Before Queenstown Lakes District Council

In the matter of	the Resource Management Act 1991
And	**The Queenstown Lakes District Proposed District Plan – Topic 15**

Casebook for

Darby Planning LP (#2376)

Henley Downs Farm Holdings Ltd and Henley Downs Land Holdings Ltd (#2381)

Treble Cone Investments Ltd (#2373)

Soho Ski Area Limited, Blackmans Creek No.1 LP (Soho) (#2384)

Mt Christina Limited (#2383)

Glencoe Station Limited (#2379)

Glendhu Bay Trustees Limited (#2382)

Dated 20 September 2018

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ORIGINAL

Decision No. C 153 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference pursuant to Clause 14 of the First Schedule and an application under section 293 of the Act

BETWEEN WAKATIPU ENVIRONMENTAL SOCIETY INCORPORATED

(RMA 1394/98)

Referrer

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge J R Jackson
Environment Commissioner C E Manning
Environment Commissioner R Grigg

Hearing at Queenstown on 31 August and 1 September 2004

Appearances
Mr N S Marquet for Queenstown Lakes District Council ('QLDC')
Ms K Swaine for Wakatipu Environmental Society Incorporated ('WESI')
Mr J R Castiglione for the Clear Family Trust ('CFT')
Mr A O Turner for A O and B M Turner and Ponderosa Property Trust

INTERIM DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] This case concerns the zoning of land at the western edge of Arrowtown to the north of Malaghans Road and the east of Manse Road under the proposed district plan of the Queenstown Lakes District Council. The owners of the two blocks of land

concerned are the Clear Family Trust which owns the southern block and A O and B M Turner whose land lies to the north. Both parcels of land include parts of Feehly's Hill, which is recognised in the partially operative district plan as an Outstanding Natural Feature ('ONF'). The Clear land is on the southern side of Feehly's Hill and is the large paddock adjacent to Malaghans Road. The Turner land has frontage only to Manse Road; this land wraps around the base of Feehly's Hill as Manse Road curves around towards Arrowtown, and it contains the entire western half of Feehly's Hill.

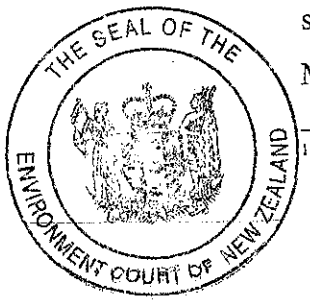
[2] To the west of Manse Road is the Meadow Park zone which provides for a building set-back of 160 metres from Malaghans Road and a Designed Urban Edge subzone ('DUE') being a strip of approximately 50 metres width to the north of the set-back. The land north-east of the Turner land is zoned Low Density Residential. To the north of the Meadow Park zone on the opposite side of the road is an Industrial zone.

[3] We note that on the western side of Manse Road within the building set-back there is an existing house approximately 90 metres from Malaghans Road which is currently being renovated and extended.

[4] The issues in this reference revolve around the appropriate boundary of the ONF, which is Feehly's Hill, and the appropriate level of development on the flat area that skirts around the base of Feehly's Hill and lies between the hill and the two roads – Manse Road and Malaghans Road. The objectives and policies of the application under section 293 of the Resource Management Act ('the Act' or 'the RMA')[1] by the Council also seek to provide a comprehensively designed and integrated development to mark the eastern entrance to Arrowtown.

Alternative zonings for the land

[5] The proposed district plan notified by the Council in November 1995 zoned the land Rural Downlands, and identified the area as an Area of Landscape Importance. After hearing submissions, the Council rezoned the land Rural Lifestyle. WESI submitted a reference seeking that the Rural Lifestyle zone between Arrowtown and Millbrook be deleted.



[1] In its form prior to the Resource Management Amendment Act 2003 – see section 112 of the latter Act.

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[6] The Court issued the First Landscape Decision[2] in these proceedings in 1999 in which it made some general determination as to how to recognise and provide for outstanding natural landscapes and features[3] in the district. The Court adjourned the hearing so that further evidence could be called in specific areas where the parties and landowners could not agree as to the limits of such landscapes. The decision records[4]:

> We should also state that our line defining the inner edge of the outstanding natural landscape in the basin is obviously not a surveyed boundary. We are prepared to move the edge at some points (particularly the dotted lines on Appendix II) if any party:
>
> (a) can show us why it is necessary to do so as a matter of law (since zone boundaries will be the real issue); and
> (b) calls cogent evidence on the matter.

The Court also expressly recorded it was not deciding any issues of zone boundaries in the First Landscape Decision[5]:

> Although the question of zoning boundaries is as much a matter of policy as methods we have not in fact decided any zone boundaries as a result of this hearing. We hope the parties will be able to consider our three-way division of rural landscapes and suggest appropriate zone boundaries by agreement. Naturally if agreement cannot be reached we will set those issues down for further hearing.

[7] When the matter was set down for a later pre-hearing conference, the Council had taken the position that the land within 210 metres of Malaghans Road – including all the Clear land – should be zoned Rural General and that most of the Turner land should retain its Rural Lifestyle zoning. As a result of further discussion between the Council and the landowners, the Council then came to the view that the development of the Meadow Park zone opposite had changed the character of the surrounding land such that a higher density of housing could be absorbed on the Turner land than was permitted by either of the proposed zones. The Council was also concerned to enable reasonable use of the Clear land and to find a means to achieve appropriate management of Feehly's

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2 [2000] NZRMA 59.
3 Under section 6(b) of the Act.
4 [2000] NZRMA 59 at para (112).
5 [2000] NZRMA 59 at para (193).

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Hill. It was not possible to consider such outcomes within the scope of the WESI reference. Thus the Council chose to make application under section 293 to amend the plan beyond the scope of the reference. That application was granted by the Court with the consent of all parties.

The present proposal

[8] The Council's present proposal is to provide specifically for the sites concerned by incorporating them into an enlarged Meadow Park zone by means of a structure plan covering the whole eastern entrance to Arrowtown. There are four new areas demarcated in this structure plan:

- a residential area (RES(E)) – standing for 'residential east' – of 1.92 hectares of flat land in the north, bounded by the base of Feehly's Hill on the inside, and on the outside by the Low Density Residential zone to the north-east, and Manse Road to the north and west; and a proposed 'Designed Urban Edge' to the south. Within this area of RES(E), development of a scale slightly denser than envisaged in low-density residential zones is permitted, with 40% site coverage and a seven metre high building height restriction. We understand the Council now proposes no minimum allotment size;
- a hillside open space area (OS-HL(E)) which comprises the land in the ONF area, Feehly's Hill; the purpose of this area is to protect Feehly's Hill from development;
- a designed urban edge (DUE(E)) starting 100 metres from Malaghans Road and extending to a distance 210 metres from Malaghans Road, bounded to the west by Manse Road and to the east by Feehly's Hill; its purpose is to provide a clear, comprehensively designed edge to the urban area of Arrowtown; within this area one residential dwelling on the Clear land is proposed as a controlled activity;
- an open space area adjoining Malaghans Road (OS-MR(E)); this is an area of land between Malaghans Road and a line drawn 100 metres to the north which tapers as the base of Feehly's Hill draws closer to Malaghans Road; the purpose of this zone is to provide an open space corridor at the entrance to Arrowtown.

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The position of the parties

[9] The Clear Family Trust reached agreement with the Council and supports its position.

[10] Mr Turner generally supported the Council's proposal, but has produced a concept plan for the Turner land through the evidence of Ms D J Lucas, a qualified landscape architect. There was some discrepancy between the evidence of Ms Lucas and some of the rules suggested by her, which was clarified during the course of proceedings and which we discuss later in this decision. However, briefly, Ms Lucas' proposal was for slightly lower density and smaller-scale housing than that permitted by the Council's proposal. Ms Lucas proposed sections of a minimum size of 575 m^2, residential buildings with a maximum of 160 m^2 floor area in the RES(E) area and 90 m^2 in the DUE(E) area plus additional provision for garaging. In addition Ms Lucas suggested that one dwelling be allowed to encroach two metres onto Feehly's Hill.

[11] WESI maintained that a building set-back of 160 metres should be maintained on both sides of Manse Road, and that no residential activity should be permitted on the Clear land. It generally supported the approach of Ms Lucas to the northern area with its concept of 'cottage-style' development for the Turner land. However it opposed allowing any residential building to encroach upon Feehly's Hill or on the open space area adjoining Malaghans Road and submitted that the plan should make clear that there was to be no residential activity in these areas. In the view of some witnesses, this submission gave the Court scope to classify residential activity in the Open Space areas as a prohibited activity.

The issues

[12] The issues requiring adjudication in this case are:

- What is the boundary of the ONF?
- What type of development is appropriate on the Turner land?
- Should development of any residential activity be allowed on the Clear land? and if it should not, what activities constitute 'reasonable' development of that land?

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- Should residential buildings be a prohibited activity in the Open Space areas?

The requirements of the Act

[13] In addressing the issues we must comply with the requirements of the RMA that district plans are to be prepared in accordance with[6] the functions of territorial local authorities under section 31, the provisions of Part II, the assessment under section 32, and any regulations. Rules in the plan are to implement the policies[7].

[14] There was no argument about most of those matters. As for the policies to be implemented, Ms JJ Parker, a qualified planner called by the Council, provided us with a comprehensive and helpful survey of the district wide objectives and policies relevant to the zoning of the land. Because the differences between the parties were more limited by the time the case was heard, we shall not need to refer to them all. Nevertheless they inform our decision.

Where should the ONF boundary be located?

[15] Ms R E Ramsay, a qualified landscape architect called by the QLDC, showed the boundary she proposed on an aerial photograph attached to her evidence (attachment 6). She considered that the appropriate boundary was the base of the hill where the schist rock of Feehly's Hill gives way to the flat and undulating land with its more complex but invisible underlying geology of glacial deposits and terrace alluvium. Under cross-examination she accepted that in the paddock at the corner of Manse and Malaghans Roads the boundary was less easily discernible since at that point the toe of the slope tapers more gradually than on land to the north and west. Elsewhere on the subject land she considered the line that marked the hill was clearly visible. Even where the line was less discernible, it could be ascertained to an accuracy of 'a few metres or so'.

[16] In his submissions Mr Turner proposed that the boundary be set at the 432.5 metre contour where what he described as an historic internal fence existed on his land. He submitted that this fence marked the boundary between the English pasture grass below and the more indigenous vegetation on the slopes above. He produced photographs to show the fenceline hidden behind two existing woolsheds and contended

[6] Pursuant to section 74(1) of the Act.
[7] Section 75(1)(d) of the Act.

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that setting the ONF line in that area would not diminish the amenity of views from public places nor from residences on Manse Road. We note however that the witness with landscape expertise called by Mr Turner, Ms Lucas, after using a fine grained contour map, considered the major change in slope to be broadly approximate to the ONF boundary delineated by Ms Ramsay. She showed her line marking the difference in slope on her attachment 14.

[17] However we find that the ONF boundary is located at the base of Feehly's Hill. Whether that is along the line mapped by Ms Ramsay or that mapped by Ms Lucas can be determined, or preferably agreed, before a final decision is issued.

What is appropriate development on the Turner land?

[18] The Council's proposal is that most of the Turner land on the flat is within the RES(E) area of the proposed structure plan, and a small area of flat in the south within the DUE(E). Within the RES(E) area, buildings are to be set back ten metres from Manse Road and from the open-space, hillside area (OS-HL(E)). They are to be 4.5 metres from any other road or zone boundary and two metres from internal boundaries. We understand that there is to be no minimum size for allotments, a maximum site coverage of 40% and a height restriction of seven metres. Within the DUE(E) area of the Turner land buildings and landscaping are to be a discretionary activity, and the Council must be convinced that landscaping effectively mitigates adverse effects from Malaghan Road and is consistent with the ecological restoration of Feehly's Hill.

[19] Amongst the unchallenged objectives which the rules are designed to implement is Part 12.21.3.1 which is:

> Comprehensively designed and integrated development that:
>
> (a) enhances the eastern entrance to Arrowtown; and
>
> (b) becomes an integral part of Arrowtown's urban fabric;
>
> whilst having regard to:
>
> - surrounding landscape values;
> - Arrowtown's heritage resources and character;
> - indigenous ecology of surrounding mountains and Feehly's Hill
>
> ...

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This objective is supported by Policy 12.21.3.4 which is:

> To recognise the sensitivity of the zone on the eastern side of Manse Road, and around any development that compromises the foreground to Feehly's Hill or the entrance to Arrowtown.

[20] We also refer at this point to a district-wide policy 4.2.5.1(c) which requires development to harmonise with local topography and ecological systems and other nature conservation values as far as possible.

[21] Ms Parker opined that the Council's section 293 application provides for the social and economic well-being of the community by recognising the ability of land to the north (the Turner land) to absorb additional residential development and that it would satisfy the requirements of section 5(2)(c) by the provision of an open space and set-back of 100 metres from Malaghans Road and landscaping on the DUE(E) land. It was agreed by all parties that it would do so better than a rural general or rural lifestyle zoning.

[22] Ms Lucas considered that a more refined concept would better achieve the purpose of the Act. Ms Lucas told us that the built form of much of Arrowtown is small scale, single storey vernacular, with a limited materials palette. She proposed that houses on the Turner land should be small, simple structures responding to the Arrowtown character, rather than semi-rural in nature. The subdivision she proposed was designed to differ from the large allotment, large house style of the Butel Park subdivision opposite. She gave evidence that with the type of housing she proposed, houses closely aligned with the base of the hill were in keeping with the Arrowtown character.

[23] Not all the rules put forward by Ms Lucas were mutually consistent. The concept she put forward provided for sections of around 600 m^2. In the RES(E) area houses were to be a maximum area of 160 m^2 with a further 40 m^2 for garaging, and in the DUE(E) area they were to be of 90 m^2, with provision for a single garage and attached lean-to carport/woodshed. We clarified during the course of the hearing that the dimensions for residential buildings that she proposed were for total floor area. Yet she also told us that building coverage of 40% was acceptable, as was a maximum height of seven metres (two storeys) in the RES(E) and 5.5 metres in the DUE(E) areas.

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This would allow a 400 m^2 house (two storeys of 200 m^2) plus a separate 40 m^2 garage on a 600 m^2 section in the RES(E) area.

[24] In cross-examination Ms Lucas said she was concerned about the potential for large housing, and replying to questions from the Court told us 'the plan is there be a limit on size'[8]. We take it from this that the floor area limit is the more important element in Ms Lucas's concept, and that if that is adhered to, a site coverage rule would be unnecessary.

[25] We understand that Mr Turner's submission on the ONF line was designed to facilitate this concept plan with houses sited only two metres from the base of Feehly's Hill, and one house partially on the slope. We note that the relevant policy does not necessarily run contrary to such an outcome. The relevant policy, 4.2.5(5), Outstanding Natural Features, reads:

> To avoid subdivision on and in the vicinity of distinctive landforms and landscape features unless the subdivision and/or development will not result in adverse effects which will be more than minor on:
>
> (i) landscape values and natural character; and
> (ii) visual amenity values
> ...

[26] In terms of these subdivision design proposals, Ms Ramsay told the Court that she would not take issue with housing being at or within two metres of the toe of the slope[9]. We also note Mr Marquet's acknowledgement that if the Court found in favour of the sort of design concept put forward by Ms Lucas, the Council would not see serious difficulty in that[10]. We understand Mr Marquet's comment to relate to all the matters in Ms Lucas' concept apart from the proposal to allow one house (on Lot 1) to be stepped back into the hillside at the base of the slope. We consider that matter separately.

8 Notes of evidence p 43.
9 Notes of evidence p 125.
10 Notes of evidence p 118-9.

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[27] For the rest we consider that Ms Lucas' concept is more in keeping with Arrowtown's heritage resources and character. We note that the Council's initial proposal would allow a large building (360 m^2 comprising two storeys of 180 m^2) on a small 450 m^2 section. We consider that the building/open space ratio in Ms Lucas' proposal offers a more appropriate foreground to Feehly's Hill and is more in harmony with local topography as required by Policy 12.21.3.4 and Policy 4.2.5.1(c). We find for these reasons that it better recognises and provides for the outstanding natural feature of Feehly's Hill, as required by section 6(b) and is therefore necessary in accordance with section 32(1)(c)(i) (in the sense of being better than the Council's proposal – *Marlborough Ridge Limited v Marlborough District Council*[11]). We therefore find on an interim basis that in the RES(E) area there should be a site density standard of 575 m^2, and that there should be a building coverage rule restricting dwellings to 160 m^2 floor area and other buildings to a total floor area of 40 m^2. We also find that the set back required for buildings from the OS-HL area should be reduced to two metres. We discuss provision for dwellings in the DUE(E) area in conjunction with our discussion of potential development on the CFT land.

[28] We consider at this point whether development on Lot 1 should be allowed to cut back into the base of the hill. Ms Lucas gave evidence that the discreet straddling of the base slope by one house in conjunction with public access and the protection management of the whole hill would not have adverse effects and would be compatible with Policy 12.21.3.4. We understood from cross-examination that by the phrase 'protection management' Ms Lucas meant 'giving reserve status to'.

[29] Ms Ramsay accepted that some degradation of the limits of the hill has occurred where existing houses and farm sheds have been constructed at the base. However she considered development on the slopes of the hill would not maintain the open character of the hill and would compromise the Council policy requiring maintenance of the openness of those natural landscapes which are open at the time the plan becomes operative[12].

[11] [1998] NZRMA 73 at p. 91.
[12] Policy 4.2.5.6(c).

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[30] Ms Lucas' evidence suggests that the partial intrusion of a single dwelling onto the base of the slope does require some form of environmental compensation, and we share the concerns of Ms Ramsay. We would not consider the proposed house on Lot 1 acceptable without adequate environmental compensation.

[31] In submissions Mr Turner offered to covenant from development all the land above 440 metres on the western side of the hill, and from the base of the hill where it can be seen from and is parallel to Malaghans Road. He offered to ensure a form of ownership that guarantees public access and to participate in an agreed ecological rehabilitation scheme for Feehly's Hill. Ms Lucas offered valuable insights into the most appropriate method of rehabilitation.

[32] We note that if Mr Turner's proposal were accepted, a segment of the lower slope would be left in his ownership, not covenanted against future development, though presumably protected by strong objectives and policies for the life of the plan. We consider that the intrusion of the proposed house on Lot 1 onto the hillslope would only be acceptable if there were greater certainty that there would be no others. Such certainty could be achieved by a no development covenant on Mr Turner's land on Feehly's Hill to the base of the slope (with the exception of Lot 1). That is the degree of environmental compensation the Court presently considers is required for it to allow the proposed house on Lot 1 as part of the RES(E) concept. Whether such a covenant will be offered is in Mr Turner's hands. If it is not, the Lot 1 boundary will follow the ONF 'boundary' at the base of the hill (i.e. the change in contour to the flats).

Appropriate development on the CFT land

[33] As a result of discussions the Council and the Clear Family Trust are agreed on the degree of development appropriate on the CFT land. This is limited to one residential dwelling as a controlled activity on the northern area set back at least ten metres from Manse Road and the OS-HL(E) boundaries and 15 metres from the OS-MR(E) boundary, that is 115 metres from Malaghans Road. The Council has retained control over roof-pitch and colour, building materials and colour, and landscaping to reduce the visual effects from Malaghans Road. The building is limited to a height of 5.5 metres above ground level and developments can only proceed when CFT have obtained resource consents for ecological restoration of that part of Feehly's Hill in its

ownership and the provision of open space in the OS-MR(E) zone. All other development is to be a non-complying activity.

[34] The only party to oppose development on the Clear land was WESI which requests that the building set-back from Malaghans Road be 160 metres. The Clear Family Trust ('CFT') submit that this would make it difficult, if not impossible, for it to obtain consent for even one residential unit on its land. We note at this point that WESI did not call evidence in support of its submission, although there was evidence called by other parties which assists its case.

[35] There are two propositions central to the CFT/Council case: firstly that since a house already exists in the set-back area west of Malaghans Road, the proposed CFT house will appear from Malaghans Road as an extension of Butel Park (the name given to the residential subdivision in the Meadow Park zone), and be absorbed into the landscape that has Feehly's Hill as the backdrop; and secondly that to refuse any residential dwelling on the CFT land would be to deny it reasonable use of its land. We examine each of these propositions.

[36] For the first of these propositions CFT relied on the evidence of Mr R B Knox, an environmental consultant who is also an associate member of the New Zealand Institute of Landscape Architects. Mr Knox assessed the proposed building area from four points on Malaghans Road, two east and two west of the site, and from two points on Manse Road, one close to the intersection of Manse/Malaghans Road, and another 100 metres along the road. From viewpoints west of the site he considered that the proposed Clear dwelling would relate more closely to the Butel Park subdivision than to the natural feature behind. He considered that the existing house only 90 metres from Malaghans Road was important in creating this perception. From the east of the site at around 320 metres from the intersection the dominant influence would be the open space set back from Malaghans Road and closer to the intersection the dwelling would again be linked with Butel Park. Mr Knox accepted that from the Manse Road viewpoints residential development would have some impact on the natural character and rural amenity values of Feehly's Hill. However he opined that given the bulk and the vegetation cover of the elevated slopes, the natural landscape values of the ONF would not be impacted to any significant extent. Mr Knox further considered that contributions

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to the ecological restoration of Feehly's Hill and the provision of land for the OS-MR(E) zone balanced any loss of rural amenity associated with the proposal.

[37] In addressing the district-wide policies the provision must implement, Mr Knox stated that the presence of the Butel Park subdivision demonstrated the capacity of the landscape to absorb change, as required by Policy 4.2.5.1. He considered that the set-back from Malaghans Road, accompanied by appropriate planting, avoided adverse effects on the Visual Amenity Landscape at the base of Feehly's Hill in accordance with Policy 4.2.5.4. He stated that the visual impact on Feehly's Hill would be minor and would not compromise Policy 4.2.5.5 which limited strictly the circumstances in which development in the vicinity of outstanding natural features could occur. It was also Mr Knox's evidence that the design and location controls proposed would ensure that the proposed residential activity on the CFT land was consistent with the policy on urban edges (Policy 4.2.5.7), did not contravene the policy on avoiding cumulative degradation (Policy 4.2.5.8) and satisfied the policy on structures (Policy 4.2.5.9).

[38] Mr Knox's approach was not shared by the other landscape architects who gave evidence. Ms Lucas considered that the proposition of one house as a controlled activity on the CFT land could not be supported in landscape terms; such a development constituted not an urban edge, but sporadic development in front of a hill.

[39] It was Ms Ramsay's evidence that the CFT land was vulnerable to degradation and that the topography of the site did not provide opportunities for integrating development in a way that avoided changes to its natural and rural character and preserved the clear views it affords to Feehly's Hill. She considered that this land was separated from land north of a brown house in the south of the Turner land by vegetative patterns and by the south-western toe of Feehly's Hill as it extends into the flat paddocks. Overall she did not consider that the development envisaged by the provisions of the section 293 application on the CFT land would retain its character in a manner consistent with the district-wide objectives and policies of the plan. Ms Parker did not disagree with Ms Ramsay's landscape assessment. In her evidence-in-chief she commented that the policy restricting the circumstances in which development could occur in the vicinity of an ONF would be best implemented by avoiding dwellings or other buildings on the CFT land. When asked if she would support a house site on the

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CFT land in the location proposed, if it were not for the locations of the cadastral boundary, after some thought she said 'no'.

[40] We too have doubts about the justification of the proposed dwelling site in landscape terms. We accept Ms Ramsay's evidence that the topography of the CFT site affords little opportunity to integrate any proposed house into the environment. We also note that on the photographs taken by Mr Knox from the intersection of Malaghans and Manse Roads and 100 metres along Manse Road the poles, admittedly six metres high, are very evident. We consider the impact on the ONF would be significant. We understand the evidence of Mr Knox that the Butel Park subdivision, and the single house 90 metres from Malaghans Road will be visible on the other side of Manse Road, but we consider that the impact of a number of houses on a flat or gently rolling landscape west of Manse Road is not comparable to the impact of an isolated house close to the base of a prominent outstanding natural feature.

[41] We are also troubled by Mr Knox's assessment that from 320 metres east of the Malaghans/Manse Road intersection a house on the CFT site would appear to be visually linked with the Butel Park subdivision. On the photograph produced from that view, the roof of the house 90 metres from Malaghans Road is seen. Much of the rest of the building is concealed because the site is lower lying than the point from which the photograph is taken. A house on the CFT land would not be concealed in the same way.

[42] If we were making a judgement solely on landscape grounds we would be inclined to prefer the evidence of Ms Ramsay and Ms Lucas, and not to provide for a dwelling on the CFT land as a controlled activity. We proceed to consider whether without such provision there is no reasonable use for the CFT land.

[43] While this is not a case brought under section 85 of the Act, the clear implication of that section is that plans should not render land incapable of reasonable use. CFT submit that if WESI's submissions to prohibit the proposed residential unit are accepted, no use other than landscaping, planting or ecological restoration would be permitted on CFT's land except on a non-complying basis; that simply cannot achieve the purpose of the Act because it would fail to allow any substantive use of the land.

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[44] Ms Parker opined that since the CFT land was only 3.5 hectares in size and therefore not viable as an economic farming unit, there would be no reasonable use for the land if a dwelling was not provided for as a controlled activity. Mr C Vivian, a resource manager called by CFT, opined that a single residential unit was not an efficient use of the CFT land, but that having regard to the other matters the Council was obliged to consider pursuant to Part II it was a reasonable use. He did not explicitly say so, but from the general tenor of his evidence, we suspect he did not consider that there was reasonable use in the absence of any residential activity.

[45] What constitutes 'reasonable' use is not defined in the Act, though in certain circumstances it is left for the Court to determine. Ms Parker opined that in some cases reasonable use included economic use or benefits, and that certainly it was the equivalent of the landowner being able to use the land in some way. We accept that, but we would be reluctant to conclude that this involves ensuring that a land use must permit a specific rate of return. A whole range of factors, including historical uses may be relevant.

[46] We accept that if the use of all the CFT land is restricted to the provision of open-space, as provided for by the OS-MR(E) area, that would not constitute reasonable use of the land. In terms of rural uses we have the rather general comment of Ms Parker that the area of the CFT land is too small to enable a 'reasonable' farming unit. However whether to lease an area for grazing or other rural activities constitutes reasonable use depends on a whole range of factors, such as the history of the zoning of the land, conditions of purchase and so forth, about which we have little information.

