respecting the Bush Settlement provisions.

[77] Evidence was adduced for the referrer in which it was suggested that application of the 380m contour limit for the avoidance of development involves an element of broad predetermination, with an outcome that would not necessarily be appropriate in relation to the referrer's land. In evidence adduced during the hearing of the Society's case (at

which hearing the present referrer elected not to participate), it was persuasively stated by several witnesses for the Council that development above the 380m contour limit would detract from the natural character of the Lake's A zone, in that development above the contour was thought likely to be more noticeable from viewpoints in the vicinity.

[78] In coming to weigh the evidence called for the present referrer, both from a planner and landscape architect, as well as counter evidence called for the Council, we had the benefit of a comprehensive inspection of the referrer's property and area surrounding following the hearing. Moreover, we had the benefit of viewing the various Bush Settlement areas proposed by the variation from out on the lake itself, following the hearing of the Society's reference.

[79] After due deliberation, we are not persuaded that there is justification for varying the proposed policy of avoidance of buildings above the 380m contour in relation to the referrer's property. We have earlier made mention of the "layering" effect that the bush settlement concept seeks to promote; and while the variation does not exclude the possibility of bush being extended beyond the contour limit, we agree with Council witnesses that the siting of buildings above the limit, albeit within bush surrounding, would, on balance, produce an increased awareness of built form at the higher elevation, both when viewed from vantage points nearby and from the lake itself. Obviously, the foregoing conclusion involves a value judgment which must inevitably take account of the important natural values inherent within the Lakes A zone and recognised under s.6 of the RMA.

[80] Having considered all that was said in support of the referrer's case, we find that the Council's case is made out for retaining a clear policy of avoidance of built form above the 380m contour for the Bush Settlement areas at Tarawera, including the referrer's property.

[81] As to the suggestion that the variation is too prescriptive in its parameters concerning the number of sites that may be developed within Bush Settlement areas as discretionary activities, as opposed to non-complying activities, we accept Mr Green's submission for the Council that development opportunity within the Lakes A zone should be "subject to clear and precise limits given the national importance of the area". As counsel noted:

That obligation relates back to the statutory requirements under section 5 of the RMA and Part II generally, and was also a clear direction of the Court in its Decision A7/98.

[82] In summary, nothing adduced on behalf of the referrer sufficed to persuade us that the Council's approach in planning and providing for the Bush Settlement areas with their related framework of controls, (subject to refinements set forth in the Appendix annexed to this decision), requires amendment as regards the referrer's property. Rather, we gained the impression that the referrer's reference was basically driven by the referrer's individual aspiration to achieve a greater number of bush settlement lots for development purposes than would otherwise be possible by respecting the 380m contour limit.

The Royal case

[83] The hearing of this reference occurred, by agreement, at the same time as the McLean reference. As in the case of McLean, the referrer chose not to participate in the hearing of the Society's reference. While not challenging the general approach of the variation, the referrer simply seeks that a specific area of his rural property fronting the main road, in the vicinity of the lake, be zoned as a Bush Settlement area.

[84] When the variation was notified, such an area was identified on part of the property. However, the referrer did not support the particular location and sought its deletion, with another area on his property being zoned Bush Settlement instead. In the upshot, the Council decided to delete the relevant zoning affecting the referrer's property, but without providing for any other area in lieu. The reference to this Court was accordingly lodged.

[85] As with the McLean property at Tarawera, we had the benefit of a site inspection of the present referrer's property at Okareka following the hearing. That inspection confirmed the view we had gained from evidence called for the Council that the referrer's chosen area had no particular attribute readily supporting its demarcation for bush settlement purposes. In fact, irrespective of the view reached concerning Bush Settlement areas at Lake Okareka generally in relation to the Society's reference, we would not have been prepared to uphold the zoning sought under the present reference, given its separated location in relation to the settlement area – the "immediate proximity"

factor being one stressed by the Council in looking to possibilities at Okareka for bush settlement purposes.

[86] As pointed out for the Council, the referrer's case lacked detail as to how the chosen area might be developed within the Bush Settlement zoning parameters. In general terms, the referrer's planning witness envisaged that, subject to comprehensive evaluation, some six or seven sites with a minimum lot size of 8000m^2 to 1ha could be provided.

