BEFORE THE DISTRICT HEARINGS PANEL

Under the Resource Management Act 1991

In the matter of

Proposed Queenstown Lakes District Plan – Chapter 3 Strategic Directions, Chapter 4 Urban Development, and Chapter 6 Landscape

and

Transpower New Zealand Limited (Submitter 805)

Submitter

Legal Submissions on behalf of Transpower New Zealand Limited dated 16 March 2016

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Introduction

1. Transpower New Zealand Limited (**Transpower**) plans, builds, maintains, owns, and operates New Zealand's electricity transmission network, known as the National Grid. Transpower has significant infrastructure assets in the Queenstown Lakes District.[1]

2. The National Grid is the physical infrastructure that transports electricity throughout New Zealand. The Grid includes a high voltage backbone which links major generation (such as the hydro power stations in the Waitaki and Clutha Valleys) to major loads in large cities and towns. Connected to this Grid backbone are regional Grid lines which are owned or operated by Transpower and which connect smaller generation stations and supply regional communities. The regional Grid lines in the Queenstown Lakes District Council Area are 110kV.

3. Transpower's submission on the Proposed Queenstown Lakes District Plan (the **Proposed Plan**) sought amendments to Chapters 3 – Strategic Direction; 4 – Urban Development, and 6 – Landscapes. The amendments sought by Transpower are intended to give effect to the National Policy Statement on Electricity Transmission 2008 (**NPSET**) and better manage the effects of, and avoid effects on, the National Grid.

4. In these submissions we will:

   (a) outline the Council's obligation to "give effect to" the NPSET;

   (b) comment on the proposed approach to have lower-order and higher-order chapters in the Proposed Plan; and

   (c) set out why amendments are required to the provisions that seek to "avoid" or "minimise" adverse effects.

[1] As described further in the Statement of Evidence of Andrew Renton dated 29 February 2016, paras 22-25.

Legal Framework

National Policy Statement on Electricity Transmission 2008

5. The statutory purpose of a national policy statement is to state objectives and policies for "matters of national significance" that are relevant to achieving the purpose of the RMA.[2]

6. The NPSET only applies to the National Grid (which in turn is defined as the assets used or owned by Transpower NZ Limited). The NPSET does not apply to distribution companies or any lines owned by generators.

7. The preamble of the NPSET emphasises that strategic planning is required to provide for transmission infrastructure. The following provisions of the NPSET (which are summarised here) are considered to be of most relevance to Transpower's submission and further submissions on Chapters 3, 4 and 6:

    (d) Policy 1 - decision-makers must recognise and provide for the national, regional and local benefits of sustainable, secure and efficient electricity transmission;

    (e) Policy 2 - decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network;

    (f) Policy 3 – when considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network;

    (g) Policy 5 – when considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational,

[2] Section 45(1) of the RMA.

maintenance and minor upgrade requirements of established electricity transmission assets;

(h) Policy 8 - in rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities; and

(i) Policy 10 - decision-makers must to the extent reasonably practicable manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading and development of the electricity network is not compromised.

8. The Council must give effect to the NPSET in its decision on the Proposed Plan.[3] The Supreme Court recently considered what is meant by the phrase "give effect to" in the context of the New Zealand Coastal Policy Statement (**NZCPS**) and held that:[4]

> "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...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.

9. The Supreme Court held that the "requirement to 'give effect to' the NZCPS is intended to constrain decision-makers".[5] We submit this applies equally to the NPSET in the context of decisions relating to electricity transmission.

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[3] Section 75(3)(a) of the RMA provides that a district plan must give effect to any national policy statement.

[4] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 77.

[5] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 91.

10. The preamble of the NPSET highlights that the National Grid has particular physical characteristics and operational/security requirements that create challenges for its management under the RMA. It is important that this is recognised by the Council, and consistent policy and regulatory approaches are applied by local authorities.

Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009

11. The Resource Management (National Environmental Standards For Electricity Transmission Activities) Regulations 2009 (the **NESETA**) provide a national regulatory framework for activities related to existing National Grid transmission lines. Many activities are expressly permitted or controlled. This is relevant to the policy framework in the Proposed Plan and supports an enabling approach.

12. We will address the NESETA in further detail in relation to other chapters of the Replacement Plan.

Regional Policy Statements

13. The Council must also give effect to the operative Otago Regional Policy Statement (**RPS**),[6] and have regard to the proposed RPS in its decisions on the Proposed Plan.[7] Ms Craw has given substantial weight to the content of the proposed RPS on the basis that the relevant objectives and policies are unlikely to substantially alter when the proposed RPS is made operative.[8]

14. This approach is supported by case law, which provides that the importance of a proposed planning instrument will depend on the extent to which it has proceeded through the objection and appeal processes.[9]

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[6] Section 75(3)(c) of the RMA.

[7] Section 74(2) of the RMA

[8] Statement of Evidence of Aileen Craw on behalf of Transpower New Zealand Limited, dated 29 February 2016, para 4. This is based on a review of all decisions requested in the relevant submissions.

[9] *Keystone Ridge Limited v Auckland City Council* High Court Auckland AP24/01, 3 April 2001. We acknowledge this was in the context of a resource consent application but consider the principle remains valid and applicable when considering the weight to be afforded to a proposed regional policy statement in a district planning context.

Ms Craw has reviewed the decisions requested in submissions on the Proposed RPS and has concluded that no submissions have sought to substantially amend or 'dilute' the policies insofar as they relate to regionally significant infrastructure.[10]

15. In her evidence, Ms Craw discusses a number of detailed policies that are specific to regionally significant infrastructure and their relevance in the context of both the operative and proposed Otago Regional Policy Statements.[11]

Relief Sought by Transpower

Amendments are required to give effect to NPSET

16. The NPSET requires the Council to provide for the National Grid, including its development and effective operation. We submit that Chapters 3, 4 and 6 contain a number of objectives and policies which do not fully achieve Council's obligation to enable the National Grid to be developed, operated, maintained, and upgraded. We refer to Ms Craw's evidence where she identifies and discusses these objectives and policies in detail. In her evidence Ms Craw also sets out the specific amendments to the Proposed Plan sought by Transpower so as to give effect to the NPSET – we do not propose to repeat that material here.

Lower-order versus higher-order chapters

17. The planners report makes a number of references to "lower order" and "higher order" chapters. For example, with regard to the amendments sought by Transpower to the policies in Chapter 6 – Landscapes,[12] the planner's report states that "*providing exemptions and add-ons to the policies as requested, particularly within the higher-order Landscape Chapter policies, is not considered necessary or appropriate at all."*

[10] Statement of Evidence of Aileen Craw on behalf of Transpower New Zealand Limited, dated 29 February 2016, para 32.

[11] Statement of Evidence of Aileen Craw on behalf of Transpower New Zealand Limited, dated 29 February 2016, paras 30-34.

[12] Statement of Evidence of Aileen Craw on behalf of Transpower New Zealand Limited, dated 29 February 2016, para 86-88.

This statement suggests that a hierarchy approach is applied to chapters within the Proposed Plan, with some chapters having greater priority than others. Transpower has concerns about this approach given the NPSET is a higher order document under the RMA, and must be given effect to in the Proposed Plan which is likely to include provisions in a number of chapters.

18. If some chapters are to be prioritised then we submit that the 'higher-order' chapters in the District Plan must provide for the National Grid given its status as nationally significant infrastructure and that the Council must give effect to the NPSET.

Amendments required to "avoid" and "minimise" provisions

19. Transpower considers a number of the provisions in the Proposed Plan are too restrictive, and fail to provide for a case-by-case assessment of the effects of a proposal. For example, Transpower has proposed amendments to Policy 6.3.5.2 to provide an exemption for regionally significant infrastructure in light of the requirement to "avoid adverse effects from subdivision and development that are highly visible from public places...".