[47] CFT urged that resource consents for a dwelling on the CFT land had been issued in the past, most recently in February 1996, and had continued in existence until 2000; that factor favoured provision for a dwelling with suitable design and location controls as a controlled activity. In that consent the Council had expressed the opinion that 'the adverse effects could be adequately mitigated'. While that consent is not relevant to an assessment of the appropriateness of the Council's proposed section 293 provisions in landscape terms, it may well be a factor in determining reasonable use. However CFT had the opportunity to implement that resource consent or to have it extended, and did not take it. No reasons for this were suggested to us.

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[48] The evidence presented to us is insufficient for us to determine in this proceeding whether in the absence of residential use as a controlled activity any reasonable use can be provided for the CFT land. We accept that additional uses to those provided for the OS-MR(E) area need to be made available.

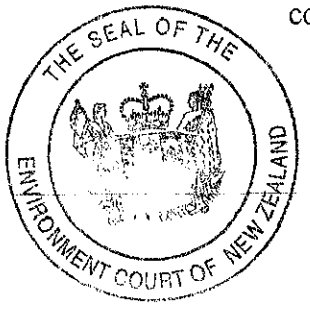
[49] It follows from this that we do not think a case has been established that the DUE(E) should contain provision for a residential dwelling on the CFT land as a controlled activity. But neither do we think a case has been made to suggest it should be prohibited.

[50] One of the concerns we had about the DUE(E) provisions was that the CFT land would contain a dwelling as a controlled activity, and that a dwelling or dwellings would be a discretionary activity on the Turner land in the DUE(E) area. This seemed to run counter to the evidence of Ms Ramsay and Ms Lucas that the land south of the toe of Feehly's Hill was in landscape terms the most sensitive. Ms Parker appeared concerned that houses on both the Turner and the CFT land in the DUE(E) might give the appearance of urban sprawl, but given that the CFT land is further from the residentially zoned area, a house on that land is the most likely to create that impression.

[51] We note that the stated purpose of the DUE is:

> To provide for an interesting and comprehensively designed urban edge between the open space approach to Arrowtown and new residential activities. It is anticipated that the Designed Urban Edge (E) will successfully integrate planting with the ecological restoration of Feehly's Hill and will screen housing from Malaghans Road.

We do not consider that permitting one house as a controlled activity in the most sensitive part of the area, and by a different process considering an application for discretionary activity in the remainder, is necessarily the most appropriate way to create a comprehensively designed urban edge. We are inclined to make residential activities in the whole of the DUE(E) area discretionary. We note that in an ideal world a comprehensive design for the whole DUE(E) might be contemplated.



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[52] As a consequence of this additional uses for the CFT land should be provided, at least until the question of residential development of the land is determined, and beyond that if it is determined to be unsustainable. WESI sought Rural-General zoning in its reference. In our view appropriate uses under that zoning include grazing, pastoral farming, arable and horticultural uses, but there may be others the parties may agree upon. They should be added as appropriate activities in the DUE(E) and OS-HL(E) subzones.

Should residential activity be prohibited in the Open Space Areas?

[53] WESI submitted that clarification was needed that no residential building take place in Activity Areas OS-MR(E) or OS-HL(E) areas. This was understood by Ms Parker to give scope to impose prohibited status on residential buildings in these areas. We are not certain that it does, but in the event we do not need to decide that for reasons we shall outline.

[54] There are two ways in which the Court, as opposed to the landowner, can seek to ensure that residential development does not take place in the Open Space Areas. One is to prohibit the activity. The second is to have rules with which the activity does not comply, backed by strong objectives and policies. In this case a number of unchallenged policies of the Meadow Park zone give strong backing to a council wishing to control activities. They include:

> Policy 12.21.31.1
> To ensure that development of the zone is comprehensively designed and integrated through the adoption of a structure plan which in conjunction with zone rules:
> ...
> - retains significant open space adjoining Malaghans Road;
> ...
> - retains the openness and restores the ecology of the upper slopes of the zone;
> ...
> - maintains and enhances the landscape and ecological values of Feehly's Hill;
> ...
> - maintains the open foreground to Feehly's Hill as viewed from Malaghans Road

and Policy 12.21.3.4:

To recognise the sensitivity of the zone on the eastern side of Manse Road and avoid development that compromises the foreground to Feehly's Hill, or the entrance to Arrowtown.

[55] In addition there are general policies which seek to protect the landscape, natural character and usual amenity values of Outstanding Natural Features, and to identify the edges of urban areas. Any proposal would be required to meet them.

[56] In considering references on plan provisions, the Court must be satisfied that any rule it adopts is necessary, in the sense of 'the better of the choices before it on the evidence' as adopted in *Suburban Estates v Christchurch City Council*[13], in achieving the purposes of the Act and, in the case of unchallenged objectives and policies, in implementing them. There is a presumption that where those aims can be met by a less restrictive regime that regime should be adopted. We consider that with the objectives and policies we have outlined a non-complying regime offers strong protection to the values associated with open-space along Malaghans Road and on Feehly's Hill. We therefore intend to retain that status for residential activities in the OS-MR(E) zone.

Findings

[57] We summarise our findings as follows:

- We find that subject to the changes to the rules we outline below, the Council's section 293 application performs the Council's function of achieving the integrated management of land under section 31(a) of the Act, achieves its purpose under Part II, and is necessary to do so pursuant to section 32.
- The ONF boundary is to be located at the base of the slope of Feehly's Hill.
- In the RES(E) area, the minimum area of a residential section is to be 575 m^2, the maximum floor area of any dwelling is to be 160 m^2 with an allowance for accessory buildings to a maximum floor area of 40 m^2; the minimum set-back from the OS-HL(E) area is to be two metres.
- An exception may be made for one house in the RES(E) zone to straddle the hill if the environmental compensation we have outlined is offered.
- In the DUE(E) all residential activity is to be discretionary.

[13] C217/2001 at para 276.

A series of assessment matters may be added which could include:

(a) the extent to which it is possible to provide a landowner with reasonable use of his land by other means;

(b) the extent to which the proposal assists in providing a comprehensively designed urban edge to Arrowtown.

- Within the OS-MR(E), a range of additional uses including grazing, and arable or pastoral farming are to be permitted. Such uses are not to include tree planting.

[58] We invite the parties to confer on the changes to the rules necessary to implement these findings.

Costs

[59] The question of costs is reserved, though at present we see no reason to depart from the normal practice in plan references, that costs should lie where they fall.

DATED at CHRISTCHURCH 21 October 2004.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

C E Manning
Environment Commissioner

R Grigg
Environment Commissioner

Issued[14]: 21 OCT 2004

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BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC051

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal under clause 14 of Schedule 1 to the Act
	BETWEEN	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
		(ENV-2016-AKL-000014)
		Appellant
	AND	WHAKATĀNE DISTRICT COUNCIL
		Respondent

Court:	Environment Judge DA Kirkpatrick Environment Commissioner RM Dunlop Environment Commissioner WR Howie
Hearing:	At Whakatāne on 9 March 2017 Respondent's submissions in reply filed on 24 March 2017
Appearances:	S Gepp for Royal Forest & Bird Protection Society Inc D Riley for Whakatāne District Council
Date of Decision:	6 April 2017
Date of Issue:	6 April 2017

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused.

B: The provisions of the proposed Whakatāne District Plan are amended in the terms set out in **Attachments A and B** to this decision.

C: There is no order as to costs.

REASONS

Introduction

[1] The review of the Whakatāne District Plan, notified on 28 June 2013, has now progressed to the point where the only remaining issue to be resolved is the status or classification of the activity of harvesting of mānuka and kānuka in Significant Indigenous Biodiversity Sites (**SIBS**) listed in the schedules to Chapter 15 – Indigenous Biodiversity.

[2] The relevant decisions of the Whakatāne District Council (**the Council**) on submissions were that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.1 Schedule A (Coastal and Wetland Sites) and a permitted activity in SIBS listed in Rule 15.7.3 Schedule C (Te Urewera-Whirinaki Sites).

[3] The appellant, Royal Forest & Bird Protection Society Inc (**the Society**) seeks in its appeal that such harvesting be a non-complying activity in SIBS in Schedule A and a restricted discretionary activity in SIBS in Schedule C.

[4] The parties agree that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.2 Schedule B (Foothills).

Background

[5] As notified, the proposed Whakatāne District Plan included Rule 15.2.1.1(9) stating the activity status for the following activity:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal Zone, for commercial use provided that; a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; b. that no more that 10% of the **Significant Indigenous Biodiversity Site** is harvested in any one year; and c. that a sustainable management plan verifying the above is submitted to **Council**.	RD	C	P

[6] The Society, in its submissions on the proposed District Plan in relation to this

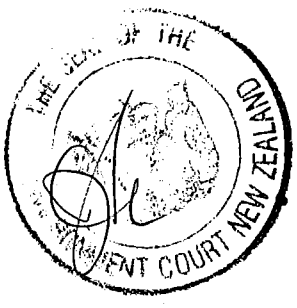
activity, submitted that there should be no permitted or controlled harvesting of mānuka and kānuka within scheduled SIBS, that the replanting conditions were not enforceable and that the ten per cent per year threshold was unsustainable. It sought to change the activity status or classifications in this part of the activity table to non-complying for SIBS in Schedule A and to discretionary for SIBS in Schedules B and C.

[7] The Council's decisions on submissions and further submissions on the plan in relation to Chapter 15 – Indigenous Biodiversity said this at paragraph 13.2.9 in relation to activity 9 in Rule 15.2.1:

> The committee heard evidence from several submitters including Mr Brosnahan about the status and threshold level for sustainable harvesting of mānuka and kānuka. Forest & Bird and P Fergusson asked for a more restrictive status for commercial harvesting of kānuka and mānuka within SIBS, while DoC requested clarification that the reference to ten per cent in the Rule applied to mānuka and kānuka rather than all indigenous vegetation. Federated Farmers and John Fairbrother for Nikau Farms sought provisions that allow the harvesting in a sustainable way as either a permitted or controlled activity in all SIBS.
>
> The committee notes that the rule is intended to provide for sustainable harvesting of mānuka and kānuka, recognising that in some SIB regenerating mānuka and kānuka can be managed sustainably to enable the economic benefits to be gained from the activity. However, the committee takes particular note that the rule does not apply to vulnerable coastal mānuka and kānuka in the Rural Coastal zone.
>
> The committee notes that commercial extraction of mānuka and kānuka have been managed sustainably for many years as mānuka and kānuka grows relatively fast and can be sustainably harvested while retaining significant values.
>
> The committee agrees with the submission by DoC that clearance of ten per cent of the total area of a SIB could amount to a large amount of clearance in any one year, particularly in the SIB extended over multiple titles and included other vegetation types. To address this issue the amended wording is accepted to clarify that the clearance relates to ten per cent of the total area of mānuka and kānuka as follows:
>
> > *"Harvesting of mānuka and kānuka excluding any kānuka in the rural coastal zone, for commercial use provided that:*
> >
> > *(a) an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate;*
> >
> > *(b) that no more than ten per cent of the total area of kānuka and mānuka in a scheduled feature* ~~***Significant Indigenous Biodiversity Site***~~ *on any site is harvested in any one year; and*
> >
> > *(c) that a sustainable management plan verifying the above is submitted to* ***Council.***"

[8] The decision made no change to the activity status in any of the Schedules.

[9] The Society's appeal against this decision is on the grounds that allowing commercial harvesting of mānuka and kānuka on a concessionary basis does not protect the habitat values of this vegetation type which may contain threatened species, and does not recognise the successional aspect of forest ecology, and that the



conditions are unenforceable. The relief sought in the appeal on this matter was the same as the submission, namely that the activity should be non-complying in Schedule A sites and discretionary in Schedules B and C sites.

[10] The Council and the Society, with other interested parties, participated in mediation of this and many other matters in the Indigenous Biodiversity chapter. The relevant outcomes for the purposes of this appeal were that the description of Activity 9 in (now) Rule 15.2.1.2 (including its requirements, conditions, and permissions) was reworded but the activity status for areas listed in Schedules A and C was not agreed, as follows:

	Activity Status	**Schedule A** <u>**Coastal and Wetlands**</u>	**Schedule B** <u>**Foothills**</u>	**Schedule C** <u>**Te Urewera - Whirinaki**</u>
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; <u>b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration</u>; and ~~b~~<u>c.</u> no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; ~~and~~ <u>d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover; and</u> ~~c. a sustainable management plan verifying the above is submitted to **Council.**~~	~~RD~~ D <u>**or**</u> NC	~~C~~ RD	P <u>**or**</u> RD

[11] The deletion of condition (c) (as notified) was addressed through mediation by the insertion of a new rule 15.2.6 – *Harvesting of kānuka and mānuka (Rule 15.2.1.2(9))*, which provides:

> *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements (in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[12] Also agreed through this mediation process was that the activity status for classification of such harvesting in SIBS listed in Schedule B should be restricted

discretionary.

[13] The remaining issues for the Society and the focus of the hearing of this appeal are the appropriate activity statuses or classifications for such harvesting as described in Activity 9 in SIBS listed in Schedules A and C.

Relevant planning provisions

[14] It was common ground between the Society and the Council that the following provisions of the operative Bay of Plenty Regional Policy Statement (**RPS**) concerning matters of national importance are relevant to this appeal:

> **Policy MN 1B: Recognise and provide for matters of national importance**
>
> *(a) Identify which natural and physical resources warrant recognition and provision for as matters of national importance under section 6 of the Act using criteria consistent with those contained in Appendix F of this Statement;*
>
> *...*
>
> *(c) Recognise and provide for the protection of areas of significant indigenous vegetation and habitats of indigenous fauna identified in accordance with (a); ...*
>
> **Policy MN 2B: Giving particular consideration to protecting significant indigenous habitats and ecosystems**
>
> *Based on the identification of significant indigenous habitats and ecosystems in accordance with Policy MN 1B:*
>
> *(a) Recognise and promote awareness of the life-supporting capacity and the intrinsic values of ecosystems and the importance of protecting significant indigenous biodiversity;*
>
> *(b) Ensure that intrinsic values of ecosystems are given particular regards to in resource management decisions and operations;*
>
> *(c) Protect the diversity of the region's significant indigenous ecosystems, habitats and species including both representative and unique elements;*
>
> *(d) Manage resources in a manner that will ensure recognition of, and provision for, significant indigenous habitats and ecosystems; and*
>
> *(e) Recognise indigenous marine, lowland forest, freshwater, wetland and geothermal habitats and ecosystems, in particular, as being underrepresented in the reserves network of the Bay of Plenty.*
>
> **Policy MN 3B: Using criteria to assess values and relationships in regard to section 6 of the Act**
>
> *Include in any assessment required under Policy MN 1B, an assessment of: ...*
>
> *(c) Whether areas of indigenous vegetation and habitats of indigenous fauna are significant, in relation to section 6(c) of the Act, on the extent to which criteria consistent with those in Appendix F set 3: Indigenous vegetation and habitats of indigenous fauna are met;*
>
> **Policy MN 7B: Using criteria to assist in assessing inappropriate development**
>
> *Assess, whether subdivision, use and development is inappropriate using criteria consistent with those in Appendix G, for areas considered to warrant protection under section 6 of the Act due to:*
>
> *(a) Natural character;*

(b) Outstanding natural features and landscapes;

(c) Significant indigenous vegetation and habitats of indigenous fauna;

(d) Public access;

(e) Māori culture and traditions; and

(f) Historic heritage.

Appendix G – Criteria applicable to Policy MN 7B

Policy MN 7B

Methods 1, 2, 3 and 11

1 Character and degree of modification, damage, loss or destruction;

2 Duration and frequency of effect (for example long-term or recurring effects);

3 Magnitude or scale of effect (for example number of sites affected, spatial distribution, landscape context);

4 Irreversibility of effect (for example loss of unique or rare features, limited opportunity for remediation, the costs and technical feasibility of remediation or mitigation);

5 Resilience of heritage value or place to change (for example ability of feature to assimilate change, vulnerability of feature to external effects);

6 Opportunities to remedy or mitigate pre-existing or potential adverse effects (for example restoration, enhancement), where avoidance is not practicable;

7 Probability of effect (for example likelihood of unforeseen effects, ability to take precautionary approach);

8 Cumulative effects (for example loss of multiple locally significant features).

Policy MN 8B: Managing effects of subdivision, use and development

Avoid and, where avoidance is not practicable, remedy or mitigate any adverse effects of subdivision, use and development on matters of national importance assessed in accordance with Policy MN 1B as warranting protection under section 6 of the Act.

[15] The proposed District Plan, as amended by decisions on submissions, is now past the point where any of its provisions (other than those which are the subject of this appeal) can be changed. We therefore treat the proposed provisions as having greater weight than any provisions in the operative District Plan.

[16] The following strategic provisions of the proposed District Plan were agreed to be relevant:

Strategic objective 7 (Our special places – Māori and iwi):

Subdivision, use and development are managed so that tāngata whenua, including kaitiaki maintain and enhance their culture, traditions, economy and society.

Strategic objective 8 (Our special places):

The natural, cultural and heritage resources that contribute to the character of the district are identified, retained and protected from inappropriate subdivision, use and development.

Policy 2 *To recognise the contribution that natural character, landscapes, biodiversity and heritage resources make to the social, cultural and economic wellbeing of people; and to provide for the* ***maintenance***

and enhancement of those resources in resource management decisions.

[17] The following objectives and policies of chapter 15 of the proposed District Plan on Indigenous Biodiversity[1] were agreed to be relevant:

> **Objective IB1:** *Maintenance of the full range of the district's indigenous habitats and ecosystems, including through restoration and enhancement.*
>
> **Policy 2** *To recognise sustainable land management practices and cooperative industry arrangements that reflect the principles of stewardship and kaitiākitanga, and to take into account the range of alternative methods in the maintenance and protection of indigenous biodiversity, including Tasman Forest Accord, NZFOA Forest Accord, Iwi Management Plans, Bay of Plenty Regional Council biodiversity management plans and protective covenants with the QEII Trust and Nga Whenua Rāhui.*
>
> **Objective IB2:** *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*
>
> **Policy 1(b):** *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*
>
> *(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.*
>
> **Policy 5:** *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[18] Section 15.4 of the proposed District Plan sets out the assessment criteria for restricted discretionary activities and Rule 15.4.4 provides:

> ***15.4.4*** ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.4.4.1* *Council shall restrict its discretion to:*
>
> *a. Timing to enhance the regeneration or establishment of mānuka and kānuka;*
> *b. Stock type;*
> *c. Grazing intensity;*
> *d. Stock containment methods; and*
> *e. Potential adverse effects on water bodies within the property.*

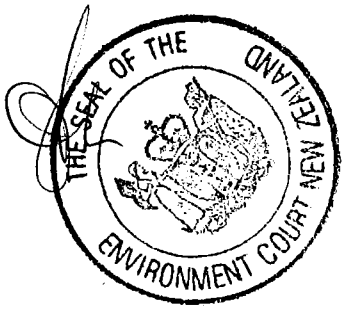
[19] In relation to activities which are classified as discretionary or non-complying, the relevant assessment criteria are set out in section 3.7 in Chapter 3 of the proposed District Plan. The introductory paragraph of this section states that the criteria are a guide to the matters that the Council can have regard to when assessing an application, but that they do not restrict the Council's discretionary powers under s 104(1)(a) of the Act to consider any actual or potential effects on the environment of allowing the

[1] As amended by a consent order dated 5 October 2016 in this proceeding and other related appeals.

activity.

[20] Section 3.7.13 sets out the criteria in respect of indigenous biodiversity effects as follows:

> *3.7.13.1* ***Council*** *shall have regard to;*
>
> *a.* *any adverse effect on* ***ecosystems*** *including;*
>
> *i.* *coastal* ***ecosystems****;*
>
> *ii.* *estuarine margins;*
>
> *iii.* *rivers and streams, wetlands and their margins;*
>
> *iv.* *habitats of* ***indigenous fauna*** *or flora;*
>
> *v.* *the cumulative effects of the activity on habitat of* ***indigenous vegetation*** *and fauna;*
>
> *vi.* *the degree to which the activity will result in the fragmentation of indigenous habitat and adversely impact on the sustainability of remaining vegetation;*
>
> *vii.* *the impact on ecological linkages and connectivity between significant natural areas;*
>
> *viii.* *the degree to which the effects are reversible and the resilience of the feature to change;*
>
> *ix.* *the long-term sustainability of an affected coastal* ***ecosystem****, waterway, estuarine margin, wetlands and their margins, indigenous vegetation or habitat;*
>
> *x.* *the indigenous vegetation to be retained and the degree to which the proposal will protect, restore or enhance indigenous vegetation and the net ecological gain as a consequence of the activity; and*
>
> *xi.* *the means to protect fish habitats by maintaining riparian vegetation;*
>
> *b.* *the effect on Significant Biodiversity areas identified in Appendix 15.7.1, 15.7.2 and 15.7.3, or other sites considered significant according to criteria in the Bay of Plenty Regional Policy Statement;*
>
> *c.* *the location of* ***buildings****, structures and services (such as* ***accessways****) in relation to how that may adversely affect ecological features;*
>
> *d.* *specifically, the management of existing kānuka stands in the Rural Coastal Zone, and means of restoring or rehabilitating this regionally significant feature;*
>
> *e.* *whether there is a reasonable alternative siting for the proposed activity or any alternative subdivision layout that will avoid, remedy or mitigate a significant adverse effect on the environment;*
>
> *f.* *location of the activity relative to any indigenous area and its vulnerability to the pest species; method of containing the pest plant or animal; other barriers to the spread of the plant or animal pest; method of identifying animals (for example, branding); method of dealing with escapes;*
>
> *g.* *plant and animal pest management;*
>
> *h.* *the means to manage the adverse effects of pets, for example, cats, dogs, ferrets and rabbits on wildlife and vegetation;*
>
> *i.* *whether there will be adverse effects on* ***ecosystems****, including effects that;*



i. may deplete the abundance, diversity or distribution of native species; or

ii. disrupt natural successional processes; or

iii. disrupt the long term ecological sustainability of Significant Biodiversity sites, including through increased fragmentation and vulnerability to pests; or

iv. obstruct the recovery of native species and the reversal of extinction trends, or the restoration of representative native biodiversity within an ecological district, ecological region, or nationally, or

v. reduce representative biological values within an ecological district, ecological region, or nationally, or

vi. reduce the area, or degrade the habitat value of an area set aside by statute or covenant for the protection and preservation of native species and their habitat, or

vii. degrade landscape values provided by native vegetation, or

viii. degrade soil or water values protected by native vegetation, or

ix. degrade a freshwater fishery, or

x. degrade aquatic ***ecosystems****.*

j. the degree of clearance in relation to the area retained or protected property.

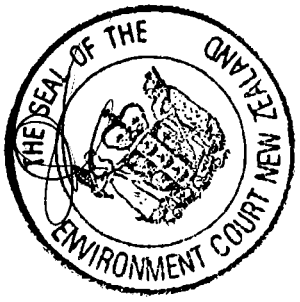
The evidence

[21] Mr Shaw, an expert ecologist called by the Council, has extensive knowledge of the natural environment in the district. He gave essentially unchallenged evidence of primary facts about the circumstances in which mānuka and kānuka are present in the district as follows:

(a) The three types of scheduled SIBS in Chapter 15 of the proposed Plan and the table in Rule 15.2.1.2 have been identified based on Land Environment New Zealand Classifications.

(b) There are six sites listed in Schedule A containing kānuka forest (that is, where more than 80 per cent of the cover consists of kānuka) and one further site of mixed kānuka-kamahi forest that could potentially contain more than 80 per cent cover in kānuka. They are located in the Te Teko, Taneātua and Ōtānewainuku Ecological Districts. They are smaller in size than the sites in Schedules B and C and are located in much modified environments.

(c) The sites listed in Schedule C are much larger and fall largely within the Whirinaki, Ikawhenua and Waimana Ecological Districts with some also present in the Taneātua and Waioeka Ecological Districts. Large



proportions of these districts, other than Taneātua, have a cover of indigenous vegetation: from Waimana at 98 per cent to Whirinaki at 78 per cent. Most of these districts also have very high levels of formal protection as reserves under the Reserves Act or by way of covenants, of the order of 76-89 per cent.

(d) Commercial harvesting of kānuka for firewood is a longstanding (over many decades) activity in various parts of Whakatāne district. Typically, trees are harvested and the areas are left to regenerate naturally, often in the presence of grazing. Currently, most of this activity occurs on sites listed in Schedule B, with little or none presently occurring on sites listed in Schedules A and C.

(e) The areas in Schedule C with significant extensive kānuka dominant forest which are unprotected either as reserves or by way of covenants are all physically inaccessible and therefore are not subject to harvesting.

(f) The value of mānuka as firewood appears to be diminishing, with much higher values being placed on it for the harvesting of foliage for use in skin and hair care products and as a resource for bee keeping and honey production.

[22] Against this factual background, Mr Shaw expressed the following principal opinions:

(a) The small size and limited number of the sites listed in Schedule A means that assessment of the effects of harvesting in these areas can be done effectively.

(b) An activity status of discretionary is sufficient in the Schedule A areas, given the clear requirements in the objectives, policies and assessment criteria for promoting sustainable management in terms of the conditions on the activity for regeneration and the scope of the general discretion to decline consent.

(c) While the sites listed in Schedule C are substantially larger, other methods of protection and limited accessibility means that including rules in the plan to require resource consents to be obtained for harvesting in these areas would be of little benefit.

[23] The Council also called Mr McGhie, its principal planner, to outline the Council's planning approach. Mr McGhie relied on the evidence of Mr Shaw as the basis for his planning assessment. Mr McGhie also outlined the views that had been expressed to the Council by Māori, who own much of the land in the areas where the Schedule C sites are located, during consultation and the submission process.

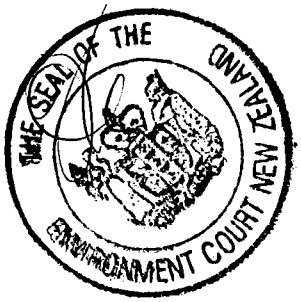
[24] Mr McGhie characterized the issue before the Court as one of balancing the protection of indigenous biodiversity with management responses that would be appropriate to each type of SIBS. In that regard, he observed that the Council had originally proposed only two types of SIBS, but had created Schedule C for two main reasons:

(i) Māori had objected to large tracts of land being controlled in ways that would unnecessarily restrict their development opportunities; and

(ii) the list in Schedule B would otherwise have consisted of sites varying significantly in size.