[87] Accepting in concept that that could be achieved, we are not persuaded that the area at issue has any particular feature recommending it, whether in form or location, as to warrant its recognition as a Bush Settlement area. The referrer's farm property lies on the landward side of the road, with a public reserve stretching from the other side of the road to the lake edge. Given the presence of the reserve and mature trees within the general area, the referrer's rural land behind should be uniformly treated for zoning purposes, without proceeding to carve out and zone the portion suggested for bush settlement purposes.

[88] We therefore conclude that this reference should also be declined, but note that there may be justification, once the Regional Catchment Management Plan is further progressed, for rezoning part of the referrer's land immediately adjacent to the existing settlement, to allow for some limited extension of the settlement within the referrer's land fronting the road.

The vision statement issue

[89] An additional issue pursued by the Society was a request to include what was termed a Vision Statement in S.1.1 of the variation in lieu of the present text headed Reasonable Use. Section 1.0 itself is titled "Significant Resource Management Issues".

[90] The rationale for such a statement was said to be a felt need for a "general message" for members of the community to read and digest. The statement, so it was said, would serve an important purpose in reinforcing the major importance of the lakes area in general, and the consequential need to protect and where possible enhance the environment for the benefit of present and future generations.

[91] In answer, it was contended for the Council that the variation, read as a whole, provides a clear indication of careful attention to all aspects of concern under Part II of the Act, and the planning process founded on ss. 31, 32, 72 and succeeding sections bearing on district plans. In short, it was argued that the variation recognises and provides for the special qualities and attributes of the area. That, in turn, is reflected by prescriptive elements under parts of the variation, in order to achieve the Act's purpose against the background of the area's exceptional character and importance overall.

[92] It was pointed out that the area contains manifold features of difference, necessarily leading to the variation's complex framework. The controlling regime is founded on carefully conceived standards of performance, designed to protect the amenities of local areas and the lakes' environment generally.

[93] Having weighed the arguments for and against, we acknowledge and accept the concerns raised for the Council as regards introducing a statement of the kind suggested by the Society. As Mr Kivell put it, an "overarching statement of intent...would more than likely confuse and serve to blur the subsequent issue, objective, policy method and rule relationships". We note, too, the remarks of the Planning Tribunal in the *St Columba's Environmental House Group* case (W85/94), as to the perceived drawbacks and tendency to confuse in relation to a "vision chapter" under the regional policy statement for the Hawkes Bay region.

[94] For present purposes, Mr Kivell went on to outline certain explanatory-type amendments acceptable to the Council, which he was prepared to support. We endorse those as usefully elaborating on the variation's intent without an obvious risk of confusion. They are incorporated in the Appendix of amendments to the variation earlier referred to.

Site coverage

[95] On a final note we record that, as regards the permitted site coverage of up to $400m^2$ for buildings within a Bush Settlement lot, the additional evidence of the Council's planning witness, Mr G G Colson, provided us with reasonable explanation and assurance. That provision, viewed in conjunction with others, including particularly those directed to limiting building height and avoiding undue reflectivity or inappropriate

exterior wall surface treatments, combined to satisfy us that the Bush Settlement controls have been determined in the light of appropriate analysis, as to obviate any apparent need for introducing added refinement or ordering material change on this Court's part. It is expected, however, that the Council will carefully monitor consent performance and outcomes in relation to changes of land use in the Bush Settlement areas at Tarawera to ensure that the intent of the variation is achieved in maintaining and enhancing the quality of the environment associated with the lake, the importance of which needs no further repetition.

Leave to apply

[96] Leave is reserved to apply if anything requires further clarification or direction in relation to this decision, including matters raised in evidence for the Council as to amendments to the variation by way of refinement or correction, unopposed in themselves by other parties, but not covered in the attached Appendix.

