IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2336
[2016] NZHC 138

BETWEEN	ALBANY NORTH LANDOWNERS Plaintiff
AND	AUCKLAND COUNCIL Defendant

[Continued over page]

Hearing: 28 November - 2 December 2016

Counsel:
M Baker-Galloway for Albany North Landowers
T Mullins for Auckland Memorial Park Ltd
S Ryan for Franco Belgiorno-Nettis
R Brabant and R Enright for Character Coalition Inc & Anor
M Savage for Howick Ratepayers and Residents Assoc Inc & Anor
R Enright for The Straits Protection Society Inc and South Epsom Planning Group Inc & Anor
A A Arthur-Young and S H Pilkington for Strand Holdings Ltd
R E Bartlett QC for Summerset Group Holdings Ltd
A A Arthur-Young and D J Minhinnick for Valerie Close Residents Group
H Atkins for Village New Zealand Ltd
R Brabant for Wallace Group Ltd
M Casey QC and M Williams for Man O'War Farm Ltd
R J Somerville QC, K Anderson and M J L Dickey for Auckland Council
C Kirman and A Devine for Housing Corporation New Zealand and Minister for the Enironment
S F Quinn and A F Buchanan for Ting Holdings Ltd
S J Simons and R M Steller for Property Council of New Zealand
R M Devine for Ngati Whatua Orakei Whai Rawa Ltd

Judgment: 13 February 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 13 February 2017 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar
Date: ……

CIV-2016-404-2298

BETWEEN	AUCKLAND MEMORIAL PARK LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2323

BETWEEN	AUCKLAND UNIVERSITY OF TECHNOLOGY Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2333

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2335

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2351

BETWEEN	BUNNINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2326

BETWEEN CHARACTER COALITION INC LTD & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2327

BETWEEN CHARACTER COALITION INC LTD & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2322

BETWEEN STEPHEN HOLLANDER
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2321

BETWEEN HOWICK RATEPAYERS AND RESIDENTS ASSOCIATION INCORPORATED & ANOR
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2320

BETWEEN JPR ENTERPRISES & ORS
Plaintiff

AND AUCKLAND COUNCIL
Defendant

CIV-2016-404-2324

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2325

BETWEEN	NORTH EASTERN INVESTMENTS LIMITED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2349

BETWEEN	THE STRAITS PROTECTION SOCIETY INCORPORATED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2350

BETWEEN	STRAND HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2344

BETWEEN	SUMMERSET GROUP HOLDINGS LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2305

BETWEEN	VALERIE CLOSE RESIDENTS GROUP Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2341

BETWEEN	VILLAGE NEW ZEALAND LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2316

BETWEEN	WALLACE GROUP LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2331

BETWEEN	MAN O'WAR FARM LIMITED Plaintiff
AND	AUCKLAND COUNCIL Defendant

CIV-2016-404-2302

BETWEEN	SOUTH EPSOM PLANNING GROUP INCORPORATED & ANOR Plaintiff
AND	AUCKLAND COUNCIL Defendant

TABLE OF CONTENTS

Introduction

[1] The Auckland Unitary Plan (AUP) is a combined 30 year plan, incorporating for the first time a regional policy statement, a regional plan and a district plan for Auckland in one document. It represents the culmination of a mammoth undertaking by the Auckland Council (the Council) and an Independent Hearings Panel (IHP) over the span of several years. The scale of this task reflects the significance of the AUP to the people and communities of Auckland and beyond.

[2] This Court's relatively discrete involvement has been triggered by 51 appeals and judicial review applications. A central issue for 20 of those proceedings is whether the recommendations made by the IHP on the proposed Auckland Unitary Plan (the PAUP) were within scope of the submissions. If they were not in scope, then affected persons have the right to appeal on the merits of the decisions of the Council based on those recommendations to the Environment Court.

A guide

[3] This judgment answers the following preliminary questions agreed by the parties:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 (the RMA) case law relevant, when addressing scope under the Act?

(e) Did the IHP correctly apply the legal framework in the specified test cases?

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

(*The Preliminary Questions*)

[4] In order to properly understand the decisions made by the IHP and the Council, it is necessary to consider the full context within which they were made. Consequently, the judgment is divided into three key parts. It commences by describing the various parties to the proceeding and the characteristics of each of their particular claims – [5]-[9]. Part B provides the background to the current proceeding, tracing through both the legislative and factual context to the development of the AUP– [10]-[91]. With that background in mind, in Part C I address the Preliminary Questions in the order they are given above – [92]-[302].

PART A: THE PARTIES

[5] The appellant/applicant parties actively involved in the preliminary question proceeding on scope are:

(a) **Albany North Landowners Group (ANLG).** ANLG brings an appeal regarding the decision made by the Council to adopt recommendations of the IHP to zone the ANLG site as Future Urban Zone, which prohibits the subdivision and development of its site. ANLG contend no submission provided scope for the FUZ zoning.

(b) **Character Coalition Inc and Auckland 2040 Inc**. The Character Coalition represents over 55 community organisations in the Auckland area that have a collective interest in protecting the character and heritage of Auckland. Auckland 2040 is coalition of local groups that have expressed concern with the implications of the PAUP. These two societies have brought appeal and judicial review challenges to the decision of the Council to accept the zoning recommendation of the IHP in relation to 29,000 residential properties, which the IHP said was within the scope of submissions requesting changes to residential zoning in the notified PAUP. They argue that the rezoning of the 29,000 properties was out of scope.

(c) **Howick Ratepayers and Residents Association Inc (HRRA).** The HRRA made a submission on the PAUP addressing the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court to challenge the rezoning of 65 properties which it argues were not sought by any submitter or identified by the IHP as being out of scope.

(d) **Strand Holdings Ltd (SHL).** SHL owns property that was affected by the Council's acceptance of the IHP's recommendation to relocate the origin point of the Dilworth View Protection Plane (the Viewshaft), which protects the street view of the Dilworth Terrace houses in Parnell.

The relocated Viewshaft places height restrictions on SHL's property. SHL brings judicial review proceedings alleging that the IHP made an error of law in not identifying this recommendation as beyond the scope of submissions.

(e) **Wallace Group Ltd (WGL).** WGL appeals against the decision of the Council to rezone the property owned at 55 Takanini School Road, Takanini (the site) to a Residential Mixed Housing Suburban Zone. WGL owns a property that directly adjoins the northern portion of the site and the rezoning directly impacts its ability to develop and use its land. The notified version of the PAUP retained the status quo zoning, which was split zoning, with the northern portion zoned Light Industry. WGL argues that there were no submissions seeking a change of the status quo zoning.

(f) **Man O'War Farm Ltd (Man O'War).** Man O'War owns rural property on Waiheke Island that is bounded on three sides by 24 km of coastline. It appeals against the IHP's recommended definition of coastal hazard, namely "land which may be subject to erosion over at least a 100 year timeframe", which was adopted by the Council. The issue in its appeal was whether the definition was within the scope of submissions to the PAUP and/or is void for uncertainty.

[6] The Council was the respondent in all proceedings. Its role in relation to the AUP, which will be discussed at [294], was to accept or reject the IHP's recommendations on the PAUP and to determine the final form of the PAUP.

[7] There were a number of parties that supported the Council:

(a) **The Minister for the Environment (the Minister) and Housing New Zealand Corporation (HNZC).** The Minister (on behalf of Cabinet) and HNZC, along with the Ministry for Business, Innovation and Employment (MBIE), were submitters on the PAUP and presented at the hearings. In this proceeding, the Minister and HNZC supported the Council in respect of the challenges brought by Auckland 2040 and the

Character Coalition to the Council's acceptance of specific residential zoning recommendations. These parties contend that their submissions provided scope to upzone the 29,000 properties said to be out of scope.

(b) **Ting Holdings Ltd**, trading as Ockham Residential (Ockham). Ockham appeared in opposition to Character Coalition and Auckland 2040's appeal and judicial review application. Ockham undertakes large scale brownfield apartment developments and was a submitter on the PAUP. Its submission was one of the submissions relied on by the IHP to provide jurisdiction and scope for the residential rezoning recommendations made.

(c) **Property Council of New Zealand (Property Council).** The Property Council is a not-for-profit organisation that represents commercial, industrial and retail property owners, managers, investors and advisors. It made submissions and further submissions on the notified versions of the PAUP, and presented evidence before the IHP. Throughout the hearings process, the Property Council advocated for residential upzoning and intensification. It argues that the residential zoning recommendations on the properties affected by the Character Coalition and Auckland 2040 proceedings were within the scope of the relief sought in its submissions to the IHP.

(d) **Ngati Whatua Orakei Whai Rawa Ltd (Whai Rawa).** Whai Rawa supported the Council in respect of the Strand Holdings test case. It argued that its submission to the IHP on the Viewshaft brought the IHP's recommendation within scope.

(e) **Summerset Group Holdings Ltd and Equinox Capital Ltd (Equinox).** Equinox have a property interest in the property subject to the WGL appeal. They made submissions on the role of the IHP and the legal principles that should be applied in relation to issues of scope under the Act.

[8] The IHP did not take an active role in the proceedings.

Acknowledgement

[9] I wish to acknowledge the considerable assistance afforded to me by counsel for all parties represented at the hearing of this matter. Given the depth and breadth of those submissions and conversely the requirement for a succinct judgment, I have not been able to cite all argument as fully as might be expected. The relevant themes drawn from submissions should, however, be evident to counsel.

PART B: BACKGROUND AND FRAME[1]

Establishment of Auckland Council, adoption of Auckland Plan

[10] One of the first priorities for the Council after it was established as a territorial authority on 1 November 2010 was to prepare and adopt a spatial plan for Auckland to provide a comprehensive and effective long-term strategy for Auckland's growth and development. This became known as the Auckland Plan, which was adopted on 29 March 2012.

[11] Following the adoption of the Auckland Plan, the Council's next significant planning priority was the development of the AUP consistent with the vision and foundations set out in the Auckland Plan. The AUP was to meet the requirements of the following planning instruments:[2]

(a) *A regional policy statement* (RPS): an RPS achieves the purposes of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region;[3]

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1 A common bundle was produced by the Council without objection and the information supplied therein has formed the basis of this background narrative, along with the relevant legislation.

2 Local Government (Auckland Transitional Provisions) Act 2010, s 122(2).

3 Resource Management Act 1991, s 59.

(b) *A regional plan*: the purpose of a regional plan is to assist the Council to carry out its region-wide functions, including:[4]

(i) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region;[5] and

(ii) Preparation of objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance.[6]

A regional plan must also give effect to national and regional policy statements.[7]

(c) *A district plan*: a district plan is to assist a territorial authority to carry out its district level function, including the establishment 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.[8] The district plan must be consistent with any regional plan.

[12] It was envisaged that, once approved, each of these elements of the AUP would be deemed to be plans or policy statements separately approved by the Council.[9] Out of a concern that the AUP be prepared in a timely fashion, the Council raised with the Government the possibility of legislative changes to provide unique processes for the development of a combined plan for Auckland.

New legislation for development of the AUP

[13] The Government introduced legislation in December 2012, in the form of the Resource Management Reform Bill, which would speed up the processes for developing

4 Section 63(1).
5 Section 30(1)(a).
6 Section 30(1)(b).
7 Section 67(3).
8 Section 31(1).
9 Local Government (Auckland Transitional Provisions) Act 2010, s 122(3).

the AUP. The then Minister for the Environment, Hon Amy Adams, stated in the first reading:[10]

> I am concerned that under existing law Auckland Council estimates that its first Unitary Plan could take up to 10 years to become operative. No one benefits from long, drawn-out, and expensive processes, during which time Auckland's development stagnates in a cloud of uncertainty. Auckland's economy is too important to New Zealand for us to wait up to a decade for the plan to be implemented. Auckland represents some of our most pressing housing affordability issues, and the council needs to be able to make changes to address this issue without long delays.

[14] The expectation was that under the new process the AUP would become operative within three years from notification, instead of the six to 10 years likely under the First Schedule Process of the RMA.[11] On 4 September 2013, Part 4 was inserted into the Act, which allowed for such a process to proceed by adopting a one-off hearing process. The hearing process is discussed in greater detail below at [34] – [51].

Notification of the draft PAUP

[15] At the same time as legislation to create a streamlined process was being considered by Parliament, the Local Board, local iwi and key stakeholders were notified of the AUP and were provided an opportunity to consult with the Auckland Council about it and offer feedback. This occurred between September and November 2012. On 15 March 2013 the draft PAUP was notified and public consultation followed until May 2013.

Section 32 Report

[16] The Council was required to prepare an evaluation report in accordance with the requirements in s 32 of the RMA (the s 32 Report).[12] Such reports involve examination of the extent to which the objectives being evaluated are the most appropriate way to achieve the purpose of the RMA.

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10 (11 December 2012) 686 NZPD 7331.
11 (27 August 2013) 693 NZPD 12851-12852.
12 Local Government (Auckland Transitional Provisions) Act 2010, s 115(d).

[17] The s 32 process ran parallel to development of the AUP from the initiation of the project in November 2010.[13] It involved extensive consultation with the public spanning two years, including with key stakeholders such an HNZC, local boards, Character Coalition and Ockham. The report also refers to engagement with around 16,500 Aucklanders on the draft plan, with feedback analysed by subject matter experts, including the impact on zoning.[14] The Report was notified on 30 September 2013. The new Act also required that the s 32 Report be provided to the Ministry for the Environment for auditing as soon as practicable.[15] That audit occurred in November 2013.

[18] Significantly for present purposes, the s 32 Report addressed urban form and land supply in detail. The central resource management issue to be addressed is identified as the provision of an additional 400,000 new dwellings over the next 30 years to support an additional one million people living and working in Auckland, referring to the need to accommodate these new dwellings in existing urban areas, as well as ensuring that there is a sufficient supply of greenfield land.[16] It notes that the PAUP outlines the expected distribution of dwelling land supply to be 70 per cent in the existing Auckland urban core; that is, 280,000 additional new houses by 2041.[17]

[19] The urban core was to be marked out by the Rural Urban Boundary (the RUB), which was intended to be "a defensible, permanent rural-urban interface and not subject to incremental change".[18] The RUB was contrasted with the status quo Metropolitan Urban Limit (the MUL), which is the tool used to control the speed of peripheral expansion into greenfield areas around Auckland.[19] The MUL is located at the edge of existing urbanised areas while the RUB was proposed to be located some further distance away.

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13 Auckland Council *Section 32 Report – Part 1 for the Proposed Auckland Unitary Plan* (30 September 2013) at 15.

14 At 45-46.

15 Section 126.

16 Auckland Council *2.1 Urban form and land supply – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 4.

17 At 5.

18 At 4.

19 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) at 65.

[20] The s 32 Report considered a number of alternatives as to how to accommodate residential and business growth in Auckland:[20]

(a) The status quo policy of retaining the current RPS policies and approach, using a statutory urban boundary – the MUL, able to be amended by way of plan change;

(b) The preferred alternative – a quality compact Auckland approach using a defensible long term statutory urban boundary – the RUB, with targets up to 70% of dwellings inside metropolitan urban area (as at 2010) and orderly, timely and planned development with the RUB consistent with Auckland's development strategy; and

(c) A laissez-faire approach – an expansive alternative with no growth management tool, relying on plan changes to accommodate growth in whatever form it may present itself.

[21] In relation to each of these three alternatives, the s 32 Report considered their appropriateness, effectiveness and efficiency. It also took into account economic, social and cultural costs, risks and benefits, as well as the environmental benefits and risks of each alternative.

[22] The preferred approach is said to be an approach:[21]

> … combining targets for both intensification and greenfield areas of Auckland, a planned, staged and orderly land delivery and development capacity process, supported by a long-term, a defensible rural urban boundary (the Rural Urban Boundary), is considered to offer a more robust urban growth management process than other options. This approach is considered to be more pro-active, enabling and integrated when compared with retaining the current RPS provisions or taking a less regulated approach. The RUB provisions and targets, the land supply objectives and policies will provide greater certainty to Auckland's communities, infrastructure providers and the development sector about the timing and location of growth, while still ensuring all environmental safeguards are in place.

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20 Auckland Council, above n 1, at 25-33

21 At 34.

[23] The s 32 Report addresses the implications of the initially proposed five residential zones, namely Large Lot, Rural and Coastal settlements, Single Home, Mixed Housing and Terrace and Apartments zones. The report records that the Mixed Housing zone was split into two zones – Mixed Housing Urban (MHU) and Mixed Housing Suburban (MHS) in August 2013.[22] The final description given to these zones in the s 32 Report is noted below at [26].