[25] Mr McGhie set out in his statement of evidence numerous amendments that had been made to Rule 15.2.1.2(9) and in other plan provisions through the process of mediation as summarised above. As well as the Rules referred to earlier in this decision, he also explained that a new definition of "naturally regenerate" had been inserted in chapter 21 of the proposed Plan and that the definition of "indigenous vegetation" had been amended to ensure that regenerated kānuka or mānuka was not covered by the exclusion for vegetation established for commercial purposes. These amendments were not in issue before us.

[26] Mr McGhie also set out his analysis of the activity rule in terms of s 32 of the Act and in the context of the relevant objectives and policies of the Regional Policy Statement and the proposed District Plan. In his opinion, a non-complying activity status for harvesting in Schedule A sites would be out of proportion with those objectives and policies given the degree of protection that the rule has been drafted to provide and the extent to which the process of considering an application for resource consent should include an assessment of sustainable practice to address the relevant assessment criteria in section 3.7.13 of the proposed District Plan. Given those considerations, he opined that a discretionary status was more appropriate.



[27] In relation to a permitted activity status for the Schedule C sites, he also expressed the opinion that this would be consistent with the relevant objectives and

policies and would better address landowner concerns, subject to a restricted discretionary activity status applying where grazing is proposed during the natural regeneration phase.

[28] The Society called Ms Myers as an expert ecologist. In her evidence, Ms Myers set out the ecological context for the harvesting of mānuka and kānuka. She noted the extent of ongoing loss of indigenous biodiversity nationally and emphasised the ecological values of kānuka and mānuka forest in Whakatāne District and, especially, the national importance of Te Urewera for its range of ecological diversity. She stressed the successional role of kānuka and mānuka and the benefits that these species provide in the form of buffers for other forest species and corridor functions between stands of bush and forest. She noted that there was a lack of specific survey information to enable the extent of harvesting and regeneration to be quantified.

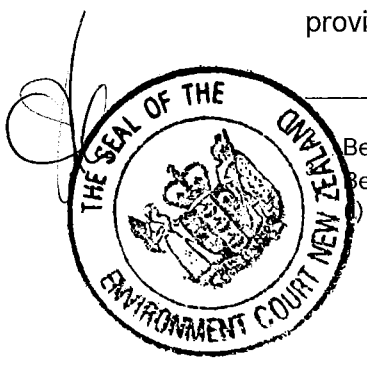
[29] In her opinion, rules for vegetation clearance should be based on the ecological values of that vegetation, as the degree of threat to an ecosystem may be unknown or can change over time. On that basis, she expressed the opinion that harvesting in areas listed in Schedule A should be non-complying because those areas are small and vulnerable and that resource consent as a restricted discretionary activity should be required for harvesting in sites in Schedule C in order to provide a basis for understanding the extent of that activity and its effects.

[30] Ms Myers agreed with the changes to these plan provisions that had been achieved through mediation.

Relevant considerations for a district plan

[31] Under s 290 of the Act, the Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. We must accordingly proceed to consider the issues on appeal on the same statutory basis as they were considered by the Council.

[32] The Council was required to prepare its the proposed District Plan in accordance with ss 74 and 75 of the Act,[2] and the Court must now consider the provisions still in issue in this appeal under those sections.[3] Those sections now



[2] Being s 74 in the form it was when the proposed District Plan was notified on 28 June 2013.
[3] Being s 74 in the form inserted by s 78 Resource Management Amendment Act 2013, given:
(a) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013; and

relevantly provide:

> ***74 Matters to be considered by territorial authority***
>
> *(1) A territorial authority must prepare and change its district plan in accordance with—*
>
> *(a) its functions under section 31; and*
>
> *(b) the provisions of Part 2; and ...*
>
> *(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and*
>
> *(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; ...*
>
> *(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to— ...*
>
> *(b) any—*
>
> *(i) management plans and strategies prepared under other Acts; ...*
>
> *(2A)A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district. ...*
>
> ***75 Contents of district plans***
>
> *(3) A district plan must give effect to— ...*
>
> *(c) any regional policy statement.*

[33] The Council plainly has a function of the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity under s 31(1)(b)(iii).

[34] In relation to the consideration of Part 2 of the Act, counsel for the Council referred us to the Court's decision in *Appealing Wanaka Inc v Queenstown-Lakes District Council*[4] and submitted that because the relevant objectives and policies of the proposed Plan for indigenous biodiversity are beyond challenge, there is no need to look past them to Part 2 of the Act.

[35] That decision is based on the reasoning of the Supreme Court in *Environmental Defence Society v NZ King Salmon*.[5] The Supreme Court held that there is a hierarchy of statutory planning instruments under the Act in order to achieve the purpose of the Act. The purpose of these instruments is to give substance to the principles in Part 2 of the Act. Where an instrument has been prepared to give effect to a higher instrument,

(ii) there appears to be no transitional provision in the Amendment Act which would require the application of s 74 of the Act as it stood when the proposed District Plan was notified.

4 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

5 *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

there is no need to refer back to that higher instrument, or to Part 2 of the Act, to interpret and apply the lower instrument unless there was a challenge based on invalidity, incompleteness or uncertainty in relation to the lower instrument.[6]

[36] In the present case, there is no issue before us of invalidity, incompleteness or uncertainty in the relevant objectives and policies of the proposed District Plan. Accordingly, our consideration of the most appropriate activity status for the harvesting or mānuka and kānuka in SIBS listed in Schedules A and C to the District Plan should be in terms of those relevant objectives and policies.

[37] We address matters concerning the obligation to prepare and have particular regard to an evaluation report in accordance with s 32 of the Act under a separate heading below.

[38] In relation to management plans and strategies prepared under other Acts, Counsel for the Council referred us to Te Urewera Act 2014. The purpose of that Act is:[7]

> *... to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—*
>
> *(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and*
>
> *(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and*
>
> *(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.*

[39] The principles for achieving that purpose are:[8]

> *(1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—*
>
> *(a) Te Urewera is preserved in its natural state:*
>
> *(b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:*
>
> *(c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:*
>
> *(d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:*
>
> *(e) the historical and cultural heritage of Te Urewera is preserved:*
>
> *(f) the value of Te Urewera for soil, water, and forest conservation is*

6 Ibid at [85] and [88].
7 Te Urewera Act 2014, s 4.
8 Te Urewera Act 2014, s 5.

maintained:

(g) the contribution that Te Urewera can make to conservation nationally is recognised.

(2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

[40] This Act declares Te Urewera to be a legal entity and establishes a board for its governance and management. That board is under an obligation to prepare a management plan to identify how the purpose of the Act is to be achieved and to set objectives and policies for Te Urewera, but we understand that such a plan has not yet been prepared.

[41] We were also referred to an integrated planning protocol between Tuhoe Te Uru Taumatua, the Council and other local authorities in which Te Urewera is situated, but that is not a statutory document and did not appear to contain any objectives or policies.

[42] We have set out above the policies of the RPS of most relevance to this appeal.

Evaluation under section 32 of the Act

[43] The necessary evaluation of a proposed rule under s 32 of the Act[9] involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:

(a) identifying other reasonably practicable options for achieving those objectives;

(b) assessing the efficiency and effectiveness of the rule in achieving those objectives, including:

i) identifying, assessing and, if practicable, quantifying the benefits and

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[9] Being s 32 in the form inserted by s 70 Resource Management Amendment Act 2013, given:
(i) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013;
(ii) the transitional provision in cl 2 of Schedule 2 to the Amendment Act (inserting a new Schedule 12 in the principal Act) which requires the further evaluation under s 32 to be undertaken as if s 70 of the Amendment Act had not come into force only if it came into force on or after the last day for making further submissions on the proposed District Plan; and
(iii) the last day for making further submissions on the proposed District Plan being 19 December 2013.

costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and

ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and

(c) summarising the reasons for deciding on that rule.

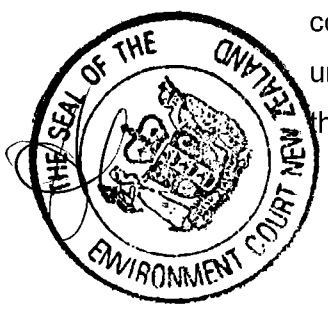
[44] Section 32 of the Act has been through several amendments since the Act first came into force. It is not necessary to rehearse the whole evolution of the section for the purposes of this case, but in light of the focus of this appeal and the wording of the relevant objectives and policies of the proposed District Plan it is appropriate to address one particular aspect of s 32 which has recently been inserted.

[45] The requirement to identify other means or options for achieving the purpose of the Act and the objectives of the plan which is being evaluated has been a central element of s 32 of the Act in all its versions. The current version appears to be the first time that the options have been qualified by the words *reasonably practicable*. The potential importance of this qualification is emphasised in this case given the centrality of Policy MN 8B in the RPS and Policy IB2(1)(b) in the proposed District Plan in argument before us and their wording which calls for consideration of whether avoiding adverse effects on significant indigenous vegetation and SIBS is or is not "practicable."

[46] Neither the word "practicable" nor the phrase "reasonably practicable" is defined in the Act. There is a definition of "best practicable option" in s 2 where it is defined to mean, unless the context otherwise requires:

> *in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—*
>
> *(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the financial implications, and the effects on the environment, of that option when compared with other options; and*
>
> *(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.*

[47] While acknowledging that this case is not concerned with the discharge of a contaminant or the emission of noise, we consider that this definition is helpful in understanding what the word "practicable" may mean in the context of the Act and how the practicability of an option should be analysed.



[48] The word "reasonably" is often used to qualify other words both in legislation and in case law. It has been held in relation to the predecessor provision to s 6(a) of the Act that it may be an implied qualification of the word "necessary."[10] Similarly in relation to s 341(2)(a) of the Act, the same qualification has been implied on the basis that it is unlikely that the legislature envisaged the unreasonable.[11] In the context of an earlier version of s 171(1)(c) of the Act, it has been held to allow some tolerance to the meaning of "necessary" as falling between expedient or desirable on the one hand and essential on the other.[12] There does not appear to be any reason why it should be interpreted differently when used (whether expressly or by implication) in the phrase "reasonably practicable."

[49] Examining other legislation which may be of assistance in this context, we also note that there is a definition of "reasonably practicable" in the Health and Safety at Work Act 2015, as follows:

> *In this Act, unless the context otherwise requires,* reasonably practicable*, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
>
> *(b) the degree of harm that might result from the hazard or risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

[50] Similar definitions are to be found in other legislation concerned with matters of health and safety and the protection of property, including in s 2 Electricity Act 1992, s 2 Gas Act 1992, s 69H Health Act 1956 and s 5 Railways Act 2005. The phrase is also used in many statutes without definition.

[51] These legislative examples are, perhaps unsurprisingly, consistent with well-established case law interpreting the meaning of "reasonably practicable." It has been

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[10] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 260; (1989) 13 NZTPA 197 at 203 (CA) per Cooke P in relation to s 3(c) of the Town and Country Planning Act 1977, citing *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423, 430; and *Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25, 54.

[11] *Hugle v Cowie* [1998] 1 NZLR 104 at 109-110; [1997] NZRMA 395 at 400-401; (1997) 3 ELRNZ 261 at 268 (HC).

[12] *Bungalo Holdings Ltd v North Shore City Council* A137/2002 at [94].

held that the phrase is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk.[13] Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable, but if the risk is a very rare one and the trouble and expense involved in precautions against it would be considerable but would not afford anything like complete protection, then adoption of such precautions could have the disadvantage of giving a false sense of security.[14] "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[15] Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighing exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.[16]

[52] While acknowledging that this case is not governed by any of those other Acts referred to and that the case law summarised above was decided under other legislation, nonetheless we consider the approach consistently taken in other legislation and by other Courts to the assessment of the correct approach to or the boundaries of what is "practicable" in relation to a duty to ensure the health and safety of people and the protection of property could be analogous to the approach which may be taken to protecting, or otherwise dealing with adverse effects on, the environment under the Resource Management Act 1991.

[53] We consider that these statutory provisions and cases together illustrate a consistent approach to the meaning of "reasonably practicable" which we respectfully adopt in this case in considering the options before us. We accordingly proceed to consider RPS Policy MN 8B and District Plan Policy IB2(1)(b) and identify reasonably practicable options for achieving the objectives of the proposed District Plan by examining the options having regard to, among other things:

[13] *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743 (EWCA).
[14] *Marshall v Gotham Co Ltd* [1954] AC 360; [1954] 1 All ER 937 (UKHL).
[15] *Union Steam Ship Co of NZ Ltd v Wenlock* [1959] 1 NZLR 173 (CA).
[16] *Auckland City Council v NZ Fire Service & anor* [1996] 1 NZLR 330 (HC).

i) The nature of the activity and its effects;

ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;

iii) The likelihood of adverse effects occurring;

iv) The financial implications and other effects on the environment of the option compared to other options;

v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;

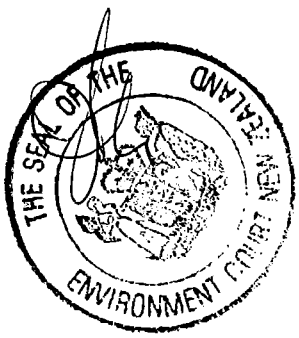
vi) The likelihood of success of the option; and

vii) An allowance of some tolerance in such considerations.

The extent to which adverse effects must be avoided

[54] A further consideration arising from the centrality of RPS Policy MN 8B and District Plan Policy IB2(1)(b) in the argument is the need expressed in those policies to avoid adverse effects on significant indigenous vegetation and scheduled SIBS or, where avoidance is not practicable, to remedy or mitigate adverse effects.

[55] The most obvious meaning of "avoid" in the context of the Act and in policy statements under it, as held by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[17] is "not allow" or "prevent the occurrence of." The Supreme Court then goes on to explore the contexts in which the word is used and, in particular, the importance of its meaning when used with the word "inappropriate" in relation to subdivision, use and development. That exploration is principally in the context of s 6(a) and (b) of the Act and against the framework of the New Zealand Coastal Policy Statement. It is clear, however, that the approach of the Supreme Court is equally applicable in other contexts where the extent of avoidance called for by a policy is to be considered.[18]



[17] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [92]-[97].

[18] See for example *R J Davidson Family Trust v Marlborough DC* [2017] NZHC 52 at [61]-[93] where the Supreme Court's approach in relation to a proposed plan change was held to be a lawful consideration in relation to an application for resource consents.

[56] Certainly, in relation to this case which involves a plan review and proposed provisions intended to recognise and provide for the protection of areas of significant indigenous vegetation as required by s 6(c) of that Act, it was common ground that the approach of the Supreme Court was applicable.

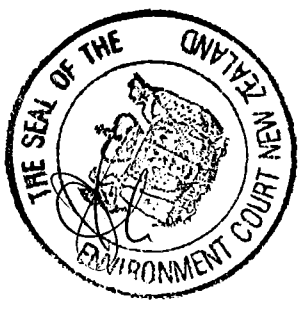
[57] The consideration of context is, as it usually is,[19] an essential part of the interpretation and application of policy provisions. It is generally insufficient to refer to the presence of the word "avoid" as a conclusion in itself: a policy to avoid adverse effects of activities on the environment, without any greater particularity, could be said to be a basis for not allowing any activity at all. As the Court of Appeal recently observed in *Man o'War Station Ltd v Auckland Council,*[20] much turns on what is sought to be protected.

[58] We bear this guidance respectfully in mind in considering not just whether the SIBS listed in Schedules A and C to Chapter 15 of the proposed District Plan should be protected, but the extent of such protection and the manner in which such protection is intended to be achieved.

[59] In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*:[21] that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

Classes, categories or status of activities

[60] The power to categorise activities into one of six classes and to make rules and specify conditions for each class is conferred by s 77A of the Act. The six classes of



[19] *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (UKHL), 1636 per Lord Steyn; referred to in *McGuire v Hastings DC* [2001] NZRMA 557 (PC) at [9] per Lord Cooke.

[20] *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [65] as part of discussion in [59]-[66] and [70]-[73].

[21] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

activities are listed in s 77A(2) and described in s 87A. The class of an activity is often referred to as its "activity status."[22]

[61] The six classes may be seen as a spectrum of control from *permitted* through to *prohibited* in a progression of increasing levels of constraint:

(i) a permitted activity requires no resource consent and may be undertaken as of right if it complies with the requirements, conditions and permissions, if any, specified in the Act, regulations or relevant plan;

(ii) a controlled activity requires a resource consent but that consent must (with limited exceptions) be granted and may be subject to conditions within the scope of control specified in the relevant plan or national environmental standard;

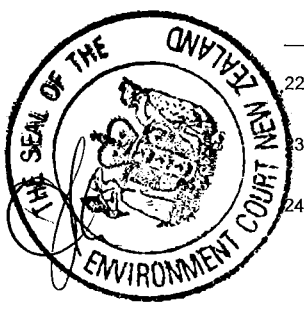
(iii) a restricted discretionary activity requires a resource consent but the consent authority's power to decline an application for such an activity or to grant consent and impose conditions is restricted to the matters specified for that purpose in the plan or national environmental standard;

(iv) a discretionary activity requires a resource consent and the consent authority's discretion to decline consent or to grant consent with or without conditions is, within the scope of the Act itself, unlimited;

(v) a non-complying activity must be assessed against the threshold tests in s 104D of the Act and may be granted only if it passes one of those threshold tests; and

(vi) a prohibited activity is one for which no application for resource consent may be made.

[62] Counsel for the Council referred us to well-known decisions in *New Zealand Mineral Industry Association v Thames-Coromandel District Council*[23] and *Mighty River Power Limited v Porirua District Council*[24] in support of her argument that the harvesting of trees from sites listed in Schedule A should be discretionary rather than non-



[22] The phrase "activity status" appears only in s 149G of the Act, inserted on 1 October 2009, but the usage among practitioners is considerably older than that.

[23] *New Zealand Mineral Industry Association v Thames-Coromandel District Council* (2005) 11 ELRNZ 105.

[24] *Mighty River Power Limited v Porirua District Council* [2012] NZEnvC 213.

complying. She did acknowledge, however, in response to a question from the Court that the statements in those decisions on which she relied were conditioned by the factual circumstances before the Court in those two cases. We consider that acknowledgement to be properly made and, with respect to those decisions and others of a similar nature,[25] we think that caution must be exercised in applying the reasoning in those decisions to other cases. Without doubting the correctness of the statements in the context of the cases in which they were made, the complexity of plan making means that the classification of activities in other circumstances is likely to require specific analysis of the effects of the activity against the particular objectives and policies which relate to the activity being assessed.

[63] It is important to note that the statutory framework for the classification of activities contains no provisions which address the application of these categories or classes to any particular activities or in terms of the nature of the effects of any activity. Instead, the scheme of the Act is that the categorization or classification of an activity is to be done by rules under s 77A. Such rules, like all others in a district plan, must be examined and assessed in accordance with the requirements of s 32 of the Act and consistent with the requirement under s 76(3) of the Act to have regard to the actual or potential effect on the environment of the activity under consideration including, in particular, any adverse effect.

Evaluating the most appropriate activity status

[64] In terms of achieving the objectives of the proposed District Plan, both parties pointed to Objective IB2 as being the most relevant:

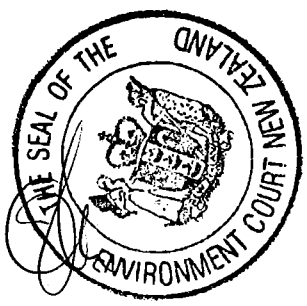
> ***Objective IB2:*** *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

The focus of the argument was then on the issue of the most relevant policy, with the focus of the case being on policies IB2(1)(b) and IB2(5).

[65] Counsel for the Council, in addressing the extent of protection that is appropriate in the circumstances, placed the most weight on Policy IB2(5):

> ***Policy 5:*** *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[66] She submitted, based on Mr Shaw's evidence, that classifying harvesting in



[25] In relation to permitted activities, see *Twisted World Limited v Wellington City Council* W024/2002 at [62]-[64]; in relation to restricted discretionary activities see *Auckland City Council v John Woolley Trust* (2007) 14 ELRNZ 106 at [49] (HC); and in relation to discretionary activities, see *Lakes District Rural Landowners Society Inc v Wakatipu Environmental Society Inc* C75/2001 at [43]-[44].

Schedule A sites as non-complying would go too far, given the extent to which the plan provided for the assessment of effects in terms of specific criteria and the status of discretionary left open the ability of the Council to decline an application.

[67] In relation to classifying harvesting in Schedule C sites as permitted, she submitted, on the basis of Mr Shaw's evidence that the effects would be no more than minor, that it was unnecessary to impose the costs of the consenting process on landowners except where grazing was proposed during the regeneration phase.

[68] It was common ground that grazing generally slows the regeneration of indigenous species, but that as kānuka and mānuka are relatively unpalatable to stock they are able to regenerate in the presence of managed grazing. On that basis, the parties were agreed that the activity status in Schedule C sites should be restricted discretionary where grazing is proposed during the regeneration phase, which amounts to a partial allowance of the Society's appeal.

[69] The Council proposed that, should the Court confirm the status of Activity 9 in Schedule C sites as otherwise permitted, this outcome could be provided for in the rules by inserting a footnote to that activity status stating that restricted discretionary status applies where grazing is proposed during the natural regeneration phase. The assessment of an application for consent for that activity would not be against the assessment criteria for clearance of indigenous vegetation and so the heading of Rule 15.4.1 would explicitly exclude Activity 9. Instead, such assessment was proposed to be dealt with by a new rule 15.4.4 setting out the restrictions on the Council's discretion, as follows:

> ***15.4.4*** ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.4.4.1* *Council shall restrict its discretion to:*
>
> *a. Timing to enhance the regeneration or establishment of mānuka and kānuka;*
> *b. Stock type;*
> *c. Grazing intensity;*
> *d. Stock containment methods; and*
> *e. Potential adverse effects on water bodies within the property.*

[70] Counsel for the Council also addressed the relocation and expansion of condition (c) in Activity 15.2.1.2(9) (as notified) to become a new rule 15.2.6, in the following terms:

> ***15.2.6*** ***Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.2.6.1* *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is*

> *submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[71] Counsel submitted that this rule would apply to Activity 15.2.1.2(9) regardless of its activity status because it forms part of the rules for indigenous biodiversity generally. We note the statement at the beginning of section 15.2 of the District Plan:

> The following standards and terms apply to Permitted, Controlled, and Restricted Discretionary activities and will be used as a guide for Discretionary and Non-Complying activities.

[72] Should any harvesting of kānuka and mānuka not meet the standards and terms[26] of Rule 15.2.1.2(9) or Rule 15.2.6, counsel noted that then it would be subject to Rule 15.2.1.2(14), the catch-all activity rule which makes activities involving indigenous vegetation clearance or modification or habitat disturbance not otherwise provided for in the activity table a non-complying activity in sites listed in Schedule A and a discretionary activity in sites listed in Schedules B and C.

[73] The Court expressed a doubt about the likelihood of compliance with Rule 15.2.6.1, particularly at years five and 15 and especially where the subject property may have been transferred. In reply, counsel for the Council submitted that much of the land listed in Schedule C is Māori land and unlikely to be transferred to third parties. She said that monitoring of sites that had been subject to harvesting would occur whether the activity was the subject of a consent or not and whether the costs of monitoring were the subject of an administrative charge under s 36(1)(c) or not.

[74] In response, counsel for the Society placed the most weight on Policy IB2(1)(b):

> ***Policy 1(b):*** *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*
>
> *(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.*

[75] Counsel for the Society approached the issue of the appropriate activity status for harvesting kānuka and mānuka by referring us to the decision in *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council*.[27] There the Court was concerned with the level of protection of significant natural areas required in terms

[26] Being the "requirements, conditions, and permissions" referred to in s 87A of the Act.

[27] *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council* [2015] NZEnvC 219.

of s 6(c) of the Act. By analogy with the consideration of the requirements of s 6(a) and (b) of the Act taken by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[28] the Environment Court held that there was a requirement to implement the protective element of sustainable management in those circumstances.

[76] While recognising that counsel for the Society referred to the *New Plymouth* case for its clarification of the meaning of the word "protection" which is not defined in the Act, we note that the case concerned an application for declarations and enforcement orders based on claims that the Council had not appropriately recognised and provided for protection of areas of significant indigenous vegetation, among other things. Those circumstances clearly come within the exception of incompleteness to the hierarchical approach as explained by the Supreme Court.

[77] In the present case there is a clear relationship between Policy IB2(1)(b) in the District Plan and Policy MN 8B in the RPS where the former gives effect to the latter, providing local and regional substance in terms of the principles in s 6(c) of the Act. On that basis, and consistent with the approach described in the *Appealing Wanaka* decision[29] discussed above, we should not go back to Part 2 of the Act in a more general assessment of what is appropriate.

[78] Counsel for the Society stressed the character of the adverse effects of the harvesting activity and relied on the evidence of Ms Myers in relation to the disruption of forest succession, loss of habitat, hedge effects and the particular threat to Schedule A sites given their small size. She also submitted that the evidence that little or no harvesting was presently occurring in the Schedule A and C sites meant that there was no economic incentive to undertake harvesting and therefore it would be unnecessary to provide for that activity so as to enable reasonable use of the land. With respect, we think that latter submission is not supported by the scheme of the Act or other authority. In our view, the Act is not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary.

[79] Another point raised in the argument before us was the notion that the classification of an activity as non-complying tended to indicate that it ought not to occur, while the classification as discretionary usually means that the activity will be

[28] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [24]-[28].

[29] *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

acceptable if it is made subject to appropriate conditions.

[80] With respect, cognisant of the degree to which some earlier decisions of the Court noted above[30] may give that impression, we consider it better to approach these two classifications in their statutory context. In particular, they share the same consenting provision in s 104B of the Act, which is expressed simply as a general discretion. While a non-complying activity must first pass one of the thresholds set out in s 104D, if it does so then in terms of s 104B it is to be considered on the same statutory basis as a discretionary activity. At that stage, both types of activities must be considered in terms of the matters set out in s 104 of the Act, including having regard to any effects on the environment of allowing that activity and any relevant provisions of any of the planning documents listed in s 104(1)(b). Typically, the most relevant provisions will be the objectives and policies which bear most directly on the activity or others of like nature and on the environmental context in which the activity is proposed to be established.