20. Policy 6.3.5.2 could restrict and/or prohibit the operation, maintenance, and development of the National Grid. The Cromwell-Frankton transmission line is located within areas identified as Rural Landscapes (which is the focus of the policy). As highlighted by Ms Craw, transmission lines are always highly visible and the Cromwell-Frankton transmission line is located near a number of public places.[13]

21. The planner's report recognises that in light of the *King Salmon* decision, the word 'avoid' has its ordinary meaning of "not allowing" or "preventing the occurrence of"[14] and therefore care is required when utilising the word in policy. Despite this sentiment it has not been reflected in the Proposed Plan or amendments recommended in the

[13] Statement of Evidence of Aileen Craw on behalf of Transpower New Zealand Limited, dated 29 February 2016, para 88.

[14] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company* (2014) 17 ELRNZ 442, para 24 and 96.

planner's report. Instead the planner's report considers that the importance of regionally significant infrastructure is acknowledged and recognised within the Strategic Direction and the Energy and Utilities chapters of the Proposed Plan. We submit this fails to address the issue.

22. The planner's report does recommend the addition of a new policy to acknowledge the important contribution that regionally significant infrastructure makes to the social and economic wellbeing and health and safety within the District, and to also acknowledge the location constraints in the District. The proposed new policy (Policy 6.3.12) states:

> *Regionally significant infrastructure shall be located to avoid degradation of the landscape, while acknowledging location constraints.*

23. It is not clear how this policy is to be applied in the context of identified Rural Landscapes – in practice how do you recognise location constraints but still avoid degradation of the landscape when developing or upgrading the National Grid?

24. Ms Craw's evidence sets out in detail why Transpower's proposed policies are more consistent with the RMA and how they will give better effect to the NPSET. We submit that the Proposed Plan does not currently give effect to the NPSET and in particular, the 'seek to avoid' policy direction contained in Policy 8.

Conclusion

25. The National Grid is recognised in the NPSET as being of national significance. The Council must "give effect to" the NPSET in its decisions on the Proposed Plan. This requirement is a strong directive and means it must be implemented in the Proposed Plan. The provisions sought by Transpower will give effect to the NPSET, as required by the RMA.

26. Transpower is calling evidence from:

a) Mr Andrew Renton – Engineering; and

b) Ms Aileen Craw – Planning.

AJL Beatson/ N J Garvan
Counsel for Transpower New Zealand Limited

16 March 2016

Environmental Defence Society Inc v New Zealand King Salmon Company Ltd

[2014] NZSC 38

Supreme Court, (SC82/13)
Elias CJ, McGrath, William Young, Glazebrook, Arnold JJ

19-22 November 2013; 17 April 2014

Resource management — Consents — Considerations — Area of outstanding natural character and landscape — Board of Inquiry granted an application to rezone a coastal marine area to allow salmon farming as a discretionary activity — Appeal against a successful consent for salmon farming — Relationship between the New Zealand Coastal Policy Statement and the Resource Management Act 1991 — Whether granting consent would have significant adverse effects on an area of outstanding natural character and landscape — Whether Board had erred in law by incorrectly interpreting and misapplying the New Zealand Coastal Policy Statement — Whether decision-maker able to seek information on alternative locations for proposed activity — Resource Management Act 1991, ss 3, 5(2), 6(a), 6(b), 32, 58.

Words and Phrases — "Avoid".

Words and Phrases — "Give effect to".

Words and Phrases — "Inappropriate".

The respondent, New Zealand King Salmon Company Ltd, applied to establish nine new salmon farms in the Marlborough Sounds. Under the District Council's combined Regional, District and Coastal Plan (the Sounds Plan), the Coastal Marine Area was divided into two zones: Zone One where marine farming was prohibited and Zone Two where it was a discretionary activity. The respondent sought to rezone eight sites into a new zone, Zone Three, where farming of salmon would be a discretionary rather than prohibited activity. The respondent also sought consent for salmon farms in those eight sites. The respondent also sought consent for a ninth location, White Horse Rock, which was located in Zone Two.

The applications were referred to a Board of Inquiry. The Board granted plan changes in relation to four of the proposed sites. These changes allowed salmon farming to become a discretionary rather than prohibited activity in those locations. Consent for salmon farming was also granted in relation to these four sites. The other five locations were declined.

The appellant unsuccessfully appealed to the High Court in relation to one location, Papatua in Port Gore, on the basis that granting permission inadequately protected an area of outstanding natural character and outstanding natural landscape in the coastal environment. The appellant appealed to the Supreme Court. A separate Supreme Court appeal, brought by the second respondent, Sustain Our Sounds Inc, in relation to all four locations where consent was granted, was unsuccessful.

The issues on appeal in this proceeding were whether the Board: (i) had erred in law by incorrectly interpreting and misapplying policies 8, 13 and 15 of the New Zealand

Coastal Policy Statement (the NZCPS) and therefore, whether the proposed plan change in relation to Papatua complied with s 67(3) of the Resource Management Act 1991 (the RMA), and: (ii) was obliged to consider alternative sites/methods when determining a private plan change that is located in an outstanding natural landscape or feature or outstanding natural character area within the coastal environment.

Held, (1) (per Elias CJ, McGrath, Glazebrook and Arnold JJ) the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. (paras 31, 33, 34, 37, 41)

(2) Section 55(2) of the RMA relevantly provides that, if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies 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. (para 125)

(3) The Board was required to "give effect to" the NZCPS in considering the respondent's plan change applications. "Give effect to" simply means "implement". It is a strong directive, creating a firm obligation on the part of those subject to it. The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minster sets objectives and policies in the NZCPS 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. The caveat is that 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. (paras 77, 79, 80)

(4) The Board of Inquiry affirmed the primacy of s 5 of the RMA over the NZCPS, and the perceived need for the "overall judgment" approach 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. 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 considers the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS), before making a decision. 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. The Board ultimately determined the applications not by reference to the NZCPS, but by reference to pt 2 of the Act. It did so because it considered that the language of s 66(1)

of the RMA required that approach. The Supreme Court did not accept this was correct. (paras 83, 84)

(5) The purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2, and there is no need to refer back to the part when determining a plan change. There are, however, several caveats to this. (paras 33, 85)

(6) 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. However, 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. (para 91)

(7) The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in pt 2, to carry out a balancing of all relevant interests in order to reach a decision. However, the Board was obliged to deal with the application in terms of the NZCPS. The Supreme Court accepted EDS's submission that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management. Accordingly, 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. (paras 153, 154)

(8) In respect of the second question of law (consideration of alternatives), the Supreme Court made a preliminary point. It 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, it 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. Consideration of alternative sites is permissible, but not mandatory. 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. 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". 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. The question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private commercial purpose, as here. (paras 157, 168, 169)

(9) Given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, this will not 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. (para 173)

(10) (per William Young) as a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) of the RMA seems to leave open the possibility that a use or development might be appropriate, despite having adverse effects on areas of outstanding natural character. Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA, and thus in terms of s 5. It follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. Those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5. It is implicit in this language that the identification of the areas in question is for regional councils, and that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils. (paras 179, 180, 187)

(11) The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. William Young J did 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, it was preferable to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 6(a) and (b) of the RMA being material to the interpretation and application of those policies. It is not difficult to construe these policies on the basis that given the stated purpose – protection from "inappropriate … use, and development" – what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose. (paras 194, 196)

(12) 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 and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed. (para 208)

Cases referred to

Auckland Regional Council v North Shore City Council [1995] 3 NZLR 18, (1995) 1B ELRNZ 426(CA)

Brown v Dunedin City Council [2003] NZRMA 420 (HC)

Campbell v Southland District Council PT Decision Wellington 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 PT Decision Wellington 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)

North Shore City Council v Auckland Regional Council (1996) 2 ELRNZ 305 (EnvC)

NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC)

Plastic and Leathergoods Co Ltd v Horowhenua District Council PT Decision Wellington W26/94, 19 April 1994

Port Gore Marine Farms v Marlborough District Council [2012] NZEnvC 72

Shell Oil New Zealand Ltd v Auckland City Council PT Decision Wellington W8/9, 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] NZEnvC 309, [2010] 16 ELRNZ 152

Appeal

This was a successful appeal from a Board of Inquiry decision to modify a district plan and grant consent for salmon farming at Papatua, Port Gore.