[24] Capacity modelling based on the March 2013 draft of the PAUP identifies that the capacity for additional residential dwellings is 38,576 on parcels that are vacant and have a residential base zone; 78,584 on parcels that have infill potential and have a residential base zone and 231,004 if all parcels that have a residential base zone are redeveloped to their maximum capacity at the modelled consent category.[23] The s 32 Report observes that no technical reports underpin this information.[24] The Report then states:[25]

> Once the Unitary Plan is notified (post all changes made by Councillors) a final model will be developed, along with the required technical reports and documentation. A large proportion of the Draft Model will be able to be reused, but some aspects will need to be redeveloped to reflect the notified rules and spatial data. It is intended that this information and the model can be used to inform the formal public engagement and hearings process with respect to growth issues generally and location specific questions as appropriate.

[25] It is also noted that the capacity information is not fully accurate because the new MHS and MHU zones will likely decrease and increase respectively the number of additional dwellings that were originally zoned Mixed Housing in the March 2013 drafts, and also that minor changes continue to be made to maps and the rules.[26]

[26] The controls and permitted land use activities for the six proposed residential zones in the notified PAUP are described, namely:

(a) *Large Lot*: Large Lot zones were applied in locations on the periphery of Auckland's urban areas, forming a transition between rural land and

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22 Auckland Council *2.3 Residential zones – section 32 evaluation for the Proposed Auckland Unitary Plan* (30 September 2013) at 5.

23 At 7. See also Harrison Grierson and New Zealand Institute of Economic Research *Section 32 RMA Report of the Auckland Unitary Plan Audit* (November 2013) at 48.

24 Auckland Council, above n 22, at 8.

25 At 8.

26 At 9.

urban land. Development on these sites was identified as being limited to one dwelling per 4000 m^2.[27]

(b) *Rural and Coastal Settlements*: The Rural and Coastal Settlement Zone was applied in settlements mostly forming a transition between rural or coastal land and rural production land. Development on these sites was also identified as being limited to one dwelling per 4000 m^2.[28]

(c) *Single House Zone* (SHZ): The SHZ was applied in settlements on the periphery of urban Auckland, in most historic character and conservation overlay areas and in selected parts of Auckland that do not have good access to public transport. It limited development to one dwelling per 500 m^2.[29]

(d) *Mixed Housing Urban* (MHU): This was identified as a key residential zone where change was anticipated. The zone is one of transition where some sites would stay in a similar form of one dwelling per 300 m^2 and other sites would be redeveloped for terraced housing or town houses.[30]

(e) *Mixed Housing Suburban* (MHS): Identified as one of the broadest residential plans in the AUP. The zone would be one of transition with some sites staying in a similar form of one dwelling per 400 m^2 and others being redeveloped for more intensive residential development such as terraced housing or town houses.[31]

The Report states:[32]

> The Mixed Housing Urban and Mixed Housing Suburban Zones make up approximately 49% of residential land. Both zones allow for four dwellings as a permitted activity provided the dwellings meet the density and development controls of the zone.

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27 At 28.
28 At 30.
29 At 32.
30 At 40.
31 At 34-35.
32 At 3.

(f) *Terrace Housing and Apartment Zone* (THZ): The THZ zone was identified as a key residential zone where change is anticipated and encouraged. The zone would be typically applied between the centres and the Mixed Housing Urban zone, and will be one of transition with some sites remaining in the form of one dwelling until sites can be amalgamated or re-developed by either current or future owners. One dwelling per site would be a permitted activity, two to four a discretionary activity, and no density limits would apply where five or more dwellings are proposed and the site meets certain site size and road frontage controls.[33]

[27] After conducting a cost benefit analysis of the proposed zones against the alternatives of (i) the status quo and (ii) removing all rules, the s 32 Report concludes that the package of six residential zones provided for "sufficient variation and housing choice" and that the inclusion of two mixed housing zones "will make a positive impact on housing affordability in the Auckland market".[34]

Notification of the PAUP

[28] The PAUP was then required to be notified and submissions invited.[35] This occurred on 30 September 2013. Under ss 123(4)–(5) of the Act it was not necessary for copies of the public notice of the PAUP to be sent to affected landowners, except for the owners and occupiers of land to which a designation or heritage order applied.[36]

[29] At this point, any person was able to make a submission on the PAUP, and further submissions could be made by any person representing a relevant aspect of public interest, any person with an interest greater than the one the public has, or the local authority.[37] Many of the parties to this proceeding made submissions on the PAUP and some made further submissions. Overall, more than 9400 submissions composed of 93,600 unique requests and over 3800 further submissions containing over 1,400,000 points were made to the IHP.

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33 At 45-46.
34 At 51.
35 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(e).
36 Sections 123(4) and (5).
37 Resource Management Act 1991, sch 1 cls 6 and 8.

[30] The Council, in accordance with the RMA, prepared and notified a summary of the submissions, and forwarded all the relevant information obtained up to that point to the specialist hearing panel, the IHP.[38]

The IHP: Role, Function

[31] The IHP is a specialist panel appointed by the Minister for the Environment and the Minister of Conservation.[39] During the first reading of the Resource Management Reform Bill, Hon Amy Adams described the composition of the IHP, and its general role, as follows:[40]

> The Unitary Plan developed by the council after enhanced consultation will be referred to a hearings panel appointed by me and the Minister of Conservation in consultation with the council and the independent Māori Statutory Board, to ensure that the consideration is properly independent. There will be the usual guidelines applied for making appointments, including a high degree of local knowledge, competency, and understanding of tikanga Māori. The process will involve all the dispute resolution options available in the Environment Court, and provide the board with wide discretion to control its processes to ensure that it is easily accessed and understood by all.

[32] It was envisaged that a one-off hearing process carried out by the IHP would "streamline and improve" the development of the AUP, and ensure Aucklanders would have comprehensive input and a "high-quality independent review of the council plan".[41]

[33] Its functions are set out in full in s 164 of the Act. Those functions include holding and authorising pre-hearing meetings, conferences of experts and alternative dispute resolution processes, commission reports, holding hearing sessions, making recommendations to the Council and to regulate its processes as it thinks fit. The procedure adopted must, however, be "appropriate and fair in the circumstances".[42] The submission and hearing process was also subject to a strict statutory timetable, with limited powers for extension.[43]

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38 Schedule 1, sub-cls 7(1)(a) and (b).
39 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(g).
40 (11 December 2012) 686 NZPD 7331.
41 (11 December 2012) 686 NZPD 7331.
42 Section 136.
43 Sections 123(7)–(9).

The issue of scope emerges

[34] The IHP chose to structure the hearings according to topics based on the way the Council had grouped its submissions, which resulted in approximately 80 hearing topics. The IHP took an approach that generally moved from the general to the specific, dealing first with topics relating to the RPS then moving through to site-specific issues.[44]

[35] The IHP provided interim guidance on certain hearing topics to assist submitters. Relevant guidance on Topic 013 RPS included the following note:[45]

> It is appropriate to enable higher residential densities in and around centres and corridors or close to public transportation routes, social facilities or employment opportunities. A broad mix of activities should be enabled within centres. A wide range of housing types and densities should be enabled across the urban area.

[36] At around this time, it became apparent that the Council in the development of the PAUP had "relied on theoretical capacity enabled by the Unitary Plan, rather on the measure of capacity that takes into account physical and commercial feasibility, which the Panel refers to as 'feasible enabled capacity', and defines as:[46]

> …the total quantum of development that appears commercially feasible to supply, given the opportunities enabled by the recommended Unitary Plan, current costs to undertake development, and current prices for dwellings. The modelling of this capacity at this stage is not capable of identifying the likely timing of supply.

[37] During the panel session on Urban Growth (Topic 013) on 25 February 2015, the IHP directed extensive analytical work and modelling to be done.[47] The IHP convened two expert groups to develop methods to estimate the feasible enabled capacity of the PAUP and of the possible alternatives put to the Panel.

[38] Meanwhile, in July 2015,the IHP also released its interim guidance on "Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)". The interim guidance requested that the parties should ensure any evidence

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44 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 23.

45 Auckland Unitary Plan Independent Hearings Panel *Interim Guidance Text for RPS Topic 013* (23 February 2015) at [11].

46 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.

47 At 47, 49 and 69.

provided for the hearing on the residential topics should address matters included in the guidance.[48] The relevant parts of the interim guidance for present purposes provided:

> 1.1. The change is consistent with the objectives and policies of the proposed zone. This applies to both the type of zone and the zone boundary.
>
> 1.2. The overall impact of the rezoning is consistent with the Regional Policy Statement.
>
> …
>
> 1.11. Generally no "spot zoning" (i.e. a single site zoned on its own).

[39] The two expert groups convened by the IHP met on several occasions in 2015 and prepared a report which was uploaded to the IHP on 27 July 2016. The results of their capacity forecasts identified a severe shortfall in the PAUP relative to expected residential demand. The results in the report are summarised in the IHP's "Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan" (the Overview Report):[49]

> The results …found that the feasible capacity enabled by the proposed Auckland Unitary Plan as notified at 213,000 fell well short of the long-term projections for demand for an additional 400,000 dwellings.

[40] The Council responded to this new information in late 2015 by filing in evidence revised objectives, policies and rules for residential zones that enabled significantly greater capacity. These changes removed density rules for the MHU and MHS zones and relied on bulk and location provisions to regulate amenity, which significantly increased capacity estimates.[50]

[41] The hearings on residential zones (topics 059–063) then commenced on 14–28 October 2015. By this stage the issue of scope had become a major issue. Auckland 2040, Character Coalition, the HRRA and HNZC made submissions challenging or supporting the Council's revised position as in or out of scope.[51]

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48 Auckland Unitary Plan Independent Hearings Panel, *Interim Guidance – Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)* (31 July 2015) at 1.

49 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 49.

50 Overview Report at 49–50.

51 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing Topics 059 - 063: Residential zones* (22 July 2016) at 28-30.

[42] From the available record, the Council filed revised zoning maps on 17 December 2015 based on more intensive zoning around centres, transport nodes and along transport corridors.[52] The maps outlined certain areas where the zone change was said to be "out of scope". This triggered a request to allow affected home owners to make late submissions and a request the IHP to reject such "out of scope" changes as they apply to Westmere. Auckland 2040 also sent a memorandum seeking interim guidance on the IHP's power to consider "out of scope zoning changes" and asserted that the majority of the changes to zoning that the Council had proposed were "out of scope". HNZC filed a memorandum in reply on 13 January 2016 stating that the Corporation and other government submitters' submissions provided scope for rezoning and that the Council was in error in referring to some rezoning as "out of scope".

[43] On 14 January 2016, the IHP issued a direction refusing to grant the requests for waivers for late submissions (both general and specific) and refusing to reject the Council's material as to its position on residential zoning at that present time. The IHP notes, in summary:[53]

(a) The IHP has a general power to consider out of scope submissions;

(b) The IHP must adhere to an appropriate and fair hearing procedure and act in accordance with principles of natural justice; and

(c) It must be persuaded that it would be appropriate for the matter to be the subject of an out of scope submission.

[44] The Council's proposed zoning maps were uploaded to the IHP website on 26 January 2016. Three weeks later, on 18 February 2016, the IHP issued a further direction clarifying its position. In short, the direction records:[54]

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52 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

53 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (14 January 2016) at 3.

54 Auckland Unitary Plan Independent Hearings Panel *Topics 080/081 – Rezoning and Precincts: Clarification of directions of Chairperson in relation to Auckland Council's preliminary position on residential zonings and issues of scope and waivers for late submissions* (18 February 2016) at 1-2.

(a) The panel does not regard itself as having an unlimited power to make out of scope recommendations;

(b) The panel must proceed in accordance with the principles of natural justice, the requirements of the Act and the RMA, including the s 32 requirements;

(c) The submission stage is an important part of the process, as is the identification of significant resource management issues and methods to address them;

(d) The panel has heard evidence for 18 months and is aware of the range of issues that rezoning may raise including accommodating population growth and the effect of intensity on residential amenity; and

(e) The panel is conscious that any person affected by an out of scope recommendation has a full right of appeal to the Environment Court and that it is a safeguard for any person prejudiced by an out of scope recommendation.

[45] However, the Auckland Council then retracted some of the revised zoning maps on 24 February 2016 in areas where the Council considered the changes to be out of scope of any submissions made to the IHP. This resulted in a revised set of Council proposed "in-scope" changes to residential zoning.[55] The Council resolution retracting the maps records:[56]

> That the Governing Body:
>
> c) note that the proposed 'out of scope' zoning changes (other than minor changes correcting errors or anomalies) seek to modify the Proposed Auckland Unitary Plan in a substantial way.
>
> d) note that the timing of the proposed 'out of scope' zoning changes impacts the rights of those potentially affected, where neither submitter

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55 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 50.

56 Auckland Development Committee *Proposed Auckland Unitary Plan – revised zoning maps incorporating the Governing Body decision of 24 February 2016* (Auckland Council, Council Resolution Number GB/2016/18, 24 February 2016) at 170.

or further submitter, and for whom the opportunity to participate in the process is restricted to Environment Court appeal.

e) in the interests of upholding the principle of natural justice and procedural fairness, withdraw that part of its evidence relating to 'out of scope' zoning changes (other than minor changes correcting errors and anomalies).

[46] The IHP responded to the Council's retraction in the following way on 1 March:

> The Hearings Panel has considered this memorandum and notes counsels' advice as to how they may act in accordance with their instructions as set out in the resolution of the Governing Body to withdraw that part of the evidence lodged by the Council relating to "out of scope" zoning changes.
>
> The Hearings Panel will be proceeding with the hearings in accordance with its existing procedures. Parties may present their cases generally as they wish, within the scheduling constraints of this process.
>
> The presentation of personal submissions by submitters and legal submissions by counsel on behalf of submitters is expected to reflect the positions of submitters.
>
> The presentation of evidence by persons who appear as experts must be in accordance with the Code of Conduct for Expert Witnesses. It is essential that a person giving expert evidence does so on an independent basis, and not affected by the position of the submitter calling that witness.

The hearings on rezoning and precincts

[47] Meanwhile, between 15 and 25 February 2016 there were hearings on general rezoning and precincts (Topic 80). HNZC made submissions, but there is no reference to the HRRA, Character Coalition or Auckland 2040 appearing.

[48] On 1 March 2016 the IHP issued interim guidance for Topic 081 Rezoning and precincts (Geographic areas). The purpose of the guidance was to set out the IHP's approach to submissions on proposals for re-zoning and precincts in the Greenfield areas proposed to be located within the RUB.

[49] Hearings then followed between 3 March and 29 April 2016 on Topic 081. HNZC, Auckland 2040, the HRRA appeared before the IHP on these topics; however, there is no reference to the Character Coalition in the hearing records.

[50] HNZC presented first and among other things called the Council's retracted evidence (including mapping evidence) by way of summons and also produced a

combination of new zoning maps for some areas within the region. These are referred to as the "evidence or merits based maps" as they purport to show how the application of HNZC's rezoning principles could be applied across the region. During this presentation the IHP requested HNZC to provide shape files (i.e. spatial mapping) to illustrate the scope for the zoning changes of HNZC's primary submission. This request was confirmed in a published memorandum dated 22 March 2016. These maps, together with another set of the evidence or merits maps, were produced on 6 May 2016. As they are based on HNZC's proximity criteria, they are referred to as the "proximity maps".

[51] Mr Brabant for Auckland 2040 appeared on 24 March 2016 and submitted on the proposed changes to the SHZ and the subsequent proposal for the substantial upzoning of the SHZ. He argued that these changes were outside the scope of submissions, and provided submissions on whether specific changes to the zone wording or mapping were reasonably foreseeable and whether recommending the requested changes would create procedural unfairness.

IHP Recommendations

[52] On 22 July 2016, the IHP provided the Council with its formal report and recommendations, which was subsequently published by the Council on its website on 25 July 2016. On 19 August 2016, the Council publically notified its decisions on the IHP's recommendations.

[53] The following topics, which have been referred to above, are of relevance to the zoning aspects of the present appeal:

(a) Topic 013, Urban Growth;

(b) Topic 016/017, Rural Urban Boundary;

(c) Topics 059 to 063, Residential Zones;

(d) Topic 080, Rezoning and Precincts (General); and

(e) Topic 081, Rezoning and Precincts (Geographic Areas).