[81] In relation to the Schedule A sites, we conclude that a discretionary activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka. We consider that this activity status responds to the policy framework in the District Plan by providing suitable protection of SIBS through an assessment and consenting process for sustainable use of the resource. The detailed assessment criteria for this activity should ensure a thorough analysis of all likely effects, including effects on wider ecosystems. Given those provisions in the District Plan, we do not see any reason to require a prior threshold assessment under s 104D of the Act: that would amount to a further restriction which would add little if anything to the assessment under s 104.

[82] In relation to the Schedule C sites, we conclude that a permitted activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka where grazing will not occur during the regeneration phase. We consider that the requirements, conditions, and permissions for this activity appropriately delimit the extent to which it could occur without a resource consent being required and provide a reasonably clear boundary to the activity for the purposes of monitoring and enforcement. We also have regard to the fact that harvesting of mānuka and kānuka has been occurring in the district for a long time without evidence of more than minor adverse effects on the environment. We also note the fact that currently little or no such

[30] At fn 23 and fn 24.

harvesting activity is occurring in the Schedule C sites and see no evidence that a requirement to obtain resource consent should be imposed on any sort of pre-emptive basis. We acknowledge the relationship of the Māori owners with much of the land listed in Schedule C and take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi and the purpose and principles of Te Urewera Act 2014 in reaching our conclusion.

[83] We are grateful to the parties for the constructive way in which they have worked together to improve the related provisions of the District Plan, including since mediation. In particular:

(a) We endorse the suggested amendment of the activity description to replace the words "in the same year" with "within one year." This amendment effectively addresses the potential problem of treating the activity as occurring within a calendar year when it is much more likely to be seasonal.

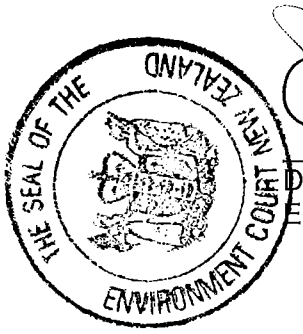
(b) We endorse the agreed position that if harvesting in the Schedule C sites is to be generally a permitted activity, nonetheless it should be a restricted discretionary activity if grazing is proposed in the harvested area during the regeneration phase, given the effect of grazing to delay such regeneration.

(c) As a consequence of that adjustment to the activity status in the Schedule C sites, we also confirm the appropriateness of the amendments to the headings of Rules 15.2.6, 15.4.1 and 15.4.4 to make that distinction clear.

[84] We attach to this decision as **Attachment A** the relevant provisions of the District Plan, amended in accordance with our decision. We attach as **Attachment B** the same provisions with those amendments shown with deletions struck through and additions underlined.

[85] In accordance with the Court's usual practice on appeals under clause 14 of Schedule 1 to the Act, there is no order as to costs.

For the Court:



D A Kirkpatrick
Environment Judge

Attachment A

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover.	D	RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

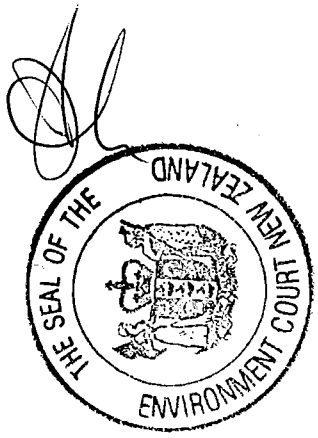
a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

Where indigenous vegetation naturally regenerates or is replanted within a SIB in accordance with Rule 15.2.1.2(9), it is not a "plantation or vegetation established for commercial purposes" as described in the definition of indigenous vegetation.

Naturally regenerate means the harvested area is retired from other active land uses (including grazing) and indigenous vegetation is allowed to regenerate through natural processes. For kānuka and mānuka dominant stands this will typically take ten to twenty years.



Attachment B

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

Amendments are shown with deletions ~~struck through~~ and additions underlined

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted ~~in the same~~ within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; ~~b~~c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover. ~~c. a sustainable management plan verifying the above is submitted to Council.~~	~~RD~~ D	~~C~~ RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9)) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

3. Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

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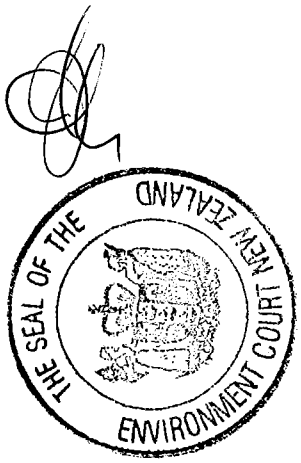


ORIGINAL

Decision No. C 128 /2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference pursuant to Clause 14 of the First Schedule of the Act

BETWEEN **OTAGO PRESBYTERIAN GIRLS COLLEGE BOARD OF GOVERNORS INCORPORATED (COLUMBA COLLEGE)**

(RMA 976/99)

Referrer

AND **DUNEDIN CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith
Environment Commissioner N J Johnson
Environment Commissioner I G C Kerr

HEARING at DUNEDIN on 23rd and 24th April 2001

APPEARANCES

Mr P J Page for the appellant
Mr S W Christensen for the Dunedin City Council
Mr P Constantine, appearing to give evidence for the Academy Group NZ Limited s.274 participant
Mr M M Mitchell, appearing for himself, s.274 participant
N and M Weir agreed to the proposed standards and did not appear

INTERIM DECISION

Introduction

[1] This is a reference to the Dunedin City Proposed District Plan as to whether the activities of the referrer (**Columba College**) to operate a primary and secondary school now integrated with the state system should be a permitted activity in the Residential 1 zone. There are several other references awaiting the outcome of this decision relating to other primary and secondary schools operating on land not owned by the Ministry of Education (**the Ministry**).

[2] Currently schools form part of "*community support activities*" which are unrestricted discretionary activities in the Residential 1 zone.

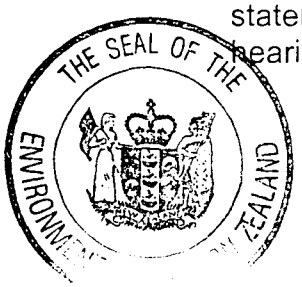
[3] Existing schools have existing use rights but any construction or development requires an application for resource consent which we are told causes inevitable costs and delays. All schools owned by the Ministry are designated within the area covered by the Dunedin City Council (**the Council**) and therefore are not subject to any requirement for notification in respect of any development or additions.

[4] The essential position of Columba College is that their school should be on the same footing as the Ministry's schools because the only distinction between the two is as to the ownership of the land. It is accepted that the Court does not have the power to designate the land and accordingly the referrer seeks equivalent treatment by making their activity a permitted or scheduled activity in the Residential 1 zone.

[5] Although the issue before this Court may be simply stated on this basis, the particular interest of the s.274 participants and urgency of this matter relates to a particular development that Columba College is seeking to undertake involving the construction of a gymnasium.

[6] That application, subject to a resource consent application under the proposed plan, was declined by the Council and is now appealed before this Court. The position of the parties is that in the event that the activity is permitted in the zone by virtue of this reference then a hearing of that appeal may be unnecessary or the issues significantly reduced.

[7] This case has been subject to case management which has resulted in a statement of facts and issues being agreed to between the parties to this hearing.



We repeat this in full because, in our view, it properly encapsulates both the background and the issues before this Court and also because it may be of assistance to other parties in preparing statements of issues in respect of other hearings.

[8] STATEMENT OF FACTS AND ISSUES

Background

1. Otago Presbyterian Girls College Board Of Governors Incorporated (Columba College) ("the referrer") lodged a submission to the Dunedin City Proposed District Plan in 1995 seeking that community support activities be provided for as permitted activities in the Residential 1 zone. Community support activities, as defined in the Proposed Plan, include educational facilities.

2. The Council's decision on this submission, issued in August 1999, rejected this submission. The reasons for the decision were as follows:
   (i) There are a number of effects of community support activities that may be detrimental to the residential amenity and character.
   (ii) These effects may vary, according to the nature and scale of the proposed activity, and it is therefore appropriate to assess these on a case by case basis.
   (iii) The resource consent process provides the opportunity to assess the actual or potential effects of an activity on its merits, and identify means by which any adverse effects may be avoided, remedied or mitigated.

3. The submitters filed a reference against this decision, seeking again that community support activities be provided for as permitted activities in the Residential 1 zone.

   The grounds for the reference are that it is not necessary to control the effects resulting from community support activities through the resource consent process as a discretionary activity. Community Support Activities such as educational facilities are essential services in residential areas and ought to be permitted activities.

4. Three parties have given notice under s. 274 of the Resource Management Act.

5. Following discussions, the relief sought by the referrer has been narrowed to providing for school-related activities on the existing site of Columba College (scheduling the activity as permitted). Agreement has been reached between the referrer and the respondent as to the conditions under which such provision could be made. The proposed rules incorporating the agreed provision is attached as Annexure 1.

6. One of the s.274 participants, the Academy Group NZ Limited, agrees with all but one provision of the proposed rules at Annexure 1. The matter to be heard in relation to this Section 274 participant is whether an activity which fails to comply with any of the conditions for scheduled activities at Rule 8.77 should be considered as a Discretionary (Unrestricted) Activity (refer proposed Rule 8.7.5) rather than a Discretionary (Restricted) activity (refer proposed Rule 8.7.4).

7. N and M Weir, the second s.274 participants, have agreed to the proposed standards.

8. Mr Maurice Mitchell, another s.274 participant, has not accepted the approach agreed between the referrer and the respondent. The matters to be heard in relation to this section 274 participant have been narrowed to the following:
   (i) whether it is appropriate to schedule Columba College as a permitted activity on the subject site; and
   (ii) whether scheduling Columba College, subject to associated performance standards, will avoid, remedy or mitigate any adverse effects.

Site description

9. The land subject to this reference is located at 421 Highgate, Dunedin. The site is hatched and marked as "A" on Annexure 2.

10. The site was zoned Residential A in the Transitional District Plan (Dunedin Section) and is zoned Residential 1 in the Proposed District Plan.

Relevant provisions of the Resource Management Act

11. In preparing the Proposed District Plan, the Council and now the Environment Court (under s.290 of the Resource Management Act) must consider a range of matters. The following matters are of particular relevance to this reference.

12. Part II of the Resource Management Act, which establishes the purpose and principles of the Act. Of particular importance to this reference are the following sections:

- Section 5(1), which states that the purpose of the Act is to *"promote the sustainable management of natural and physical resources".*

- Section 5(2), which states that

  ... 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 –

  ..

  (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

13 Section 7(c), which requires that particular regard be given to the maintenance and enhancement of amenity values.

14 Section 7(f), which requires that particular regard be given to the maintenance and enhancement of the quality of the environment.

15. Section 31 of the Act which identifies the functions of territorial authorities in relation to the purpose of the Act. These functions include:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district

(b) The control of any actual or potential effects of the use, development, or protection of land, ...

16. Section 32(1) of the Act, which requires that before a Council includes a provision in its Plan, it must

(a) Have regard to –

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

(ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and

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

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

(c) *Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) -*
   (i) Is necessary in achieving the purpose of this Act; and
   (ii) Is the most appropriate means of exercising the function; having regard to its efficiency and effectiveness relative to other means.

17. Section 72 of the Act, which states that
The purpose of the preparation, implementation and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act.

18. Section 74 of the Act, which states in subsection (1) that
A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32, and any regulations.

19. Section 75 of the Act, which states that
(1) A district plan shall make provision for such of the matters set out in Part II of the Second Schedule as are appropriate to the circumstances of the district, and shall state -
   (a) the significant resource management issues of the district; and
   (b) the objectives sought to be achieved by the plan; and
   (c) the policies in regard to the issues and objectives, and an explanation of those policies; and
   (d) the methods being or to be used to implement the policies, including any rules; and
   (e) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the plan...

20. Section 76(1) of the Act, which states that
A territorial authority may, for the purpose of –
(a) Carrying out its functions under this Act; and
(b) Achieving the objectives and policies of the plan, -
include in its district plan rules which prohibit, regulate, or allow activities.

21. Part II of the Second Schedule includes the following as matters related to Districts:
(1) Any matter relating to the management of the use, development, or protection of land and any associated natural and physical resources for which the territorial authority has responsibility under this Act, including the control of -.
   (a) Any actual or potential effects of any use of land described in section 9(4)(a) to (e),...
(2) Any matter relating to the management of any actual or potential effects of any use, development, or protection described in clause 1 of this Part, including on -
   ...
   (b) Other natural and physical resources...

Relevant issues, objectives and policies in the Proposed District Plan

22. **Sustainability Section**
The Sustainability Section of the Proposed Plan identifies the overarching resource management issues for Dunedin and sets out the approach of the Plan for addressing these issues. The objectives and policies of this Section provide the framework for the other sections which break the matters identified in the Sustainability Section down into more specific issues.

Apart from the Kirkland reference, there are no references which affect the Issues, Objectives or Policies of the Sustainability Section.

Issue 4.1.1	Objective 4.2.1	Policy 4.3.1
The residents of Dunedin seek to retain and enhance the existing character and amenity of the City and surrounding areas.	Enhance the amenity values of Dunedin.	Maintain and enhance amenity values.

Issue 4.1.4	Objective 4.2.5	Policy 4.3.7
The use and development of the natural and physical resources of the City has the potential to cause adverse effects, not all of which are readily apparent.	Provide a comprehensive planning framework to manage the effects of use and development of resources.	Use zoning to provide for uses and developments which are compatible within identified areas.
		Policy 4.3.8 Avoid the indiscriminate mixing of incompatible uses and developments.
		Policy 4.3.9 Require consideration of those uses and developments which: (a) Could give rise to adverse effects. (b) Give rise to effects that cannot be identified or are not sufficiently understood at the time of preparing or changing the District Plan.
		Policy 4.3.10 Adopt an holistic approach in assessing the effects of the use and development of natural and physical resources.

23. **Residential Section (including Residential 1 zone).**

Apart from the Kirkland reference, there are no references which affect the Issues, Objectives or Policies of the Residential Section.

Issue 8.1.1	Objective 8.2.1	Policy 8.3.1
The amenity of the residential area can be adversely affected by land use activities and development.	Ensure that the adverse effects of activities on amenity values and the character of residential areas are avoided, remedied or mitigated.	Maintain or enhance the amenity values and character of residential areas. **Explanation** The amenity values of residential areas may be affected by development, redevelopment or activities that take place ion these areas. These amenity values include the following: (a) The set back of buildings from the street frontage (b) The space between buildings created by yards.

		(c) The height of the building with regard to other buildings in the immediate vicinity. (d) The penetration of sunlight to a site and building (e) The amount and scale of landscaping in and around a site (f) The formation of the street (grass berms, trees, formed road widths and footpaths) and the amount of traffic which utilises the street (g) The adequate provision of carparking for each development, its location and visual effect on the environment (h) The residential character of the neighbourhood (i) The proximity to services such as shops and community support activities. The loss or lack of any of these qualities and characteristics lowers the total amenity value, which can also be affected by other environmental problems such as noise, lighting and glare. Their retention or enhancement helps maintain it and raises the quality of an area and contributes to the health, safety and wellbeing of the community.
	Objective 8.2.7	**Policy 8.3.10**
	Recognise that some community support activities contribute to the maintenance and enhancement of residential character and amenity. **Explanation** Some non-residential activities provide valuable community support within residential neighbourhoods, enabling people to provide for their social and cultural wellbeing...in close proximity to their place of residence. Such non-residential activities may be appropriate to and compatible with the character and amenity of residential	Provide for community support activities within residential areas. **Explanation** Community support activities enable the community to provide for its health, safety and wellbeing. These activities need to be recognised and provided for within residential areas, although care needs to be taken to avoid, remedy or mitigate any adverse effects that may result. Community support activities attract significantly greater levels of activity than purely residential uses This is primarily due to

	areas, but care needs to be taken to ensure that any adverse effects are avoided, remedied or mitigated...	the size of the buildings accommodating such facilities, the number of people using them and the frequency with which they are used. These effects have the potential to reduce the levels of neighbourhood amenity.

[9] In addition we quote the Residential 1 Zone rules:

8.7 Residential 1 Zone – Rules

Rule 8.7.1 Permitted Activities

The following activities are permitted activities provided that they comply with the relevant conditions in Rule 8.7.2 of the Residential 1 Zone:

(i) Residential Activity at a density of not less than 500 m^2 of site area per residential unit provided that a single residential unit may be erected on an existing site of any size.

This rule does not apply to multi unit residential developments in the area shown as 'Restricted Water Supply Area' (refer Rule 8.7.4(ii)).

(ii) Recreational Activity provided that associated structures do not exceed 25 m^2 in floor area.

(iii) Accessory buildings for permitted and controlled activities, excluding structures for recreational activities in excess of 25 m^2.

(iv) Signs permitted in this zone are specified in the Signs Section.

Rule 8.7.2 Conditions Attaching to Permitted Activities

(i) **Minimum Yards**

(a) **Front Sites**

Front Yard	4.5 m
All Other Yards	2.0 m

(b) **Rear Sites**

All Yards	2.0 m

(ii) **Height Plane Angle**

63° (1 to 2 yard to height ratio).

(iii) **Maximum Height**

9 m.

(iv) **Maximum Site Coverage**

Front Sites	40% of site area
Rear Sites	40% of site area excluding the access strip

(v) **Amenity Open Space**

Every residential unit shall provide at ground level an area of 35 m^2 of amenity open space containing a minimum dimension of 4.5 m. For residential units not at ground level (ie multi-storeyed apartments and flats) Rule 8.6.2 shall apply.

(vi) **Separation Distances**

Development containing more than one residential unit that does not share a common wall shall be separated by a distance of no less than 4 m.

(vii) **Minimum Car Parking**

On-site car parking shall comply with the performance standards in Section 20 (Transportation) and shall be provided on the following basis:

(a) **Residential Activity**

(i) 1 car park per residential unit up to and including 150 m^2 gross floor area (excluding garaging areas).

(ii) 2 car parks per residential unit greater than 150 m^2 gross floor area (excluding garaging areas).

(iii) 1 visitor car park per 5 residential units.

(iv) 2 additional car parks for a residential unit where staff provide for between 13 and 18 residents inclusive.

(b) **Recreational Activity**

(i) 1 car park per 750 m^2 of site area.

(viii) **Loading and Access**

No requirements for loading. Access requirements shall comply with the performance standards in Section 20 (Transportation).

(ix) **Signs**

Refer to the Signs Section.

(x) **Noise, Glare, Lighting and Electrical Interference**

Refer to the performance standards of the Environmental Issues Section.

(xi) **Port Noise – Buildings used for Residential Purposes within the Port Outer Control Boundary (Port Chalmers)**

On any site located between the Port Noise Boundary and the Port Outer Control Boundary at Port Chalmers, as shown on District Plan Maps 65 and 70, any new building to be used for residential activities shall be acoustically insulated from external noise so as to meet an indoor design level of 40 dBA Ldn within any kitchen, dining area, living room, study or bedroom.

(xii) **Minimum Site**

(a) **Minimum Area**

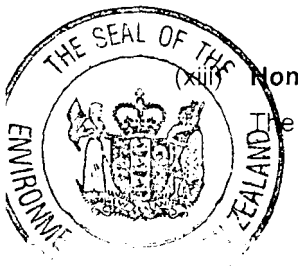
(i)	Front Site	500 m^2
(ii)	Rear Site	500 m^2 excluding the access strip

(b) **Minimum Frontage**

(i)	Front Site	3.5 m
(ii)	Rear Site where access serves up to 3 residential units	3.5 m
(iii)	Rear Site where access serves 4 or more household units	6.0 m

(xiii) **Home Occupation**

The area within any building used for home occupation(s) is limited to 50 m^2.



8.7.3. *[Deleted by Variation 6: 18/10/00]*

Rule 8.7.4 Discretionary Activities (Restricted)

The following activities are discretionary activities (restricted):

(i) Any permitted or controlled activity which does not comply with the relevant conditions in Rule 8.7.2 of the Residential 1 Zone. The Council's discretion is restricted to the condition or conditions with which the activity fails to comply.

(ii) Multi-unit residential activity at a density of not less than 500 m^2 of site area per residential unit in the area shown as 'Restricted Water Supply Area'. The Council's discretion is restricted to the requirements of Rule 8.7.2 and the use of and demand for water created by the proposal.

Rule 8.7.5 Discretionary Activities (Unrestricted)

The following activities are discretionary activities (unrestricted):

(i) Community Support Activity.

(ii) Structures for recreational activities with a floor area greater than 25 m^2.

(iii) Accessory buildings for discretionary activities.

(iv) Commercial Residential Activity.

Rule 8.7.6 Non-Complying Activities

(i) Forestry Activity.

(ii) Quarrying.

(iii) Any activity not specifically identified as permitted, controlled or discretionary by the rules in this zone or in the rules of Sections 17 to 22 of this Plan is non-complying. This rule does not apply to activities identified as permitted, controlled or discretionary in the rules of Sections 13 to 16 of the Plan, regardless of where in the zone those activities are undertaken.

[10] Both as a result of the statements of facts and issues and as a result of the hearing of this matter, we are satisfied that the issues for determination by the Court are:

(i) Whether it is appropriate to schedule Columba College as a permitted activity on the subject site; and

(ii) If so, whether the proposed performance standards are appropriate and, if so, whether they are sufficient to avoid, remedy or mitigate adverse effects of the activity.

(iii) In circumstances where the Court concludes the activity should be scheduled but the development of the Columba site fails to satisfy the conditions for scheduled activity under proposed Rule 8.7.7: whether an activity status of restricted discretionary activity under proposed Rule 8.7.4 is sufficient to avoid, remedy or mitigate any adverse effects on the development.

The Evidence

[11] Evidence was given to the Court by three planners, Mr M E A McCallum-Clark, for Columba College, Mr P Constantine for the Academy Group NZ Limited (**Academy Group**) and Mr A P Henderson for the Council. Evidence of all of these planners was remarkably consistent. The keypoints were:

(i) There is no proper reason in resource management terms for a distinction between properties owned by the Ministry of Education and those owned by other structures, Trusts or Boards, which deliver primary and secondary education.

(ii) There are no special features of this school which single it out for differential treatment from other schools.

(iii) That development works on the Ministry properties are subject to minimal controls, ie a 2 metre setback and height plane angle of 63°. These schools are required to provide an outline plan prior to works being undertaken.

(iv) To obtain an initial designation under the Resource Management Act a public consultative process is necessary. However most schools in Dunedin were established well before such a process was established.

(v) The particular issues relating to development on this site relate to the impact on neighbours. This includes Mr M M Mitchell, a s.274 party whose property at 409 Highgate is surrounded on three boundaries, and properties to the south of the site. Those properties, particularly on the opposite side of Oban Street, may be affected by shadowing as a result of the topography. Mr Constantine for the Academy Group NZ Ltd gave evidence on shadowing issues.

Other Evidence

[12] Evidence was given by Dr N C Wilson for the Board of Governors (**the Board**) of Columba College.

[13] Dr Wilson particularly identified the Board's concern at the differential treatment of their school compared with a Ministry owned school. She pointed to the changes in curriculum which required capital works to be undertaken for the provision of facilities, including health and science. She accepted that there had been an expansion of the roll of the school and accordingly there was a requirement for more classrooms. She particularly pointed to other Ministry owned schools undertaking major construction projects that were started considerably after the gymnasium at Columba College was first mooted in 1997.

[14] In short, her concern was that the Ministry required New Zealand schools to introduce a significant number of new subjects into the curriculum. This has had a flow on effect with regard to the increased need for teaching space to accommodate this "crowded curriculum". Dr Wilson stated *"schools must be permitted to absorb that pressure through more efficient use of their property."* She then gave particular evidence about the building plan and effectively that the gymnasium which Columba College is seeking to build, is the major building item on the current agenda in the next few years. She indicated that the costs involved in processing this application at this stage have been in the order of $50,000. There were adverse comment from parents about the utilisation of monies for capital works to obtain consents.

[15] Mr Mitchell's evidence related to his view of the adverse effects of the co-location of the school next to his property. As an owner of his property for around twenty years, he has seen properties on Oban Street converted to school use with the construction of a large building which is now known as the Girton Block. Other sites on Oban Street which also had private homes on them have been converted for use by the school. Mr Mitchell considers that he is now surrounded by school buildings and isolated from the residential zone of which his property forms part.

[16] A large portion of his evidence, however, addressed his particular concerns with the gymnasium structure to be constructed. Concerns were listed by him as follows:

> Dominance of the gymnasium building bulk;
> shading of his land and buildings;
> loss of sunlight, natural light, view, privacy and kerbside parking;
> increased traffic, movement and congestion;
> area safety;
> hours of operation and after hours activity;
> cumulative effect of building and development on site; and
> depreciation on property value.

[17] He points out that the original proposal for the gymnasium was situated further to the south-west, closer to Oban Street. It is now being pushed back further to the north-east and will interfere with his sunlight, particularly in the late afternoon. Mr Mitchell also argued that the reference does not accord with the objectives and policies of the proposed plan.

[18] Mr Constantine's (for Academy Group) evidence did not oppose the reference but sought to assist the Court particularly on shadowing issues. His evidence largely agreed with the approach of Columba College.

[19] We have already cited Policy 4.3.1 of the sustainability section of the proposed plan to maintain and enhance amenity values. The explanation to that policy reads in part:

"The use and development of resources in some circumstances can adversely affect the pleasantness of an area, and where those effects are significant such use and development should be avoided."

[20] We have had the benefit of a visit to the site and conclude that Columba College offers a high standard of amenity not only to persons on the site but also to the neighbourhood. Particular features of that amenity include the retention of a number of large trees on the site, and a significant historical building which appears to have been constructed in stone in 1871 or 1872. It is still in everyday use. This educational establishment must also be seen in the context of other educational establishments in close proximity (including the Academy of New Zealand). We conclude Columba College maintains and enhances amenity values for persons visiting and living in that area.

Shading

[21] As part of his amenity argument Mr Mitchell suggested that there was a necessity to ensure that the amenity of late afternoon and evening sun is maintained on his property. We are not directed to any specific provisions of the plan supporting that contention. It appears to us that the height plane angle of 63°[1] and minimum yard requirements[2] aim to achieve that result indirectly. We could not conclude that the plan envisaged, even with general residential activities, that there was any guarantee of sunlight for all available hours of the day.

[22] We note, in particular, that Mr Mitchell's house on the west side of Highgate Road is above properties on the east side blocking their afternoon sun. The nature of the hill slope on Maori Hill in Dunedin, particularly for properties on the falling slope on the easterly side, must have the result that properties can be affected by shadows late in the afternoon. Mr Mitchell's property has been relatively free from such shadowing to date. Earlier construction on the Columba College site has not shaded Mr Mitchell's property. However this is not due to planning issues but rather the way Columba College has utilised their site.