D A Kirkpatrick, *R B Enright* and *N M de Wit* for appellant
D A Nolan, *J D K Gardner-Hopkins*, *D J Minhinnick* and *A S Butler* for first respondent
M S R Palmer and *K R M Littlejohn* for second respondent
C R Gwyn and *E M Jamieson* for fourth respondents
P T Beverley and *D G Allen* for Board of Inquiry

Cur adv vult

The judgment of Elias CJ, McGrath, Glazebrook and Arnold JJ was delivered by

ARNOLD J

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

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

[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 SC84/13. 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]

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (Marlborough District Council, Blenheim, 2003).

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, s 148.

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

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

7 At [1341].

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.

[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 pt 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

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

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

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource

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).

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

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

Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it was he who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects … ".[17]

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

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

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

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

16 As contained in s 5 of the RMA.

17 (4 July 1991) 516 NZPD 3019.

18 RMA, s 43AA.

19 Sections 43-44A.

20 Sections 45-55.

21 Sections 56-58A.

22 Section 57(1).

23 Sections 45(1) and 58.

24 See further [31] and [75]-[91] below.

25 RMA, s 60(1).

26 Section 59.

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) 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

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).

33 Section 75(1).

34 Section 75(2)(b).

35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and pt 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].

36 RMA, ss 63(2) and 64(1).

37 Section 73(1) and the definition of "district" in s 2.

38 Section 28.

39 Section 30(1)(d).

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, 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.

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40 See s 87A.

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

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

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
>
> …
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.
>
> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

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

Statutory background — pt 2 of the RMA

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

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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.

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

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

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition.[47] The definition is sometimes viewed as having

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43 RMA, s 3.

44 Section 2.

45 Section 2.

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] NZEnvC 309, [2010] 16 ELRNZ 152 at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

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

two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in 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 paras 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 management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

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

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

(a) Section 6, headed *Matters of national importance*, provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and provide for" seven matters of national importance. Most relevantly, these include:

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

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

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

48 Resource Management Bill 1989 (224-1), *Explanatory Note* at i.

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

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

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

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

(vii) The protection of protected customary rights.

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

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

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

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

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

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

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

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49 RMA, ss 7(a) and (aa).

50 Section 7(b).

51 Section 7(f).

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

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

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

(b) Second, a protection against "inappropriate" development is not necessarily a protection against *any* development. Rather, it allows for the possibility that there may be some forms of "appropriate" development.

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

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

New Zealand Coastal Policy Statement

(i) *General observations*

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

52 Emphasis added.

53 See [40] below.

54 See [98]-[105] below.

55 Marlborough District Council *Marlborough Regional Policy Statement* (Marlborough District Council, Blenheim, 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).

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 inquiry had considered the draft, received public submissions and reported to the Minister.

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

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

> [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:

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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.

62 NZCPS, above n 13, at 5.

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

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

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

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in pt 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

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

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

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

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

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *NZ Rail Ltd v Marlborough District Council*, in the context of an appeal

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* PT Decision Wellington W8/94, 2 February 1994; *Foxley Engineering Ltd v Wellington City Council* PT Decision Wellington W12/94, 16 March 1994; *Plastic and Leathergoods Co Ltd v Horowhenua District Council* PT Decision Wellington W26/94, 19 April 1994; and *Campbell v Southland District Council* PT Decision Wellington W114/94, 14 December 1994.

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.

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 meanings 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 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 *NZ Rail* and said that none of the ss 5(2)(a), (b) or (c) considerations necessarily trumped the others — decision-makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

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71 *NZ 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 *NZ Rail Ltd*, above n 71, at 85.

76 At 85-86.

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).

> We have considered in the light of those remarks [in *NZ 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 to attain fully, 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 [*NZ 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 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

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].

82 *Man O'War Station*, above n 46, at [41]-[43].

83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].

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 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

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".

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.

this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
> - the coastal environment contains renewable energy resources of significant value;
> - the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
> - the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;
> - the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and
> - historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

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

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

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

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

[53] Policy 7 provides:

> **Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> (a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and

(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

(i) are inappropriate; and

(ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;

and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

(2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

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

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

Aquaculture

Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:

(a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:

(i) the need for high water quality for aquaculture activities; and

(ii) the need for land-based facilities associated with marine farming;

(b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and

(c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

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

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

[59] Policy 13 provides:

Preservation of natural character

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

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

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

including by:

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

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

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

(a) natural elements, processes and patterns;

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

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

(d) the natural movement of water and sediment;

(e) the natural darkness of the night sky;

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

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

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

[60] Policy 15 provides:

Natural features and natural landscapes

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

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

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

including by:

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

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

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

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

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

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

(v) whether the values are shared and recognised;

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

(vii) historical and heritage associations; and
(viii) wild or scenic values;
(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
(e) including the objectives, policies and rules required by (d) in plans.

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

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

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

Regional policy statement

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

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).

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

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

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

> **7.2.9 METHODS**
>
> (a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.
>
> *The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.*
>
> (b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.
>
> *Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.*
>
> *Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.*

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

> **8.1.3 POLICY — OUTSTANDING LANDSCAPES**
>
> Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.
>
> *The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.*

92 Italics in original.

93 Italics in original.

> *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".

[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 (CMZI), 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.

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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).

97 Sounds Plan, above n 1, at [1.0].

98 At [9.2.2].

[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 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 pt 2, a direction given under section 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement — an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan.

99 At Appendix 2.

100 At [2.1.6]. Italics in original.

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.

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

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

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

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

[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.

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106 *King Salmon* (Board), above n 6, at [1179].

107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 (EnvC).

108 RMA, ss 293(3)-(5).

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

> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.
>
> [1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.
>
> [1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

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

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

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

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

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

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect

to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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

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

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

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

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

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

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in pt 2 in respect of the coastal

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

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

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

Meaning of "avoid"

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

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

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

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

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

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

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

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

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket 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 well-being.[113]

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

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

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].

preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

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

Meaning of "inappropriate"

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

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> • the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

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:

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116 RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development: …

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic, region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34] to [35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of pt 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a biophysical 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 issues. 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

117 (28 August 1990) 510 NZPD 3950.

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.

> 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:

(a) Is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) Does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by pt 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) *The NZCPS: policies and rules*

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed 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, (1995) 1B ELRNZ 426 (CA).

124 At 19, 428.

125 At 22, 431.

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 discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) National priorities for specified matters (ss 58(a) and (ga));

(b) The Crown's interests in the coastal marine area (s 58(d));

(c) Matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));

(d) The implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));

126 At 23, 433.

127 At 23, 433.

(e) The procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and

(f) The protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110](a) above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of ss 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities?