[54] Broadly, the IHP's recommendations on these topics address what the Panel identified as the issue of greatest significance facing Auckland: its capacity for growth.[57] It states that:[58]

> The overarching approach to a combined resource management plan for Auckland starts with the development strategy for a quality compact urban form as set out in the Auckland Plan…based on existing centres and corridors…

[55] Consequently, the IHP recommended enabling greater capacity by both allowing for greater intensification of existing urban areas and identifying areas at the edges of the existing metropolis suitable for urbanisation.[59]

[56] The Executive Summary of the Overview Report recorded the following salient recommendations:[60]

> i. Affirming the Auckland Plan's development strategy of a quality compact urban form focussed on a hierarchy of business centres plus main transport nodes and corridors.
>
> ii. Concentrating residential intensification and employment opportunities in and around existing centres, transport nodes and corridors so as to encourage consolidation of them while:
>
> a. allowing for some future growth outside existing centres along transport corridors where demand is not well served by existing centres; and
>
> b. enabling the establishment of new centres in greenfield areas after structure planning.
>
> …
>
> vi. Supporting the Council's submission to remove density controls as a defining element of residential zones.
>
> vii. Revising a number of the prescriptive residential bulk and location standards to enable additional capacity while maintaining residential amenity values.
>
> viii. Promoting better intensive residential development through outcome-based criteria for the assessment of resource consents.

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57 Auckland Unitary Plan Independent Hearings Panel, above n 19, at 9.
58 At 9.
59 At 9.
60 At 10-11.

ix. Supporting numerous submissions seeking more flexible residential zones and mixed-use zones around centres and transport nodes and along corridors to give effect to the development strategy in the Auckland Plan by:

a. enabling housing choice with a mix of dwelling types in neighbourhoods to reflect changing demographics, family structures and age groups; and

b. encouraging adaptation of existing housing stock to increase housing choice.

[57] The IHP observed that, unlike the PAUP, its recommended Plan was consistent with the Auckland Plan target of locating 60 to 70 percent of enabled residential capacity in the within the existing urban footprint.[61] It considered that the PAUP's 70/40 capacity distribution between urban and future urban development was not supported by the evidence. It instead "recommended regional policy statement objectives and policies to promote the centres and corridors strategy and quality compact urban form and … deleted the reference to a predetermined 70/40 spatial distribution of that capacity".[62]

[58] The recommendations made by the IHP in response to each topic hearing need to be seen in light of this. Among other things, the IHP's recommendations on matters such as the RUB, residential zoning and rezoning and precincts are guided by a desire to achieve the targets of the Auckland Plan and RPS.

Topic 013 – Urban Growth

[59] Topic 013 addressed the RPS provisions relating to urban growth, the extent to which the PAUP enabled sufficient development capacity to achieve a quality compact urban form, and whether there should be greater recognition of the character and amenity values of existing neighbourhoods with respect to intensification.[63]

[60] In the Panel's own words, "urban growth issues permeated most topics heard", and thus "the Panel's response to urban growth issues likewise permeates most topics in

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61 At 57-58.
62 At 58.
63 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 013 – Urban growth* (22 July 2016) at 6.

order for the recommended Plan to provide a coherent response to the growth issues facing the Auckland Region."[64]

[61] The Panel recommended a new section B2.4 Residential Growth to address how residential intensification will be provided for. This responded to the Auckland Plan's envisaged need for 400,000 additional dwellings, and the severe shortfall in the PAUP relative to expected residential demand identified by the two expert groups. The Panel considered the AUP should err toward over-enabling. Many of the corresponding recommendations on Topic 013 are listed at [54]-[57], including:[65]

(a) The centres and corridors strategy accompanied by "significant rezoning with increased residential intensification around centres and transport nodes, and along transport corridors (including in greenfield developments)";

(b) Enabling of capacity in residential, commercial and industrial zones, for example by removing density rules in more intensive residential zones; and

(c) Being "more explicit as to the areas and values to be protected by the Unitary Plan (e.g. viewshafts, special character, significant ecological areas, outstanding natural landscapes, and so forth) and otherwise enabl[ing] development and change".

[62] On the matter of residential capacity, the IHP projected demand for 400,000 new sites by 2041, and examined the feasible enabled capacity with the PAUP as notified, PAUP with the Council's modified rules and the IHP recommended Plan. Only the IHP recommended Plan is assessed as providing for the projected demand.

[63] The IHP report on urban growth notes that B2 Urban growth contains fundamental objectives and policies affecting almost all resource management issues in

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64 At 6.
65 At 7.

the region and the Panel's recommendations on this topic influenced its approach to all other hearing topics.[66]

[64] The IHP records that the reference documents relied upon by the IHP includes the 013 submission points' pathway reports and parties and issues reports.

Topics 016, 017 Rural Urban Boundary, 080 Rezoning and Precincts (General) and 081 Rezoning and Precincts (Geographic Areas)

[65] The IHP provided its recommendations on these topics in one report. Previously, on 31 July 2015, it issued interim guidance to all parties about best practice approaches to rezoning, precincts and changes to the RUB. This included observations that zone boundaries need to be defensible and that the IHP would generally avoid spot zoning.[67] It also records all parties generally agreed with this overall approach.[68]

[66] The Panel recommended that the land zoned Future Urban Zone be expanded from 10,100 hectares to approximately 13,000, reflecting that in its view increased residential capacity had to come outside the existing metropolitan limit as well as within.[69]

[67] An extension of the RUB in the Albany area is recommended "where future development would be an extension of the Albany Village" and "[i]t is easily accessible and infrastructure services can be extended readily to the area given its close proximity to the Village".[70]

[68] This report also records that a particular concern for the IHP was the reasonableness of recommended zone changes to persons who were not active submitters. It observes that where the matter could reasonably have been foreseen as a

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66 At 17.

67 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts: Hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas)* (22 July 2016) at 5-6.

68 At 8.

69 At 9.

70 At 13.

direct and logical consequence of a submission point, the Panel has found that to be within scope.[71] I return this statement of approach below.

[69] The Panel's approach to precincts and rezoning precincts is said to be in line with the promotion of a quality compact urban form focusing on capacity around centres, transport nodes and corridors.[72] This led to recommended upzoning around these features, and while the Panel generally avoided rezoning the inner city special character areas (such as Westmere and Ponsonby), it did so in areas "where other strategic imperatives dominate", such as Mt Albert.[73]

[70] The IHP also writes that:[74]

> The Panel's approach to land use controls has been to, as far as practicable, establish a clear and distinct descending hierarchy from overlay to zone to precinct (where applicable) based on relevant regional policy statement provisions.
>
> …overlay constraints…have generally not been taken into consideration as far as establishing the zoning is concerned. That is, the 'appropriate' land use zoning has generally been adopted regardless of overlays. That approach leaves overlays to perform their proper independent function of providing an important secondary consideration, whereby solutions and potential adverse effects can be assessed on their merits. It also avoids the risk of double-counting the overlay issue both at the zone definition and then at the overlay level. In many instances this has resulted in consequential rezoning changes. In Newmarket, for example, the Panel has upzoned the centre to Business - Metropolitan Centre Zone; removed the particular building height restrictions; and relied upon the Volcanic Viewshaft and Height Sensitive Areas Overlay (along with general development controls) to govern individual site structure heights.
>
> As a consequence of the approach to zoning noted above, typically the setting aside of an overlay from a residential site for the purpose of establishing the zoning, has resulted in upzoning of that site by one order of dwelling typology – commonly from Residential - Single House Zone to Residential - Mixed Housing Suburban Zone for instance (indeed, the Residential - Mixed Housing Suburban Zone has become the new 'normal' across many parts of the city). This residential upzoning has most commonly arisen from the uplifting of the flooding overlay, which in no way diminishes the relevance of that, or any other, overlay because of its importance in the hierarchy of controls.

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71 At 18.
72 At 18.
73 At 18.
74 At 18-19.

[71] The panel also accepted a 400-800m walkability metric from key transport nodes, corridors and town centres from HNZC when applying higher density zones in residential areas, considering that in the long term such zoning was appropriate.[75]

[72] Finally, the IHP relevantly observes that in areas with dense HNZC property ownership (such as around Mangere township), it has in-filled upzoning across other properties where HNZC sought higher densities to make a more logical block.[76]

Topics 059-063 – Residential Zones

[73] The relevant overall IHP recommendations relating to residential zoning are as follows:[77]

(a) Provide greater residential development capacity (linked with the spatial distribution of the residential zones);

(b) Greater development on sites as of right, provided they comply with the development standards; and

(c) A more flexible outcome-led approach to sites developed with five or more dwellings in the MHS Zone and MHU Zone and for all development in the THZ.

[74] The IHP notes that:[78]

> This report needs to be read in conjunction with the Panel's Report to Auckland Council – Overview of recommendations July 2016 and Report to Auckland Council – Rural Urban Boundary, rezoning and precincts July 2016 relating to residential zones and precincts, as the combined recommendations provide an integrated approach to residential development – i.e. the various residential zones and the provisions within them and their spatial distribution.

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75 At 19.
76 At 20.
77 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 4-5.
78 At 5.

[75] Further:[79]

> In summary the combination of the zonings and zone provisions would not give effect to the regional policy statement's objectives and policies relating to a quality compact urban form, a centres plus strategy and housing affordability. These are also major policy directives in the Auckland Plan to which the proposed Auckland Unitary Plan must have regard.
>
> It is the Panel's view that the proposed Auckland Unitary Plan did not have sufficient regard to the Auckland Plan and would not give effect to the regional policy statement as notified nor as amended through the submission and hearing process.

[76] As noted, the issues of capacity for residential growth and spatial distribution of residential and mixed zones are addressed in those reports.[80]

[77] Specific relevant anticipated outcomes include:[81]

> i. Overall, the residential development capacity has been better enabled by the changes recommended.
>
> ii. The Panel recommends the retention of the zoning structure of the six residential zones, but has recommended a number of changes to the zone provisions…
>
> iii. The purpose of the Residential – Single House Zone has been amended and clarified to better reflect its purpose.
>
> iv. There are no density provisions for the Mixed Housing Suburban, Mixed Housing Urban and Terrace Housing and Apartment Buildings Zones, but development standards and resource consents are applied, as addressed below.
>
> v. Up to four dwellings are permitted as of right on sites zoned Residential – Mixed Housing Urban Zone and Residential – Mixed Housing Suburban Zone which meet all the applicable development standards.
>
> vi. Five or more dwellings require a restricted discretionary activity consent in the Residential – Mixed Housing Suburban Zone and Residential – Mixed Housing Urban Zone
>
> …
>
> xiii. [a number of] development standards, particularly in Residential – Mixed Housing Suburban, Residential – Mixed Housing Urban and Residential – Terrace Housing and Apartment Buildings Zones, have been deleted; some recommended by the Council and others by the Panel…

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79 At 10.
80 At 7.
81 At 5-6.

[78] This report also dealt with the type of development enabled by each residential zone. The Panel observed that based on much of the evidence, "residential provisions needed to be more enabling and to provide for greater residential capacity." [82] The IHP was influenced by the number of submitters including HNZC, Ockham, and MBIE who "considered that the proposed Auckland Unitary Plan fell well short of implementing this strategic direction of providing greater residential intensification."[83]

[79] The IHP observed that the combination of zonings and zone provisions would not give effect to the RPS's objectives and policies relating to a quality compact urban form, a centres based strategy and housing affordability. The IHP referred to and agreed with the evidence given on behalf of HNZC, which suggested that a "bold and innovative approach" which will provide for residential activities and development would need to include:[84]

> - Moderate increases to the permitted height limits in appropriate locations (being in and around centres, and within walking distance of public transport facilities and other recreational, community, commercial and employment opportunities and facilities);
>
> - Significant reductions in, or removal of, land use density controls (particularly in the Residential – Mixed Housing Suburban and the Residential – Mixed Housing Urban zones);
>
> - A reduction in the currently proposed extensive suite of quantitative development controls, such that a limited number of quantitative controls are retained to address the key matters which have the potential to create adverse effects external to a site, most notably in relation to amenity effects (such as retention of building height, height in relation to boundary and yard, building coverage, impermeable surface controls for instance); with the remainder of controls which relate to potential effects internal to a site being addressed in a more flexible way through the use of design-related matters of discretion and assessment criteria; and
>
> - A simplified yet potentially strengthened, suite of matters of discretion and assessment criteria, particularly in relation to development control infringements (in order to address concerns of neighbours in relation to amenity impacts, and provide clear guidance to processing planner to assist in their assessment), as well as design assessment…

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82 At 8.
83 At 10.
84 At 12.

[80] On the SHZ, the Panel referred to a proposal by the Council to recast the SHZ and to the opposing submissions by, among other Auckland 2040. Preferring in part Auckland 2040's position, the Panel found that the zone applies to:[85]

> i. some inner city suburbs, albeit with the special character overlay;
>
> ii. some coastal settlements (e.g. Kawakawa Bay); and
>
> iii. other established suburban areas with established neighbourhoods (e.g. parts of Howick, Cockle Bay, Pukekohe and Warkworth)."

[81] The IHP also recommended retaining MHS and the MHU:[86]

> The Panel finds that the Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys. The Residential - Mixed Housing Urban Zone will provide for a more intensive building form of up to three storeys, facilitating a transition to a more urban built character over time. The Residential - Mixed Housing Urban Zone also provides for a transition in built character between suburban areas (zoned Residential - Mixed Housing Suburban Zone) and areas of higher intensification with buildings of five to seven storeys in areas zoned Residential - Terrace Housing and Apartment Buildings Zone.

[82] The IHP then recommended the removal of all density provisions in the MHS, MHU and THZ zones, but it rejected an outcome-led approach to development, preferring a combination of a more enabling approach with a rule-based approach.[87] For this purpose, some development standards (e.g. unit size) are however recommended for deletion as they do not serve an urban form purpose.

[83] The Report identified submission point pathway reports 059, 060, 062, 063 and parties and issues reports as relevant to the IHP's recommendation.

Appeal and review rights

[84] The only appeal rights available in respect of the proposed plan are as follows:

(a) The right of appeal to the Environment Court under section 156 or 157 of the Act:

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85 At 13-14.
86 At 15.
87 At 16-17.

(b) The right of appeal to the High Court under section 158 of the Act.

[85] Section 156 and 158 of the Act provide the following rights of appeal (in summary):

(a) Under ss 156 a submitter may appeal to the Environment Court on any decision of the Council accepting a recommendation that was out of scope of the submissions or that rejects an IHP recommendation; and

(b) Under s 158, a submitter may appeal to the High Court on any decision of the Council that accepts an IHP recommendation but only on points of law.

[86] Any decision of the Environment Court may be appealed to the senior courts in the usual way under the appeal provisions of the RMA pursuant to s 308.[88] By contrast, appeals to the Court of Appeal are not available pursuant to s 158.[89]

[87] Section 159 of the Act provides a right to judicially review the decision of the Council:

> **159 Judicial review**
>
> (1) Nothing in this Part limits or affects any right of judicial review a person may have in respect of any matter to which this Part applies, except as provided in sections 156(4) and 157(5) (which apply section 296 of the RMA, that section being in Part 11 of that Act).
>
> (2) However, a person must not both apply for judicial review of a decision made under this Part and appeal to the High Court under section 158 in respect of the decision unless the person lodges the applications for judicial review and appeal together.
>
> (3) If applications for judicial review and appeal are lodged together, the High Court must try to hear the judicial review and appeal proceedings together, but need not if the court considers it impracticable to do so in the circumstances of the particular case.

[88] As noted in s 159(1), the right of judicial review is subject to s 296 of the RMA, which provides:

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[88] Local Government (Auckland Transitional Provisions) Act 2010, s 156(4).
[89] Section 158(5).

> **296 No review of decisions unless right of appeal or reference to inquiry exercised**
>
> If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation—
>
> (a) no application for review under Part 1 of the Judicature Amendment Act 1972 may be made; and
>
> (b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court—
>
> unless the right has been exercised by the applicant in the proceedings and the court has made a decision.

[89] The effect of ss 159(1) of the Act and 296 of the RMA is to prevent a person from bringing a judicial review application where he or she has a right to appeal to the Environment Court against the decision of the Council.

Thresholds for appeal and review

[90] The thresholds for oversight of specialist tribunals are well settled in the RMA jurisdiction.[90] This Court is slow to interfere with decisions of the Environment Court within its specialist area.[91] The same deference should be afforded to the IHP, having regard to, among other things, the scale, complexity and policy content of its task. But as the question of scope also bears on natural justice considerations, close scrutiny by this Court is to be expected.[92]

[91] Accordingly I approach the appellate and review exercises on the following basis. I may test the IHP's scope decisions for error of law, irrelevant considerations or failure to have regard to relevant considerations, procedural impropriety and/or unreasonableness, which includes a conclusion without evidence or one to which on the evidence it could not have reasonably come.[93] The objective of the appeal or review procedures on the issue of scope is to secure both legality and substantive fairness. To

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90 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).
91 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC).
92 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
93 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90.

this end, I must examine the IHP's exercise of discretion on scope so as to ensure it was exercised lawfully and fairly.[94]

PART C: THE PRELIMINARY QUESTIONS

Did the IHP interpret its statutory duties contained in Part 4 of the Act lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

[92] Several issues arising under this question are addressed in the context of the subsequent questions. The focus of this question at the hearing was whether the frame adopted by IHP for the purpose of identifying out of scope recommendations was correct. I outline the legislative frame on scope and the IHP's frame below, before turning to the arguments of the parties.