[23] It appears to us that the ground height behind Mr Mitchell's property is approximately 1.8 metres higher than his property and accordingly even a modest home built there would have the effect of blocking out afternoon sun from his property at certain times of the year.

Parking

[24] Mr Mitchell also raised concerns relating to traffic levels and kerbside parking. We were not directed to any policies, objectives or rules of the plan which gave higher priority for kerbside parking to residents than members of the public

[1] Rule 8.7.2(ii) of the proposed plan.
[2] Rule 8.7.2(i) of the proposed plan.

generally. In Mr Mitchell's case, we can readily appreciate his concerns as to the use of his garage which is on the corner of Highgate Road in a position where manoeuvring the vehicle both into and out of the garage could be risky. However, the plan itself does not guarantee any parking to Mr Mitchell on the kerbside. That issue is not in itself the subject of any reference before this Court.

The Proposed Plan

[25] Mr Mitchell also points to the historic difference between the transitional plan and the proposed plan. He notes that schools and education facilities under the Transitional Plan had a separate classification and a 9 metre sideyard. His view is that the Council has appropriately dealt with schools as community support activities under the Proposed Plan on the basis that all applications for resource consents should be determined as unrestricted discretionary activities.

[26] We need to state some of the definitions of the plan which are relatively broad in their concept. We note *"community support activity"* means

> *the use of land and buildings or collection of buildings which are used for the primary purpose of supporting the health, welfare, safety, education, culture and spiritual wellbeing of the community including childcare facilities and community police officers but excludes hospitals, recreational activities, facilities which have or require a liquor licence or which provide restaurant facilities.*

All parties, including Mr Mitchell, accepted this definition is particularly wide in its intention and goes well beyond provision for school and educational facilities.

[27] We also note the definition of *"residential activity"* which means:

> *the use of land and buildings by a residential unit for the purpose of permanent living accommodation and includes resthomes, emergency housing, refuge centres, halfway houses, retirement villages and papakaika housing if these are in the form of residential units.*
>
> *Residential activity also includes*
>
> *(a) home occupation;*
> *(b) childcare facility for up to and including five children;*
> *(c) homestay or boarding house for up to and including five guests - provided that these are secondary to the permanent living accommodation.*

[28] *"Residential unit"* means:

> *a building or part of a building which is self contained at least in respect of sleeping, cooking, dining, bathing and toilet facilities, where one or more persons live together whether related or not, but excludes units where staff provide for more than 18 residents. Staff living on the site are not included in this limit.*

[29] During the evidence of Mr Mitchell it became clear to the Court that he had not appreciated the definition of community support activity or that for residential activity.

The Statutory and Planning Framework

[30] We have already stated the relevant issues, objectives and policies of the plan which relate to this application and in particular issue 8.1, objective 8.2.1, policy 8.3.1 which recognise the amenity values of the residential areas and the importance of ensuring that it is not compromised. Community support activities including schools are clearly recognised in objective 8.2.7 and policy 8.3.10. This recognises particularly the value of educational establishments while at the same time recognising that care needs to be taken to avoid, remedy or mitigate any adverse effects. In terms of this reference the policies and objectives are entirely consistent with the range of propositions available to the Court provided it recognises their presence in the residential areas and any potential adverse effects that may occur from that.

[31] Under section 75(1) of the Resource Management Act (**the Act**) the district plan must provide for the control of the effects of the use of land and state the matters listed in sub-sections (a) to (e) of section 75(1). It involves consideration of the functions of a local authority under section 31 of the Act, Part II of the Act and duties under section 32. We do not understand the parties to raise any additional provisions that could be relevant to this case.

[32] The Environment Court recently stated the matters under section 74 of the Act in the following terms:

> *Considering section 74 of the Act first: in this case the relevant functions of local authorities are the integrated management of, and the control of the effects of the use, development or protection of land. The relevant parts of Part II of the Act are first, the duty to ensure the management of natural and physical resources in a way or at a rate which enables the people and communities of Dunedin to provide for their social, economic and cultural wellbeing; and secondly, the obligation to have particular regard to some of the matters identified in section 7 of the Act:*
>
> - *the efficient use and development of natural and physical resources;*
> - *the maintenance and enhancement of amenity values;*

- *the recognition and protection of the heritage values of buildings and areas and their finite characteristics;*
- *maintenance and enhancement of the quality of the environment.*

There are no matters of national importance relevant to this proceeding.[3]

We concur with that approach and conclude that any of the relevant provisions from permitted activity status with performance criteria to discretionary activity would meet these requirements.

[33] In terms of section 32 no issue was raised relating to this reference. However we are of the view that in economic terms the efficient use of these resources is a question which is relevant to the appropriate status of the activity and the rules that might relate to it. In particular the benefits and costs of the various restrictions or approaches are a matter relevant to this Court.[4] Overall the intention of the rules of the plan should be to achieve the sustainable management purpose of Part II of the Act. In this case all of the prospective provisions would be consistent with the objectives and policies of the plan and generally meet the enabling provisions of section 5. We have to conclude which is the most appropriate set of rules having regard to the enabling nature of section 5 and the limits to that enabling contained in sections 5(a) to (c) inclusive.

Appropriate Action to be Adopted

[34] It is Columba College's position, agreed to by the Council and Mr Constantine, that the starting point in considering this reference is that a restriction should only be imposed if the Court considered one was properly justified. Mr Page (for Columba College) accepted that this is subject to the limitation as to scope imposed by both the original submission and reference filed. In other words, his proposition was that the Court should be looking at the most liberal provision sought unless it was satisfied that it was appropriate for a restriction to be imposed. He referred the Court to Leith v Auckland City Council[5]. This was support for the proposition that there is no presumption on a reference as to the term of the proposed order. He also referred us to the Environment Court decision in Ferrier v Auckland City Council[6] and noted the comment at page 405 where the Court said:

In a case like this, there is no presumption in favour of the City Council's position. However the position of the Council (and the parties supporting it) would impose less restraint on buildings on the subject properties than would the position of the Ferriers (and the parties supporting them). The first of the tests from ***Nugent*** *is that a rule has to be necessary for achieving the statutory purpose. (That test is derived from the application of s32(1)(a)(i) and s32(1)(c)(i)). The effect of that must be that unless we are persuaded that the additional building height restraint of the Residential 7a zone is necessary for achieving the purpose of the Act, the position of the City Council will prevail. That is not because there is any presumption in*

3 ***The Warehouse Limited v Dunedin City Council*** Decision No: C101/2001.
4 ***Financial Systems Limited v Auckland City Council*** (1992) Decision No: A11/97.
5 [1995] NZRMA 400.
6 [1999] NZRMA 401

favour of its position, but because the greater restraint does not meet that test. To the extent that it was the case for the Ferriers that the additional building height of the Residential 7b zone has to be justified, we do not accept that this represents a correct application of the law.

[35] The case of Nugent Consultants v Auckland City Council[7] is also authority for the approach that before a restriction on an activity is imposed it must be justified.

[36] We agree with Mr Page's analysis except that the starting point in this case is that a community support activity should be permitted unless there are proper reasons to impose restrictions. This was the purport of the referrer's original submission and the reference to the Court. This would include not only all primary and secondary schools but the wide range of other activities included in the definition. Permitted activities are subject only to the controls in 8.7.2 of the proposed plan, none of which the referrer has suggested are unreasonable although some of which are not relevant (in particular at 8.7.2 (v), (vi), (vii) and (xi)). We find that the most liberal provision which could be imposed in this case would be to include community support activities as permitted activities in Rule 8.7.1 without further amendment. That is within the scope of both the submission and reference of Columba College in this case.

[37] The parties agree and we accept, that the most restrictive provision that the Court could impose, is the regime under the proposed plan. This is that Columba College continue to form part of the community support activity for which new development is an unrestricted discretionary activity under Rule 8.7.5. All parties agree that the Court has a broad discretion between those two positions to impose any intermediate position it believes is justified as necessary for achieving the purpose of the Act.

[38] We see those, in order of increasing restriction as being:

(a) A limited group of activities including Columba College is permitted under Rule 8.7.1.
(b) Further conditions are attached to permitted activities to provide some further restriction on any permitted activity status extended to include Columba College.
(c) The activity of this particular site or such other (range of) sites that the Court believes is appropriate is scheduled.
(d) In respect of such scheduling performance conditions are provided to meet the particular requirements of this and/or other sites.
(e) The activity is provided for as a controlled activity under Rule 8.7.3 which is currently deleted. This would involve providing particular areas of control for the consent authority to consider.
(f) Developments for Columba College are provided for as restricted discretionary activities. This would involve providing restrictions upon the discretion in some detail.

[7] [1996] NZRMA 481; 2 ELRNZ 254.

[39] It is both the referrer's and the Council's position that the appropriate course of action is to adopt a scheduling of the activities of Columba College and to recognise that that position should also extend to other primary and secondary schools not owned and operated by the Ministry. This would involve the adoption of performance standards, at this stage, in particular, for Columba College.

[40] Mr Mitchell, on the other hand, believes that the appropriate course of action is for Columba College to remain a community support activity with any new developments considered on a discretionary basis. In the alternative, he supplied us with some very helpful submissions as to the type of performance criteria that should be adopted.

[41] Columba College accepted that providing for non-Ministry owned schools as a community support activity in general would permit an extremely wide range of additional activities within the relevant zone. We agree that such a provision would fundamentally change the nature of the Residential 1 zone. In the event that such an approach was adopted it would be necessary to significantly modify the current definition of community support activity so as to appropriately restrict its scope.

[42] Initially, what is sought by Columba College is equivalence with schools owned by the Ministry. A Ministry school, to establish under the Act, is required to undertake a designation process. That is a public participatory process which allows a range of issues to be considered, including adverse effects and appropriate remedy, avoidance or mitigation. In reality, we suspect that almost all schools in Dunedin were established prior to the Act coming into force. The issue for those schools established on land not owned by the Ministry arises when a particular development requires a resource consent.

[43] As noted above when the Ministry seeks to establish a new school it is necessary for them to undertake a designation process. We accept that at the time a Ministry school is set up a consideration of adverse effects and any potential to avoid, remedy or mitigate these is undertaken. To that extent we accept that providing for schools as a permitted activity in the Residential 1 zone will not achieve the purpose of the RMA, particularly section 5. Although section 5 is enabling, it is subject to the restriction that adverse effects are avoided, remedied or mitigated. We are not satisfied that providing for new schools or their further development as permitted activities per se would achieve that purpose. Nor would permitted activity status without performance criteria provide for equivalence with Ministry schools.

[44] Having considered the provisions of the plan and the evidence of the parties, we are satisfied that there should be some restriction on the range of educational activities that should be permitted in the Residential zones and that provisions are necessary to identify and address adverse effects.

[45] Mr Constantine (for Academy Group) in his evidence, considered that permitted activity status for primary and secondary schools was appropriate. He had not formulated performance conditions and accepted that there would be logistical

and drafting difficulties in doing so. We also consider that there may be grounds to consider whether there should be a school or educational zone as in the previous transitional plan. However, this issue was not before us on this reference.

[46] We are of the view that it would be possible to draft performance criteria for permitted activities which would adequately proscribe the type of activity permitted (for example schools existing at the date of the proposed plan) and to draft the necessary conditions to provide for schools which are not currently under designation. It is possible that a range of activities wider than schools could also be recognised under this category. However, we immediately accept that neither the Council nor the other planners have undertaken the necessary examination to finalise such provisions.

[47] We accept that the alternative of scheduling with performance conditions would achieve the same objective as a more explicit permitted activity status with conditions. Effectively the objective of scheduling provides permitted status subject to special conditions and we are satisfied that the same outcome would be achieved.

[48] After permitted or scheduled activity status the next status which could be considered is making the activity a controlled activity. It is certainly possible to identify the appropriate category of schools that should meet the status and provide general powers for the local authority to consider the imposition of conditions.

[49] The referrer's position is that this would be unnecessarily restrictive and that it would immediately place Columba College in the position of having to apply for resource consents for any new projects.

[50] We were told by the Council's solicitor, Mr S W Christensen, that this would involve Columba College obtaining consent from all parties that could be affected. In the case of Columba College's gymnasium this would almost certainly involve consent from Mr Mitchell. In the event that the consent of an affected party was refused (which in the light of the history is probable) the application would probably be notified before the Council could proceed to consider the imposition of conditions.

[51] In terms of procedure, it appears that the time to process a controlled activity application would be similar to a fully non-complying application, although the range of the Council's discretion would be significantly more limited. Mr Page quite properly made the submission that this would place the school at a significant disadvantage compared with the Ministry's schools. All planners accept that there are no planning reasons why private and Ministry schools should not be treated on an equivalent basis. We are not satisfied that even this limited further restriction could be justified.

[52] Mr Mitchell, in justifying an unrestricted discretionary status, indicated that it would give the Council the ability to consider the adverse effects in every case.

It appears, however, that he is referring to the general impact of the activity of the school itself. In that regard he includes traffic, size of buildings, pupils, school activity and the like. These are similar at all schools and there does not appear to be a reason to treat Ministry schools on a different basis to integrated or private schools. We conclude that there is no reasonable basis for a further imposition on Columba College or in fact on any other integrated private primary or secondary school subject to the educational review office requirements. We agree that scheduled status is appropriate.

The Scope of Scheduled Activities

[53] Quite clearly Columba College was arguing this case in its particular circumstances. Mr Page and Mr Christensen accepted however, that there are a number of other primary and/or secondary schools in the same or similar situation.

[54] We accordingly direct that the Council investigate other schools that comply with the Court's criteria and prepare draft schedules in respect of those also.

[55] We are not satisfied that scheduled permitted activities should be extended to other areas of community support activities for the following reasons:

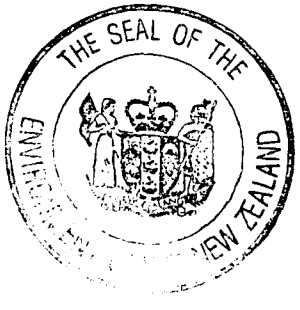
a) No parties appeared to support their inclusion.
b) There appeared to be no argument of equivalence with other designated sites.
c) The categories are so broad as to be difficult to analyse in the context of the Columba College reference.

[56] We are unclear as to whether any other references seek the extension of the activities permitted in the residential zone. We do not preclude the possibility that another group may be able to justify a further amendment to the permitted activities. However at this stage we do not see any proper basis to proceed further than outlined.

Scheduling of the Sites

[57] Columba College seeks to have scheduled all its currently owned sites and we agree that this would be the minimum. The question arises whether any provision should be made to include other sites that may be acquired. We have concluded in the circumstances that it is not appropriate on the basis that:

(a) This does not achieve equivalence with state schools which would need to designate further properties acquired.
(b) There may be additional performance conditions which are applicable on new sites acquired.
(c) We can see no compelling reasons or the necessity for such an additional provision.



Performance Conditions

[58] Having concluded that it is appropriate that the Council schedules this site, we now consider the appropriate scheduling conditions.

[59] It was suggested by the Council that Rule 8.7.1 have added to it a new paragraph (v) which reads:

> *The following activities are permitted activities provided that they comply with the relevant conditions in 8.7.7(1)(i) Scheduled Activities as listed in Rule 8.7.7.*

[60] We see no reason why Rule 8.7.2 should also not apply as relevant to scheduled activities. We reword the suggested provision accordingly to:

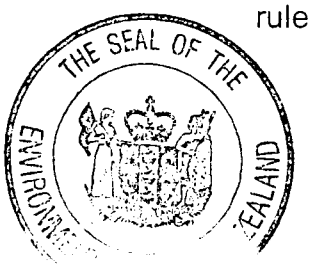
> ***(v) Scheduled activities as listed in Rule 8.7.7 subject to compliance with the relevant provisions of Rules 8.7.2 and 8.7.7.***

[61] It was suggested to us a new Rule 8.7.3 be included to provide for control by the Council in respect of design and appearance of a building and associated landscaping where a facade is over 20m. The clause suggested is:

> *Rule 8.7.3 Controlled Activities*
>
> *(i) New building development on a scheduled site identified in Rule 8.7.7 with a façade length greater than 20m is controlled in respect of the following matters:*
> *(a) design and appearance of the building*
> *(b) landscaping*
>
> *where the purpose of the assessment is to avoid, remedy or mitigate adverse effects on the residential character and amenity of the neighbourhood.*

[62] For the reasons already set out in respect of controlled activities, we see no benefit in the inclusion of such a rule. We believe the delays and disputes inherent in such controlled status far outweighs any benefits from the Council being able to control the design, appearance and landscaping issues.

[63] Having regard to the Columba College buildings, we are satisfied that the Board seeks at all times to achieve the highest standard of building design and landscaping that it can in terms of its budgetary constraints. We are not convinced that any proper or any necessary purpose is served by including rule 8.7.3.



Restricted Discretion for Non-complying Activity

[64] Where there is non-compliance with aspects of the provisions of the rules in 8.7.2 and 8.7.7 the parties seek status of restricted discretionary rather than discretionary or non-complying. We conclude that the appropriate status for activities which do not meet performance standards is restricted discretionary. We see no basis to broaden the discretion beyond the scope of the area of non-compliance. No basis for doing so was suggested by any witness. The Council's power to consider breaches is sufficiently wide to include refusal of consent. Similarly, notification and participation rights are protected under the Act.

[65] The parties seek to include in Rule 8.7.4 a provision relating to discretionary activities (restricted):

> *(i) Any permitted or controlled activity which does not comply with the relevant conditions of 8.7.2 of the Residential 1 zone,* ***and, for scheduled activities, the conditions listed in the Schedule.*** *The Council's discretion is restricted to the condition or conditions with which the activity fails to comply.* ***The assessment of the affects of non-compliance with the relevant conditions in 8.7.7(1) and 8.7.2 shall include an assessment of the effects of shading on adjacent properties and roads.***

[66] We have added several words to 8.7.4(i) to include our reference to both 8.7.7 and 8.7.2 in respect of scheduled activities.

[67] The purpose of the evidence from Mr Constantine was to justify the insertion of this provision. The concern of his client was that in undertaking the restricted discretionary consideration, the Council may not take in to account the question of shading.

[68] We accept that shading is an issue on properties, including the Academy's and Mr Mitchell's' property and that it is a matter that should properly be taken into account by the Council when considering restricted discretionary activities.

[69] We conclude that the addition to this Rule is properly included and that it does not impose a further restriction but merely identifies and clarifies one of the aspects of adverse effect which the Council needs to take into account on restricted discretionary activity consents.

8.7.7 – Scheduled Activities

[70] As to the content of 8.7.7 the parties addressed at this stage only Columba College. All parties but Mr Mitchell have agreed to the following formulation:

(i) School activities, including administration offices, classrooms and recreational facilities at Columba College on the site comprised of the following parcels:

Then follows a number of certificates of titles.

[71] We note that the description of school activity leaves out the boarding facility of the College. We believe that the position should be to accept the reality of the existing situation on the sites. This activity has occurred for the last 85 years. We see no proper reason why the scheduled activities should not simply be:

(ii) ***Columba College on the site comprised of the following parcels:***

Pt Lot 91 Deeds Plan 85 (CT 202/206)
Pt Lot 1 DP 1994 (CT 256/150)
Pt Lots 90-92 Deeds Plan 85 (CT 269/286)
Pt Lot 91 Deeds Plan 85 (CT 305/115)
Lot 2 DP 11030 (CT 2D/974)
Lot 2 DP 2958, Lot 1 DP 17605 (CT 8D/147)
Pt Lot 3 DP 2958 (CT 8D/148)
Lot 1 DP 17790 (CT 8D/1451)
Pt Lot 1 DP 1994, Lot 1 DP 25738 (CT 17D/480)
Lots 1-2 DP 7983, Lots 8-12 DP 1994, Pt Lot 85-86, Deeds Plan 85 (CT 18C/474)
Lot 88 Deeds Plan 85, Pt Lot 1 DP 2958 (CT 18C/475)

We conclude that such a description is less likely to generate confusion or uncertainty.

Conditions to Scheduled Activity 8.7.7

[72] In this regard Mr Mitchell made detailed submissions seeking to suggest different conditions in the event the Court concluded that scheduling was appropriate. Mr Mitchell suggested that there should be a 9 metre side and rear yard set back from his boundary with 20 metres on his northern boundary.

[73] From our inspection of the site, we are satisfied that his property is substantially above that on his northern boundary. It is most unlikely that any building would be built there at least in the near future. We consider that a 20 metre side boundary on that northern boundary is unnecessary in the light of the topography of the site. In respect of the 16 metre front boundaries provided on Oban Street and to the rear of Mr Mitchell's property, that recognises the site specific nature of the buildings that could be constructed in that area. As Mr Mitchell has indicated this reflects negotiations relating to the gymnasium. We agree that any building constructed close to Oban Street or close to Mr Mitchell's west boundary may have an adverse shading effect. In light of the agreement of all parties to those provisions, we therefore confirm

the general yard requirement of 4.5 metres and the 16 metres on the Oban Street boundary and on Mr Mitchell's rear boundary.

The relevant part of the condition shall read:

The following conditions shall apply to development at Columba College:

> ***(c) All yards on the site as defined in 8.7.2(i) above – 4.5m provided that there shall be no building***
> ***(i) within 16 metres of the Oban Street boundary; or***
> ***(ii) within 16m of the western boundary of Pt Lots 90 and 92, Deeds Plan 85 (CT 213/283); or***
> ***(iii)on the land described as Lot 1, DP 17790 (CT 8D/1451).***

[74] The requirement in subparagraph a(iii) for no construction on Lot 1 DP 17790 (CT 8D/1451) refers directly to an agreement reached between the Columba College and the Weirs which avoids overshadowing. We accept that the Weirs agreed not to appear on the basis of this condition. In light of the agreement of both the referrer and the Council, we are reluctantly prepared to include this in the schedule.

Height Plane Angle and Maximum Height

[75] The parties proposed as part of Rule 8.7.7(i):

> *(b) height plane angle – 63%*
> *(c) maximum height – 9metres.*

[76] This figure has been adopted from 8.7.2 and accordingly if it is appropriate there is no particular reason to include it again. However, Mr Mitchell made submissions that the height plane angle for schools should be 45°. We believe there is some force in his submission in this regard.

[77] A one in one angle would mean that a building at 4.5 metres from the boundary would be limited to a height of 4.5 metres in height at that point. To achieve a 9 metre high facade, the building would need to be set back 9 metres from the boundary. Furthermore, this would allow taller buildings to be built further back from the boundaries. This would provide some setback in scale to people viewing the buildings from the street.

[78] The maximum height suggested is 9 metres. We are concerned that such a height is unnecessarily restrictive on the school. Although Columba College have agreed to it, it may not be in their long term interest. Dr Wilson, for the Board, told the court that the internationally recommended height for a gymnasium was 12 metres. There is no proper planning reason why it should

be restricted to 9m. We accept that a 9 metre maximum height would give equivalence to residential buildings in the area but quite clearly this school and others similar are on far larger sites generally which gives the prospect of further setback from the viewing position. There are existing buildings on the site that in a number of instances appear to exceed 9 metres. We conclude that better utilisation of the site would be provided by allowing for taller buildings to be constructed provided they do not dominate or overlook neighbouring properties. We conclude that the appropriate course of action is to adopt the height plane angles suggested by Mr Mitchell of 45° but impose no maximum height for buildings on the site. In practical terms this may mean that the gymnasium, which is proposed for the site, may be able to achieve a height closer to the 12 metre international standard stated by Dr Wilson than the 9 metre height currently proposed. We therefore adopt:

(b) Height Plane Angle 45%

(c) Deleted.

Carparking

[79] The parties propose:

(c) Minimum carparking – one carpark per 15 pupils (calculated on total school roll).

[80] It was accepted by the referrer that some carparking ratio was appropriate, particularly because of negotiations between the parties. The suggested figure was one carpark for every fifteen pupils whereas Mr Mitchell submitted that there should be one carpark for every ten pupils. Again we believe there is some force in his submission in this regard. We understand that there are currently in the order of some 35 carparks on site and a further 24 are intended as part of the gymnasium project. The total roll of the school at the current time is 550 pupils which would bring a requirement for parking of 55 carparks at Mr Mitchell's ratio. A one in fifteen ratio would give a roll of 900 before any further carparks would need to be provided. Furthermore, the current 35 carparks would satisfy the current student roll including the gymnasium.

[81] We agree with Mr Mitchell and consider that a condition on new developments of one space per ten pupils will achieve a proper balance to mitigate adverse effects. We accept that the higher school role has placed pressure on street parking. The parties agree there should be a relationship between total pupil numbers and parking requirements. We agree that higher role numbers bring higher support and parental parking pressure. We accept that this can properly be related to pupil numbers and on that basis we include a further condition –

(c) minimum carparking - that there be a minimum of one carpark for every ten pupils calculated on a total school roll.

[82] The balance of the suggested conditions are all included in 8.7.2 and accordingly we believe it is more appropriate to merely adopt those Rules. Whether the parties wish to list them again or let the existing reference stand can be made clear in the final provisions.

[83] We therefore conclude that the following conditions should apply to development at Columba College:

(a) All yards on the site as defined in paragraph 71 above – 4.5 metres provided that there shall be no building:
  i) within 16 metres of the Oban Street boundary; or
  ii) within 16 metres of the western boundary of Pt Lots 90 and 92 Deeds Plan 85 (CT 213/283); or
  iii) on the land described as Lot 1, DP 17790 (CT 8D/1451).
(b) Height plane angle 45°;
(c) Minimum carparking – one carpark per ten pupils (calculated on the total school roll);
(d) Compliance with the 8.7.2 conditions of permitted activities excepting (i), (ii), (iii) and (vii)(a) and (b).

[84] We list the alterations made to 8.7 of the plan as a result.

Rule 8.7.1 Permitted Activities
(v) ***Scheduled Activities as listed in Rule 8.7.7 subject to compliance with relevant provisions of Rules 8.7.2 and 8.7.7.***

Rule 8.7.4 Discretionary Activities (Restricted)
(i) Any permitted or controlled activity which does not comply with the relevant conditions in Rule 8.7.2 of the Residential 1 Zone or, for scheduled activities, the relevant condition in Rules 8.7.2 or 8.7.7. The Council's discretion is restricted to the condition or conditions with which the activity fails to comply. An assessment of the effects of non-compliance with the conditions in Rule 8.7.7.1 shall include an assessment of the effects of shading on adjacent properties and roads.