Determinations

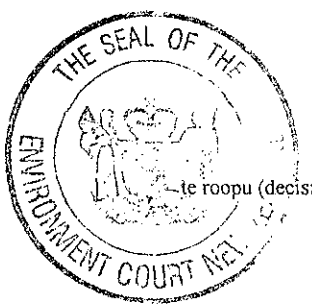
[97] RMA 404, 436 and 396/02 are allowed in part on the basis indicated at paragraph [8] above, and in terms of the contemporaneous consent order alluded to. Remaining issues under those references stand adjourned. If not settled, those issues will be heard and determined by the Court as a matter of priority.

[98] RMA 418/02 is dismissed.

[99] RMA 293/96 is without further purpose, and thus confirmed as being at an end.

[100] RMA 390/02 is allowed by deleting the Bush Settlement and Settlement Extension zonings at Lake Okareka, and by amending the controls for Bush Settlement areas at Lake Tarawera in accordance with the Appendix attached. We record that the variation as amended refers to the availability of a "Revegetation Guide" (which we have viewed in draft), helpfully formulated by the Council as a source of useful reference and practical assistance for persons wishing to achieve desired revegetation outcomes.

[101] RMA 375/02 and 389/02 are dismissed.

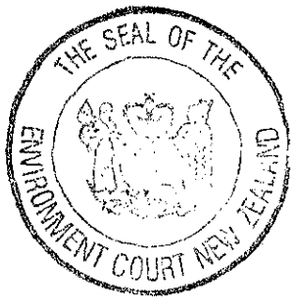


Costs

[100] Being appeals by way of reference to the Court on matters concerning the variation, our tentative view is that costs should lie where they fall. However, should there be an issue, memoranda for and against may be filed and served within successive periods of 15 working days.

DATED at **AUCKLAND** this 3rd day of August, 2004.

For the Court:



R J Bollard
Environment Judge

Appendix

AMENDMENTS TO VARIATION 12 REGARDING THE ROTORUA PROPOSED DISTRICT PLAN

Vision Statement

(1) Add an opening sentence at the beginning of S1.1 Significant Resource Management Issues to read:

> "The Lakes A Zone comprises a discrete planning unit within the Rotorua District. Part 20 of the District Plan contains specific provisions to manage the unique and sensitive attributes of the lakes' environment. The high degree of intactness of the lakes' environment contributes to the national significance of their catchments."

(2) Add the following text at the beginning of Section 2.0 Key Matters of National Importance:

> "The Significant Resource Management Issues described in Section 1.0, along with the matters of national importance in the Lakes A Zone set out below, followed by all the objectives and policies in Section 4.0 and anticipated environmental results and monitoring detailed in Section 7.0 form part of Council's vision for the sustainable management of the natural and physical resources of the Lakes A Zone."

(3) Add the following at the beginning of Section 4.0 Objectives and Policies:

> "The objectives and policies that follow are not limited to the current planning period and provide a framework for sustainable management over the ensuing planning periods to ensure that the attributes of the Zone will not become eroded, either in character or degree."

Carriageways / Walkways (See Rebuttal Evidence of Peter Dine at paragraph 3.5 and Attachment 2)

(4) Add a new sentence to rule 12.1.1 – Recreational Opportunities as (d) to be worded as follows:

> "Any walkway on Spencer Road shall be on one side of the road except for any crossing points."

(5) Adopt the revised carriageway diagram shown in Attachment 2 of Mr Dines Rebuttal evidence in respect of the following rules;

(i) A2.1.1

(ii) B2.1.1

(iii) B3.1.1

380m contour

(6) A new sentence be added to Policy 2.9.6 as (e) to read;

"**P2.9.6** To avoid the presence of *buildings* and *structures* which:

...

e) Are sited higher than the 380m contour in the Tarawera Bush Settlement Policy Area."

(7) Policy 2.14.3 be amended to read;

"**2.14.3** To avoid the presence of buildings and structures above the 380m contour."

(8) Policy 2.15.3 be amended to read;

"**2.15.3** To avoid the presence of buildings and structures above the 380m contour."

(9) Policy 2.16.4 be amended to read;

"**2.16.4** To avoid the presence of buildings and structures above the 380m contour."

Revegetation

(10) A new Policy 2.9.9 be added to read;

"**2.9.9** To comprehensively design subdivision, use and development with ecological enhancement measures."