(i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or

(ii) relate to areas in the coastal marine area that have significant conservation value: …

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

1. Incorporation of documents by reference

(1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:

(a) standards, requirements, or recommended practices of international or national organisations:

(b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:

…

(3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) *Interpreting the NZCPS*

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the 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

128 Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

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).

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 15 provided "more guidance" than other policies or constituted "starting points", but argued that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one 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

140 *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of 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.

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141 See [16] above.

142 Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

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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].

[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 *NZ Rail* case, Grieg J expressed the view that pt 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of policy in a general and broad way".[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of pt 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

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146 See [63] above.

147 *NZ Rail Ltd*, above n 71, at 86.

148 At 86.

[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 *NZ 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 ss 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or

149 At 85.

development is an aspect of sustainable management — not the only aspect, of course, but an aspect. Through ss 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *NZ Rail*, that the Environment Court, a specialist body, has been entrusted by Parliament to construe and apply the principles contained in pt 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in pt 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater

150 At 86.

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 pt 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to 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,

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

152 At [1].

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—
>
> …
>
> (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

153 *King Salmon* (Board), above n 6, at [121]-[172].

154 At [124].

155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed Plan Change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific Plan Change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific Plan Change can be contrasted with a full district-wide Review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed Plan Change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider alternatives with express

156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).

158 *King Salmon* (HC), above n 2, at [174].

159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).

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 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

160 At [77]-[81].

161 At [86]-[87].

162 *King Salmon* (HC), above n 2, at [171].

neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand … the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private 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

163 *Brown v Dunedin City Council*, above n 155, at [16].

164 RMA, sch 1 cl 23(1)(c) (emphasis added).

that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA 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

165 *King Salmon* (HC), above n 2, at [171].

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 RMA. 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:
>
> (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

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).

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

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of ss 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of ss 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the RMA

[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.

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, (1995) 1B ELRNZ 426 (CA).

171 At [116] of the majority's reasons.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited, this would have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> …
>
> • identifying those areas where various forms of … use, and development would be inappropriate and protecting them from such activities; and …

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of … use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7. Strategic planning**
>
> (1) In preparing regional policy statements, and plans:
>
> …
>
> (b) identify areas of the coastal environment where particular activities and forms of … use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate … use, and development in these areas through objectives, policies and rules. …

It is again clear — but this time as a result of explicit language — that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of … use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of … use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through … use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> …
>
> - the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
>
> …
>
> - the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and …

[192] Policy 8 provides:

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

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8 and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate.

On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate … use [or] development" in the NZCPS is taken directly from ss 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept — informed by the NZCPS as a whole and construed generally in light of ss 6(a) and (b) and also s 5 — of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate … use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13. Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate … use, and development:
>
> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; …

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose — protection from "inappropriate … use, and development" — what follows should read as confined to activities which are associated with "inappropriate … use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and

172 At [98]-[105] of the majority's reasons.

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.

[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).

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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".

175 At [144] of the majority's reasons.

[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.

[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.

176 See above at [195].

IN THE HIGH COURT OF NEW ZEALAND AP24/01
AUCKLAND REGISTRY

UNDER	**The Resource Management Act 1991**
IN THE MATTER	**of an appeal pursuant to Section 299 of the Act**
BETWEEN	**KEYSTONE RIDGE LIMITED**
	Appellant
AND	**AUCKLAND CITY COUNCIL**
	First Respondent
AND	**KEYSTONE WATCHGROUP (INC)**
	Second Respondent
Date of hearing:	**8 March 2001**
Date of judgment:	**3 April 2001**
Counsel:	R Brabant for appellant W J Embling for first respondent N Paterson in person for second respondent

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[redacted]

JUDGMENT OF O'REGAN J

Solicitors
Knight Coldicutt, PO Box 106-214, Auckland
Simpson Grierson DX CX 10092, Auckland
N Paterson in person

[1] This is an appeal on questions of law from a decision of the Environment Court. In its decision, the Environment Court allowed an appeal by Keystone Watchgroup against a decision of the Auckland City Council granting consent to the appellant substantially to demolish a former supermarket building, at 3 Keystone Ave, Mt Roskill, and to replace it with three apartment blocks containing a total of 66 residential units.

Background

[2] The site of the proposed development, at 3 Keystone Avenue, Mt Roskill, is 50m east of the avenue's intersection with Dominion Rd. It is zoned as Business 2 in the Operative Auckland District Plan ("operative plan"), as are the properties to its west. Traffic flow in the street is approximately 2000-3000 vehicles per day, and the majority of Keystone Avenue, with the exception of the commercial properties to the west, is a typical suburban residential street of well-established houses. All of Keystone Avenue east of the site is zoned Residential 6a. At present, the site is derelict, rubbish-strewn and in a state of disrepair; it is occupied by a supermarket which has been abandoned for 3-4 years and is covered with graffiti.

[3] The appellant submitted detailed plans of the proposed apartment blocks to the Council, and applied for the necessary consent to begin development. Under the operative plan, construction of residential units in the Business 2 zone is a restricted controlled activity. The appellant's proposal also required a number of resource consents under the operative plan. Specifically, the proposal involved discretionary or controlled activities in respect of maximum height requirements, streetscape improvements, earthworks, excavations, parking requirements, stacked parking formation, and the gradient of vehicle access.

[4] The Council granted consent to the developer, Keystone Ridge Limited. Keystone Watchgroup, the second respondent in the present proceedings, appealed to the Environment Court against that decision. Its appeal was successful. In the

present proceedings, the appellant is appealing to this Court under s299 Resource Management Act ("the Act").

Scope of appeal

[5] This is an appeal on questions of law only. The scope of the appeal is restricted in the manner outlined by the Full Court of the High Court in *Countdown Properties (Northland) Limited v Dunedin City Council* (1994) NZRMA 145 at 153:

> ... this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise; see *Environment Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-2.

[6] Blanchard J expressed the scope of the appeal in similar terms in *Stark v Auckland Regional Council* [1994] NZRMA 337 at 340:

> The role of this Court is to see that the statute, the district plan and the regional plan have been correctly interpreted, ie that their language has been properly understood and applied, to ensure that all relevant, and no irrelevant matters have been considered, that the decision of the Tribunal is properly based upon the evidence before it and that the decision reached is 'reasonable' in the sense that it was one that could

be arrived at by rational process in accordance with a proper interpretation of the law and upon the evidence.

Grounds for appeal

[7] The Notice of Appeal sets out the alleged errors of law as follows:

- As a matter of law, the Court was required to determine whether any regard should be had to Plan Change T003 ('Change 3'), before making an assessment of the proposal under s 104 of the Act, but failed to do so.

- The Court ought to have ruled that no weight should be given to the objectives, policies, rules and other provisions in Change 3, since that Change and its predecessor Variation 164, had been awaiting the hearing of submissions to the Change since June 1997. Those submissions included requests that the Variation and the Change be withdrawn in its entirety.

- As a matter of law, the Court was required to recognise existing use rights and what could be constructed on the site as a permitted activity (s 9 of the Act), and what extent of development the Council would be obliged to give consent to as a controlled activity (s 105(1) of the Act), when assessing the effects on the environment of the proposed activity, but failed to do so.

- When taking into account the effects referred to above [in the preceding paragraph], the Court was wrong to rule, as it did, that when considering the effects of alternative forms of industrial/commercial developments, these would only be the effects of credible developments that could be done as of right and that the possible construction of such a commercial/industrial building as a credible form of development was not addressed in evidence for the appellant.

- The Court erred in its interpretation of Rule 12.9.1.2(d) of the Operative Plan, in holding that stacked parking spaces cannot be "*physically associated*" with a residential unit if separated from the unit by a minimum of one storey and a maximum of four storeys.