The legislative frame

[93] Section 144 of the Act sets out the IHP's recommendatory powers:

> **144 Hearings Panel must make recommendations to Council on proposed plan**
>
> (1) The Hearings Panel must make recommendations on the proposed plan, including any recommended changes to the proposed plan.
>
> (2) The Hearings Panel may make recommendations in respect of a particular topic after it has finished hearing submissions on that topic.
>
> (3) The Hearings Panel must make any remaining recommendations after it has finished hearing all of the submissions that will be heard on the proposed plan.
>
> *Scope of recommendations*
>
> (4) The Hearings Panel must make recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA (which relates to designations and heritage orders), as applied by section 123.
>
> (5) However, the Hearings Panel—
>
> (a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan; and

[94] *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.

(b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.

(6) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.

Recommendations must be provided in reports

(7) The Hearings Panel must provide its recommendations to the Council in 1 or more reports.

(8) Each report must include—

(a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and

(b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and

(c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

(9) Each report may also include—

(a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and

(b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.

(10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[94] Mandatory relevant criteria for the purpose of making recommendations are listed at s 145. Key among those criteria are ss 145(1)(d) and (f):

(d) include in the recommendations a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA; and

…

(f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:

(i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2), 165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:

(ii) any other provision of the RMA, or another enactment, that applies to the Council's preparation of the plan.

[95] Section 148(3) also relevantly states:

(3) To avoid doubt, the Council may accept recommendations of the Hearings Panel that are beyond the scope of the submissions made on the proposed plan.

The IHP approach to scope

[96] It is important not to cherry pick parts of the Panel's explanation of its approach to scope and with that qualification in mind, I find that the IHP approach included the following key elements:

(a) Consideration of:[95]

(i) The plan provisions as notified, together with any relevant section 32 reports prepared by the Council;

(ii) The submissions and further submissions;

(iii) Material lodged by the Council and submitters;

(iv) The relevant plan-making provisions of the RMA, especially sections 32 and 32AA and the provisions specifically listed in section 145(1)(f) of the Act;

(v) The Auckland Plan; and

[95] Auckland Unitary Plan Independent Hearings Panel, above n 19, at 28-29.

(vi) The specialist knowledge and expertise of the members of the Panel in relation to making statutory planning documents based on sound planning principles

(b) An acknowledgement of the power to make out of scope recommendations;[96]

(c) The guidance afforded by existing jurisprudence on scope;[97]

(d) The Panel's recommendations generally lie between the provisions of the Unitary Plan as notified and the relief sought in submissions on the Unitary Plan, including consequential amendments that are necessary and desirable to give effect to such relief.[98]

(e) Identifying four types of consequential change:[99]

(i) Format/language changes;

(ii) Structural changes;

(iii) Changes to support vertical/horizontal integration and alignment, to give effect to policy change, to fill the absence of policy direction, and to achieve consistency of restrictions or assessments and the removal of duplicate controls; and

(iv) Spatial changes, for example where a zone change for one property raises an issue of consistency of zoning for neighbouring properties and creates difficulty in identifying a rational boundary.

(f) On changes supporting vertical integration, following a top down approach so that consequential amendments to the plan to achieve integration with overarching objectives and policies, which were drawn

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96 At 28.
97 At 26-28.
98 At 24.
99 At 29-30.

from higher level policy statements. Given the logical requirement for a plan to function in this way, these changes would normally be considered to be reasonably anticipated.[100]

(g) On the issue of spatial consequential changes, where there were good reasons to favour rezoning sought in a submission and good reasons to include neighbouring properties as a consequence, even where there were no submissions from the owners of them neighbouring properties, including the neighbouring properties in recommendations because it saw that the overall process including notification, submission, summarising points of relief, further submission and late submission and further submission windows provided the real opportunity for participation by those potentially affected.[101]

(h) Assessing consequential changes in several dimensions, being:[102]

(i) Direct effects: whether the amendment would be one that directly affects an individual or organisation such that one would expect that person or organisation to want to submit on it.

(ii) Plan context: how the submission of a point of relief within it could be anticipated to be implemented in a realistic workable fashion; and

(iii) Wider understanding: whether the submission or points of relief as a whole provide a basis for others to understand how such an amendment would be implemented.

(i) Framing the assessment of scope provided by broadly couched submissions in response to the resource management issues which can be identified in relation to them and in the context of many other submissions which are relevant to more detailed aspects of the AUP

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100 At 32.
101 At 34.
102 At 30.

provisions. More specifically, the strategic framework of the RPS, submissions seeking greater intensification round existing centres and transport nodes, and submissions seeking retention of special character areas were relied on to assist in understanding how more generalised submissions ought to be understood.[103]

(j) A review of zoning issues by area with reference to submissions on each area.[104]

(k) Identifying remaining out of scope recommendations.[105]

[97] The effect of all of this is exemplified in the following passage taken from the IHP's report to the Auckland Council on the Rural Urban Boundary, Rezoning and Precincts:[106]

> A particular concern of the Panel in deciding whether to recommend rezoning and precincts has been the reasonableness of that to persons who were not active submitters and who might have become active had they appreciated that such was a possible consequence.
>
> **Where the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point the Panel has found that to be within scope.** Where submitters, such as Generation Zero, have provided very wide scope for change the Panel has been guided by other principles – such as walkability; access to multi-modal transport; proximity to centres; and so forth – in finessing such change.

[98] For ease of reference I refer to the IHP test for scope as the reasonably foreseen logical consequence test.

Argument (in brief)

[99] On the Council's view (supported by the 'in scope' parties), a generous approach was needed, given the scale of the planning exercise. The Council submitted that the IHP was not bound by common law principles and could recommend changes that were not expressly sought in a submission provided that the changes reasonably and fairly arise from the submissions and that they achieves the purpose of the Act. Whether a

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103 At 33.
104 At 34.
105 At 34-35.
106 Auckland Unitary Plan Independent Hearings Panel, above n 67, at 17-18 (emphasis added).

recommendation was reasonably and fairly raised or sufficiently foreseeable was an evaluative matter for the IHP and not this Court. Moreover a strict interpretation of scope, requiring precise correspondence between submission and recommendation would be absurd and unworkable, with the prospect of a very large part of the evaluative exercise transferring to the Environment Court contrary to the clear policy of Part 4. It submitted further, in any event, that the IHP adopted a robust methodology in accordance with the express statutory requirements and established principle.

[100] By contrast, several of the "out of scope" parties emphasised:[107]

(a) Contrary to the Council's argument, nothing in the scheme of Part 4 suggests a more generous approach to scope is permissible. The IHP was under a duty to clearly identify and make decisions that were within scope;

(b) It was not sufficient to be satisfied that the recommendation "fairly and reasonably relate" to the submissions. Section 144 requires a clear nexus between the relief sought in submissions and the recommendations – that is the relief must be *necessary* and arising from the submissions based on what a reasonable person would understand from the relief sought in the submission;

(c) The IHP reports do not transparently demonstrate by reference to specific submissions that the requisite nexus was established by the IHP;

(d) While the IHP reports purport to adopt an area by area approach, they do not specify what submissions supported the recommendations to upzone 29,000 properties (this claim is also addressed below in terms of the second question);

(e) A finding of scope to rezone neighbouring properties "where there are no submissions" was clearly erroneous and not saved by the proviso that

[107] Ms Arthur Young for SHL did not join with the other out of scope parties on this issue. Mr Martin Williams for Man O' War largely confined his submission to maintaining that existing jurisprudence provided requisite guidance on scope.

there should not be amendments without a "real opportunity for participation";

(f) The test on the issue of scope laid down in *Countdown*[108] has evolved over time with the more recent expression of the test by Kós J in *Motor Machinists*[109] (discussed below at [126]-[128]) providing greater assistance and demanding more surety about whether the public had a reasonable opportunity to submit;

(g) The IHP had to be satisfied that an affected person was on notice of a potential change to the PAUP. This could only be achieved if any affected person was put on reasonable enquiry about the potential for the change recommended by the IHP (this aspect is addressed more squarely in the context of the test cases below at [165] – [176];and

(h) The IHP erred by relying on generic submissions or the RPS to establish area or site specific zone changes (this claim is addressed below in terms of the third question at [148] – [153].

Assessment

[101] The question of scope raises two related issues: legality and fairness. Legality is concerned with whether the IHP has adhered to the statutory requirement to identify all recommendations that are outside the scope of submissions (at s 144(8) of the Act). The second issue of fairness is about whether affected persons have been deprived of the right to be heard.

[102] I am satisfied that the IHP did not misinterpret its duties on the issue of scope in either respect, having regard to the words and text used at s 144, informed by purpose[110] and context,[111] including the scheme of Part 4 and the relevant parts of the RMA.[112] In short, the IHP approach:

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108 Above n 90.
109 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.
110 Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].
111 *McQuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [18]-[19].

(a) Addresses the relevant statutory criteria;

(b) Is consistent with the RMA's policy of public participation;

(c) Accords with the schemes of Part 4 and relevant parts of the RMA;

(d) Largely conforms with orthodox jurisprudence dealing with scope; and

(e) Is not materially inconsistent with the approach and principles set out in *Clearwater*[113]*/Motor Machinists*[114].

[103] It is necessary to elaborate on each of these points.

The statutory criteria

[104] For present purposes, the key relevant s 144 criteria are:

(a) **Section 144(1)**: The IHP must make recommendations "on" the proposed plan. Proposed plan is defined as the proposed combine plan prepared by the Auckland Council in accordance with ss 121-126; that is the notified PAUP. The significance of this is that the IHP's jurisdiction to make recommendations is circumscribed by the ambit of the notified PAUP.

(b) **Section 144(5)**: The IHP recommendations are not limited to the scope of the submissions on the PAUP. The jurisdiction therefore to recommend changes to the PAUP is not limited by the relief sought in submissions.

(c) **Section 144(8)(a)**: The IHP must identify "the recommendations [on a topic or topics] that are beyond the scope of the submissions made in respect of that topic or those topics". This duty involves three evaluative steps: an assessment of the effect of a recommendation, an assessment of

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112 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* Ltd [2012] NZHC 2156, [2012] NZRMA 552, at [13]; *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92, at [6].

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

114 *Palmerston North City Council v Motor Machinists Ltd*, above n 109.

the scope of a submission or submissions and an assessment of whether the effect of the recommendation is beyond the scope of the submission.

(d) **Section 144(8)(c)**: The IHP must provide "reasons for accepting or rejecting submissions", and may do so by grouping the submissions according to provisions or subject matter.

(e) **Section 144(9)(a)**: The IHP may report on "consequential alterations necessary to the proposed plan arising from submissions". While the requirement to report is discretionary, it is implicit that the consequential alterations are a necessary corollary of submissions.

(f) **Section 145(d) and (f)**: In formulating recommendations, the IHP must include a further s 32 evaluation and ensure that the matters specified at s 145(1)(f) are complied with, namely RMA decision making criteria relating to the promulgation of plans. Accordingly, the IHP could not make recommendations without being satisfied about compliance with the listed matters.

[105] It was not suggested that the IHP was under any misapprehension about the ambit of of its powers to make recommendations pursuant to ss 144(1) and 144(5). The focal point of criticism for present purposes is whether the IHP properly interpreted and discharged the duty to identify recommendations that were beyond "scope" in the sense of being satisfied that consequential changes were "necessary" and/or fairly made.

[106] Dealing first with the requirement for "necessary" alterations; no particular definition of "necessary" featured in argument, but Character Coalition submitted that reasonably foreseeable is a lower threshold than necessary. But "necessary" is not an unfamiliar term in environmental law. Dealing with the meaning of "unnecessary subdivision", Cooke P said in *Environmental Defence Society Ltd v Mangonui County Council* "necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other".[115] This definition of necessary was subsequently applied to the interpretation of an earlier incantation of s 32 and the evaluation of

[115] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

whether an objective, policy or rule was "necessary" to achieve sustainable management.[116]

[107] I consider this definition of necessary should apply to the meaning of consequential alterations "necessary" to the proposed plan arising from submissions. It adequately meets the natural justice considerations underpinning the scope provisions without unduly fettering the attainment of the Act's purpose by literally limiting the relief to that sought in the submission – an approach to planning processes long rejected by the Courts.[117] As the Full Court in *Countdown* put it:[118]

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

[108] It is tolerably clear that the IHP framed its scope decision employing a similar definition of necessary when it expressed the requirement for the consequential relief to be "necessary" in two ways – that is the consequential changes must be "necessary and desirable" and "foreseen as a direct or otherwise logical consequence of a submission".

[109] I address the issue of fairness when dealing with the common law approach to scope. I first turn to consider the wider context in terms of the duty to identify recommendations that are beyond the scope of submissions.

Policy of public participation

[110] Participation by the public in district and regional plan processes is a long standing policy of the RMA.[119] The First Schedule process envisages an opportunity for participation by affected persons. There must be public notification of a proposed policy statement or proposed plan.[120] Directly affected ratepayers must be served a copy of a

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116 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC) at [25].
117 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 170.
118 At 170.
119 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 92.
120 Clause 5(1)(b).

public notice of a proposed plan of by a territorial authority.[121] Regional Councils must send a copy of a public notice and such further information as the council thinks fit relating to a proposed policy statement or plan to any person likely to be directly affected by the proposed policy or the plan.[122] Any notice must, among other things, state that any person may make a submission on the proposed planning instrument.[123] Any person (except trade competitors unless directly affected by a non trade competition effect) may make a submission. The Council must then give public notice of the availability of a summary of submissions and any person may make further submissions in support or opposition to a submission.[124] Public hearings must be held, unless no submitters wish to be heard.[125]

[111] Part 4 of the Act incorporates the Schedule 1 process from the RMA, save that it does not require service of a public notice on directly affected persons[126] and unlike the usual RMA processes, there are no full rights of appeal to the Environment Court except for recommendations that are out of scope or in respect of recommendations rejected by the Council.[127] A process for re-notification of out of scope changes pursuant to s 293 was also removed. Some of the 'out of scope' parties contended that these amendments to the usual process heightened the need for caution and surety about scope. Conversely, it was said by some of the 'in scope' parties that this showed a more relaxed statutory policy toward the involvement of affected landowners. For my part I do not consider that the differences enhance or diminish the policy of public participation. These modifications streamline the process but do not materially derogate from that policy, given also the requirement to identify out of scope recommendations and the right of appeal by any person unfairly prejudiced by such recommendations.[128]

[112] I am satisfied the IHP was cognisant of this policy as is evident from the decision elements described at [96](a)(ii) and (h). Furthermore, the requirement for each recommendation to be a reasonably foreseen logical consequence of a submission point is consistent with the attainment of this policy. It enables robust recognition of the right

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121 Clause 5(1A).
122 Clause 5(1C).
123 Clause 5(2).
124 Clauses 7 and 8.
125 Clause 8B.
126 Section 123.
127 Section 156.
128 Sections 144(8) and 156(3).

to make a submission while ensuring that the public are not caught by changes that could not have been reasonably anticipated.

The scheme of Part 4 and the RMA

[113] The Scheme of Part 4 and relevant parts of the RMA envisage:

(a) A streamlined process in terms of rights of participation by the public;

(b) An iterative promulgation process, commencing with the s 32 analysis of the costs and benefits of the PAUP prior to notification, a central Government audit of the s 32 report, an alternative dispute resolution process, a full hearing process before the IHP, a further s 32 report on proposed changes to the PAUP, recommendations by the IHP, decisions on the recommendations by the Council, and limited rights of appeal; and

(c) Any recommendation will be made having regard to the usual requirements for regional and district planning instruments, including ss 66-67 and 74-75 of the RMA, which require (among other things) compliance with the functions of territorial authorities at ss 30 and 31, the provision of Part 2 (purpose and principles) and the obligation to give effect to higher order planning instruments (e.g. national policy statement, any New Zealand coastal policy statement, any regional policy statement and in the case of District Plans, any regional plan).