(11) Policy 2.13.5 be amended to read;

"**2.13.5** To revegetate pastoral land."

(12) Policy 2.14.2 be amended to read;

"**2.14.2** To revegetate areas of the site which are not in *indigenous vegetation*."

(13) Policy 2.16.2 be amended to read;

"**2.16.2** To revegetate pastoral land."

(14) Rule B17.4(4) be amended to read;

"4) The proposal demonstrates how the relevant landscape policies are to be given effect to; and"

(15) New Rules B17.4(5) and (6) be added to read;

"5) Where 85% of the site does not have an intact cover (i.e. closed canopy) of predominantly indigenous species, a Revegetation Plan shall be provided which complies with the following standards:

(a) It shall enable a minimum of 85% of the site (below the 380m contour) to be clothed in *indigenous vegetation*;

(b) 80% of the indigenous plants used in the Revegetation Plan shall be capable of a mature height of no less than 5 metres;

(c) Any steep *slope*, gullies, watercourses, riparian and damp areas shall be revegetated;

(d) Any on-site effluent disposal areas shall be revegetated with dense low indigenous cover such as flax and shrubs;

(e) The plants shall be indigenous species that occur naturally within the Tarawera Lakes Area/Rotorua Lakes Ecological District; and

6) Where the *site* is to be revegetated, the following shall take place prior to the construction of a *building*:

(a) Revegetation shall be in accordance with the Revegetation Plan requirements under B17.4.1(5);

(b) An independent audit shall be carried out by a suitably qualified person to certify that the indigenous planting required by the Revegetation Plan has been undertaken, and

(i) 90% of the required indigenous plantings are taller than 1.5m with an average maximum spacing (between stems) that does not exceed 2.1m, or

(ii) the required indigenous planting has achieved canopy closure of 90%,

(iii) there shall be a general absence of problematic environmental weeds, and

(iv) a weed monitoring and control plan has been approved by the Council to control weeds until canopy closure has been achieved."

(16) Rule B17.4(5) is to be renumbered B17.4(7) and amended to read;

"7) A covenant shall be entered into with the Council to ensure that protection management is in place for any existing or planted *indigenous vegetation* including a maintenance programme, protection from disturbance and grazing, and management of plant and *animal pests* in perpetuity."

(17) A new Rule numbered B38.4.1(8) be added to read;

"8) Where 85% of the site does not have an intact cover (i.e. closed canopy) of predominantly indigenous species, a Revegetation Plan shall be provided which complies with the following standards:

(a) The Revegetation Plan shall enable a minimum of 85% of the Bush Settlement Management Area (below the 380m contour) to be clothed in *indigenous vegetation*. This 85% target is to be met for each individual *site* (below the 380m contour) proposed as part of the subdivision;

(b) 80% of the indigenous plants used in the Revegetation Plan shall be capable of a mature height of no less than 5 metres;

(c) Any steep *slope*, gullies, watercourses, riparian and damp areas shall be revegetated;

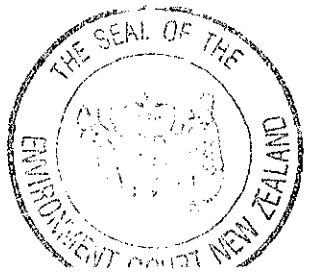
(d) Any on-site effluent disposal areas shall be revegetated with dense low indigenous cover such as flax and shrubs;

(e) The plants shall only include indigenous species that occur naturally within the Tarawera Lakes Area/Rotorua Lakes Ecological District; and"

(18) A new Rule numbered B38.4.1(9) be added to read;

"9) Prior to the issue of a Certificate pursuant to Section 224(c) of the RMA, where the site is to be revegetated, an independent audit shall be carried out by a suitably qualified person to certify that the indigenous planting required by the Revegetation Plan has successful canopy closure of 90% with an average height of no less than 1.5 metres for 70% of the plants; and"

(19) Rule B38.4.1(9) is to be renumbered B38.4.1(11) and amended to read;



"11) A covenant shall be entered into with the Council to ensure that protection management is in place for any existing or planted *indigenous vegetation* including a maintenance programme, protection from disturbance and grazing, and management of plant and *animal pests* in perpetuity; and"

(20) Criteria 6.8 – Site Coverage be amended to read;

"CR 6.8 Site Coverage

a) The location of the *building* on a *site* in relation to other *buildings* and *site* boundaries so as not to visually link with any *building* on or off the *site* and thereby give the *effect* of one continuous *building* when viewed from a *lake*, *public reserve* or public *road*.

b) The extent to which the *building* is of a scale compatible with the attributes of the landscape policy area in which it is situated.