Rule 8.7.7 Scheduled Activities

8.7.7.1 Columba College, on the site comprised of the following parcels:
Pt Lot 91 Deeds Plan 85 (CT 202/206)
Pt Lot 1 DP 1994 (CT 256/150)
Pt Lots 90-92 Deeds Plan 85 (CT 269/286)
Pt Lot 91 Deeds Plan 85 (CT 305/115)
Lot 2 DP 11030 (CT 2D/974)
Lot 2 DP 2958, Lot 1 DP 17605 (CT 8D/147)
Pt Lot 3 DP 2958 (CT 8D/148)
Lot 1 DP 17790 (CT 8D/148)
Pt Lot 1 DP 1994, Lot 1 DP 25738 (CT 17D/480)

Lots 1-2 DP 7983, Lots 8-12 DP 1994, Pt Lot 85-86, Deeds Plan 85 (CT 18C/474)
Lot 88 Deeds Plan 85, Pt Lot 1 DP 2958 (CT 18C/475)

The following conditions shall apply to development at Columba College:

(a) All yards on the sites as defined above – 4.5m provided that there shall be no building
  (i) within 16 metres of the Oban Street boundary; or
  (ii) within 16m of the western boundary of Pt Lots 90 and 92, Deeds Plan 85 (CT 213/283); or
  (iii)on the land described as Lot 1, DP 17790 (CT 8D/1451).

(b) Height Plane Angle - 45°

(c) Minimum Carparking – one carpark, per 10 pupils (calculated on the total school roll)

[(d) Maximum Site Coverage – 40% of the total land area]

[(e) Access – Access requirements shall comply with the performance standards in Section 20 (Transportation)]

[(f) Signs – Refer to the Signs Section]

[(g) Noise, Glare, Lighting and Electrical Interference – Refer to the performance standards of the Environmental Issues section.]

Those provisions in square brackets may not require to be re-stated.

[85] The Council is to prepare and circulate to the parties the proposed plan provisions amended accordingly. We direct that this occur within 20 (twenty) working days and the Council file a copy for approval by the Court within twenty (20) working days. The Council is also to investigate and prepare a memorandum for the Court as to other schools affected by this decision by 31 August 2001.

Costs

[86] Costs are generally not appropriate on references. We tentatively see no reason to depart from that view in this case. If any party wishes to file an application they are directed to do so within twenty (20) working days with any replies ten (10) days thereafter.

DATED at CHRISTCHURCH this 6th. day of **August** 2001.

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DOUBLE SIDED ORIGINAL

Decision No. W 98 /97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of five references under clause 14 of the First Schedule of the Act

BETWEEN TRANZ RAIL LIMITED

(RMA 650/96 and RMA 510/97)

PORT WELLINGTON LIMITED

(RMA 511/97)

NEW ZEALAND RAILWAYS CORPORATION

(RMA 512/97)

WELLINGTON STADIUM DEVELOPMENT TRUST INCORPORATED

(RMA 513/97)

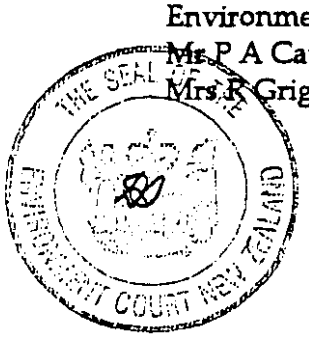
Referrers

AND THE WELLINGTON CITY COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge Sheppard (presiding)
Mr P A Catchpole
Mrs R Grigg



HEARING at WELLINGTON on 15, 16, 17, 18, 19, 22, 23, 24, 25 and 26 September 1997 and 6 October 1997.

APPEARANCES

Mr J A Burrett for Tranz Rail Ltd
Mr D J Turley and Ms S J Simms for Port Wellington Limited
Mr M F McClelland for NZ Railways Corporation
Mr B Bornholdt and Mr M F McClelland for Wellington Stadium Development Trust
Mr C P Mitchell and Ms S A Dossor for the Wellington City Council
Mr J W Tizard for the Wellington Regional Council
Mr I A Hunter and Mr S W Toomath for the Wellington Civic Trust
Mr M B Spackman for Stadium Affected Residents Group Inc

DECISION

These proceedings involve five references under clause 14 of the First Schedule of the Resource Management Act 1991 relating to provisions of the Wellington City Council's proposed district plan for the use and development of the railway yards at Wellington.

Background

The proposed district plan, as originally notified, did not include any specific planning provisions for the railway yards, although it was noted as an area which could be the subject of a design guide in the future.[1]

The railway yards cover about 40 hectares at the northern edge of the central city area. It is the largest open space left in the central city area, and most of the land is used for railway operations at ground level. It is adjacent to the port and incorporates the city's railway station.

The main approach to Wellington from the north is by a narrow strip of land between hills to the west and the Wellington Harbour. The area at the northern end

[1] Refer Wellington City Council proposed district plan Part 1.9.

of the railway yards at Thorndon gives a sense of a gateway to the city, and the general area is sometimes called the Northern Gateway. It is also called Te Ara Haukawakawa.

Part of the railway yards was considered to be a potential location for a new regional stadium for Wellington. The territorial authority, being the Wellington City Council, made a submission on its own plan seeking to include additional provisions to allow for a stadium there. In December 1995 a resource consent application was made for a stadium on part of the railway yards. That application and the City Council's submission were heard by commissioners who declined both the resource consent and the submission. They recommended that the Wellington City Council undertake a detailed investigation of how to develop the site, with a view to initiating a variation to the proposed district plan [2].

In the meantime, New Zealand Rail, now Tranz Rail, had made a submission on the proposed district plan seeking the creation of a "comprehensive development area" for the railway yards. That proposal was rejected by the council because it was not satisfied with the provisions, and because it considered that proposals of that magnitude should be dealt with by way of variation to the proposed district plan.

In response to the commissioners' recommendation, and the Tranz Rail submission, the City Council prepared a variation to the proposed district plan to make provisions for the railway yards and some adjoining land fronting Thorndon Quay. This variation is known as Variation 8.

Variation 8 proposes two sets of provisions for the area. One set would apply to the stadium site only; and the other would apply to the rest of the railway yards and the adjacent land fronting Thorndon Quay.

Variation 8 was notified in December 1996, and the council issued its decisions on the submissions in June 1997. Four appeals were lodged against those decisions, and these are the subject of this decision, together with the Tranz Rail appeal against the earlier council decision rejecting Tranz Rail's submission for a comprehensive

[2] Refer Commissioners' report, 10 July 1996.

development area. The purpose of these appeals is to determine the appropriate district plan provisions for the use and development of the Wellington railway yards and adjacent land.

The References

Tranz Rail Limited

The main appellant at the hearing of the appeals was Tranz Rail Limited which proceeded with its appeal on the original proposed district plan [3], and its appeal on Variation 8 [4]. Tranz Rail seeks to have Variation 8 replaced by either the proposals put forward in its submission on Variation 8, or failing that by its original submission on the proposed district plan.

New Zealand Railways Corporation

New Zealand Railways Corporation ("NZRC") currently owns the land in the relevant area on behalf of the Crown. The land is designated in the transitional and proposed district plans for railway purposes. NZRC opposed Variation 8 and supported the Tranz Rail proposal. Its reference [5] made particular objection to the height restrictions, car parking limits, and use of design guides in Variation 8.

Port Wellington Limited

By its reference [6] Port Wellington Limited raised an issue of reverse sensitivity in that there may be a potential for conflict between residents of apartment buildings on the railway yards site and noise from port operations. The issue is mainly one of setting appropriate noise insulation requirements.

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[3] Appeal RMA 650/96.
[4] Appeal RMA 510/97.
[5] Appeal RMA 512/97.
[6] Appeal RMA 511/97.

A proposal for a consent order has been presented to the Court by the port company and the City Council. That order would resolve the appeal by amending certain rules of Variation 8. The making of the proposed consent order depends on the decision of the Court on the Tranz Rail appeal.

Wellington Stadium Development Trust Inc

The Wellington Stadium Development Trust Inc lodged a reference [7] appealing certain provisions in Variation 8 which related to the stadium. A proposal for a consent order to resolve that appeal was presented to the Court by the City Council and the Stadium Trust. The parties to that appeal, and a representative of the Stadium Affected Residents Group Incorporated (SARGI), were given an opportunity to make representations about the consent order.

Like the proposed consent order proposed on the port company's appeal, the proposed consent order for the Stadium Trust's appeal would amend Variation 8, so it is subject to the outcome of Tranz Rail's appeal.

The Site

The land the subject of these appeals comprises about 40 hectares of largely reclaimed land to the north of the current central business district. It has few buildings on it, but is mostly covered by railway lines and other structures.

The area to which Variation 8 would apply includes properties on both sides of Thorndon Quay from Davis Street to the motorway. The Tranz Rail proposal has its boundary along Thorndon Quay, only including the properties on the eastern side of that road, leaving existing provisions of the proposed district plan to apply to properties on its west.

[7] Appeal RMA 513/97.

Another difference between the two proposals is a small area of land on the eastern side of Thorndon Quay opposite Pipitea Marae. Variation 8 excludes this land as it is part of the Pipitea Precinct which is covered by separate provisions in the proposed district plan. However the Tranz Rail proposal includes this area.

Within the railway yards an area of 6.4 hectares, on the eastern edge where Aotea Quay meets Waterloo Quay, has been set aside for a stadium. Resource consent has been granted for a stadium on that site, and appeals have now been disposed of.

Tranz Rail intends to continue to use the railway yards (apart from the stadium site) for railway operations. It is envisaged that if development is to occur for other activities, it would be on decking above ground level.

The Proposals

The first part of Variation 8 (part 13B) relates to the main railway yards area and properties along Thorndon Quay. A precinct design guide is appended to it. The second part of the Variation (part 13C) relates to the stadium site specifically, and a stadium design guide is appended.

The provisions of Part 13B would apply subject to the existing designation of the land for railway purposes.

By its submissions on the proposed district plan and on Variation 8, Tranz Rail proposed detailed provisions for development and use of the railway yards (subject to the railway purposes designation) in place of the provisions proposed by the City Council.

There are four main areas of difference between Variation 8 and the Tranz Rail proposal. These are the basic approach to provisions for further development of the railway yards (permissive/ prescriptive), provisions limiting building heights, a design guide for assessment of buildings, and traffic and parking provisions.

Permissive and Prescriptive Provisions

There is a basic difference in approach between the provisions proposed for the railway yards by the City Council in Variation 8 and those proposed by Tranz Rail in its submission on the variation.

Comparison of provisions

Rule 13.14.1 of the City Council's proposed Variation 8 would provide as permitted activities [8], –

> Any activity, except for:
>
> - those specified as Controlled Activities, Discretionary Activities (Restricted), Discretionary Activities (Unrestricted); and
> - those activities listed in the Third Schedule to the Health Act 1956;
>
> is a Permitted Activity provided that it complies with the following conditions ...

The conditions referred to relate to noise, discharge of contaminants, dust, lighting, electromagnetic effects, screening of activities and storage, vehicle parking, servicing and site access; use, storage and handling of hazardous substances, waste management and signs.

Rule 13.14.2 about buildings and structures would provide –

> The construction, alteration of, and addition to, buildings or structures except:
> those specified as Controlled Activities, Discretionary Activities (Restricted), or Discretionary Activities (Unrestricted)
> are Permitted Activities provided that they comply with the following conditions ...

The conditions referred to relate to building height, windows, view protection, wind, design, external appearance and siting.

In comparison, Tranz Rail's proposal would incorporate into the proposed district plan Rule 13A.1.2 –

[8] Except in respect of four parcels of land adjacent to Aotea/Waterloo Quays which are the site for a proposed stadium for which resource consent has been granted.

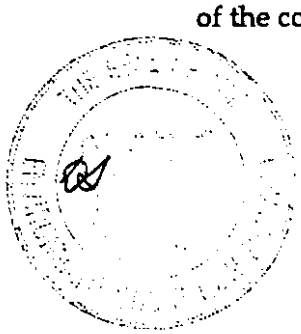
> The following activities, uses and buildings are Permitted Activities provided they comply with the conditions listed below:
>
> bus terminus;
> casino;
> conference facilities;
> hotel;
> indoor recreation and sports facilities;
> indoor entertainment;
> theatre and meeting place;
> office;
> railway station;
> residential;
> restaurant, café and bar;
> retail (including personal services, financial services, food);
> stadium;
>
> and all structures, access and egress points, roads, service routes and areas, unloading bays, pedestrian routes, car parking, outdoor recreational and leisure areas, plazas and squares, hard landscaping and planting associate with any of the above.
>
> Comprehensive Development Plan :
> All permitted activities, uses and buildings shall be in accordance with the comprehensive development plan set out in words and drawings contained in Appendix 7.

For an understanding of the full effect of that rule, we also quote the first sentence of Rule 13A.5 from Tranz Rail's proposals—

> Activities that contravene a rule in the Plan and the Comprehensive Development Plan are Non-Complying Activities.

It is evident that the intention is that the development of the land would be subject to the comprehensive development plan [9], and that development or uses that would not conform with the comprehensive development plan would be noncomplying.

In short, the Council's proposals provide for any activity to be permitted, unless it is specifically controlled (a permissive approach). By comparison, Tranz Rail's proposals prescribe permitted activities by reference to a list, and also by reference to the comprehensive development plan by which classes of activities are assigned to parts of the area (a prescriptive approach). That basic difference underlay much of the contention between Tranz Rail and the Council.



[9] See also p 12A/2 of Tranz Rail submission on Variation 8, and Policies 12A.2.1.2 and 12A.2.1.3.

The City Council's case

The City Council acknowledged that prescription of development and activities by reference to a comprehensive development plan is an owner's prerogative (subject to compliance with the plan or a resource consent). However the Council opposed incorporation of prescriptive provisions in its district plan, on several grounds : that it is not consistent with the provisions of the Resource Management Act; that it is quite at odds with the City Council's approach to district planning; that the comprehensive development plan does not provide controls on design for buildings and public spaces; and that Tranz Rail's proposals are not likely to be effective.

In support of his submission that prescriptive provisions are not contemplated by the Act, counsel for the City Council, Mr Mitchell, referred to several provisions.

The first was the meaning given to 'sustainable management ' by section 5(2). Counsel submitted that because the meaning involves management of resources "in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety ...", method and timing are significant.

Secondly, Mr Mitchell referred to the City Council's functions under the Act, which are defined by section 31. Paragraph (a) of that section contemplates "objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district." Counsel observed that it is the effects of use and development which are to be managed, not the use or development itself. He submitted that development prescription is not an appropriate approach to district planning; that it is not for the City Council to enshrine a particular concept of development, or to promote a particular form of development; and that the City Council does not have enough information to maintain that a comprehensive development plan is both necessary and most appropriate in terms of section 32(1)(c). Mr Mitchell acknowledged that an overall plan for development of the land might be beneficial or even necessary, but contended that it was for the owners to decide on (although

in reply to a question from the Court, Mr Mitchell agreed that there could be force in requiring the owner to have a comprehensive development plan).

Mr Mitchell then referred to section 32, which imposes a discipline on preparation of plan provisions. He submitted that this section is less a mechanism for evaluating the merits of detailed alternative provisions, and more concerned with evaluation of alternative means or methods for achieving the purpose of the Act : the essence of a requirement for a council to inform itself of alternatives and satisfy itself that it has chosen "the most appropriate means" before adopting a particular set of provisions.

Tranz Rail's case

Counsel for Tranz Rail, Mr Burrett, submitted that the City Council's provisions in Variation 8 fail to promote the sustainable management of natural and physical resources of the area, and would introduce controls which would effectively destroy any development opportunity. In particular he criticised application of a design guide for development in the subject area as not meeting the requirements of the Act.

In referring to section 5, Mr Burrett reminded us that the Act has a sole purpose, and that the Act is not about controlling the use of natural and physical resources. He submitted that the land, the airspace above the railway yards, and Tranz Rail structures on the land are natural and physical resources. [10] Counsel then referred to section 72 which states that the purpose of district plans is "to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act" ; and to section 31(a) as stating the relevant territorial authority function, noting the goal of achieving integrated management of effects. Mr Burrett contended that Variation 8 fails to make provisions to achieve integrated management, in particular of traffic effects of the use and development of the resource.

[10] As we understand it, that was not contested by the City Council.

Mr Burrett also submitted that in preparing Variation 8 the City Council had failed to have particular regard to various of the matters listed in section 7, and that its desire to control the quality of the environment would effectively prevent efficient use and development of the resource and prevent any enhancement of amenity values.

It was Tranz Rail's case that the majority of the objectives, policies, and rules, including the design guide, are not necessary in achieving the purpose of the Act, and that the most likely outcome of adoption of Variation 8 would be no development, that the resource would not be used, developed or protected in a way or at a rate which enables people and communities to provide for their social and economic welfare.

It was submitted that the district plan should promote the sustainable management of the railway system both for passengers and for freight, that pressure to develop the area should not interfere with that, and that any development of the site makes best use of the passenger network. However Mr Burrett acknowledged that as requiring authority Tranz Rail has a veto on any activities which would affect the operation of the railway system.

Tranz Rail was critical of Variation 8 in that it does not address the value of the development having a direct connection with the motorway and a new public transport interchange. It maintained that the need for those, and the need to realign the railway tracks to allow for structures to support development overhead, justifies the existence of a comprehensive development plan for the area. It also criticised Variation 8 in that it allows for industrial uses when the City Council does not wish to see the land developed as a industrial site; and suggested that it would be better to declare what activities are intended to be permitted.

Consideration

It is our understanding that both parties accepted that our approach to deciding this issue should proceed in the way the Planning Tribunal and the Environment Court

have adopted for other appeals about the content of planning instruments under the Resource Management Act. That approach has been developed on consideration of the relevant provisions of the Act, and applying such of the case law on the previous planning regime as remains applicable. Because that was not challenged, we do not need to repeat the detailed reasoning, and merely re-state the summary of it [11].

In references of provisions of proposed district plans, no onus rests on the appellant to establish that the subject provision should be deleted, the proceedings being more in the nature of an inquiry into the merits in accordance with the statutory objectives and existing provisions of policy statements and plans; nor is there a presumption that the provisions of the proposed plan are correct or appropriate [12].

The following are guidelines for such an inquiry [13] —

> ... a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

In addition to studying the various sections of the Act that were cited by counsel, because this issue concerns the provision to be made for use and development of land we have also referred to section 9, material parts of which [14] are —

> **9. Restrictions on use of land** — (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
> (b) An existing use allowed by section 10 or section 10A.
> (2) No person may contravene section 176 or section 178 ... (which relate to designations ...) unless the prior written consent of the requiring authority concerned is obtained.
> ...
> (4) In this section, the word "use" in relation to any land means -
> (a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or
> (b) Any excavation, drilling, tunnelling, or other disturbance of the land; or
> ...
> (e) Any other use of land -

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[11] from *Caltex v Auckland City Council* (1997) 3 ELRNZ 297, 300-301.
[12] *Hibbitt v Auckland City Council* [1996] NZRMA 529, 533.
[13] *Nugent Consultants v Auckland City Council* [1996] NZRMA 481, 484; 2 ELRNZ 254, 257; *Hibbitt v Auckland City Council* [1996] NZRMA 529, 533.
[14] As amended by section 6 of the Resource Management Amendment Act 1993.

> and "may use" has a corresponding meaning.
> ...

For the present purpose it is significant that it is the scheme of the Act that use [15] of land is controlled only to the extent that it contravenes a rule in an instrument, unless it is expressly authorised by a resource consent or provision for continuation of existing uses.

With that in mind we consider first whether a rule requiring conformity with a comprehensive development plan is necessary in achieving the purpose of the Act and to assist the City Council to carry out its function of control of actual and potential effects of the use and development of the land in order to achieve that purpose.

The land is unusual in three main respects. First, the use and development to be provided for would mainly be of air space, supported over the railway yards which would continue to be used for railway operations. Secondly, the land is virtually surrounded by existing central city development, with commercial development along Thorndon Quay, a motorway crossing the northern end, port activities generally to the east, and the central business district to the south. Thirdly, the main roads bordering the land, Aotea Quay and Waterloo Quay to the east, and Thorndon Quay to the west, are important routes in and out of the central business district, and the former at least is congested at times.

The statutory purpose of promoting sustainable management of natural and physical resources involves limiting management of the resources for the goals described in paragraphs (a) to (c) of section 5(2).

Development of an area of about 40 hectares would be likely to take place over many years. If adverse effects (including cumulative effects [16]) on the environment around it, including safe and efficient use of the railway yards, main roads, and port facilities, are to be effectively avoided, remedied or mitigated, any development would need to be designed with regard to existing and future development

[15] The extended definition in section 9(4)(a) of the term 'use' includes erection of structures.
[16] See the definition of the term 'effect' in section 3 of the Act.

elsewhere on the land in a coordinated way that can best be achieved by having an overall plan for the whole area —in short, a comprehensive development plan.

Similarly, the goal of sustaining the potential of the resources to meet the reasonably foreseeable needs of future generations requires an understanding of how any part of proposed development and use of airspace over the railway yards would be related to development of other parts, again calling for a comprehensive development plan. The City Council's function of integrated management of the effects of the use and development of land and associated natural and physical resources could scarcely be performed without such an understanding.

Therefore we find that a rule requiring conformity with a comprehensive development plan is necessary in achieving the purpose of the Act and to assist the City Council to carry out its function.

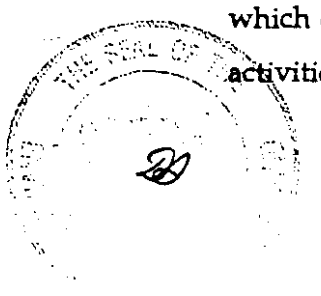
The next step is to consider whether it is necessary for those purposes for the district plan to prescribe *the* comprehensive development plan with which development and uses are to conform (as Tranz Rail's proposals would). The effect of that would be that the comprehensive development plan would be incorporated in the district plan; it would become the public's development plan, not just the landowner's development plan. The owner would not be able to alter it without exposure to the public submission process, and decisions by the Council (or, on appeal, by this Court).

The value of a public submission process is not in question. However the scheme of the Resource Management Act is that the broad pattern of development provisions in a district plan are to be subject to such a process, leaving matters of detail, within the scope of the general provisions, for landowners to make their own choices. What we have to consider is whether it is necessary for achieving the purpose of the Act and to assist the City Council to perform its function of integrated management of effects that a comprehensive development plan for development above the railway yards be incorporated in the district plan, with the result that the plan and any alterations to it are exposed to the public submission process, and decisions made by the Council or the Court.

In our opinion the necessity of having development conform to a comprehensive development plan can be attained without incorporating the comprehensive development plan in the district plan. The latter could prescribe that use and development of the airspace above the railway yards are to conform with *a* comprehensive development plan, leaving it for the owner(s) to define, and requiring deposit with the Council for public viewing, so that compliance can be publicly ascertained. In that way the imposition of a particular comprehensive development plan on the owners, which would not be necessary, would be avoided; the benefit of ensuring that the pattern of development and uses conforms to such a plan, can be achieved, yet retaining the ability of the owner to alter the development plan as changing circumstances may indicate.

We have not overlooked Tranz Rail's argument that in practice a developer needs certainty to be able to fund and proceed with a development of the scale contemplated, and the suggestion that if Variation 8 becomes effective, there may be no development over the railway yards, and an opportunity for more efficient use of that valuable resource will be forgone. We recognise that development of that kind and scale would be very costly. We do not think that the question whether that development is needed is a relevant consideration —Tranz Rail should not be restrained from competing with the existing central business district for provision of central business district accommodation to the extent that is consistent with the purpose of the Resource Management Act. However the district plan can and should properly constrain that development to the extent necessary to achieve the purpose of the Act and to assist the City Council to achieve integrated management of effects of the development and use of the land and resources on the environment. To the extent that development needs to be constrained to achieve the purpose of the Act, it must be taken not to be efficient within the meaning of section 7(b).

We have also to consider the other essential difference between Variation 8 and Tranz Rail's proposals : prescribing what is controlled (leaving all else as permitted activities), or prescribing what is permitted, leaving activities which are not listed, or which do not conform with the comprehensive development plan, as noncomplying activities.



Again the test is whether the provision is necessary for achieving the purpose of the Act and to assist the City Council to perform its function of integrated management of effects. The latter is more restrictive than the former. Mr Burrett argued that the Variation 8 rule is unsatisfactory in that industrial activities would be allowed on the land, and neither party contemplated it becoming an industrial site.

We consider that in general the purpose of the Resource Management Act is better addressed by describing effects on the environment which are to be controlled, than by prescribing general categories, such as industrial activities, which are to be controlled. There may be some industrial activities which could be carried on in a development of air space over the railway yards in full compliance with the conditions for permitted activities prescribed in Rule 13.14.1 in Variation 8 and without any adverse effects on the environment of any kind. As owner, Tranz Rail would be free to preclude any such activity —or any other class of activity— if it chose to do so. However we do not understand why it would be necessary for achieving the purpose of the Act or to assist the City Council in the integrated management of effects for it to prescribe by a rule in the district plan that any such activity requires consent as a noncomplying activity. Rather, it is our opinion that Rule 13.14.1 of Variation 8 more closely conforms with section 9(1) of the Act, which appears to contemplate that use of land (defined to include erection of structures etc) is to be controlled only to the extent that it contravenes a rule in a district plan.

For those reasons, we have concluded that the methods used in Variation 8 are to be preferred to those used in Tranz Rail's proposal. It is not necessary for us to address the absence from Tranz Rail's comprehensive development plan of controls on building design, or the effectiveness of that plan. We address the design guide of Variation 8, and management of traffic effects, in later sections of this decision.

Building height limits and urban form

Another significant difference between Variation 8 and Tranz Rail's proposals is control of building heights.

Comparison of provisions

Variation 8 would state this policy –

> 13.13.1.4 Ensure development is compatible with the urban form of the city.