- The Court wrongly substituted its own opinion for that of the specialist traffic and transportation engineers and urban design and landscape assessment experts called by the appellant and the specialist traffic and transport engineer called by the first respondent, who were the only independent expert witnesses who gave evidence on matters of traffic management, site access, parking, loading and manoeuvring, urban design and amenity effects.

- Given that pursuant to s 290 of the Act the Court had the power to *confirm, amend or cancel* the first respondent's decision, and in circumstances where the Court:

    (a) recorded evidence and submissions on behalf of the second respondent that the development of apartments was *supported* in principle but that the proposal had been designed beyond the capacity of the site; and

    (b) itself found that the development of apartments in this location and the replacement of the existing derelict supermarket would give rise to positive effects:

    The Court erred in law by not *amending* the decision on appeal so as to allow a lesser form of development, or alternatively issuing an interim decision recording its conclusions on the evidence so that the appellant would have the opportunity to put a modified form of development before the Court for consideration

[8] Mr Brabant indicated to me in the course of his submissions that he did not wish to pursue the penultimate point in light of the recent decision of Chisholm J in *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* (High Court Dunedin, 9 February 2001, AP27/00). I therefore say no more about that aspect of the appeal.

The decision of the Environment Court

[9] The Environment Court's decision described the site and its position relative to neighbouring properties, gave a brief history of the site's usage and its present state, and analysed the extent of the proposed development. Consents for various discretionary and controlled activities had to be granted by the Council before the developer could obtain overall consent for the proposed development, and the decision briefly outlined the scope of these activities. The Court also noted the application of Plan Change T003 ("Change 3") to the proposed development.

[10] The Environment Court considered at length the issue of whether these multiple consents should be considered together or individually. It declined to compartmentalise the inquiry and considered the development proposal as a single discretionary activity that had to be considered under s104(1) of the RMA. This approach has not been challenged on appeal.

[11] It was accepted that the development proposal was in line with the operating plan's emphasis on encouraging intensified use of land and on reusing redundant, unused land. However, the Environment Court highlighted the need to be conscious of possible adverse effects on neighbouring properties. The Court considered the application of Change 3 to the consent process. This was particularly relevant as Change 3 was explicitly designed to cover the interaction of business and residential zones, such as the site under consideration in this case.

[12] The Environment Court also considered the correct approach to calculating the appropriate baseline against which adverse effects of a development proposal are to be evaluated. It was held that the appropriate comparison for determining whether consent should be given was what could be done on the land as of right; only developments that were a credible prospect were relevant to this determination. Additionally, the Court did not accept that, when assessing a discretionary activity, it should not consider the environmental effects of a building that complies with development controls.

[13] In examining Keystone Watchgroup's specific objections to the development, the Court held that the apartment block was too large and thus excessively dominated the site. It impinged on the privacy of neighbouring properties, and the developer's attempts to ameliorate this effect were insufficient. The allegation that traffic would worsen markedly was not accepted, but deficiencies in the number, type and layout of parking were regarded as serious. Additionally, the gradient of the entrance to the building was considered to be unacceptably steep and, combined with the parking problem, it was held that this posed a risk to traffic on the street. Allegations that infrastructure would be overburdened, or that lighting or noise would be serious problems, were rejected.

[14] Finally, the Environment Court determined the requisite baseline and evaluated the development proposal against it. The Court did not accept that a large industrial or commercial building could have been constructed as of right, and, given the mixed residential/business nature of the zone, set the baseline considerably lower. It held the site was being overdeveloped and the various adverse effects were serious. When these factors were considered in light of the operative plan and

Change 3, the Court was persuaded that the development would have an adverse effect on the existing environment contrary to sections 5(2)(c), 7(c) and 7(f) of the RMA. Therefore the appeal was allowed and the Council decision to grant consent was set aside.

First and second ground of appeal: Change 3

[15] I deal with the first and second grounds of appeal together because they both concern Change 3.

[16] The first ground of appeal was that the Environment Court was required to determine whether any regard should be had to Change 3 before making an assessment of the proposal under s 104 of the Act, but failed to do so. Mr Brabant referred me to paragraph 45 of the Environment Court's decision in which the principles to be taken into account in making such a determination are enunciated. Paragraph 45 says:

> ...In considering the weight that we give to it we take into account the following principles which arise from the various cases:
>
> - The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.
>
> - The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:
>
> (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;
>
> (ii) circumstances of injustice;
>
> (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.
>
> - In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.

[17] Mr Brabant accepted that the principles were correctly identified in that paragraph. However, he then referred to paragraph 46 of the Environment Court decision which says:

> In considering the weight to be given to the proposed Change 3 we have regard to the stage it has reached through the objection and appeal process. We note that it does reflect the general provisions of the operative plan relating to the clear intent of the plan to protect the amenity of residentially zoned properties from the potential adverse effects of activities in the business zones. This requires us carefully to consider the potential effects of the proposal on the adjacent Residential 6a zones, which we will consider in some detail later in this judgment.

[18] Mr Brabant argues that the Environment Court failed to come to a clear conclusion on the issue in this paragraph, as it was required to do, and that a reading of the entire decision of the Court indicates that it did have resort to the criteria and development Controls which were introduced by Change 3 in its decision-making process.

[19] I accept that the Environment Court was required to determine the issue. I note however, that in paragraph 119 the Court specifically says:

> We have regard to Change No. 3, bearing in mind the stage it has reached during the resource management process.

That statement is made in the section of the judgment headed "Exercise of discretion". Of course it reflects the requirements of s 104(1)(e) of the Act. Therefore, the Environment Court appears to have reached a conclusion on the issue, although its reference to "having regard" (which echoes the language of s 104), does not make clear the extent to which the Court gave weight to Change 3 in its decision.

[20] I do not accept that the Environment Court failed to reach a conclusion on the issue, but I find that it ought to have been more specific about the weight it was prepared to give to Change 3, taking into account all the criteria it set out in paragraph 45.

[21] The second ground of appeal is closely related to the first. The appellant argues that the Environment Court ought to have ruled that no weight be given to the

objectives, policies, rules and provisions in Change 3, since that Change and its predecessor, Variation 164, had been awaiting the hearing of submissions since June 1997.

[22] As the Environment Court noted in paragraph 43, Change 3 was publicly notified on 15 November 1999. However, it had been preceded by Variation 164, which had been notified on 23 June 1997. Variation 164 had been withdrawn at the time the District Plan became operative. It was common ground among all parties that Change 3 was, in all material respects, the same as Variation 164. The Environment Court recorded in paragraph 45 that Change 3 had reached the stage where the Council's officers were assessing and preparing reports on the submissions received by the Council, but the Change had not been subjected to independent decision-making and testing through the various processes required by the Act.

[23] The Environment Court recorded that it had had regard to the stage that Change 3 had reached through the objection and appeal process in determining how much weight should be given to it. However, there is nothing in the decision to indicate that the other matters which it identifies in paragraph 45 of its decision were taken into account.

[24] Mr Brabant submitted that the Environment Court ought to have ruled that no weight could be given to Change 3. He referred me to the Council's submissions before the Environment Court, which contended that little weight should be given to Change 3, as it had not yet proceeded through the public submission process. He also referred me to the decision of the then Planning Tribunal in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No.2)* (1993) NZRMA 574 at 580, where the Tribunal had criticised the local authority for not proceeding with a plan change with reasonable expedition. He pointed out that Change 3 was still at an early stage of the process envisaged by the First Schedule to the Act, and noted that the Environment Court had been provided with a summary of the submissions made in relation to Change 3, some of which requested that the Change be withdrawn completely and some seeking that it be changed significantly.