In the Bush Settlement Area, the following matters will also be considered:

c) The provision of a *site* plan of the existing *site* which shows:

- Existing *site* features including landforms and watercourses
- Existing vegetative cover, both indigenous and exotic
- Existing *site* works including tracks, drains, platforms or *buildings*

d) The provision of a *site* plan of the proposed development showing:

- Areas of *indigenous vegetation* to be protected
- Areas of revegetation and the type of vegetation
- Proposed accessways, *building platforms* and curtilage. Indicate whether tall forest, low forest, tall shrubland, flaxland, or low shrubland is to be established.

Note: Lower-growing species may be appropriate in viewshafts from houses, riparian areas and any effluent disposal areas;

e) If the site is not dominated by *indigenous vegetation*, the provision of a Revegetation Plan shall include the following components:

i. A planting schedule listing:

- The local indigenous species to be used for different areas within the *site*
- The spacings for each species
- The size of the plants to be used and the anticipated rate of maturity and canopy closure

ii. A planting programme including:

- *Site* preparation techniques
- The timing or staging of planting

- Techniques for maintaining the planting and excluding exotic plants from the revegetation area
- Details of any intended inter-planting with later successional species after canopy closure or once construction is complete;
- Any additional plantings to be undertaken close to *buildings*, *structures*, curtilage and accessways

iii. A post-planting maintenance regime including:

- A plant and *animal pest* management programme
- Details for permanent protection of the plantings and natural successional processes
- The legal mechanism(s) to be used to ensure that the existing or planted *indigenous vegetation* is protected

f) The extent to which the Revegetation Plan achieves the Landscape Policies;

g) The extent to which the Revegetation Plan uses the methods in the Lakes A Zone Revegetation Guide;

h) The legal mechanism to be used to ensure that areas of *indigenous vegetation* and/or revegetation areas are to be maintained and retained;

i) The extent to which the legal mechanism(s) proposed provides protection from disturbance and grazing and management of *plant* and *animal pests* in perpetuity."

(21) Criteria 6.14 and 6.15 be amended to read;

CR 6.14 Where relevant, the inclusion of a *site* plan which demonstrates:

- *building platforms* and access to them;
- areas of *indigenous vegetation* that are to be retained;
- areas of *land* that are to be revegetated in *indigenous vegetation*;

CR 6.15 Where relevant, details of:

- the legal mechanism to be used to ensure that areas of *indigenous vegetation* and/or revegetation areas are to be maintained and retained; and
- Where revegetation is to be part of the proposal;
- the number, density and species of plants;
- the anticipated rate of maturity;
- the timing for planting;
- a maintenance and plant management programme."

(22) Criteria 6.0, under the heading "Matters Council May Impose Conditions On" (page 210 in the Variation), the ninth sentence under the first bullet point be deleted.

(23) Four new bullet points be added to Criteria 6.0, under the heading "Matters Council May Impose Conditions On" to read;

- Specifying revegetation including:
  - The areas to be planted;
  - The numbers, density, grade and species of plants;
  - Site preparation techniques;
  - The timing or staging for planting;
  - Inter-planting with later species after canopy closure or completion of construction;
  - Any additional plantings to be undertaken close to buildings;
  - A post-planting maintenance regime;
  - The extent of the *site* which must be vegetated or revegetated prior to the construction of any *building*;
  - The degree of canopy closure and height of plants required before revegetation is considered to be established.
- Specifying the type of qualifications/experience required by any person who will be certifying that the Revegetation Plan has been carried out satisfactorily to the Council specified standards.
- Requiring a consent notice to be registered on the title of each site to ensure that, prior to the construction of a *building* and/or extensions to existing *buildings* on each *site*, protection management is in place for any existing or planted *indigenous vegetation* including maintenance, protection from disturbance and grazing, and management of plant and *animal pests* in perpetuity
- Specifying the type of legal mechanism to be used to ensure that areas of *indigenous vegetation* and/or vegetation areas are retained and maintained.