[114] The IHP's integrated approach to scope noted at [96](a)(iv), (f) and (g) accords with this scheme and more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA, particularly in the context of a combined plan process. Submissions on the higher order objectives and policies inevitably bear on the direction of lower order objectives and policies and methods, including zoning rules given the statutory directions at ss 66-75 of the RMA.[129] Given that all parts of the combined plan are being developed contemporaneously, it would have been wrong for the IHP to promulgate objectives, policies and rules without regard

[129] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [11].

to all topically relevant submissions, including submissions dealing only with the higher order matters. Provided the lower order recommendation is a reasonably foreseen logical consequence of the higher order submission, taking such an integrated approach to scope was lawful.

Orthodoxy

[115] The reasonably foreseen logical consequence test also largely conforms to the orthodox "reasonably and fairly raised" test laid down by the High Court in *Countdown* and subsequently applied by the authorities specifically dealing with the issue of whether a Council decision was authorised by the scope of submissions. This orthodoxy was canvassed in some detail in the IHP overview report, which I largely adopt. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change.[130] To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[131] The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions**.**[132] It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.[133]

[116] As Wylie J noted in *General Distributors Limited v Waipa District Council* the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[134]

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130 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90.
131 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112.
132 *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].
133 *Westfield (New Zealand) Ltd v Hamilton City Council*, above n 116, at [73]-[74].
134 *General Distributors v Waipa District Council*, above n 91, at [55].

[117] Any differences between the *Countdown* orthodoxy and the IHP's 'reasonably foreseen logical consequence' test are largely semantic. The IHP's concern for natural justice is repeated in a number of different ways in the Reports. The IHP's test is simply one way of expressing an acceptable method for achieving fairness to potentially affected persons.

[118] For completeness, I do not consider the language or scheme of Part 4 envisages a departure from the *Countdown* orthodoxy. The only material point of difference is that Part 4 is more streamlined, but as noted, the policy of public participation remains strongly evident and there is nothing in the legislation to suggest that the longstanding careful approach to scope should not apply.

The Clearwater two step test

[119] Some of the appellants emphasised that the two step *Clearwater* test as applied by Kós J (as he then was) in *Motor Machinists,* not the *Countdown* test, provided the better frame for scope. I disagree to the extent that it is said to depart from the *Countdown* orthodoxy. Given the significance of this aspect to the parties, I will address the *Clearwater* approach in some detail.

[120] The *Clearwater* case concerned whether a submission was "on" a variation to the noise contour polices of the then proposed Christchurch District Plan. William Young J identified his preferred approach as:[135]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly "on" the variation.

[121] A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan and in the *Clearwater* case, the Council sought to introduce a variation (Variation 52) to remove an incongruity between policies dealing with urban growth and

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135 *Clearwater Resort Ltd v Christchurch City Council*, above n 113, at [66].

protection of the Christchurch airport. The proposed plan placed constraints on residential development within specified noise contours. Variation 52 contained no proposal to adjust the noise contours, but the submitter, Clearwater, wanted to challenge the accuracy of the contours on the planning maps. The Court was not concerned with whether the scope of the submission was broad enough to include a particular form of relief (as was the case in *Countdown*, *Royal Forest*, *Shaw* and *Westfield*). Rather, the Court was literally concerned with whether the submission was "on" the variation at all.

[122] Relevantly, William Young J also stated in relation to the second *Clearwater* step:[136]

> It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely differently from the envisaged by the local authority. It may be that the process of submissions and cross submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have the opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

[123] William Young J went on to hold that assuming Clearwater's submission sought a change to the 50 dBA contours, it would have been "on" the variation because "[t]he class of people who could be expected to challenge the location of this line under [the notified proposed plan] is likely to be different from the class of people who could be expected to challenge it in light of Variation 52."[137] By contrast, Clearwater's submission on the 55dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours was not "on" the variation because it was clear that "the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive".[138]

[124] Ronald Young J applied the *Clearwater* steps in *Option 5 Incorporated*, noting that the first point may not be of particular assistance in many cases, but that it is highly relevant to consider whether the result of accepting a submission as on a variation

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136 At [69].
137 At [77].
138 At [80].

would be to significantly change a proposed plan without the real opportunity for participation by affected persons.[139] In this case the Judge placed some significance on the fact that at least 50 properties would have their zoning fundamentally changed without any direct notification "and therefore without any real chance to participate in the process by which their zoning will be changed."[140] Ronald Young J added that there was nothing to indicate to that "the zoning of their properties might change."[141] In concluding that the submission was not on the variation Judge observed that the Environment Court correctly took into account:[142]

a) The policy behind the variation;

b) The purpose of the variation;

c) Whether a finding that the submission on the variation would deprive interested parties of the opportunity for participation.

[125] The Court also noted the appellant's submission was to be contrasted with the more modest intention of Variation 42 which was to support the central Blenheim CBD and to avoid commercial developments outside the CBZ.

[126] More recently, the *Clearwater* test was applied by Kós J, in *Motor Machinists.* This case concerned a plan change about the distribution of business zones. The appellant had sought extension of the "Inner Business" zone to its land. The Environment Court rejected this submission as out of scope. Kós J agreed, observing that a very careful approach must be taken to the extent to which a submission may be said to satisfy both limbs one and two of the *Clearwater* test. The Judge emphasised the importance of protecting the interests of people and communities from submissional side-winds. The absence of direct notification was noted as a significant factor, reinforcing the need for caution in monitoring the jurisdictional gateway for further submissions.[143]

[127] The first limb was said to be the dominant consideration, namely the extent to which there is a connection between the submission and the degree of notified change

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139 *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 at [34].
140 At [35].
141 At [36].
142 At [41].
143 *Palmerston North City Council v Motor Machinists Ltd*, above n 109, at [43].

proposed to the extant plan. This is said to involve two aspects: the breadth of the alteration to the status quo entailed in the plan change and whether the submission addressed that alteration.[144] The Judge noted that one way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If not the submission is unlikely to fall within the ambit of the plan change.[145] The Judge added that incidental or consequential extensions of zoning change proposed in the plan change are permissible provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. The second limb is then directed to whether there is a real risk that persons directly affected by the additional change, as proposed in the submission, have been denied an effective response.[146]

[128] Kós J also disapproved the approach taken by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[147], noting that *Countdown* was not authority for the proposition that a submission "may seek fair and reasonable extensions to a notified variation or plan change".[148]

[129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*, *Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J was therefore very wide.

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144 At [80].
145 At [81].
146 At [82].
147 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* NZEnvC Christchurch C108/06, 30 August 2006.
148 At [70].

[130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report. I respectfully doubt that Kós J contemplated that his comments about s 32 applied to preclude departure from the outcomes favoured by the s 32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.

[131] By contrast a s 32 report is, in the context of a full district plan review, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.[149]

[132] To elaborate, the primary function served by s 32 is to ensure that the Council has properly assessed the appropriateness of a proposed planning instrument, including by reference to the costs and benefits of particular provisions prior to notification.[150] Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge[151] and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification.[152] On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.[153] To hold otherwise would effectively consign

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149 As it is in terms of the substantive assessment – see Resource Management Act 1993, ss 67 75.

150 See Derek Nolan (ed) *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at 3.91.

151 Section 32A.

152 *Leith v Auckland City Council* [1995] NZRMA 400 at 408.

153 I accept that as Environment Court Judge Jackson said in *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [38] that the *Motor Machinists*

any submission beyond the precise scope of the s 32 evaluation to the Environment Court appellate procedure. This is not reconcilable with the streamlined scheme of Part 4.

[133] The important matter of protecting affected persons from submissional side-winds raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 30 year region-wide plan, via the submission process. [154] Take for example a landowner affected by a rule in a proposed plan that will remove a pre-existing right to develop his or her property in a particular way. The RMA does not envisage, via s 32, that he or she would be precluded from seeking by way of submission a form of relief from the proposed restriction that was not specifically considered by the s 32 assessment and report.[155]

[134] A corollary of the foregoing analysis is that the IHP did not err by failing to determine scope strictly by reference to the options considered in the s 32 reports. Rather, the IHP was not constrained by the s 32 reportage for the purpose of establishing whether a submission was "on" the PAUP.

Summary

[135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a

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dicta now creates a situation whereby if a local authority's s 32 evaluation is (potentially) inadequate that may cut out the range of submissions that may be "on" the plan change. But as explained at [129], this dicta was specifically directed to plan changes, not full plan reviews.

[154] See also *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [29]-[40].

[155] Iacknowledge that in *Power v Whakatane District Council* HC Tauranga CIV-2008-470-456, 30 October 2009 an 11th hour proposal to amend height controls was rejected as out of scope, it not being raised by a submission. But as Allan J in that case noted at [43], "[i]n the end, the jurisdiction issue comes down to a question of degree and, perhaps, even impression".

reasonably foreseen logical consequence test which accords with the longstanding *Countdown* "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in *Clearwater* and Kós J in *Motor Machinists*.

[136] Whether the IHP correctly applied the requisite threshold tests in the test cases is addressed below at [165] – [170].

Did the IHP have a duty to:

(a) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

(b) Identify when it was exercising its powers to make consequential alterations arising from submissions?

[137] Character Coalition and Auckland 2040 submit that the IHP, having purportedly resolved scope on an area by area basis, should have identified the specific supporting submissions seeking corresponding relief on that basis. It says s 144(8) expressly directs the IHP to address these matters in its report to the Council. The requirement to identify is also said to accord with the public importance of requiring reasons from decision makers.[156]

[138] The Council (and supporting parties) responded that:

(a) It is absurd and unrealistic to expect the IHP to identify every submission that it relied upon, noting for example that issues of growth and housing capacity involved a very large percentage of the approximately 93,000 submissions on the PAUP;

(b) Sections 144(9) and (10) expressly permit grouping of submissions; and

(c) In any event, the IHP identified the out of scope submissions as it was required to do by s 144(8)(a) and identified submission points relied upon in relation to specific topics.

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156 *Singh v Chief Executive Officer Department of Labour* [1999] NZAR 258.

Assessment

[139] The answer to both questions is no, but more importantly, I see no flaw in the IHP's reporting having regard to the provisions of s 144 in light of the statutory purpose, the scheme of Part 4 and in context. This conclusion should be read together with my conclusions on the legality of the approach taken by the IHP traversed in detail above.

[140] For ease of reference, to repeat s 144(8) states:

> (8) Each report must include -
>
> (a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and
>
> (b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and
>
> (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.

[141] Contrary to the submission made by Character Coalition and Auckland 2040 this section does not expressly or by necessary implication require the IHP to identify and respond to specific submissions. Rather s 144(8) plainly contemplates:

(a) Identification of out of scope recommendations;

(b) Grouping of submissions by topic; and

(c) Responding to those submissions collectively on a topic by topic basis.

[142] This 'group' or collective identification and response approach is supported by:

(a) The discretion (not duty) at s 144(9) to identify matters relating to consequential alterations arising from the "submissions" (plural);

(b) The very clear direction at s 144 (10):

> (10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[143] Approaching the issue purposively and in light of the scheme of Part 4, it is, as Mr Somerville QC submitted, unrealistic to expect the IHP to specify and then state the reasons for accepting and rejecting each submission point. As Ms Kirman helpfully noted there were approximately 93,600 submission points in respect of the PAUP. It would have been a Herculean task to list and respond to each submission with reasons, especially given the limited statutory timeframe to produce the reports (3 years). Furthermore, the listing of individual submissions and the reasons given would inevitably have involved duplication, adding little by way of transparency or utility to interested parties, provided the issues raised by the submissions are addressed by topic in the reasons given by the IHP. Accordingly I can see no proper basis for reading into s 144(8) a mandatory obligation for greater specificity than that adopted by the IHP, namely to identify groups of submissions on a topic by topic basis.

[144] I acknowledge that the IHP reference to having resolved the issue of residential intensification on an "area by area" basis invites speculation as to which submissions or groups of submissions provided the foundation for a planning outcome. As matters have unfolded, this aspect has assumed some significance and with the agreement of Counsel I requested a report pursuant to s 303(5) from the IHP identifying the submissions said to support the outcomes for specific test cases. But it does not follow that the IHP erred by not undertaking this exercise in its reports. The Act plainly envisages resolution of issues by topic not by individual submission or area. The requirement for elaboration at this stage simply provides assistance for the purpose of the appellate and review exercise.

Was it lawful for the IHP to:

(a) Determine the scope of submissions by reference to another submission?

(b) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

[145] It remains unclear to me precisely what specific recommendations these questions purport to address. The questions appear to be based on limbs (B) and (C) of the third alleged error of law raised in the Character Coalition proceeding. It is pleaded:

> There were methodological errors in the Hearing Panel's approach to scope for the SHZ and MHS rezoning of the 29,000 properties. The methodological errors were adopted by Council (third error). The errors of law were:
>
> …
>
> (B) The Hearings Panel interpreted the scope of generic submissions by reference to the scope of non-generic submissions ("More specifically, there are submissions seeking greater intensification around existing centres and transport nodes as well as submissions seeking that existing special character areas be maintained and enhanced. The greater detail of these submissions assists in understanding how the broader or more generalised submissions ought to be understood."). The scope of a submission cannot be understood by reference to another submission, and it is an irrelevant consideration or wrong legal test to do so.
>
> (C) The Hearings Panel interpreted the scope of submissions by reference to the proposed regional policy statement being evaluated and the subject of recommendations in the Report: ("The strategic framework of the regional policy statement also assists in evaluating how the range of submissions should be considered"). It is circular for the Hearings Panel to draft the recommended regional policy statement, then infer scope in light of the regional policy statement as drafted by it. The proper scope of a submission cannot be understood by reference to a recommended regional policy statement and it is an irrelevant consideration or wrong legal test to do so.

[146] Problematically the pleadings do not particularise specific instances of error, although this may be because the pleadings also allege at limb (A) that the Hearings Panel failed to identify submissions that created scope on an area by area basis and for each area failed to identify whether rezoning was in reliance on one or more submissions or on consequential powers.

[147] In any event, I address the stated questions on an in principle basis to the extent that it may assist the resolution of the pleaded claim.

Assessment

[148] The answer to both questions is yes.

[149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

[150] Second, I could not find a reference in the IHP report purporting to adopt an approach of *enlarging* relief sought in submissions solely by reference to the RPS (though ANLG submit that this error underpinned the decision to zone its land FUZ - discussed below at [270] – [278]. The quote by the IHP in the Character Coalition pleading does not suggest that relief sought has been enlarged by the RPS. Rather it simply states that the framework of the regional policy statement assists in evaluating how the range of submissions should be considered. There can be nothing wrong with this as a statement of methodology:[157]

(a) The RPS sets the policy frame for the regional plan and the district plan so any outcome that gives effect to that policy is prima facie permissible and to be anticipated;[158]

(b) Whether any purported outcome based on the RPS is out of scope of the submission will depend on the wording of the submission – it is not unlawful per se reach an outcome on a submission by reference to the

[157] See also discussion at [102], [135].
[158] *Royal Forest and Bird Protection Society of New Zealand v Buller Coal*, above n 112, at [24], [26].

> RPS[159] – for example the submission may simply seek residential intensification of a zone without specifying the precise form of that intensification, but any form must give effect to the RPS.[160]

[151] Conversely, the consequences of failure to have due regard to higher order objectives and policies when formulating a lower order planning instrument were exemplified by the outcome of the *King Salmon*. The Supreme Court (by majority) stated that:[161]

> Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in section 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location It is these documents that provide the basis for decision making, even though Part 2 remain relevant.

[152] Within the present context, the RPS sits at the head of the hierarchy and drives the direction of both the regional and district plan.

[153] Third, the theoretical concerns raised by the Character Coalition (and others) about over-extending the recommendations by adopting a top-down approach are offset by the self imposed requirement that the planning outcome must be a reasonably foreseen and otherwise a logical consequence of a submission. This provides a clear bulwark against cross pollination of submissions (vertically or horizontally) in a way that is unfair to potential submitters. If for example the relief sought in relation to Devonport has no reasonably foreseeable or otherwise logical consequence for Grey Lynn, then that relief will likely be out of scope in terms of Grey Lynn. But that is an evaluative matter, not an error of law. Framing the scope of general submissions to accord with the RPS and the cross pollination of submissions for the purpose of making recommendations is not per se unlawful.

To what extent are principles (regarding the question of scope) established under the RMA case law relevant, when addressing scope under the Act?

[154] I have addressed this question above at [114].

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159 See discussion in *Clearwater*, above n 113, at [70]-[78].

160 As required by Local Government (Auckland Transitional Provisions) Act 2010, s 145(1)(f) and Resource Management Act 1991, s 67.

161 At [151].

Did the IHP correctly apply the legal framework in the test cases?