The explanation of that policy refers to the central city having a recognised urban form characterised by tall buildings in the central business district and decreasing building heights outward from this area; and to the City Council having an urban form strategy which retains that distinctive urban form; that Te Ara Haukawakawa area is in the 'low city' part; that the existing policy of a maximum building height of 27 metres (above mean sea level) will be continued, but that height limits of 50 metres (above mean sea level) are permitted for buildings in the part of the area north of the railway station and south of the proposed stadium, and existing commercial buildings along Thorndon Quay will continue to be permitted to 35.4 metres (above ground level). To give effect to that policy, Rule 13.14.2.1 would prohibit buildings exceeding the building heights shown on a map. Rule 13.16.2 provides for the height limits to be waived (as a restricted discretionary activity) to the extent of one storey (4.2 metres).

Tranz Rail's proposals would control height of buildings by clause 5 of the comprehensive development plan. That clause sets an absolute building height of 95 metres above mean sea level. It would also provides limits on the extent of the area that might be covered by tall buildings –

> Not more than 40% of the area covered by new development shall have buildings exceeding 10 levels (50 metres above ground level maximum), and no more than half of this (i.e. 20% of the area covered) shall exceed 80 metres above ground level. The distribution of tall buildings shall be as shown on the plans ...

The City Council's case

It was the City Council's case (supported by the Wellington Civic Trust) that it has a policy about the urban form of the central city (referred to as a 'high city/low city' approach) by which the core of the central business district is 'high city' where higher buildings are permitted, and the northern and southern ends of the central business district are 'low city' where building heights are more restricted. The City

Council maintained that this policy had been endorsed by the Planning Tribunal in a 1990 decision [17] concerning building height limits in the district scheme under the Town and Country Planning Act 1977 which became the transitional district plan under the Resource Management Act.

The City Council acknowledged that since that decision was given, time has passed and the legislation has changed, but its commitment to the strategy is unwavering; it submitted that development of the airspace over the railway yards should be integrated with the existing central business district (including the existing ribbon development on Thorndon Quay), not treated as a separate 'island' of development; and it contended that the building height limits of Tranz Rail's proposal are at odds with that urban form policy.

Tranz Rail's case

It was Tranz Rail's case that the City Council had made no proper review of the urban form policy in the light of enactment of the Resource Management Act 1991, and that the policy does not meet the requirements of that Act; and that so many high buildings exist in the 'low city' that this notion does not exist in reality on the ground. Mr Burrett claimed that during the existence of the policy, the height limits applying to the area behind the railway station have ranged from 60 metres in 1985 to 85 metres in 1988 to 27 metres in 1994 to 50 metres in 1997. Counsel contended that it is difficult to identify the adverse effects that may be caused by permitting high rise buildings on part of the site, and even more difficult to believe that any such adverse effects would outweigh the social and economic benefits from such development. He submitted that high quality development of the railway yards would improve the environment of the area and the view from the surrounding hills.

[17] *Building Owners and Managers Association v Wellington City Council* (1990) 14 NZTPA 289.

Consideration

The question is not whether the City Council's commitment to the urban form policy endorsed in the 1990 Planning Tribunal decision has remained unwavering. Rather, the question is whether the building height rules of Variation 8, and those of Tranz Rail's proposal, meet the tests for provisions of district plans under the Resource Management Act. We have restated our understanding of those tests earlier in this decision.

On the challenge to the City Council's urban form policy, we accept Tranz Rail's case that many high buildings exist in the northern part of the 'low city', and that this undermines the integrity of the policy. However we also find that those buildings are on the higher ground around the Molesworth Street ridge, not on the Thorndon flat ; that many of them were erected before the City Council adopted its urban form policy, and some were erected under cover of former Crown immunity. We do not consider that the City Council should be precluded from adopting for the future a policy which has not always been enforced in the past.

We accept that in general the City Council's urban form policy is capable of serving the statutory purpose by avoiding or mitigating adverse effects of tall buildings on the environment, and in particular amenity values. However the height limits, and the parts of the area where they are to apply, are of course somewhat arbitrary. We have considered the scope for exceeding the limits by more than one storey on an exceptional site and on appropriate conditions.

The building height rules proposed by the City Council are such that any proposal for a building which would exceed the limits set by more than one storey would have to be considered as a noncomplying activity. The effects of such a building on the environment are likely to be more than minor, and would be likely to conflict with the urban form policy, so it is doubtful whether the condition for consenting to a noncomplying activity in section 105(2)(b) of the Act could be met.

The building height provisions of Tranz Rail's proposals have been designed to avoid the adverse effects of uniformity of building heights. Although the provisions are contained in the comprehensive development plan, they could of course be

transferred to rules of the district plan. However building to the limits that would be allowed in accordance with the comprehensive development plan would be quite inconsistent with the urban form policy. If buildings were permitted to the heights allowed, the urban form policy would be discredited and would have to be abandoned.

We have therefore to consider whether the urban form policy, and rules to give effect to it, meet the tests for district plan provisions already mentioned. In that regard there was a conflict between the parties. The policy was supported by the City Council's Urban Designer, Mr S C Niven; by a consultant urban designer, Mr G R McIndoe; and by an architect called for the Wellington Civic Trust, Mr S W Toomath. It was challenged by an architect called for Tranz Rail, Mr C W Hadlee.

There would be no value in us summarising the reasons given by those witnesses for their opinions. Mr Hadlee professed no specialist post-graduate qualification in urban design. In comparison, both Mr Niven and Mr McIndoe have post-graduate degrees in that discipline from the celebrated Joint Centre for Urban Design at the Oxford Polytechnic; and Mr Toomath, a Master in Architecture of Harvard University, has practised his profession in Wellington for over 40 years, and has an impressive record of public service in contributing to urban design issues in his home city throughout his career. Where differences of opinion on urban design arose among them, we found the common views of Messrs Niven, McIndoe and Toomath readily acceptable, in preference to those of Mr Hadlee.

On the basis of the evidence of Messrs Niven, McIndoe and Toomath we find that the City Council's urban form policy is generally necessary in promoting sustainable management of the natural and physical resources of central Wellington, and for the City Council to achieve integrated management of the effects of development of land and resources on the environment, and in particular amenity values.

However we are not persuaded that inflexible imposition of building height limits is necessary for those goals. The urban form policy would not lose credibility if the district plan provided for a new building more than one storey over the permitted height to be proposed as a discretionary activity (unrestricted). We apprehend that

any such application would be notified, so that those interested in the amenity values protected by the policy would have opportunity to assist the consent authority in evaluating the proposal; and the urban form policy would be among the considerations in reaching a decision, as would the other assessment criteria in rule 13.16.2, but without being limited to those. Providing opportunities of that kind would be a more appropriate means of exercising the City Council's integrated management function; and we find that the building height provisions of Variation 8, amended in that way, would be necessary for the purpose of the Act and for the Council's function.

Design control

Another main difference between Variation 8 and the provisions proposed by Tranz Rail was the application to the subject area of design guide provisions in the proposed district plan for the central business district.

Variation 8 provisions

By Variation 8 the conditions for new buildings as permitted activities include –

> 13.14.2.6 Design, external appearance and siting for those areas in Thorndon Quay (as identified in Appendix 7).[18]

The assessment criteria for buildings with access to Thorndon Quay as controlled activities [19], for buildings elsewhere as discretionary activities (restricted) [20], for buildings and structures above the street that exceed 25% of the road width as discretionary activities (unrestricted) [21], and for subdivision as a discretionary activity (unrestricted) [22], include –

> The extent to which the proposal will meet the provisions of Te Ara Haukawakawa Design Guide.

In the first two cases there is an explanation that the Council wishes to ensure that new buildings are managed in relation to their effects on public spaces; in the third

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[18] Quotation from the Variation as amended by decisions on submissions. Exceptions are provided for alterations and additions to certain existing buildings and structures, and for new buildings and structures that do not exceed a gross floor area of 100 m2 and cover no more than 20% of the site.
[19] Rule 13.15.1.1
[20] Rule 13.16.3.3
[21] Rule 13.17.1.1
[22] Rule 13.17.3.3

there is reference to the effects of such structures on the visual qualities of the streetscape.

The Design Guide is attached as part of Variation 8. It is not cast in prescriptive language, but as general guidelines for design –

> on the premise that structure is the primary determinant of public space and city quality. [23]

The following passage explains the document –

> ... This design guide provides the criteria against which elements will be assessed.
>
> The design guide is intended as an important source of reference for those seeking resource consents for development within the precinct. Development proposals are expected to demonstrate a commitment to developing a high quality urban environment that will enhance the central city.
>
> Development is allowed considerable flexibility in terms of detailed design. No precise formula exists for ensuring the skilful and innovative design of buildings. However the intention of this design guide is to outline some clear urban design principles that new developments are expected to observe and interpret.
>
> The guide should not be seen as a requirement to replicate established central city patterns or design types. The opportunity exists over the very large area of the precinct, an area not constrained by a strong physical context, for innovative high quality development that makes a positive contribution to the character and amenity of the city.
>
> The illustrations in the guide are intended to further clarify principles outlined in the text, and are not intended to represent actual design solutions. [24]

Having a Design Guide for Te Ara Haukawakawa would not single out that area. The proposed district plan also contains general design guides for the central area of the city, for multi-unit housing and for subdivision; and it also contains specific design guides for various areas of the city that are considered to have particular character, and for institutional precincts.

Tranz Rail's case

Tranz Rail challenged having a specific design guide incorporated in the district plan for assessment of building proposals in the railway yards area. It was Tranz Rail's case that design quality would be achieved by commercial pressures, in that

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[23] Design Guide, section 1, page 3.

[24] Design Guide, section 1, page 4.

without that quality the development would not be saleable; and that the Council ought not to make provisions for development of the railway yards airspace because the development would be a private area, nor provide for making judgments about the design work of those engaged by developers of the airspace.

Tranz Rail's consulting planner, Mr D W Collins, observed that the Council and its officers should not be arbiters of good taste, and referred to designers having the uncertainty of being subject to the whim of Council committees and officers.

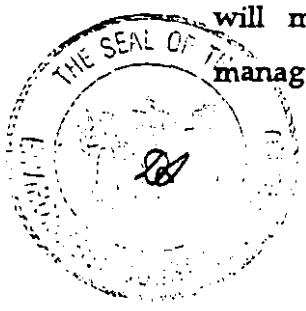
In crossexamining Mr McIndoe, Mr Burrett taxed him with absence of particular requirements, such as the location of a motorway off-ramp, the location of a passenger transport station, in the design guide.

The City Council's case

The City Council responded that the design guide provisions are intended to achieve amenity enhancement and protection in the design of, and in the relationship between, buildings and public spaces. Mr Mitchell submitted that it would be naive to suppose that commercial pressures would result in good design; and that the idea of a totally private environment for a large area of land that is supposed to become the focus of the central business district or offer a serious alternative to it is simply unrealistic.

Consideration

We address first the suggestion that there is no justification for intervention in the design of development in the railway yards airspace because it would be private, not public. We are not sure that counsel for Tranz Rail focused on the Resource Management Act 1991 in addressing this point; nor that Mr Mitchell did in formulating a response on behalf of the City Council. The Act does not distinguish between public areas and private areas as such, but contemplates that district plans will make provisions necessary for achieving the promotion of sustainable management of natural and physical resources, including avoiding, remedying and



mitigating adverse effects on the environment. The term 'environment' is given an extended meaning, which includes amenity values, being –

> ... 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. [25]

We have already quoted a passage from the Design Guide for Te Ara Haukawakawa which adequately describes the contents and how they are to be used. It is evident that they are directed to achieving the avoidance of adverse effects on the component of the environment which is within the meaning given to the term 'amenity values'.

We are not persuaded by Tranz Rail's argument about commercial pressures resulting in design quality. Although they may lead to that result, we have to bear in mind that it is the City Council's function to provide policies and methods to achieve integrated management of the effects of development [26]. Although there may be other ways of performing that function, we accept the evidence of Mr Niven and Mr McIndoe that a design guide is the most appropriate means of exercising the function of avoiding adverse effects of development on amenity values.

Some of the Tranz Rail criticism of the design guide incorporated in Variation 8 seems to stem from a misunderstanding of its purpose and effect. The passage we have already quoted shows clearly enough that the City Council is not setting out to make judgments about the work of designers engaged by developers. Rather, it is giving designers a source of reference and guidance. Likewise the criticism about the absence of particular requirements for motorway off-ramps and public passenger-transport stations can only arise from a failure to understand the purpose of the design guide as stated in that passage.

For those reasons we do not accept Tranz Rail's criticism of the design guide.

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[25] Section 2(1) of the Resource Management Act 1991.
[26] Section 31(a) of the Resource Management Act.

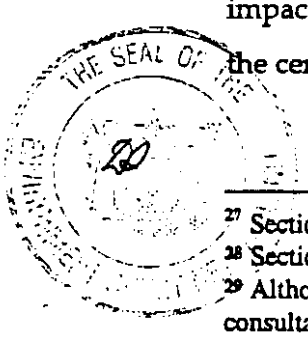
Traffic and parking control

A further major difference between Tranz Rail and the City Council concerned provisions for traffic, particularly intersections with public roads, and for car parking.

The Wellington Regional Council has a regional land transport strategy under section 29F of the Land Transport Act 1993 [27]. In the preparation of a district plan a territorial authority is required to have regard to management strategies prepared under other Acts [28]. The Wellington regional strategy promotes (among other matters) urban public passenger transport, minimising travel demand by well planned land use development, restraining the growth of commuter traffic, and minimising the impact of transport on the environment.

The City Council's transportation policies are set out in the proposed district plan and in a transport strategy dated December 1994. [29] Among other matters, the transport strategy contains a policy of restraining the growth of peak traffic volumes, and a policy on parking of minimising vehicle congestion on city streets while contributing to the economic well-being of the city.

The proposed district plan provides that activities in the central area (from which Te Ara Haukawakawa would by Variation 8 be excluded) are not required to provide vehicle parking on-site, but that where parking is provided it is not to exceed one space per 200 square metres of gross floor area in the inner sector; and where more than 70 spaces are to be provided, resource consent is required as a discretionary activity (restricted) in respect of generation of vehicular traffic [30]. Those provisions are designed to discourage on-site parking beyond a certain level to minimise the impact of commuter traffic on congestion and to improve the street environment in the central city.



[27] Section 29F was inserted by section 5 of the Land Transport Amendment Act 1995.
[28] Section 74(2)(b)(i) of the Resource Management Act 1991.
[29] Although the Transport Strategy is not a statutory instrument, it was only adopted after public consultation.
[30] Wellington City proposed district plan, Rule 13.3.3.

Comparison of provisions

Consistent with the permissive approach evident elsewhere in it, Variation 8 does not prescribe specific locations for intersections with existing public roads. Among other matters, it recognises that the area is a strategic public transport corridor; it contains a policy of promoting provision and use of public transport; a policy of enabling development by allowing for new roads and access points where appropriate; and a policy requiring appropriate parking, loading and site access.

A rule in Variation 8, like that for the central city, provides that activities are not required to provide vehicle parking on-site, but stipulates that where parking is provided, it is not to exceed one space per 200 square metres of gross floor area [31].

However an activity which does not comply with that rule is a restricted discretionary activity, so that short-stay parking for retailing and other business activities can be considered [32]. Assessment criteria include the following —

> 13.16.1.9 whether the activities undertaken on or proposed for the site, will generate a demand for additional parking and it can be shown that additional on-site parking is necessary for the development. In this regard, Council will give particular consideration to the type of activity and the nature of the parking proposed. Short-stay customer parking will be favoured
>
> ...
>
> 13.16.1.13 the extent to which the standards for parking, servicing or site access can be varied without endangering public safety or affecting the efficient traffic operation on the street

The accompanying explanation is —

> the parking ... provisions are to promote efficient, convenient and safe access throughout Te Ara Haukawakawa and to complement Council's Transportation Strategy. Particular developments may, however, justify changes from these conditions or standards...

For developments providing more than 70 parking spaces, resource consent is required as a restricted discretionary activity, the exercise of discretion being limited to generation of vehicular traffic and its effect on the roading network [33]. The standards and terms of the rule require that the impact of traffic generated from

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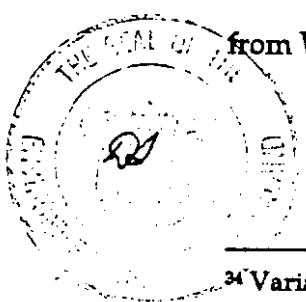
[31] Variation 8, rule 13.14.1.7.1.
[32] Variation 8, rule 13.16.1.
[33] Variation 8, rule 13.16.4.

such a development on the roading network are to be comprehensively studied and analysed, and the assessment criteria focus primarily on the effect of the development on traffic movement, congestion and safety on surrounding streets and the motorway.

The conditions for permitted activities prohibit vehicle access to a site from Waterloo and Aotea Quays [34], to enforce the function of those streets as arterial roads which primarily carry through-traffic between the motorway and the central business district. There are other conditions about site access on matters of operational detail. If the conditions are not met, resource consent is required (as a restricted discretionary activity) [35].

In comparison, Tranz Rail's proposal is more specific. It would state policies to promote the provision and use of public transport direct into the area, and to promote the provision of access and egress to and from the motorway to the north direct into the main car parking areas of the area. It would contain an explanation that 8,000 to 10,000 car parking spaces will be provided.

Tranz Rail's proposal would classify as permitted activities all structures, access and egress points, roads, service routes and areas, unloading bays, pedestrian routes and carparking associated with the activities and uses listed as permitted, in accordance with the comprehensive development plan. The conditions would preclude parking being available to commuters working in the existing central business district. The comprehensive development plan provides that the first deck level over the railway yards is to be used primarily for carparking; that development over the railway yards between the stadium and the motorway is contingent on direct access for light vehicles being provided to the motorway north in the location shown on the plan; and sets out specific points for access to and from the motorway and street network. It would provide that the area south of the stadium could be served solely by access from Waterloo and Thorndon Quays as a permitted activity.



[34] Variation 8, rule 13.14.1.7.7.
[35] Variation 8, rule 13.16.1.

Tranz Rail's case

It was Tranz Rail's case that unless the development has a direct connection with the motorway, and a public transport interchange, it would not be possible for people to get there in sufficient numbers to sustain commercial development. Tranz Rail's proposals make provision of those facilities a condition of any development to the north of the stadium; but Mr Burrett contended that Variation 8 fails to address this issue or to provide any policies designed to achieve the integrated management of the traffic effects of any use or development of the resource represented by the railway yards. He also submitted that the Variation 8 rules about car parking (by which more than one parking space per 100 square metres for more than ten spaces per site would be a noncomplying activity) would prevent a major shopping centre.

The City Council's case

The heart of the City Council's opposition to Tranz Rail's proposals in respect of traffic and planning is that the project could proceed as of right in accordance with the comprehensive development plan, but there would be significant effects on the surrounding street network, and those have not been adequately analysed and assessed. For example, no assessment has been carried out to demonstrate the acceptability of access to the area south of the stadium from Waterloo Quay and Thorndon Quay.

Tranz Rail's comprehensive development plan would allow for some 13,000 parking spaces as a permitted activity. The City Council maintained that this provision would not leave an incentive to commuters to use public transport, and would conflict with the regional land transport strategy, and with the City Council's own transport strategy; and would not be consistent with the provisions of the proposed district plan for the central areas, nor with Tranz Rail's own policy of promoting use of public transport. There are no detailed standards for site access, and the vehicle access and egress points would be permitted activities without any detailed assessment of traffic impacts on traffic flow and safety on the road network. The provision for a public transport facility would be consistent with the Council's policies, but the specific site could result in significant traffic circulation effects on Thorndon Quay, and needs detailed traffic assessment.

The Regional Council's case

The Regional Council urged that the actual design of the various interchanges and off-ramps would be crucial and that further modelling would be required to ensure that effects on safe and efficient movement of traffic would be minimised. It doubted whether it would be feasible to include rules in Tranz Rail's comprehensive development plan to achieve that. The Regional Council also expressed concern about traffic within the railway yards area, which creates public transportation issues; and about the scale of carparking that could be provided in accordance with the comprehensive development plan in conflict with the regional land transport objective.

While generally supportive of development of the railway yards in the way contemplated, the Regional Council expressed preference for Variation 8 over Tranz Rail's proposals for development of the railway yards, because it makes development discretionary, and reserves opportunity to assess traffic effects and impose conditions to deal with them where appropriate.

Consideration

In our opinion the regional land transport strategy and the City Council's transport policies provide a sound basis for consideration of these issues. There was no contest about the desirability of the proposed public passenger transport station, the direct access to and from the motorway, or appropriate intersections of the internal roads and the city street network. Nor was it contested that intersections should be properly designed and located to minimise effects on the efficiency and safety of that street network.

Tranz Rail's transportation planning and traffic engineering consultant, Mr M G Smith, took the position that Transit New Zealand in respect of the motorway, and the City Council (in its capacity as owner) in respect of the public roads, would have control over the location and design of off-ramps, on-ramps, and intersections, so that there is no need for additional control being imposed under the district plan.

We accept that Transit New Zealand would have control over off-ramps and on-ramps, although we understand that its focus would be effects on the safety and efficiency of the motorway, rather than effects on the city street network. We also accept that the City Council would have some control over intersections with the public roads of the city —perhaps as much as controlling authority under Part XXI of the Local Government Act 1974 [36], as nominal owner of the roads. However in that regard, we also bear in mind the right of frontagers to cross their frontages.

It is our understanding that the Resource Management Act does not preclude consideration being given to effects of development and use of land on that component of the environment which is represented by the public street network, its efficiency, and the safety of those who use it. The extended definitions of the terms 'environment' and 'amenity values' [37] would include that component.

The purpose of a district plan is to assist the territorial authority to carry out its functions in order to achieve the purpose of the Act [38]. A territorial authority's functions include objectives, policies and methods to achieve integrated management of the effects of the use and development of land and associated resources [39]. We accept that integrated management of those effects includes management of the effects of that use and development on the efficiency and safety of the street network. So we find that a district plan may properly contain provisions in that regard, in addition to whatever control the territorial authority may have over roads in its district under Part XXI of the Local Government Act 1974, being provisions to assist the territorial authority to carry out its function, to achieve the purpose of the Act, of integrated management of the effects of the use and development of land and associated resources. The territorial authority's control under the Local Government Act 1974 is for the purposes of that Act, not for those of the Resource Management Act.

The provisions of Variation 8 already referred to are provisions of that kind. The size of the railway yards, and the scale of the contemplated development of the

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[36] Local Government Act 1974, section 317(1).
[37] Resource Management Act, section 2(1).
[38] Resource Management Act, section 72.
[39] Resource Management Act, section 31(a).

airspace over them, are such that development is likely to be extended over a long period, and traffic conditions may change over that period in ways that cannot be predicted reliably. The requirements for resource consent contained in Variation 8 —for additional carparking spaces as well as for intersections with the public road network —allow for changes, and contemplate judgments being made in the light of analyses of the traffic conditions then existing.

We find that adopting Tranz Rail's provisions would not reserve to the Wellington City Council the same degree of control in that respect. Rather, they would accord permitted activity status for intersections which have not yet been fully analysed even in the light of current traffic conditions. In our opinion that would not assist the City Council to carry out its function of integrated management of effects as well as the Variation 8 provisions would. We therefore find that the Variation 8 provisions are necessary in achieving the purpose of the Act, would assist the City Council to carry out its function of integrated management of the effects of the use and development of land and associated resources, and would be the most appropriate means of exercising that function.

Subdivision control

Another important difference between Variation 8 and Tranz Rail's proposal is the provision for subdivision. The variation would make subdivision of certain areas in Thorndon Quay which complies with stated conditions a permitted activity [40] or (for company lease, cross lease and unit title subdivisions) a controlled activity [41]; elsewhere in the area a restricted discretionary activity [42]; and otherwise (ie, where stated conditions are not complied with) a discretionary activity (unrestricted) [43]. In comparison Tranz Rail's submission would make all subdivision a permitted activity [44].

[40] Variation 8, rule 13.14.3.
[41] Variation 8, rule 13.15.2.
[42] Variation 8, rule 13.16.7.
[43] Variation 8, rule 13.17.3.
[44] Tranz Rail submission on Variation 8, rule 13A.1.4.

In considering how that important difference should be resolved, we continue to be influenced by the nature of the City Council's function of integrated management of the effects of the development of land and resources. We accept the opinion of Mr D B McKay, an experienced planner who is the City Council's district plan manager, that land subdivision will be instrumental in establishing the pattern of development in the area. In our opinion, making subdivision a permitted activity in the way proposed by Tranz Rail would not assist the City Council in its function of integrated management of effects of development of the land and associated resources. The provisions for subdivision in the variation have been graded so as to reserve to the Council increasing scope of considerations for decision. That responds to the statutory expectation that provisions should only be included in a district plan to the extent that they are necessary for achieving the purpose of the Act and for the territorial authority to carry out its functions. We find that the provisions of Variation 8 in respect of subdivision meet that test and (to the extent that the matter was addressed by the parties) is the most appropriate means of exercising the City Council's function.

Noise of port operations

The port company's reference raised the 'reverse sensitivity' issue of noise insulation requirements for apartment buildings over the railway yards to provide a living environment which would not be unduly disturbed by noise from port operations. The port company and the City Council had reached agreement on amendments to the variation in that regard.

As we understand it the only questions remaining in issue in this respect are whether the appropriate measure for the sound level within residential units should be L_{10} or L_{dn}; and whether an L_{max} should be included as well.

We have considered these rather technical questions in the light of the evidence given by the expert witnesses, particularly Mr P R Horne and Mr N R Lloyd. Our approach to these questions is influenced by the context as one of reverse sensitivity. If the intent had been to limit noise from activity on the railway yards area, we would probably have preferred the L_{10} measure and the application of an L_{max}

control as well. However the intent is to protect occupiers of residential units over the railway yards from extraneous noises. That will require an assessment by an acoustical consultant, usually before a building has been erected, and at least some sources of extraneous noise will be difficult to predict. In that context we do not see that an L_{max} level can be set in a way that would be practical; and as suggested by Mr Horne we consider that the L_{dn} measure (with weighting for night-time noise) would be more practical than an L_{10}.

Stadium controls

All the principal parties were content that the provisions of Variation 8 affecting the proposed stadium should be amended to be consistent with the conditions attached to the resource consent for the stadium as settled by the consent order made by the Environment Court on 5 September 1997. However the Stadium Affected Residents Group Incorporated (SARGI) did not agree. It urged that all the conditions of the resource consent should be incorporated in the district plan so that any relaxation of conditions would require public notification and agreement of all affected parties. SARGI's representative, Mr Spackman, explained that in negotiations about such a proposal, they would then have a bargaining point on other issues.