[25] Mr Brabant argued that the fact that Change 3 had not been subjected to testing and independent decision-making was a strong factor against any weight being given to it. He argued that the lapse of time since Variation 164 was first notified made the case similar in some respects to the *Te Aroha Air Quality Protection Appeal Group* case. I do not accept that this case is in the same category as the *Te Aroha* case, given that Change 3 itself was notified in November 1999 and the withdrawal of Variation 164 (for the valid reason of allowing the plan to become operative), and its replacement by Change 3 may have at least partly explained the slow progress in taking it through the process required by the First Schedule to the Act.

[26] Next, Mr Brabant submitted that the case was one where the criterion of "circumstances of injustice" identified by the Environment Court was important. He correctly submitted that, having identified this criterion, the Environment Court did not appear to consider it further. Change 3 had particular significance in this case because it will, if it becomes operative, require that all permitted and controlled business activities on sites within 30m of a residentially zoned property be considered as a restricted discretionary activity. In this case, the development was within 30m of a residentially zoned property and so this change was significant, because under the operative plan (without Change 3), a residential development on the site is a restricted controlled activity with no control on the density of residential units.

[27] Change 3 would, if implemented, also introduce a rule imposing a control at street frontage, referred to as the "building in relation to boundary" rule. This was significant in this case. The proposed development involved using part of the former supermarket building in the new apartment development, and the proximity of the structure to the street frontage meant the new "building in relation to boundary" rule would be breached, and therefore would be a discretionary activity.

[28] Mr Brabant's submission was that the Environment Court had applied Change 3 to the proposal and had given it considerable weight. This, he argued, constituted a significant injustice for the applicant.

[29] Mr Paterson, on behalf of the second respondent, disputed this submission, on the grounds that many of the matters required to be taken into account under Change 3 were significant and relevant to the proposal, even if Change 3 were not considered. I do not accept that this leads to a conclusion that the extent to which weight is given to Change 3 did not have a significant effect on the outcome because the effects identified earlier were, in my view, significant.

[30] Mr Paterson pointed out that the reference to "circumstances of injustice" was not limited to injustice from the applicant's point of view. He said that there would be an equal injustice to Keystone Watchgroup if Change 3 were not taken into account. I do not accept that the "circumstances of injustice" criterion applies only in relation to the applicant, and accept Mr Paterson's argument that if it can be shown that refraining from giving weight to a plan change causes injustice to a party opposing a proposal, that could also be a relevant factor in an appropriate case.

[31] Both the appellant and the second respondent thus claim that taking Change 3 into account, or not considering it at all, would be unjust to them. It is not the role of this Court to decide whether the Environment Court should have accepted that giving weight to, or not giving weight to, Change 3 constituted circumstances of injustice for either of the parties. I must, however, note that the Environment Court did correctly identify the criterion of "circumstances of injustice" as being relevant to the inquiry into how best to utilise Change 3. Following this identification, the Court did not consider it further. This was an error of law, and regardless of whether the appellant or the second respondent is correct in asserting that giving considerable weight to Change 3 or not considering it at all would have been unjust for them, the Environment Court should have considered the point.

[32] The other factor identified by the Environment Court was the extent to which a new measure (Change 3 in this case), or the absence of one, might implement a coherent pattern of objectives and policies in a plan. It referred to *Burton v Auckland City Council* [1994] NZRMA 544. In that case Blanchard J said at 553:

> At the time when the Council made its decisions in the present case its proposed plan was a relative infant, untested by a consideration of submissions from the public. Furthermore, as will be seen, one

> relevant portion is not free from ambiguity. On the other hand, it would be unwise not to recognise that some of the environmental protection provisions in the proposed plan, which are not present in the transitional district plan, are both consistent with the new Act and likely to survive the scrutiny of review of the draft provisions.

[33] The Environment Court also referred to *Lee v Auckland City Council* [1995] NZRMA 241 where the Planning Tribunal gave weight to a proposed plan which was in accord with Part 2 of the Resource Management Act, at least partly because of that fact, whereas the operative plan was one prepared under the previous legislation.

[34] The Environment Court's reference to these two decisions indicates that some weight was given to the approach taken in those cases, although the Court was not specific about what impact they had on its decision.

[35] Mr Brabant argued that the situation which applied in the *Burton* and *Lee* cases was different from that applying in this case. The crucial difference is that in this case Change 3 is a proposed change to an operative plan which has been prepared under the Act and subject to all of the processes mandated by the Act, and is therefore consistent with the provisions of the Act. This contrasts with the operative plans in both *Burton* and *Lee,* which had been prepared under the Town and Country Planning Act 1977. I accept that this is a significant distinguishing factor in this case, which the Environment Court should have considered.

[36] I conclude that the Environment Court did not correctly and comprehensively consider the criteria which it (correctly) identified in paragraph 45 of its decision and that this may well have been a material factor in the outcome of the case. This means that it did not take into account all relevant matters when determining what weight to give to Change 3.

[37] The appellant seeks a finding that the Environment Court ought to have ruled that no weight could be given to the provisions in Change 3. I am not prepared to go that far. Rather, I rule that the Environment Court:

[a] ought to have considered all of the factors it identified in paragraph 45 of its decision that were relevant in this case;

[b] ought specifically to have addressed its mind to the possible injustice to the appellant (and the second respondent if relevant) of giving significant weight, or little weight, to Change 3, in circumstances where it is still in its infancy;

[c] ought to have distinguished the present situation from that in the *Burton* and *Lee* cases because, in this case, the operative plan was itself prepared pursuant to the Act; and

[d] ought to have come to a firm conclusion as to the amount of weight which it determined should be given to Change 3.

[38] I am mindful that the Council's process of dealing with Change 3 will move on and may be further advanced by the time the case is reconsidered by the Environment Court, or it may be withdrawn altogether. I do not think it is therefore appropriate for me to impose a particular conclusion on the significance of Change 3 on the Environment Court and I therefore decline to do so. I do, however, direct that that Court decide this issue in the light of the above findings.

Third and fourth grounds of appeal: The permitted baseline

[39] I deal with these grounds of appeal together because they concern the same issue. The Notice of Appeal alleges that the Environment Court was required to recognise existing use rights, what could be constructed on the site as a permitted activity under s 9 of the Act and the extent of development to which the Council would be obliged to give consent as a controlled activity under s 105(1) of the Act when assessing the effect on the environment of the proposed activity, and that it failed to do this. The fourth ground of appeal enlarges on this, alleging that the Environment Court was wrong to rule that when considering the effects of alternative forms of industrial/commercial developments it would consider only the

effects of credible developments and require evidence of what was credible in the circumstances.

[40] Mr Brabant submitted that, in assessing the effect of the proposal on the adjacent land (particularly the visual effect of the building, dominant form of the building in the streetscape, shadowing and privacy impact), the Environment Court did not take into account the effects which would arise from:

- a continuation of uses relying on existing use rights (ie, utilising the existing supermarket building);
- the effects of a development or use permitted as of right; or
- a development in respect of which a controlled activity was required so that the Council was obliged to grant consent subject only to imposing conditions within its power to impose.

[41] Both Mr Brabant and Ms Embling for the Council, referred me to a number of cases in which this issue has been considered. The starting point is the decision of the Court of Appeal in *Bayley v Manukau City Council* [1999] 1 NZLR 568 where the Court said at 576:

> In considering the effect on the environment of an activity for which consent is sought:
>
> The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.

The Court of Appeal referred to Salmon J's ruling in *Aley v North Shore City Council* [1998] NZRMA 361 at 377 that considering a proposal's effect on the environment "requires an assessment to be made of the effect of the proposal on the environment as it exists". The Court of Appeal then commented at 577:

> We would add to [that] sentence 'or as it would exist if the land were used in a manner permitted as of right by the plan'.