The test cases

[155] At the first case management conference on the appeal and judicial review proceedings before this Court, I directed (without objection from any party) that a preliminary question procedure should be adopted in relation to the central issue of whether the IHP recommendations were within the scope of submissions. The form of the questions, together with test cases, was developed by the parties, culminating in the Preliminary Questions noted at [3] and nine test cases:

(a) Mount Albert;

(b) Glendowie;

(c) Blockhouse Bay;

(d) Judge's Bay Parnell;

(e) Wallingford St, Grey Lynn;

(f) The view shaft on the Strand;

(g) 55 Takanini School Rd;

(h) The Albany North Landowner's Group site; and

(i) The Man O'War test case.

[156] At the hearing I also resolved that the upzoning of 65 Howick properties identified by the HRRA should also be addressed as a test case.

[157] The first five test cases (and the Howick properties) concern residential zoning and whether the IHP recommendations to upzone affected areas were within scope of the submissions in respect of those areas. I propose to address these test cases first at a

general level, and then on an individual basis. The remaining test cases are fact specific and will be dealt with individually.

[158] The parties produced agreed statements of fact for each test case, which have been largely adopted by me.

Identification of relevant submissions

[159] As noted at [101], the issue of scope has two related aspects: legality and fairness.

[160] In order to address the first aspect, I base my assessment on the submissions identified by the IHP in the report produced at my request on 20 December 2016. While other submissions appear to confer jurisdictional scope, the submissions relied upon by the IHP provide the basis for the legality of its decision. The second aspect however triggers broader considerations. This assessment is not confined to what the IHP considered conferred jurisdictional scope. Rather, the resolution of questions of procedural and substantive fairness depends on the full context, including the s 32 report, the PAUP, the full public record of submissions and the hearing process.

The Maps

[161] A residual issue highlighted by the 'out of scope' parties is that the IHP refers to having relied on HNZC "839 A + C series maps". There was some confusion as to which set of maps the IHP was referring to, the C series evidence maps or the C series proximity maps. In a subsequent report dated 7 February 2017, the IHP clarified that the "839 A + C series maps" refer to maps produced by HNZC in evidence; that is the maps that illustrated HNZC submission 839 entitled "Rezoning Summary for HNZC Properties and Consequential Amendments". The IHP also noted that it requested HNZC to provide a shape file that joined together its zoning shape file (reflected in evidence) and the Council's in scope evidence version of its zoning shape file. HNZC then lodged that shape file and subsequently maps depicting information in the shape file entitled "Scope Categories A and C – Evidence Zone Map Series (the Maps). In any event, as those maps were not produced with the primary submissions notified to the public they cannot enlarge the scope of the primary submission. The 'out of scope'

parties therefore contend that insofar as the IHP placed reliance on the maps, this evinces jurisdictional error. I do not accept this complaint. The maps are simply spatial representations of HNZC's primary submission. Whether they do so accurately for the purpose of the assessment of scope was an evaluative matter for the IHP. Provided that the potential for the zone changes illustrated by the Maps was made clear in the written submission, the IHP could properly refer to them for the purpose of assessing scope.

Overview of test cases on residential zoning

[162] Character Coalition, Auckland 2040 and HRRA collectively submit (in summary):

(a) A number of the generalised submissions seeking upzoning were so far reaching that they were not "on" the PAUP, as informed by the s 32 process;

(b) The IHP recommendation upzoned more than 29,000 homes previously identified by the Council as out of scope;

(c) While generalised submissions sought residential intensification across the Auckland region, none of the submissions specifically identified these 29,000 homes for residential intensification of the type recommended by the IHP;

(d) The notified plan, the submissions and the summary of submissions did not put the 29,000 affected residents (among others) on reasonable enquiry about the potential for wholesale upzoning of their neighbourhoods, and in particular:

    (i) A landowner cannot be reasonably expected to enquire beyond the provisions (including maps), submissions and summary of submissions specifically referring his or her address or neighbourhood;

(ii) The generalised submissions did not specifically refer to the 29,000 affected homes (including the 65 homes identified by the HRRA as out of scope); and

(iii) The submissions were largely inaccessible, particularly as they were not ordered in terms of streets or neighbourhoods.

(e) The 29,000 affected landowners have not had a reasonable opportunity to voice their concerns; and

(f) There is nothing in the IHP reports to show that the IHP turned its mind to the implications for these landowners and notably:

(i) The IHP report does not identify the submissions said to support the upzoning of these properties;

(ii) The formal requirements of s 144(8)(b) in terms of identifying the relevant submissions and the reasons for accepting or rejecting them have not been met, further illustrating a lack of attention given to affected persons; and

(iii) The IHP claims to have addressed scope on an area by area basis but there is nothing in the reports to support this claim.

[163] The Council, HNZC, Ministry for the Environment, Ockham, Property Council and Equinox respond (in summary) that:

(a) A key issue for the PAUP was the extent of the provision for urban intensification to accommodate growth;

(b) The generalised submissions seeking region wide intensification were plainly directed to this issue and therefore within the scope of the PAUP;

(c) The combination of generalised, area and site specific submissions provided ample scope for the IHP recommendations. The Council, for example, identified four categories of submissions that provided scope:[162]

(i) **Category 1** - RPS objectives and policies;

(ii) **Category 2** - objectives a policies for residential zones, removal of overlays etc;

(iii) **Category 3** - patterns of zoning; and

(iv) **Category 4** – upzoning for particular areas or sites.

(d) The test is not whether affected persons were put on "reasonable enquiry" – there is no authority to suggest that a test based on the subjective competency of the affected person to access Council's search engine is mandated, but that test is satisfied in any event;

(e) Preliminary mapping of the spatial extent of the scope of a sample of submissions available to the IHP in relation to the test cases show that the IHP had sufficient scope to recommend the residential zoning relief set out in the test case areas. Specifically, HNZC submitted that submissions seeking changes through narrative description, but in a way that enables identification of whether or not land is affected, are also valid. This included submissions seeking to change zoning applying to:

(i) All land subject to a given use, for example in Ockham's submission 6099-4, which sought to rezone as MHU all areas zoned MHS under the PAUP;

(ii) All land within a specific distance of a particular category of land use or zone, for example in Ockham's submission 6099-7 which

[162] This is the Council's categorisation. Dr Kirman for The Minister for the Environment and HNZC identified six submission typologies which fall within the four categories identified by the Council.

sought a THZ zone for all land within 10 minutes' walk of transport nodes;

(iii) All land within an area of the Region that is described through identifying its boundaries, for example submission 5478-54 by Generation Zero, which sought rezoning of all MHS land to MHU within the area bounded by State Highway 20 to the South, the Southern Motorway to the East, Onehunga railway line to the Southeast, and the Waitemata Harbour to the North; and

(iv) Submissions seeking reinstatement of an earlier zoning proposal, for example, Property Council's submission 6212-22 to reinstate the residential zoning under the 2013 draft Unitary Plan.

(f) In any event, non property specific or generic submissions have always provided scope to enable changes in accordance with orthodox macro level approaches to planning and the RMA's focus on integrated and sustainable management; and

(g) The recommendations were a reasonably foreseen consequence of the issues addressed by the PAUP and the submissions on those issues.

The submissions on residential intensification

[164] The submissions identified by the IHP as conferring scope, together with the Council's publicly notified summary of those submissions are set out in **Appendix A** to this judgment. A selection of submissions identified by the "in scope" parties as providing scope is set out in **Appendix B**. A selection of further submissions is also set out in **Appendix C**.

A helicopter view

[165] The IHP identified a broad spectrum of submissions said to provide scope for the recommendations. Particular emphasis was placed on the Council's "in scope" submissions and the HNZC submissions.

[166] Generally speaking, the IHP's recommendations were plainly within the jurisdictional scope of these submissions on the PAUP. First, there is nothing "left field" about the recommendations or the submissions. The extent and form of urban residential intensification was a major issue raised by the s 32 reports, with the precise extent, form and location of such intensification left open for final resolution through the notified hearing process.[163] These submissions (among other) simply address this major issue by seeking substantially greater provision for residential intensification throughout Auckland. The s 32 reports also identify competing positions, including those of, for example, HNZC, Ockham and Character Coalition, and refer to a "laissez faire" approach as one alternative option to providing for urban growth. Accordingly, it should have come as no surprise to any person genuinely interested in residential intensification and or residential amenity to see the competing positions thoroughly ventilated in submissions on the PAUP.

[167] Second, the submissions relied upon by the IHP and others clearly envisaged comprehensive amendments to the policy framework and consequential changes to the methods (including zones) used to give effect to that policy framework and the potential for substantially increased residential intensification both in areal extent and density. In this regard, I have examined the evidence maps for the test case areas and I am satisfied they fairly illustrate the wide scope conferred by the HNZC submissions, see especially submissions 839-17 and 18 (Appendix B). I am also satisfied, save where I indicate below, the recommended changes broadly fall within the areal extent of the requested changes in the Maps.

[168] Third, there are corresponding and equally comprehensive submissions and further submissions seeking maintenance of the status quo in terms of residential amenity. These submitters were plainly alive to the prospect of changes to residential zones given the pressing issue of urban growth. For example, in response to one of Generation Zero's submissions, Auckland 2040 in further submission wrote that the submission, if allowed, "would permit unrestricted apartment development across all residential areas other than those zoned SH…[and] encourage removal of the existing housing and its replacement with high density and multi storey development."[164]

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163 Auckland Council, above n 14, at 5.

164 See also Appendix C.

[169] I am also satisfied that at a high level of generality, the recommendations made by the IHP were reasonably and fairly raised by the submissions identified by the IHP. The Summary of Decisions Requested (SDR), a publically available summary of submissions made to the IHP, describes the broad effect of the foregoing and other submissions. They alert the reader to the potential for significant changes to the proposed plan as it relates to provision for residential intensification. Indeed, an interested landowner reading, for example:

(a) the HNZC submission summaries would see requests for comprehensive zoning changes throughout Auckland based on proximity criteria together with requests for zoning changes to enable site specific upzoning of its landholdings;

(b) the Ockham submission summaries would see a request for comprehensive zoning changes based on very broad locational criteria, including proximity to transportation nodes and arterial routes located, as well as more general requests to see the size of the SHZ reduced and density controls deleted;

(c) the Auckland Property Investors Association Inc submission summaries would see a request for changes based on locational criteria, including sites within 700m of a railway station and centres; and

(d) the Generation Zero submission summaries would see a general request to make changes necessary to achieve the Auckland Plan and RPS targets elaborated upon below at [170].

[170] In summary, a landowner genuinely interested in preserving local residential amenity when presented with the submissions identified by the IHP (and others) on residential zoning must have appreciated that broad and detailed changes to the nature and extent of residential zoning throughout Auckland were sought by numerous parties, and indeed had been contemplated since the creation of the Auckland Plan. The vision of a quality compact urban form which could house 70% of a projected 1,000,000 new residents by 2040 within the existing metropolis by intensifying primarily near centres

and transport hubs was first signalled in the Auckland Plan, the s 32 reportage, and subsequently in a multitude of submissions, which individually and collectively foreshadowed change. Each envisages change based on cascading levels of intensification, with highest levels of intensification within or close to centres, and along arterial and connecting routes, together with increased provision for residential activity within mixed urban and suburban environments, spreading out from these key hubs. The Housing New Zealand submission is simply an example of the cascading intensification sought by the Council and submitters which would have alerted landowners to zoning requests to enable upzoning of a constellation of residential sites across Auckland. Accordingly, I see no error in the IHP's summary of its approach to scope, particularly its approach to consequential changes outlined at [96].

Accessibility of Council website

[171] I have considered whether the presentation of the summary of decisions sought on the council website may have affected the ability of interested landowners to participate in the submission process. Concerns were raised by Mr Brabant and Mr Enright about the usability of the Council's website and submission summaries. The basic tenor of their submission was that interested landowners would not have been put on notice of changes affecting them because a search for submissions on a particular address, street or neighbourhood would not have triggered notification of, for example, the HNZC or Ockham submissions.

[172] I agree a search on a specific address, street or neighbourhood might not uncover submissions seeking residential intensification at an address, street or neighbourhood. However, I do not accept that this is the standard of enquiry to be expected of a potentially affected landowner on matters as significant as 30 year provision for urban growth and residential amenity. It is not necessary to be precise about the standard, but it must be reasonable in the context of the planning process and the issue under consideration. The present context included a s 32 report signalling that major residential intensification was needed and required major reformation of Auckland residential zones. The central issue raised by the "out of scope" parties is the effect of provision for residential intensification on local character and amenity. In this context, a reasonable level of diligence is to be expected by landowners genuinely interested in

preserving the status quo, whether at a site specific or more general neighbourhood or zone level. It is not sufficient to simply examine the PAUP maps or the summary of submissions on those maps, which as the s 32 report signalled, were based on preliminary assessments of growth only. Rather, a reasonable landowner genuinely interested in preserving, for example, the status quo in terms of local character and amenity should be expected to search more broadly on topics such as urban growth and residential zoning which directly affect residential character and amenity.

[173] The Council noted that the submissions seeking residential intensification were coded to a "RPS", "Urban Growth", "Residential Zones" and Topic "Residential"; Theme "Zoning" and Topic "Central" and Theme "General" and Topic "Cross Plan Matters". A cursory search of topics such as "Urban Growth" and "Residential" quickly brought into frame submissions relief on zoning and intensification, including those seeking wholesale reformation of residential zones to accommodate growth. A more refined, but not arduous search, also revealed changes specifically affecting various neighbourhoods and in particular by reference to the HNZC submission. I am satisfied therefore that the Council summary of submissions was sufficiently accessible to persons genuinely interested in the issues of urban growth, residential intensification and residential amenity to provide sufficient notice of the potential for changes of the kind recommended by the IHP.[165]

[174] I am fortified in this view by the record of further submissions on the submissions underpinning the IHP's urban growth. To illustrate, the Character Coalition, representing over 55 community groups,[166] and Auckland 2040 made comprehensive further submissions in opposition to submissions by several of the abovementioned

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165 The use of the search engine was not a matter of evidence, but I was given a presentation about its use and
it formed part of the common bundle of information (by link) tabled for my consideration.

166 Including the following residents' associations: Birkenhead Residents' Association, Castor Bay Ratepayers' & Residents' Association Inc, Eden Park Neighbours' Association, Ellerslie Residents Association Inc, Freemans Bay Residents' Association, Grey Lynn Residents' Association, Herne Bay Residents' Association, Hill Park Residents' Association, Howick Residents and Ratepayers' Association, Laingholm District Citizens Association, Mangere Bridge Residents and Ratepayers, Milford Residents Association, Mission Bay Residents Association, Mt Albert Residents' Association, Northcote Residents' Association, Orakei Residents Society, Orewa Ratepayer and Resident Association, Point Chevalier Residents Againts THABS Inc., Snells Beach Ratepayer and Resident Assoc, South Kaipara Ratepayers' Association, St Heliers/Glendowie Residents Association, Te Atatu Residents and Ratepayers Association, and Titirangi Residents and Ratepayers Association.

submitters seeking upzoning of residential zones throughout Auckland. The Council summary of decisions requested was obviously sufficiently accessible to trigger submissions by genuinely interested parties.

[175] One further issue put in argument was whether a "subjective" test of notice was appropriate. Mr Bartlett QC for Equinox submitted that it was simply a matter of whether there was a submission, literally construed, that was on point. If so, it conferred jurisdiction. There is support for this approach in *Countdown*, which cautioned about the "danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person"[167]. The Court observed:[168]

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

[176] This has attractive simplicity but I think it is preferable, when dealing with a planning process of the present scale, to be cautious about the extent to which affected persons are fairly on notice of potential for changes that might substantially change, for example, their residential amenity. To that extent I prefer to approach the assessment employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her. It is the type of assessment that Judges must regularly make on behalf of the community in resource management matters.[169]

The Council's change of position

[177] Some emphasis was placed firstly on the Council's December 2015 position signalling the potential for upzoning of 29,000 or 7% of "out of scope" properties and secondly the resolution of the Council to withdraw from supporting changes to enable the upzoning of those properties. The "out of scope" parties submitted that these facts

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167 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 90, at 172.
168 At 171-172.
169 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 304-305.

support their argument that the recommendations upzoning those properties were always out of scope and that reasonable property owners relied on the Council's rejection of its own upzoning as out of scope. They contend that as a consequence of the Council's February resolution, affected landowners may have believed nothing further was required of them, compounding the unfairness of allowing unanticipated out of scope proposals to form part of the IHP's considerations in the first place. I was also referred to passages of evidence of an experienced urban planner and convenor of Auckland 2040, Richard Burton, recording that many residents had only come to the realisation that there may be significant changes to their zoning proposed by the Council because "they had not been notified and are only finding out about it through media coverage and word of mouth". While it is conceded that Auckland 2040 was able to argue that the proposed upzoning was out of scope because it was a submitter on the HNZC submission, they submit that this did not cure these process concerns.