(24) Criteria CR25.20 – 25.22 be deleted and new criteria numbered CR25.20 – 25.25 be added to read;

"For the **Bush Settlement Area**:

CR 25.20 The provision of a *site* plan showing the existing *site* including:

- Existing *site* features including landforms and watercourses
- Existing vegetative cover, both indigenous and exotic
- Existing *site* works including tracks, drains, platforms or *buildings*

CR 25.21 The provision of a *site* plan showing the proposed subdivision including:

- *Site* boundaries
- Areas of *indigenous vegetation* to be protected

- Areas of revegetation and the type of vegetation
- Proposed accessways, *building platforms* and curtilage. Indicate whether tall forest, low forest, tall shrubland, flaxland, or low shrubland is to be established.

Note: Lower-growing species may be appropriate in viewshafts from houses, riparian areas and any effluent disposal areas.

CR 25.22 If the site is not dominated by *indigenous vegetation*, the provision of a Revegetation Plan which includes the following components:

a. Plans of the existing and proposed subdivision as described in CR 25.20 and CR 25.21

b. A planting schedule listing:

- The local indigenous species to be used for different areas within the *site*
- The spacings for each species
- The size of the plants to be used and the anticipated rate of maturity and canopy closure

c. A planting programme including:

- Site preparation techniques
- The timing or staging of planting
- Techniques for maintaining the planting and excluding exotic plants from the revegetation area
- Details of any intended inter-planting with later successional species after canopy closure and/or once construction is complete;
- Any additional plantings to be undertaken close to *buildings*, *structures*, curtilage and accessways

d. A post-planting maintenance regime including:

- A plant and *animal pest* management programme
- Details for permanent protection of the plantings and natural successional processes
- The legal mechanism(s) to be used to ensure that the existing or planted *indigenous vegetation* is protected

CR 25.23 The extent to which the Revegetation Plan achieves the Landscape Policies

CR 25.24 The extent to which the Revegetation Plan uses the methods in the Lakes A Zone Revegetation Guide

CR 25.25 The extent to which the legal mechanism(s) proposed provides protection from disturbance and grazing and management of plant and *animal pests* in perpetuity."

(25) As a consequential amendment, Criteria CR25.23 be renumbered CR25.26.

(26) Four new bullet points be added to Criteria 25.0, under the heading "Matters Council May Impose Conditions On" to read;

- Specifying:
  - The areas to be planted;
  - The numbers, density, grade and species of plants;
  - *Site* preparation techniques
  - The timing or staging for planting;
  - Inter-planting with later species after canopy closure or completion of construction
  - Any additional plantings to be undertaken close to *buildings*
  - A post-planting maintenance regime
  - The extent of the *site* which must be vegetated or revegetated prior to the construction of any *building*
  - The degree of canopy closure and height of plants required before revegetation is considered to be established
- Specifying the type of qualifications/experience required by any person who will be certifying that the Revegetation Plan has been carried out satisfactorily to the Council specified standards.
- Requiring a consent notice to be registered on the title of each site to ensure that, prior to the construction of a *building* and/or extensions to existing *buildings* on each site, protection management is in place for any existing or planted *indigenous vegetation* including maintenance, protection from disturbance and grazing, and management of plant and *animal pests* in perpetuity.
- Staging of planting

Access

(27) Rule 35 be amended to read;

"35.1.1 All *buildings* and all *hard surfaces* (including all driveways) shall be provided with a stormwater collection system within the site complying with the following conditions..."

(28) The second bullet point of the definition of "Hard Surface" be amended to read:

"Driveways less than 3.5 metres in width (for the purpose of Rule 11.0 but not for Rule 35);"

(29) A new bullet point be added to the definition of "Hard Surface" to read:

"Farm tracks less than 3.5 metres in width;"

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

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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