[42] The "as of right" formulation was applied in *Low v Dunedin City Council* [1999] NZRMA 280; *King v Auckland City Council* [2000] NZRMA 145; *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 (subsequently upheld on appeal – [2000] 3 NZLR 513); and *Barrett v Wellington City Council*

[2000] NZRMA 481. Those cases concerned application of s 94 of the Act, which relates to the need to notify proposals.

[43] However, in *Smith Chilcott Ltd v Martinez* (High Court Auckland, 4 September 2000, AP74-SW/00), after referring to the *Bayley* case, Salmon J said, at para 22:

> Although the comment was made in relation to s 94, I accept that it has relevance to the exercise of discretion under s 105 and the consideration of effects pursuant to s 104(1)(a). It is appropriate, as Mr Brabant submitted, to consider s 9 in this context. Section 9 prohibits the use of land in a manner that contravenes a rule in a plan unless the activity is allowed by a resource consent or is an existing use. Mr Brabant submits, and I accept, that the consequence is that a use which does not contravene a rule in the plan may be established as of right. That being the foundation upon which the Act proceeds, the effects arising from a lawful activity must be contemplated by the Act as being acceptable and, therefore, not adverse.

[44] The Environment Court considered all of these cases in coming to the conclusion that it needed to consider the case on a holistic basis, looking at the cumulative effect of any non-compliance, rather than looking at each individual non-compliance as a separate issue. As already indicated, that holistic approach was not challenged in this appeal.

[45] However, when considering the appropriate "baseline", the Court commented that it was not persuaded that the *Bayley* case over-ruled the principle set out in *Aley* which had originated in a decision under earlier planning legislation, *Locke v Avon Motor Lodge Limited Ltd* (1973) 5 NZTPA 17. This appears to have led the Court to apply a standard which differed from that set out in *Bayley*.

[46] My view is that *Bayley* requires decision makers to consider the environmental effects of a proposal on the environment not only as it exists but also as it would exist if the land was used in a manner permitted as of right. When the Environment Court decided to consider the baseline in accordance with the principle set out in *Aley*, it failed to take account of the principle enunciated by the Court of Appeal in *Bayley*.

[47] The Environment Court's approach was inconsistent with the approach which it ought to follow, as Salmon J found in the *Smith Chilcott* case as outlined in paragraph [33] above.

[48] Later in its decision, at paras 110-114, the Environment Court considered the submission made on behalf of the appellant in this case that a range of commercial/industrial activities is available on the site as permitted activities, and that these could result in more effects on the amenities of the adjoining residential environment than the development to which the Council gave consent in this case. The Court said at para 113:

> We are required to consider credible developments that could be done as of right, not hypothetical possibilities. There is no evidence before us that would enable us to conclude that the construction of a commercial/industrial building of similar bulk and size is credible.

[49] With respect, this statement is inconsistent with the finding of Salmon J in the *Smith Chilcott* case. In that case Salmon J cited with approval the decision of Chisholm J in *Barrett v Wellington City Council* (High Court, Wellington, CP 31/00, 21 June 2000), where he had outlined the baseline test from *Bayley* and then added, at para 31:

> But I accept that when the Court of Appeal was referring to what could be done on the site as of right, it had in mind *credible* developments, not purely hypothetical possibilities which are out of touch with the reality of the situation.

[50] Salmon J then commented:

> [27] I accept Chisholm J's approach. It would not be appropriate to accept as a permitted development a proposal that is simply not credible. In determining the question of credibility, however, Judges must be wary of getting into issues of financial viability. As Chisholm J. put it, decisions which are not credible are those
>
> > ... purely hypothetical possibilities which are out of touch with the reality of the situation.
>
> [28] I accept that the Environment Court seems to have gone further than the *Barrett* decision would permit by referring to:
>
> > ... credible or likely variations to that environment...

And in saying:

> We think it far more likely that some type of development containing three units but on a much lesser scale is likely to be the more credible outcome. (para 91)

> [29] I accept that in using a "likely" test rather than a "credible" test the Court has erred in law. That error has arguably affected the exercise of its discretion when assessing the extent of the adverse effects suffered by the first respondents.

[51] The error identified by Salmon J in the *Smith Chilcott* case was that the Environment Court took into account adverse effects from the proposal under consideration when those effects would have resulted from a structure which could have been erected on the site without contravening any rule in the relevant plan. The Environment Court had taken these factors into account because it believed that another type of development, on a much lesser scale, was likely to be the more credible or likely outcome, and that that other type of development would not have had the same adverse effects as the structure which could have been built as of right.

[52] In my view, the Environment Court has made a similar error in this case. The Court's statement, that it had no evidence before it allowing it to conclude that the construction of a commercial/industrial building of similar bulk and size was credible, is a mis-characterisation of what was intended by Chisholm J in the *Barrett* case. His intention can be determined from the approach he adopted in establishing the "permitted baseline" in that case – see paras 34-38.

[53] As Salmon J pointed out in *Smith Chilcott,* it is not a matter of what is likely to occur, but a matter of eliminating anything which is, to use Chisholm J's words, "purely hypothetical possibilities which are out of touch with the reality of the situation". This is not a test of likelihood, nor a test which requires evidence as to what will occur or be likely to occur in the absence of the development under consideration.

[54] Rather, it is an issue of judgment for the Court. Given the evidence which the Environment Court had before it about the proposed development, the surrounding area, the site of the proposed development (including the existing building on the site and the existing use rights that went with it), the operative plan

and the developments which fell within the "as of right" category, it could have, and should have, then exercised its judgment to eliminate from the baseline anything which could fairly be categorised as purely hypothetical. Salmon J specifically warned in *Smith Chilcott* that Judges must be wary of getting into issues of financial viability. The Environment Court in this case failed to heed that warning.

[55] Mr Paterson submitted that adoption of the permitted baseline test outlined in *Barrett* and *Smith Chilcott* could mean going back on the Environment Court's decision to deal with the proposal in a holistic way. I do not believe that is correct, and my finding in relation to the permitted baseline is not based on any desire that the holistic approach should be abandoned.

[56] I therefore find that the Environment Court's exercise of its discretion is flawed in this respect, because it failed properly to identify the baseline against which the proposal before it should have been measured. This means that it applied the wrong legal test and failed to take into account matters which it should have taken into account.

[57] The use of the term "baseline" should not be interpreted as imposing undue rigidity on the exercise of the Environment Court's discretion in these matters. It is notable that the words used in *Bayley* were "appropriate comparison", not "baseline".

Fifth ground of appeal: Stacked parking

[58] The fifth ground of appeal involves the very specific issue concerning the meaning of the term "physically associated" in rule 12.9.1.2(d) of the plan. This does not appear to have been significant in the overall decision, but I was urged by counsel for the Council to rule on it because of its general importance in relation to developments of this kind.

[59] Rule 12.9.1.2(d) says:

> Favourable consideration may be given to the provision of stacked parking subject to the following criteria:

- Stacked parking occurs when access to a parking space is achieved through another parking space;

- Stacked parking will generally only be allowed in special circumstances in order to alleviate adverse effects when no feasible alternative exists;

- Stacked parking may be allowed for one of the two required parking spaces for any residential development and where each residential unit has two parking spaces physically associated with it.

[60] The Environment Court found that in this case none of the stacked parking spaces would be "physically associated" with particular residential units because they were separated by a minimum of one storey and a maximum of four storeys. The Environment Court rejected the contention that "physically associated" is synonymous with "assigned" or "allocated". The significance of this in the context of the decision was that this meant that the proposed parking did not comply with clause 12.9.1.2(d).