[178] The underlying theme of the submissions of the 'out of scope' parties is that the 29,000 upzoned landowners had a reasonable expectation that the PAUP set the frame for residential zoning and the Council resolution of February 2016 affirmed that expectation. But I do not accept that the s 32 report or the PAUP provided a proper basis for such an expectation. I have addressed the relevance of s 32 report and notified PAUP in detail above. They do not purport to fix a final frame for residential intensification and explicitly foreshadow the need for further modelling work. The PAUP could realistically only be seen as a starting point for consideration as clearly evidenced by the wide ranging and voluminous submissions seeking changes to it, including many by the 'out of scope' parties and other submitters seeking maintenance of low density, special character and heritage areas, among other things in the face of proposed intensification. Accordingly, while the February resolution records the then position of the Council, and is a factor to be weighed in terms of the reasonableness of the IHP's assessment on scope, it did not affirm or give rise to any reasonable expectation as to outcome.

[179] I turn now to consider the test cases.

Mount Albert

[180] The Mount Albert test case area includes the residential area bounded by Oakley Creek, Unitec Campus on Carrington Road, Segar Ave, Chamberlain Park, Burnside Ave, Martin Ave, Rossgrove Terrace, Wairere Ave, Alberton Ave, Mount Albert Road, Mount Royal Ave, Richardson Road, Harlston Road, and Ennismore Road. This includes New North Road from Alberton Ave to Ennismore Road.

[181] The test case area includes the Mount Albert town centre located along New North Road and Mount Albert maunga (Owairaka). The Unitec Wairaka campus is located on Carrington Road which is on the fringe of the test case area. A number of primary and secondary schools are also located within or close to the test case area, including Mount Albert Grammar School.

[182] There are also a number of open spaces located close to and in the test case area, which include Phyllis Reserve, Chamberlain Park, Mount Albert War Memorial Reserve, Alice Wylie Reserve, Allendale House and Reserve, Anderson Park and Mount Albert – Owairaka Domain.

[183] The area is within walking distance of a rapid and frequent public transport service network running along New North Road, Carrington Road, and Mount Albert Road along with the western railway line. Two train stations, Mount Albert and Baldwin station are located within the test case area.

[184] In the Notified PAUP, residential intensification and zoning for Mount Albert was provided through the application of the:

(a) THZ to the north of Mount Albert town centre and along Carrington Road and New North Road;

(b) MHU zone adjacent to THZ, and along Woodward Road, New North Road, Carrington Road, Seaview Terrace, and Asquith Ave; and

(c) MHS zone was applied across remaining parts of Mt Albert.

[185] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Volcanic Viewshafts Height Sensitive Area overlays were applied over many residential properties within the Mount Albert test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays. The Mount Albert test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified Proposed Auckland Unitary Plan. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[186] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings. The Decisions version of the Unitary Plan retained a mix of SHZ, MHS, MHU, THZ and Mixed Use, however, the largest proportion of residential land is now MHU.

Argument

[187] The Council contends that all 4 categories of submission (see [163] above]) can be found in relation to Mt Albert, providing a comprehensive basis for the upzoning recommendations:

(a) Category 1 – directed towards the region wide strategic need to intensify, particularly around centres and along transport corridors resulting in greater intensification around the Mt Albert centre and key transport routes such as New North Road, Woodward Road, Richardson Road and Carrington Road;

(b) Category 2 – on objectives and policies, overlays and Auckland wide provisions directed to spatial change and requiring rezoning to ensure consistency with higher order strategic objectives and policies, resulting in (among other things):

(i) increased walking distances to be imposed when applying a higher density residential zoning near transport corridors (e.g. increased use of THZ and MHU around New North Road,

Carrington Road and Woodward Road and around the Mt Albert town centre); and

(ii) Removal of overlays that affected underlying zoning.

(c) Category 3 – on the pattern of zoning, for example the Ockham submission seeking to enlarge THZ on all residential sites within five minutes walk of all main arterials (e.g. New North Road) or the Jacques Charroy submission seeking intensification of the inner suburbs including Mt Albert.

(d) Category 4 – on specific sites, with 186 submission points seeking site specific relief, a significant portion of these sought upzoning (including HNZC submissions affecting 340 properties).

[188] Character Coalition and Auckland 2040 accept the category 3 and 4 submissions based on clear locational criteria provide scope for upzoning. But they submit that:

(a) the submissions are not otherwise sufficiently explicit to clearly signal other or consequential changes of the extent made by the IHP;

(b) only 831 of the 2380 properties upzoned by the IHP were subject to site specific requests; and

(c) without any identification of the submission or submissions relied upon the Council's reliance on submissions affording scope is conjectural.

Assessment

[189] I am satisfied that submissions identified by the IHP provided jurisdictional scope for the recommendations. The listed generalised submissions plainly signal the potential for significant change throughout Mt Albert and the HNZC 'A and C series maps' for Mt Albert (Mount Albert – GIS-4215672-42b, Point Chevalier – GIS-4215672-42b) are illustrative of spatial extent of relief sought by the HNZC submissions.

[190] I am also satisfied that the recommended changes for residential zoning in Mt Albert are reasonably and fairly raised by submissions. Mt Albert was identified at the outset as a centrally located suburb with major transportation infrastructure, and was thus destined for significant residential intensification. Furthermore, I accept the Council's submission that the combination of the four categories of submission seeking upzoning in Mt Albert provided ample notice to persons genuinely interested in residential amenity that the recommended changes were a potential outcome of the submissions. In addition, having regard to the scope to make change afforded by the generalised submissions, I agree with the IHP that the consequential upzoning of properties was a logical consequence of locational and site specific submissions expressly seeking upzoning of approximately 831 properties spread throughout Mt Albert.[170]

Glendowie

[191] The Glendowie test case area includes the residential area bounded by Glendowie Road, Riddell Road, St Heliers Bay Road, Sylvia Road, Yattendon Road, Vale Road, Clarendon Road, Cliff Road and the coastline.

[192] The test case area includes three large open spaces: Churchill Park, Glover Park and Glendowie Park. The Saint Heliers local centre is the closest local centre to the residential area and is located outside the test case area on Tamaki Drive and St Heliers Bay Road.

[193] A number of primary and secondary schools are also located close to or within the test case area: Sacred Heart College on West Tamaki Road, Glendowie College on Crossfield Road, and Churchill Park School (a primary school) on Kinsale Ave.

[194] There are a number of residential properties in parts of the test case area that are within walking distance of a frequent public transport service that runs every 15 minutes along St Heliers Bay Road and Tamaki Drive. Three local connector bus services run at

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[170] This is the figure identified by Character Coalition and Auckland 2040 as representing the properties affected by locational or site specific requests. The total number of affected properties is identified as 2380.

various times during the day through the test case area and link up to the frequent public transport services.

[195] In the notified PAUP, residential intensification and zoning for Glendowie was provided through the application of the:

(a) MHU zone to properties along Yattendon Road, Rarangi Road, Clarendon Road;

(b) The application of the MHS zone to properties along Riddell Road and west of Maskell Street/Waimarie Street; and

(c) A SHZ was applied throughout the rest of the Glendowie test case area.

[196] In the notified PAUP, the neighbourhood shops located on the corner of Waimarie Street/Maskell Street and on the corner of Riddell Road/Maskell Street were zoned neighbourhood centre.

[197] Within the notified PAUP, the Pre-1944 Building Demolition Control, Special Character and Significant Ecological Area overlays apply over a number of residential properties within the Glendowie test case area. A less intensive zone (e.g. SHZ) was applied to properties affected by the Special Character and Volcanic Viewshafts Height Sensitive Area overlays.

[198] The Glendowie test case area is also affected by a number of flood plain hazards, introduced and identified as part of the non-statutory geospatial layer in the notified PAUP. A less intensive zone (e.g. SHZ) was applied to properties affected by the flooding layer.

[199] Following the hearings of submissions in Topic 081, the Council filed maps which set out its position on proposed rezonings.

[200] In the Decisions version of the Unitary Plan, Glendowie is predominantly zoned MHS, with smaller areas of SHZ to the north east and MHU to the west.

Argument

[201] The Council submits:

(a) The impact of Category 1 submissions can be seen by the widespread rezoning of SHZ areas to MHS and the rezoning of MHS areas on the outskirts of the test case area to MHU;

(b) The Category 2 submissions by HNZC, particularly relating to the removal of overlays, and other broader submissions on residential objectives and policies, supported the IHP's approach to scope;

(c) Category 3 submissions, for example by Ockham, illustrate scope for the reduction of SHZ within Glendowie and MHU upzoning along St Heliers Bay road;

(d) 27 site specific Category 4 submissions were made in relation to Glendowie, providing a basis for some consequential change.

[202] The Character Coalition and Auckland 2040 contend:

(a) No resident of Glendowie would have likely located the generalised submissions and if he or she had seen them considered they applied to Glendowie given that none of the streets identified by the submissions are Glendowie streets.

(b) With only 27 properties identified there was no scope for consequential changes.

Assessment

[203] In addition to the general submissions identified by the IHP as conferring scope, reliance was also placed on HNZC A+C series maps and 3 site specific submissions.

[204] My general observations at [166]-[168] dealing with jurisdictional scope above apply with equal force to this test case. I have also examined the HNZC evidence A and C Maps for Glendowie (Saint Heliers – GIS-4215672-42b) and, as outlined at [167], I am therefore satisfied that jurisdictional scope was conferred by the generalised submissions.

[205] On the second issue of fairness, the Council emphasised the Category 1 and 2 submissions as providing the requisite scope.

[206] I agree a search of the SDR by reference to urban growth and or residential zones quickly unveils submissions clearly signalling the potential for great changes in residential zoning throughout the Auckland region based on seeking stronger provision for intensification sought and through various locational criteria that may have direct application to Glendowie. The following table includes a sample of these submissions, which should be read in conjunction with the submissions in Appendices A and B.

Submitter	**Submission**	**Summary of the submission**
Community of Refuge Trust (CORT)	CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model. CORT argues the Single House zone promotes the opposite of the Compact City model promoted by the Council. It strengthens property owners' rights to resist intensification. The zone promotes the car use, challenges the development of efficient public transport and supports communities through regulation avoid responsibility for the sustainable growth of the city.	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage. Amend the extent of the Single House zone significantly to less than 10% of the Auckland area.

	Recommendations The zone size is significantly reduced, ideally to less than 10% of the Auckland area.	
Ben Smith	The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected". … In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: – Pertaining to the zoning allocation of the Unitary Plan: – Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. – Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone – Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone.	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL. Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].
Cooper and Associates	Greater proportion of land to be designated as Mixed Housing Urban especially in areas of high land value, adjacent to large natural features and along transit corridors" and a "Greater proportion of land designated as	Increase the extent of the Mixed Housing Urban zone.

	terrace housing/apartments especially in areas of high land value, adjacent to large natural resources (parks, waterfront etc) and along transit corridors. Increasing the height limit of these areas to 8-12 stories will also provide a good middle ground for the development proposition.	

[207] Furthermore, the merits of upzoning generally and questions of scope were thoroughly investigated by the IHP, including with the benefit of detailed submissions and evidence from representative groups such as Character Coalition and Auckland 2040.

[208] The Council properly conceded that there are relatively few area or site specific submissions (categories 3 and 4) referring to Glendowie. The prospect of widespread foreseeable consequential spatial change is not so readily inferred from those entries. Given this, it is difficult to be definitive about the level of specific notice to residents of Glendowie or as Messrs Brabant and Enright put it, where the line for change was to be drawn. But, as Ms Kirman noted for HCNZ, throughout the IHP's process for refining the purpose objectives and rules for the SHZ, both Auckland 2040 and the Character Coalition acknowledged the recasting of the objectives and policies for the SHZ, if accepted would result in significant changes. This strongly indicates awareness of the generalised submissions seeking broad change. For example, legal submissions for Auckland 2040 noted:

> The inevitable consequence of the proposed changes to the SHZ description and the objectives and policies is that the zone could no longer be applied to the majority of the areas currently shown in the PAUP maps as SHZ. If these sweeping changes to the zone provisions were accepted, it follows that either the Auckland Council or other party to the hearings will seek the removal of the existing zoning from the majority of the properties presently zoned SHZ.

[209] Overall, I am therefore satisfied that there was a sufficient basis for the recommendations given the full background to the submission process, and the numerous requests for upzoning based on the Council's categories 1 and 2 submissions, in combination with submissions based on broad locational criteria (for example 700m from town centres, relative proximity to arterial and connecting routes, and other high

amenity areas identified for intensification such as schools and public parks).[171] In this context, there is an air of Shire like unreality to the submission that the residents of Glendowie would not have appreciated that there might be broad changes to their residential landscape. It is also significant that the nature of the upzoning in this test case area is clearly tailored to its environs, with most of the rezoning to MHS. To reiterate, the IHP envisaged that the "Residential - Mixed Housing Suburban Zone will facilitate some intensification while retaining a more suburban character, generally defined by buildings of up to two storeys."[172] This illustrates that the IHP has not applied open ended submissions *carte blanche* to achieve upzoning. Rather the MHS zone is a compromise between the current SHZ and the more intense MHU and THZ applied in areas that are more directly implicated by the centres and corridors strategy. In balancing the competing agendas of submitters, and achieving consistency with the Auckland Plan and RPS, then, the IHP has proceeded in a manner that could have been reasonably anticipated by Glendowie residents genuinely interested in local residential amenity.

Blockhouse Bay

[210] The area covered by this test case is relatively large, and consists primarily of low-density suburban neighbourhoods. It is an area that has reasonable walking proximity to nine arterial roads with access to public transport, but there are some neighbourhoods and/or streets that do not have close proximity to a town or local centre.

[211] The Blockhouse Bay test case area includes a number of separate neighbourhoods of varying sizes in an established low-density suburban environment. Ten of the chosen neighbourhood areas are close to the coastal environment of the Manukau Harbour and adjoining significant recreation and open space areas. The other identified locations further north are outside walking distance to the transport network. There are however a number of schools across the test case area including Blockhouse Bay Primary, Blockhouse Bay Intermediate, St Dominic's School and Chaucer School, as well as numerous parks including Blockhouse Bay Recreational Reserve, Grittos Domain, Craigavon Park and Miranda Reserve.

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171 See Appendices A and B for elaboration.

172 Auckland Unitary Plan Independent Hearings Panel, above n 51, at 15.

[212] The zoning for the majority of the test case area in the PAUP as notified was SHZ and MHS. Maps prepared by the Auckland Council in December 2015 showing proposed upzoning of some 27,000 residential properties including all of those in the Blockhouse Bay test case area were uploaded to the IHP's website on 26 January 2016. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[213] Following recommendations from the IHP, the majority of the SHZ areas were upzoned to MHS, and the majority of the MHS areas were upzoned to MHU. The THZ zone south of Bolton Street was also enlarged.

Assessment

[214] The IHP identified a number of general and specific submissions said to confer jurisdiction, including the HNZC submission: refer Appendix A.

[215] I was not able to verify close correspondence between the HNZC Maps (Mount Roskill - GIS-4215672-42b, New Lynn - GIS-4215672-42b) and Barton and Wade Streets. But, in any event, as with Mt Albert, I am satisfied that given the depth and breadth of the submissions relating to residential intensification generally and Blockhouse Bay in particular, the recommendations were not beyond the jurisdictional scope conferred by the submissions identified by the IHP.