We regret that SARGI appears not to have understood well the nature of the Court's function in these proceedings. They are references about provisions to be made in the district plan in respect of the railway yards (including the stadium site). SARGI did not itself appeal against the resource consent for the stadium [45], nor did it make any such reference to the Environment Court of any of the provisions of Variation 8. It is not therefore in a position of proposing any changes to the Variation. Rather it was admitted to make representations on the proposals made to the Court by parties who had lodged references.

As Mr Mitchell observed in his opening address for the City Council, Variation 8 makes provision for a stadium on part of the railway yards; resource consent has been granted for one particular proposal for a stadium on that site, subject to

[45] Counsel for the Stadium Development Trust, Mr McClelland, advised the Court that SARGI had signified its endorsement of the consent order made on the appeal by MP Reed and others; and that was not contradicted by Mr Spackman.

conditions; but it does not follow that the particular design for that proposal should be determinative of the provisions of the district plan for a stadium. We agree with that, and also with the submission made by Mr McClelland, counsel for the Wellington Stadium Development Trust, that the Resource Management Act does not contemplate the Court being concerned with bargaining points for negotiations over resource consent applications. The reality is that conditions attached to the resource consent for the proposed stadium are open to the process of change or cancellation provided by section 127 of the Act, irrespective of the provisions of the district plan.

For those reasons, we do not accept the submission by SARGI, and approve the proposed consent order submitted by the Stadium Trust and the City Council.

Conclusion

We have given our decisions on what we understand to be the main questions in issue in these proceedings. We invite counsel for the City Council to present a draft formal order to give effect to those decisions (and incorporating the consent orders in the port company and stadium references as modified) by directing the council to amend Variation 8 accordingly. Any other party has leave to lodge with the Registrar within 7 working days of receiving a copy of the draft order a written memorandum bringing to the court's attention any respects in which it is claimed that the draft fails to give effect to this decision, or does so inappropriately.

If there is any matter in issue in these proceedings on which we have overlooked giving our decision, that may also be brought to the Court's attention in that way and within that time.

DATED at Wellington this 5th day of November 1997.

DFG Sheppard
Environment Judge

ORIGINAL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to section 120 of the Act

BETWEEN **CLULEE & ASSOCIATES LIMITED**

Appellant

(Appeal: RMA 231/97)

AND **KAPITI COAST DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge W J M Treadwell
Environment Commissioner R Bishop

HEARING at WELLINGTON on the 18th day of November 1998

COUNSEL

Ms K Brownlee for the appellant
Ms V J Hamm and Mr P Milne for the respondent

DECISION

This is an appeal pursuant to s.120 of the Resource Management Act 1991 (RMA) against a decision of the respondent Council refusing to grant a subdivision consent. The property is located at 24 Arcus Road, Te Horo and is presently described as Part Lot 2 DP 53229 containing 5.5030 hectares. The intention is to divide it into two allotments of 2,350 square metres and 5.2680 hectares (balance).

The Decision

The Council decisions committee correctly noted that the proposed subdivision did not meet the minimum or average lot sizes required under either the Transitional or Proposed District Plans and that it would create a site to be used for exclusively residential

purposes. The committee considered there were no exceptional circumstances and that approval would consequently challenge the integrity of the District Plan and the public confidence in consistent administration. The committee also clearly based its decision on issues of precedent when it stated that:

> *"granting of consent to the proposal would result in significant cumulative adverse environmental effects resulting from the further fragmentation of rural lots in an area traditionally used for intensive horticulture."*

Despite the reference in the decision to case law and the context in which Environment Court decisions were made we are unaware of any decision which goes further than to state that consents contrary to objectives, policies and rules are unlikely to be forthcoming unless there is something exceptional or unusual about the particular proposal. This is not the same as saying that a precedent will be established but it is rather saying that, in terms of s.104, objectives, policies and rules will not lightly be set to one side if the result would be to effectively destroy the integrity of the plan and permit something contrary to those provisions without good reason.

Apart from questions of fact the decision contained a very general comment on Part II of the Act without specifying what it was about this somewhat small parcel of land which challenged the principle of sustainable management.

In relation to one of the most important factors relating to this small parcel, namely the consent of all surrounding neighbours, the committee stated that it considered the effects of the proposal would have considerable impact on fundamental sustainable management issues within the district without specifying precisely what it meant.

The Proposal and its Background

The appellant told us of the history of this property. Regrettably an important witness Mr R F Clulee died before the hearing despite the Court according the hearing urgency because of his ill health. His evidence was in the form of an unsworn statement annexed to an affidavit of his wife Lois Helen McKewen. The Court in exercise of its powers as contained in s.276(1)(a) of the RMA considered that it was appropriate to accept this statement in evidence. The respondent Council did not challenge that ruling.

The statement disclosed that the property was acquired in March of 1992 being formerly farmed for kiwifruit as part of a 60 hectare kiwifruit development previously managed by Willow Park Developments Limited of Otaki. Since acquisition the property has been developed and some 2,000 amenity trees and shrubs were planted together with 4 hectares of commercial orchard comprising 1,340 European pear trees and 745 apple trees. In June of 1997 the orchard was leased in order to provide the appellants with a secure future income. The appellants have developed the property following professional advice with the intention of bringing all of the land to full productive potential. Three areas are however unsuitable for pip fruit. One is a block of approximately 0.4 hectares at the northeastern corner of the property split diagonally by a seasonal watercourse. This has been planted in 190 macrocarpa trees to provide timber in the long-term. There is no suggestion that this land is unsuitable for such a rural purpose. A second area roughly

triangular in shape contains some 1,100 square metres and is adjacent to the house. This has been planted in 150 eucalyptus trees for coppicing. As we understand that term in relation to the intention of the appellants the trees are allowed to grow for some five or six years then felled for firewood. The tree then regenerates from its stump forming multiple trunks which are in turn felled. It appears to be a reasonably constant cycle and there is no suggestion that this piece of land is unsuitable for that rural purpose.

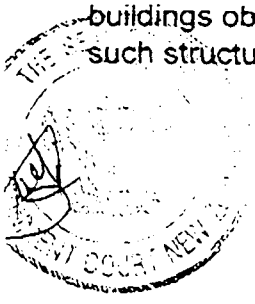
Whilst the timber production side of the enterprise is not as profitable as the other the whole activities upon site form a composite whole similar to activities on many small or larger units throughout the country. We have made that clear because the respondent Council in its submissions made the suggestion that the precedent created by consenting to the present application would allow for further fragmentation in the future by subdividing off the two parcels of land to which we have referred on the basis that they are not suitable for intensive production. For our part we consider they form one unit. The third parcel of land is a parcel of land subject to this present appeal. It is to the north of the intermittent watercourse to which we have previously referred and we accept is totally unsuitable for pip fruit production. The appellants chose not to plant it in pip fruit because it had been clear to the appellants from the outset that the watercourse formed the natural boundary for the area designated for pip fruit. The small size of the severed area plus its shape would further inhibit any economic planting of that type when one takes into account headroom etc. required for machinery and spraying.

The appellants were also advised by R E Halford & Associates (Mr Halford gave evidence before us), who are horticultural and agricultural consultants and had formerly managed the kiwifruit operations, that kiwifruit never did well on that land and that those which were planted died. The view of the consultants was that pip fruit would be similarly affected and some trees would die due to the poor soil conditions.

A third reason was that the spraying, mowing and other horticultural operations requiring the use of a tractor, would be impeded by the watercourse.

The fourth and most important reason in differentiating this land from other land in this area is that it had been disturbed by earthworks undertaken at the time of the kiwifruit development. This involved levelling a former silage pit and gully which brought large boulders to the surface and it also resulted in mixing concrete rubble with the soil as a result of the removal of milking sheds which were previously upon the property.

The appellants having exhausted all options for meaningful use of this property then considered commercial vegetable, potato, herb and flower production. This was rejected because it was clear that the lot was too small, the soil quality inadequate, the nature of the ground too rough, and the shape of the lot inappropriate for optimal machinery use. Viability could only be achieved if considerable capital was invested in for example glass or shade houses. We would comment at this stage that if the Council is concerned with buildings obstructing the general open aspect which they suggest applies in this area then such structures would have as great an effect as a residential building.



The appellants also considered the planting of the lot in timber or fencing it and grazing with livestock. The coppicing option was not acceptable because trees of ten or more metres in height on the critical northern boundary would shade and reduce the yields from the pip fruit block. Coppicing is also far from lucrative. The grazing option was not financially acceptable because the allotment would carry only two or three sheep (which would require fencing) and would be totally uneconomic and frivolous.

The uselessness of the land is shown by the fact that the appellants have to actually mow it periodically to keep it clean and tidy which is a totally uneconomic activity. We note that the Council in its decision stated that financial costs and benefits of work needed to bring this property to a better state (if that be possible) is not a relevant planning issue. For our part we would state that it is most certainly a planning issue if one of the reasons for the Council plan as it applies to this area is the value, versatility and productivity of the soils.

The original assessment by the appellants not to plant pip fruit has in their opinion been vindicated by experience over the last four years. Four pear and pip fruit trees within the main block have been lost because of their location at the edge of the watercourse which is consistent with the kiwifruit era experiences. From May till November when the water table rises there is difficulty in turning tractors and sprayers at the watercourse end of the rows of pear trees and twice the tractor and sprayer have been bogged. Deep rutting occurs. As a result of bogging or rutting the tractor is often required to reverse rather than be able to turn which is not an efficient way to operate.

The appellants have carefully recorded the incidents when water has been flowing in the watercourse and we are perfectly satisfied that it forms a serious impediment to the development of the subject site either as part of or as separate from the existing farm operations.

The General Locality

The four immediate neighbours have consented to the proposal. The consent authority accordingly for the purposes of ss.104 and 105 ~~are~~ is directed by the Act not to have regard to any actual or potential effect on those persons. By implication the subsection appears to contemplate adverse effects because it specifically refers to such an effect as not being a relevant ground upon which consent may be refused. In relation to any physical effect upon the environment the Court frankly finds it difficult to see how this small subdivision could have any environmental effect beyond the properties of those immediate neighbours. Nevertheless that does not absolve the consent authority including this Court from consideration of the other matters contained in the relevant consent sections of the Act.

Houses are not uncommon along Arcus and School Roads the latter forming a T intersection with Arcus Road. School Road indeed has a semi-urban appearance to the south with some 19 houses on relatively small sections. Along Arcus Road the houses are more scattered but there are three existing houses and a potential for three further houses within a very short distance. Along one kilometre of Arcus Road are sections having access through Arcus Road. We were told by Mr Clulee that there could be at

least 20 houses. South of School Road apart from houses there is a school, church, fire station, community hall, Plunket room, childrens' play area, three public tennis courts, farm buildings, and a catering operation. We agree with Mr Clulee that for all practical purposes the Arcus Road - School Road intersection and areas to the south plus, to a lesser extent, areas to the north comprise a small albeit slightly scattered urban township.

The Threshold Tests in s.105

Section 105(2A) is mandatory. It requires the consent authority to consider a non-complying activity and to decide in respect of that activity whether the adverse effects on the environment ... will be minor. The consent authority cannot deprive an applicant of the right to have his application considered under s.104 by applying a series of hypothetical criteria relating to what future applicants for consent may or may not do. The section to us is clear and does not require a determination of plan integrity or challenges to policies and objectives. Section 105(2A)(a) is straightforward and should not be clouded by consideration of issues under (b) or by consideration of s.104 issues.

Taking into account the consent of the immediate neighbours we consider it abundantly clear that the subdivision of this small parcel of land will have no adverse effect upon the environment. In making that decision we have taken into account questions of flood plain impediment and effluent disposal issues. These can all be adequately covered by conditions of consent. It is therefore not necessary for us to consider the alternatives contained in s.105 because compliance with one of the threshold tests is sufficient to move the issue into the arena of s.104.

It is also not necessary for us to determine whether the proposal is non-complying or discretionary - an issue which is clouded by the provisions of the District Plan to an extent where its status is debatable one way or the other - but to simply consider the issues of s.104. However, should the activity be held to be non-complying when we come to consider relevant objectives, policies and rules then that could influence the weight to be given to those matters.

Part II of the RMA

Although a parcel of land of this size can hardly be held to bring into play the full force of this part of the Act, a part which is concerned with issues of great importance, it is interesting to see how the proposal fits within the purpose and principles.

The evidence we have from Mr Clulee, Mr Mervyn Shand a surveyor and land development consultant and Mr R E Halford an agricultural and horticultural management consultant, indicates that without the expenditure of a large amount of capital (which realistically will not be forthcoming) this property in its present form is a liability rather than an asset. Despite its location within a zone designed to encourage horticultural activities of high intensity it is not realistic to expect any contribution whatsoever from the new allotment proposed to be created. Therefore in terms of s.5 the smaller allotment contributes nothing to the social, economic and cultural well-being of people and communities nor does it have any relevance whatsoever to their health and safety. Turning now to the opening words of s.5(1) we are directed to promote the sustainable

management of natural and physical resources. That means (s.5(2)) managing the use, development, and protection of natural and physical resources in a way ... which enables people and communities to provide for the matters we have just mentioned. We must do that while sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.

In the circumstances of the present case there are but two alternatives which we can see and these are:-

(a) to leave the land virtually fallow being mown from time to time to prevent long grass and weed infestation or

(b) make some use of it which essentially would be a residential activity the horticultural consultant Mr Halford rejecting the viability of glasshouse production.

There is perhaps a third very remote possibility that the land could be used for outbuildings in association with the present land uses but there are already adequate buildings for that purpose outside of the area of subdivision.

Therefore in a general sense, setting aside the provisions of the plan, there is nothing in s.5 which would suggest that use of this land for the construction of a residential dwelling would be other than in accordance with that section and there is certainly nothing to suggest that of itself that option would have any effect whatsoever on the sustainable management of this country.

Turning to matters of national importance we can find nothing relevant to the present proceedings. In terms of s.7 the matters contained in that section in respect of the present application contain nothing which would suggest that the application should not be approved. To suggest that the subdivision from the main allotment of this one small section would affect natural and physical resources, amenity values (having regard to the consents of neighbours), or the quality of the environment is stretching the meaning of the Act to an unreal extent.

There is a positive direction in Part II to ensure that land is managed and developed for some type of productive purpose unless it is land which contains cultural, environmental, or other qualities which suggest that development or use is not appropriate. The appeal site contains no such elements.

Section 104

We will now move to a consideration of the relevant subsections which are (a) and (d). We can find nothing in the Regional Plan which would suggest that this consent should not be granted and those matters in the Regional Plan concerning water or water contamination which are within the control of the Regional Council have been mentioned by that authority in submissions to the respondent Council but the Regional Council has not filed a submission objecting to the subdivision.

We can find nothing in any of the evidence placed before us (having regard to the consent of adjacent owners) which would suggest that there is any actual and/or potential adverse effect on the environment in allowing the activity. Indeed when one reads the definition of 'environment' as contained in the Act one can only conclude that the potential inclusion of another family in close proximity to a type of mini-rural community would be largely beneficial. We are not enunciating the view that this particular application if consented to should act as a catalyst for urbanisation of this area but we are saying that one more section in an area which contains elements of a settled rural community does no harm to the concept of the present zoning.

It is perhaps here that we should consider the question of whether this site contains any unique elements - a concept rejected by the Council committee. Apart from some general comments made by the senior resource consent planner, Mr C R Thomson, for the Council the only expert evidence we heard in respect of this specific property was from Mr R E Halford and Mr M Shand. They are respectively agricultural consultants and surveyors/land development consultants. They were both positive in their assessments of this site. They both have wide experience of the general area and in the course of their consultancy practices are able to comment on even isolated pockets of land such as faced by the Court in the present case. Both witnesses were positive in their approach to the unique qualities of this site. They both considered that because of the flat topography of the Te Horo area generally and of the specific area wherein horticultural activities take place that it was most unusual to find a site where the land quality had been severely modified by man. This modification had taken place in the course of filling part of the watercourse which flows through the property and had also been necessitated by the removal of buildings previously associated with dairy farming. It is indeed rare to find two witnesses who were both so positive as to the unusual qualities of this particular small parcel of land.

The Court gained the clear impression from both that had this land had potential for horticultural purposes such as the growing of timber then they would not have been before the Court espousing the cause of the appellants. The size and shape of the property plus its proximity to community facilities also sets the land aside from the general zone concept and places it in an unusual indeed unique category. In making these comments we have not yet addressed policies, objectives and rules.

In concluding this part of the decision we do not consider that the present subdivisional application has any effect whatsoever upon the integrity of the plan. The plan should have been prepared having regard to effects of activities rather than with the objective of providing rigid guidelines intended to direct what activities which can take place on land with no regard being paid to the practicalities of using a particular piece of land for the activities so directed.

We turn now to the policies, objectives and rules of the Proposed Plan which is effectively the dominant document. The general thrust of the Plan in the Te Horo vicinity is to address and encourage a mix of land uses which include pastoral, pip fruit, kiwifruit, and residential and rural-residential activities. The Te Horo settlement itself comprises a strip of houses on State Highway 1 with some other allied commercial activities and activities along the southern side of the Te Horo Hautere Crossroad between the State Highway

and Te Horo School. The subject site is approximately 150 metres from the nearest house and a similar distance from a concentration of houses to which we previously referred.

The Transitional District Plan has been effectively superseded by the Proposed District Plan there being no appeals likely to affect this present proposal. At the time of the original application the subdivision was processed as a non-complying activity in terms of both plans. The Council has now made decisions on submissions and the Proposed District Plan has become the dominant document which is where we start to face some difficulty in defining its status. Rural-residential lots are defined as:-

> *"a plot of land suitable for a dwelling, for occupation by people who wish to live in the country and enjoy a rural environment, but do not wish to be involved with management responsibility for a substantial area of land."*

The proposed lot which is of 2,350 square metres is within that concept although it is not as large as many of the allotments often found in a rural-residential situation and indeed the rules of the plan further qualify the concept in that no rural-residential lot within the respondent Council's jurisdiction should be below one hectare. It is therefore debatable whether the present proposal comes within any of the definitions in this plan. It is effectively a residential lot.

When the Proposed Plan was notified the proposal was a non-complying activity because it did not comply with the minimum lot size standards for horticultural, farmlet, or rural-residential subdivisions. A lot size for a controlled activity such as horticulture was four hectares. Farmlets and rural-residential had a one hectare minimum standard. Following decisions the plan is far from clear as to whether the activity is conforming, non-conforming or discretionary and, although our determination on the threshold standard in s.105 effectively ends that argument, it is perhaps appropriate to comment briefly.

In the existing Proposed Plan the rural zone rules D.2.1.2(vi) provide that subdivision is a controlled activity where all the controlled activity standards are complied with. The present proposal does not comply with the standards for a horticultural lot in the alluvial plains area. It is debatable whether that standard applies at all in that all parties concede that this is not a horticultural lot that being the very reason this case is before the Court.

However Rule D.2.1.3(i) provides that activities coming within the following definition are discretionary:-

> *"all activities which are not listed as Non-Complying or Prohibited and all other activities which do not comply with one or more of the permitted activity or controlled activity standards."*

This clearly applies to the present proposal.

The plan then proceeds to contradict itself in respect of subdivisions where it says that subdivisions are only discretionary where all of the discretionary activity standards for subdivision are complied with. The only standards which could be said to apply to the

present proposal (and the question of "apply" is debatable) are found in the part of the plan relating to rural-residential lots. That standard contains a minimum lot area plus a locational criteria. The present proposal complies with neither.

Essentially the thrust of the plan is to permit rural-residential activities only in defined areas such as Peka Peka Beach and to prohibit them elsewhere. This is not however what the plans says there being no areas where subdivisions of the type presently before us are prohibited.

As we have recorded however we consider the proposal clears the s.105 hurdles and thus the debate is largely academic.

Turning to the proposed District Plan C.7.2 under the heading of rural subdivision we have a general objective aimed at enhancing environmental character and the associated amenity values of rural areas, life supporting capacity of resources to meet the needs of future generation in a way which avoids, remedies or mitigates adverse effects etc.. Then follows Policy 1 which is to ensure the open space landscape of the alluvial plains is not compromised by intensive development and associated adverse environmental effects resulting from subdivision of land into lots of less than four hectares.

With the greatest of respect we feel the Council has a policy which confuses subdivision with activities which can result from it. On the present parcel of land (unsubdivided) there is already a dwellinghouse and outbuildings. As we understand the situation this piece of land could also contain glasshouses, wind breaks, a granny flat, and like buildings. Shelter belts are already in place. It is therefore difficult to see how the rules achieve open space objectives particularly when one views the photographs of Arcus Road which portray a tunnel-like effect with hedges on each side acting as wind breaks for horticultural activities. Indeed one of the witnesses for the appellants indicated that were some of the shelter belts to be removed it would probably enhance the amenity values of the area.

Policy 6 is intended to ensure that rural-residential subdivision is only permitted on land which is unsuitable for future residential subdivision and when land is near an urban area which has already been closely subdivided and will not be adversely affected by further subdivision and development. Strangely enough this policy to a degree reflects the site of the appeal where this land is unlikely to be required for future residential subdivision but is still in proximity to the community development at Te Horo.

We do not find any of the other subdivisional policies particularly relevant.

In connection with the alluvial plains, which are covered by a particular part of this plan, the plan records the versatile soils of this area and the importance of the district's horticulture and intensive agriculture activities. It states:-

> *"In addition, being generally flat terrain the open space character is vulnerable to change by development resulting from intensive subdivision. To retain the open space character and ensure ground water is not contaminated by on-site sewage systems, it is considered necessary to have controls which avoid grouping of dwellings and*

associated buildings. It is for this reason that the rural subdivision rules retain a four hectare minimum."

There are two comments we make in relation to this important statement. The first is that the present proposal is not intensive subdivision. It is an isolated excision of an otherwise useless piece of land from a productive horticultural block. The second point we would make is that the reason for the four hectare standard is clearly related to open space character and to ensure that ground water is not contaminated etc.. Open space character and protection of ground water is ensured by avoiding grouping of dwellings and associated buildings. Subject to appropriate conditions governing septic tank or other means of effluent disposal we do not consider the present proposal offends any of the matters contained in that statement.

Turning to rural-residential lots (C.7.2) the Council recognises this type of subdivision but has chosen to specify areas wherein it can take place leaving the activity simply not mentioned in any other areas. It achieves locational criteria for rural-residential development *"by ensuring this type of development is concentrated in areas where the effects will be minimal."* It does not prevent an assessment of the effects of a rural-residential lot (as opposed to a rural-residential development) in various areas where one additional allotment may have no particular effect.

There are then a series of policies and objectives relating to natural environment etc. which essentially focus on two aspects:-

(a) a rural environment as such and

(b) open space aspects.

As we have previously observed these are not necessarily compatible.

We have considered all policies and objectives but, applying the standards enunciated in New Zealand Rail v Marlborough District Council (1994) NZRMA 70 and other similar cases we can find nothing in the plan to which the present proposal can be said to be contrary. Indeed the provision in the plan enabling most non-complying activities to be considered as discretionary indicates an appropriate and open-minded attitude on behalf of the Council to individual proposals which come before it.

In relation to objectives and policies which do not specifically encourage or discourage any particular activity the Court's attention was directed at comments in Wellington RC Bulk Water v Wellington RC W 3/98 concerning the question of cumulative effects. Comments in that case were reflected in Price v Auckland City Council (1996) ELRNZ 443. In the former when discussing the word *"effect"* the Court drew attention to the 1993 amendment which qualified that word with the word *"environment"*. We considered in that case that there was a deliberate legislative intent which resulted in excluding conjectural future actions by persons unknown who are not even parties to the proceedings as being an effect within the meaning of the Act. The Court said:-

"Were the plan to contain the strong objectives and policies set against applications of this type the situation may be different because in that case the integrity of the plan would be in issue under s.104(1)(d). It would then require unique or unusual circumstances or demonstrable need before the Court would lightly set such matters aside. That is not however an issue of precedent, it is a question of paying due regard to plan provisions."

In Price (supra) when considering cumulative effects and precedent the Court stated:-

"We suspect however that the Council is concerned as expressed in the decision at the:

> *'cumulative effect and the potential for being a precedent for development of other sites in the locality and the zone generally which would alter the character of the locality and undermine the zone strategy for it in the proposed district plan.'*

We do not consider in the present case that that is an appropriate criteri(on) for consent refusal. There may be other sites in the area similar to the site owned by the applicant the development of which will also have no consequence in regard to a general zone strategy and that the effect will not destroy the zone concept. If there are other sites which can be developed without general adverse amenity effect and do not run counter to objectives and policies then those other sites should also be permitted to develop."

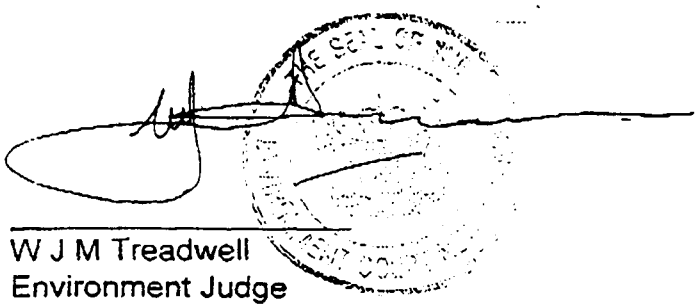
Those two quotations to us sum up this vexed question of cumulative effect. In the present case we have not found the proposal to be contrary to objectives and policies although it is not recognised in the zone wherein the site is situated. We are furthermore fortified by evidence from experts that there are no other sites exhibiting this same set of physical traits in the vicinity. Thus the case for this present application is stronger and we are not persuaded that consent should be refused merely because other people in the area are interested in subdivision or because the Council has had other applications. Any future applicants would be well advised to take heed of the detail we have placed in this decision concerning the subject site. It must also be remembered that the proposed activity is not a prohibited activity in terms of this plan but it appears that the Council is endeavouring to make it so.

Conclusions

We have set out our reasons in the foregoing part of this decision and have concluded that the matter passes the threshold tests of s.105 and also passes the tests in s.104 which set out the matters to which we must have regard. Essentially we have concluded that the effects of consenting to this activity upon the environment are negligible. We

have further concluded that to grant consent will not offend the provisions of the plan or challenge its integrity in any way. Consent is accordingly granted to subdivide the property into two as previously recorded and we await a set of suggested conditions from Council and the appellants. In the event of disagreement conditions will be set by the Court.

DATED at WELLINGTON this 3rd day of ~~January~~ February 1999



W J M Treadwell
Environment Judge

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