[61] Ms Embling submitted that the correct approach to interpretation was the tiered approach outlined in *Mackenzie District Council v Glacier and Southern Lakes Helicopters Ltd* [1997] NZRMA 569 at 572-574. In essence, that requires initial recourse to the plain ordinary meaning of the words, then to the context, then to the objectives and policies of the plan, then to the purpose and scheme of the Act.

[62] I share the misgivings about this approach expressed by Chambers J in *The Beach Road Preservation Society Inc v Whangarei District Council* (High Court, Whangarei, CP 27/00, 1 November 2000). Even if I had applied that approach, the lack of any clear meaning of the term "physically associated" would have required me to look at the context, something which Ms Embling submitted I should do, notwithstanding her advocacy for the *Mackenzie District Council* approach. She directed me to the reference to "any residential development" in R 12.9.1.2(d) and pointed out that the plan provides for residential development ranging from single dwellings to multi-storey apartment buildings.

[63] If "physically associated" is given the limited interpretation propounded by the Environment Court, the clause could not, in any practical sense, apply to multi-

storey apartment buildings, or certainly not to apartments in the upper storeys of such developments.

[64] Ms Embling suggested an interpretation that required that stacked parks be located on the same site as the residential unit, and that they be identified as associated with the particular unit. That does effectively require me to make a finding that "physically associated" is synonymous with "assigned" or "allocated", something which the Environment Court was not prepared to do.

[65] Mr Paterson supported the Environment Court interpretation and said he thought that that interpretation would still allow for stacked parking in a terrace housing development where there may be two or more floors over a garage but where the garage is in the same vertical tier and all is in one title. Nevertheless that still limits the scope of the phrase in a way that Ms Embling contended is not intended in the plan.

[66] Mr Brabant referred to a decision of the Court of Appeal in *Kingfish Lodge (1993) Ltd v Archer* [2001] NZRMA 1. That case concerned the meaning of the phrase "physical access" in s 129B(1)(c) of the Property Law Act 1952. In that case the Court of Appeal interpreted "physical access" as meaning actual access in practice. However, the statutory context is so different from the current case that I do not believe that this is of great assistance to me, apart from indicating that a practical interpretation of the term "physical" needs to be taken.

[67] Although the term "physical" in this context seems to me to be confusing and unnecessary, on balance I am persuaded by Ms Embling's submission that the restrictive interpretation suggested by the Environment Court is not correct in this context. I am persuaded that the purpose of the limitation on stacked parking is to ensure that, where stacked parking is permitted, the parks affected by the stacking are both associated with the same dwelling so that the inhabitants can arrange between themselves how to deal with the possibility that one occupier's vehicle will block that of another. That objective can be achieved whether the park is located immediately next to, or below, the relevant dwelling unit or not.

[68] Thus, I find that the correct interpretation in this case is that "physically associated" means located on the same site and associated by an identifiable form of allocation which removes the possibility of the parks concerned being allocated to different dwelling units. Accordingly, I find that the Environment Court made an error of law in coming to the interpretation that it did.

Final ground of appeal: Amending the Council's decision

[69] The final ground of appeal relates to the Environment Court's decision to cancel the decision of the Council, rather than to amend it. Section 290(2) of the Act gives the Environment Court power to "confirm, amend or cancel a decision to which an appeal relates". In this case, the Environment Court did not expressly consider the possibility of an amendment of the decision under appeal, and Mr Brabant submits that this was an error of law.

[70] The approach adopted by the Court in this case can be contrasted with what Mr Brabant described as "common practice" of the Environment Court in issuing an interim decision outlining any potential concerns for the proposed development, and giving the proponent of the development an opportunity to amend it so that it deals with the concerns raised by the Court and the opponents of the development. He gave as an example the decision of the Environment Court in *Harper v Manukau City Council* (D A63/2000) where the Environment Court said:

> ...We are making this decision interim by recording that the size and scale of the building is not acceptable and the decision of the Council in that regard cannot be confirmed. If all parties agree we are prepared to adjourn the proceedings to see if some compromise can be reached and in that regard the applicant must realise that it must make substantial concessions to the appellants who are entitled to the protection of the plan.

[71] Mr Brabant points out that the opposition of the second respondent in this case was to the scale of the development, but not to the proposed use of the site for residential purposes. Mr Paterson confirmed this, although he emphasised that Keystone considered the current scale of the development to be a major problem.

[72] Mr Brabant further argued that the Environment Court in this case identified a number of positive aspects of the development (at paragraph 115 of the judgment), and that as a matter of law the Environment Court ought to have turned its mind to a decision which did not cancel the original decision of the Council in its entirety, but which amended that decision. He argued that the Environment Court did not have before it any evidence to justify a conclusion that it should cancel the decision in respect of the use of the site for residential purposes, since no party opposed such a usage. In addition, he argued that the concerns about the development consent which were accepted by the Environment Court as being valid, were all matters which could have been dealt with by making changes to the development, so that the Environment Court should have allowed the appellant on opportunity to make such changes.

[73] He expanded this argument by reference to s 5 of the Act, which says that the purpose of the Act is "to promote the sustainable management of natural and physical resources". He particularly emphasised the use of the term "enables" in the definition of "sustainable management" in s 5(2), and argued that the Environment Court should have used its discretion in this case to allow for the possibility of an amendment to the original consent to enable some form of development to proceed.

[74] Mr Paterson argued that it was not appropriate to provide for amendment of the proposed development because it was "so flawed and over-developed that minor development would not fix the problems". He submitted that a completely new proposal would be required to address the deficiencies identified in the Environment Court's decision. Mr Brabant responded by pointing out that fundamental changes were also required in the *Harper* case, but this did not deter the Court from making an interim decision and providing for the possibility of an amended proposal being brought back to the Court.

[75] While I accept that there is some merit in Mr Brabant's argument, I do not think the Environment Court's exercise of its discretion is unreasonable in the sense that it could not have been arrived at by a rational process in accordance with a proper interpretation of the law upon the evidence. I therefore find that there was no error of law in this respect. Nevertheless, some reconsideration of aspects this case

will be required. That reconsideration may lead the Environment Court to conclude that, in the circumstances, an interim decision may be an appropriate outcome if there is a reasonable prospect that the adverse effects from the development, which prevent it from being appropriate for consent, could be sufficiently mitigated in an amended proposal.

Conclusion

[76] I therefore conclude that the Environment Court:

[a] did not take into account all relevant matters when determining whether weight could be given to the provisions of Change 3 and failed to distinguish the present situation from that in the *Burton* and *Lee* cases;

[b] erred in its determination as to the permitted baseline, in particular by failing to undertake the approach required to establish that baseline as demonstrated by Chisholm J in *Barrett,* and failing to consider developments which the applicant could have undertaken on the site "as of right", because it believed it needed evidence of "credible" developments. This led it to apply a wrong legal test and to fail to take into account all relevant matters in making its decision;

[c] made an error of law in its determination of the meaning of the term "physically associated" in R 12.9.1.2(b).

[77] I refer the matter back to the Environment Court for reconsideration taking into account the matters which I have identified in this decision. The Court may consider whether it is appropriate to issue an interim decision, with the possibility of an amendment to deal with any adverse effects, once it has undertaken its analysis of the proposal in the light of the findings in this decision.

[78] The appeal is therefore allowed in part. No submission was made to me in relation to orders for costs, and I make no ruling on that issue. If the parties cannot

agree on any question of costs, submissions should be made within 21 days of the date of this decision.

Delivered at 10.00 a.m./p.m. on 3 April 2000.

Maire O'Regan J

M A O'Regan J