[216] I am also satisfied that IHP's recommended amendments to the residential zoning are reasonably and fairly raised by the submissions, for the reasons given at [190] and [209] above, but also given that a large number of submissions that specifically identified Blockhouse Bay, including the following:

Submitter	**Submission**	**Summary of the submission**
Helen Geary	Blockhouse Bay. This very average housing quality suburb is mostly zoned single house with very little mixed zoning or intensification planned. Surely all parts of Auckland should experience some intensification, and this could allow some heritage areas to be downzoned. I seek that: Blockhouse Bay have some areas	Rezone some areas in Blockhouse Bay from Single House zone to Mixed Suburban [inferred to mean Mixed Housing Suburban zone] to correspond with down-zoning to Single House zone area of Mt

	upzoned from single house to mixed suburban, to correspond with downzoning to single house zone of areas of Mt Eden (ie. Ashton Road).	Eden (i.e. Ashton Road).
NZIA	THAB would provide additional height/density along New Windsor Road and Blockhouse Bay Road ridges and zoned to support higher densities and align additional density with view and daylight amenity. THAB & MHU would provide additional height/density along Blockhouse Bay Road (south of New Windsor Rd) and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting the neighbourhood to surrounding town centres. Blockhouse Bay Town Centre SH and MHS zoning doesn't make use of proximity to Town Centre. Highly sought after residential area where high land values would support apartment type investment and development. Near Town Centre: Recommend THAB or Mixed Use with conditions that 2+ levels THAB to be provided over any non-residential use(s) below. Significant movement streets linking Town Centres: MHU & MHS provides additional density along Margate Road/Mary Dreaver Street link, Terry Street & Bolton Street with an increase in legibility of 'east/west' visual/movement links within the neighbourhood. Blockhouse Bay North – New Windsor South THAB & MHU provides additional height/density along New Windsor Road, Wolverton Road, Tiverton Road and Blockhouse Bay Road and align additional density with view and daylight amenity. THAB & MHU provides additional height/density along Taylor Street and Whitney Street with an increase in the legibility of 'north/south' visual/movement links connecting ttle neighbourhood to surrounding town centres. MHU provides additional density along Margate Road/Mulan Street/Mary Dreaver Street/Etc link and the Terry and Bolton Street links with an increase in legibility of the 'east/west' visual/movement links within the neighbourhood.	Rezone land on Blockhouse Bay Road, New Windsor Road and Ballard Avenue, Avondale as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land surrounding Blockhouse Bay Town Centre as shown in the submission [refer to page 100/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings. Rezone land around Blockhouse Bay and New Windsor as shown in the submission [refer to page 104/104] from Single House and Mixed Housing Suburban to Mixed Housing Urban and Terrace Housing and Apartment Buildings.
Edward Jones	THAB zone within 350 metres of the Blockhouse Bay Local centre. … The property within 250 metres of the Blockhouse Bay Local Centre is ideally suited to the THAB zone as they are within a short walk of the bus routes to Downtown Auckland,	Amend Terrace Housing and Apartment Zone to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street intersection.

	New Lynn, Onehunga/Penrose and the local retail and community facilities. … I would like to see the THAB zone extended to include the East side of Blockhouse Bay Road between Exminster Street and the Taylor Street Intersection. If these properties were to be developed as terraced housing or apartments they would balance out the west side of Blockhouse Bay Road forming an impressive entry to the Blockhouse Bay Shopping Centre as you approach from the North. These few properties have the same attributes as those on the opposite side of the road and would be equally suited to a THAB zone.	Retain the Terrace Housing and Apartment Buildings zone where properties are in close proximity to town/local centres and public transport, and in particular 491, 491A and 493 Blockhouse Bay Road Retain the Terrace Housing and Apartment Buildings Zone for the properties at 491, 491A and 493 Blockhouse Bay Road, Blockhouse Bay.

Judges Bay

[217] Judges Bay, Parnell is a small residential neighbourhood within Parnell comprising a number of residential streets. Judges Bay has strong connections to early Auckland settlement that is reflected in its street layout and the presence of special character and historic heritage buildings. It is an inner city suburb, with reasonable proximity to both the Ports of Auckland and the Central Business District (CBD).

[218] The Judges Bay test case area includes properties in the residential area bounded by Judges Bay Road, Taurarua Terrace, Canterbury Place, St Stephens Avenue and Judge Street. Judges Bay is characterised by low-density housing in close proximity to the coastal areas of Judges Bay and Hobson Bay as well as Dove-Myer Robinson Park, Martyn Fields Reserve and Point Park. Judges Bay has historic heritage values and is home to a significant Auckland recreational amenity (Parnell Baths). The identified area in Judges Bay is not serviced by a frequent transport network. The only significant bus route is along Gladstone Road to the west.

[219] The notified zoning of the area was primarily SHZ, with several large blocks of MHS zoning and a block between Gladstone Road and Taurarua Terrace zoned as THZ. Maps prepared by the Council showing proposed upzoning of some 29,000 residential properties including those identified in the test case area of Judges Bay were uploaded of the IHP's website on 26 January 2016. The Council subsequently withdrew the rezonings shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council filed maps which set out its position on proposed rezoning which was to retain the SHZ in the test case area.

[220] In the PAUP decisions version, the MHS zone around Bridgewater Road and Judges Bay Road was expanded, and the SHZ decreased accordingly. The THZ zone was down-zoned to MHU, and the area on the other side of Taurarua Terrace was upzoned from SHZ to MHU.

Assessment

[221] The general submissions identified by the IHP provided jurisdictional scope to upzone properties in Judges Bay, including the HNZC submission as illustrated by the HNZC C series evidence maps (Auckland Central - GIS-4215672-42b, Orakei - GIS-4215672-42b).

[222] I am also satisfied that the recommended changes are fairly and reasonably raised by the submissions. The intensification of the central isthmus, namely the inner city suburbs, of which Parnell and Judges Bay are clearly part, was, like the upzoning of Mt Albert, emphasised throughout the Unitary Plan process. Inner city areas were always more directly implicated in the centres and corridors strategy, given their proximity to the Auckland CBD, and consequently a number of high amenity areas and transport nodes. In addition to the submissions already mentioned, the table below sets out the submissions that clearly signalled the residential areas within the central Isthmus, including Parnell in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Liam Winter	I therefore recommend that the Council considers market demand and viability more explicitly in settling residential zones, rather than simply downzoning where there is opposition to intensification and upzoning where communities are less vocal. Given that intensification is more viable with higher land values, I suggest a return to more aggressive upzoning in the central isthmus and coastal areas to increase housing supply in these high demand areas.	Seeks a more aggressive upzoning in the central isthmus and coastal area to increase housing supply in these high-demand areas.
Helen Geary	Parts of Gladstone Rd parallel to Taurarua Tce are zoned THAB, backing straight on to a single house zone. It is inappropriate and hugely compromising to have heritage housing in this position, in one of the most important heritage residential areas in the city. I see that: this part of Gladstone Rd be rezoned	Rezone parts of Gladstone Road parallel to Tauarua Terrace, Parnell, from Terrace Housing and Apartment Building zone to Mixed Urban zone [inferred to mean Mixed Housing Urban zone] to protect the values of the heritage residential area.

	mixed urban.	
Ho Yin Anthony Leung	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the Central Isthmus to Mixed Housing or Terrace Housing and Apartment Buildings.
Harsha Ravichandran	The Central Isthmus should be upzoned to mixed housing urban or to THAB.	Rezone the central isthmus to Mixed Housing Urban or to Terrace Housing and Apartment Building zone

[223] As with Glendowie, the nature of the change is evidently proportionate and considerate of the local context, where relatively discrete changes have been made. While some parts of Judges Bay were upzoned following the IHP's recommendations, other parts were downzoned. Moreover, considering the level of intensification that might normally be anticipated in an inner city suburb, a mixture of SHZ, MHS and MHU is relatively deferential to the area's special character and heritage qualities. I have no reason to suspect that the IHP did not have a sufficient basis to make an evaluative judgment as to the nexus of generalised submissions and the upzoning of Judges Bay.

Wallingford St, Grey Lynn

[224] Wallingford Street is representative of a residential cul-de-sac containing 18 residential properties. This street is at the periphery of a significant area of older and mainly special character housing, an area that was proposed to be zoned SHZ when the PAUP was notified.

[225] The majority of the residential buildings are pre-1944 "special character" houses, and the pattern and style of residential development in the adjoining neighbourhood is low-density and mainly older homes, many subject to the Special Character overlay. The identified street is not serviced by a frequent transport network. The closest bus routes are along Richmond Road to the north and Williamson Avenue to the south, each within reasonable proximity of the street. Immediately to the west of Wallingford Street is Grey Lynn Park which consists of several large recreational sports fields and tree-lined park walking tracks.

[226] Maps prepared by the Council in December 2015 showing proposed upzoning of some 29,000 residential properties including the identified properties in the Wallingford

Street test case area were uploaded to the IHP's website on 26 January 2016. The Council subsequently withdrew the rezoning shown on the 26 January 2016 maps in February. Following the hearings of submissions on Topic 081, the Council produced residential zoning maps which set out its position on proposed rezoning as part of its Closing Remarks on the topic. The maps showed retention of the SHZ in the test case area.

[227] However, in the decisions version of the PAUP, the majority of the properties have been rezoned MHU.

Assessment

[228] The general submissions identified by the IHP as illustrated in the HNZC C series Maps (Point Chevalier - GIS-4215672-42b) provide jurisdictional scope for upzoning in Grey Lynn for the reasons already expressed above at [166] – [168].

[229] As to the second issue of fairness, the reasoning at [222]-[223] applies equally here, and moreover multiple submitters sought upzoning of Grey Lynn. The table below sets out the further submissions that provided scope to upzone Wallingford St, Grey Lynn in a manner that was not specified in the notified PAUP.

Submitter	**Submission**	**Summary of the submission**
Andrew Rice	Please, more intensive housing in the inner city met areas – Ponsonby, Grey Lynn, St Mary's Bay for example. The plan is too soft on high build. Why? It seems a bit of a cop out. If young people are ever to have a chance to buy some place to live within Auckland's inner city then clearly the plan needs more intensification. Allow more high builds would be my main submission.	Further intensify inner city areas, particularly Grey Lynn and St Mary's Bay
Abhishek Reddy	Supported: – Areas of Mixed Use and centres in Newton, Grafton Against:	Rezone tracts of Grey Lynn to provide more of the Mixed Use and Terrace Housing and Apartment Buildings zones.

	– Excessive Single House zoning from Grey Lynn through to Grafton Suggested: More Mixed Use and THAB in places such as: – Around the future Newton rail station, near St Benedicts St – Much of Grafton West, around Seafield View Rd and Park Rd – Tracts of Grey Lynn	
Patrick Fontein	Upzone Auckland's City Fringe. Especially the areas around the new City Rail Loop Stations. Review all areas within 3-5km of CBD to Mixed Use, greater height.	Recognise the need to up zone the city fringe especially around the City Rail Loop stations and introduce more Mixed Use and greater height within 3-5km of the CBD.

[230] While individual properties in Wallingford St are not specified, a reasonably diligent person genuinely interested in preserving residential amenity in Grey Lynn would have been well aware of the potential for upzoning in one of Auckland's most centrally located suburbs.

Howick

[231] The HRRA made a submission on the notified PAUP and addressed the zoning of land at Howick. The Council accepted a recommendation of the IHP which resulted in modified zonings of certain land at Howick being included in the PAUP. The HRRA has appealed to the High Court challenging the zoning of 65 properties not sought by any submitter or identified by the IHP as out of scope.

[232] The properties subject to the appeal are located along Bleakhouse Road, Ridge Road, Mellons Bay Road, Picton Street, Park Hill Road and Glenfern Road in Howick. In the notified version of the PAUP, the properties were zoned SHZ. In the decisions version of the AUP, the properties were zoned MHU.

Assessment

[233] The IHP relied on general submissions to establish scope. Except for Ridge Road, the HNZC Maps (Half Moon Bay - GIS-4215672-42b) do not appear to correspond to the Howick properties.

[234] Mr Savage for HRRA reviewed the submissions identified by the "in scope" parties as conferring jurisdiction to show that the 65 properties were not expressly captured by them.[173] He also stressed that HRRA was an active and diligent participant in the publically notified process, positively seeking relief that preserved the residential amenity of Howick, including the 65 properties. At no stage was it alerted to the fact that the 65 properties might be subject to the recommended changes. Mr Savage supported this submission by referring to Council reportage on Topic 080 describing the 65 properties as "out of scope". I surmise had HRRA been alerted to that prospect it would have provided tailored submissions to show why these properties ought not to be upzoned.

[235] With respect to the care taken by Mr Savage, the breadth of the relief sought by the full collective of general submissions conferred jurisdictional scope to make zoning changes in Howick. He skilfully emphasised specific aspects of the submissions in order to show lack of relevant scope. For example Mr Savage noted that the HNZC submissions were prefaced by the words:

> "For sites where Housing New Zealand seeks that they be rezoned to Mixed Housing Urban..."

[236] Reference is also made to Tables produced by HNZC which state:

> Housing New Zealand requests rezoning on the identified sites for the following reasons…

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[173] Reference is made to all HNZC submissions, named 839-17 and -18; Adam Weller 3167-8; Habitat for Humanity Greater Auckland Limited 3600-10; Matthew B Avery 5938-5 and -6; Crainleigh 7491-1; Liam Winter 5002; John Coady 7130-2; Cooper and Associates 6042; Auckland Property Investors Association 8969-2; David Madsen 7098-1, -3, -7; Ockham 6099; Mahi Properties 5476. See also the table at [238] and Appendix B.

[237] Mr Savage then makes the point that the 65 properties are not specifically identified.

[238] But this submission belies the full import of the HNZC submission, which sought a coherent zoning framework to accommodate the upzoning of its sites. Other general submissions are dissected by Mr Savage in a similar way to emphasise that they were focused on other areas and not Howick. But their collective and individual thrust was plain – upzoning of residential land to accommodate urban intensification throughout the Auckland region. Some of those submissions are very broadly framed, and by themselves too generic to reasonably signal changes at specific locations. Nevertheless, in reality, the generalised submissions squarely raised the issue of residential intensification, including in Howick. A sample of these types of submissions is noted in the table below (**emphasis added**).

Submitter	**Submission**	**Summary of the submission**
Matthew B Avery	Prioritise High Density Housing to neighbourhoods close to high amenity areas. Part 1, Chapter B, 2.1 Policy 2 states: "Enable higher residential densities and the efficient use of land in neighbourhoods: c. **In close proximity to existing proposed large open spaces**, community facilities, education and healthcare facilities". (The council has FAILED to apply this policy. There are many instances where this zoning has not been applied to land clearly within walking distance of large open spaces. The Council has failed to apply this zoning in particular to the Auckland central suburbs, eg - Grey Lynn, Mount Eden, and to **all coastal amenities**. Central Auckland **and coastal suburbs** must participate in the intensification of Auckland also)	Include coastal properties in areas of intensification, especially areas that are near transport routes (including ferries) and metropolitan and town centres.
Cranleigh	The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity" areas, has not been sufficiently leveraged. If we are to grow the attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity - **areas such as parks and coastlines** are an obvious example of this principle. The PAUP does not deliver on this.	Rezone to provide for more density around areas where there is a high level of amenity, **such as parks and coastlines**, not just around town centres and major transport corridors
Paul Bridget	Furthermore, greater intensity (taller buildings)	Focus greater intensity in high

	should be focussed on existing high amenity parts of the city where high quality intensive developments are likely to be financially viable and people will be prepared to live in apartment style dwellings (eg **Eastern suburb** and central suburb ridgelines, north facing hill slopes and **coastal edges**).	amenity parts of the city, e.g. **Eastern Suburbs**, Central Suburb rigdelines, North facing hill slopes and **coastal edges**.
David Madsen	Housing within 250m from the boundary of the commercial town centres should have the ability to be intensified to a greater level than currently indicated e.g. terraced, apartment type dwellings or mixed zone (commercial/residential).	**Increase intensification within 250m of Town Centres**. Rezone sites further away than this as Single House or Mixed Housing [not specified] zones
John Coady	If good urban design practice is followed, the density of sites adjacent to park land should be more intensive, rather than less intensive, so that an increased number of residents can take advantage of the amenity living next to an open space provides", "A more thorough analysis of residential land adjacent to open space should be undertaken to ensure that lots adjacent to open space (perhaps with bushland being the exception, such as the Centennial Park example cited above) are zoned "mixed housing suburban" or "mixed housing urban" (depending on context), rather than "single housing"" and "Further analyse the potential for other **residential sites adjacent to parkland** to be zoned as mixed housing rather than single housing and rezone as appropriate.	Consider zoning residential sites adjacent to parkland to a Mixed Housing zone rather than a Single House zone.
Adam Weller	I really like the creation of 2 mixed housing zones: urban and suburban. My concern is over the use of Suburban compared to Urban in the Unitary Plan. There needs to be a lot more Mixed Housing Urban or even Terrace Housing around key transport areas, especially in the centre of Auckland…**Howick is one of the worse areas with such a large single house zone, very short sighted and not what Auckland needs at all.**	Provide additional Mixed Housing Urban or Terrace Housing and Apartment Buildings zoning around key transport areas, especially in the centre of Auckland and reduce the amount of Mixed Housing Suburban Zone.

[239] Furthermore, as noted by Mr Somerville, there are numerous further submissions by HRRA opposing the general submissions and supporting submissions seeking among other things, heritage status for Old Howick and pre-1944. Plainly the prospect of change arising from generalised submissions was known to them and presumably residents of Howick genuinely interested in the preservation of local character and amenity.

[240] The central remaining issue is whether the submissions relied upon by the IHP reasonably and fairly raised the prospect of the recommended changes insofar as

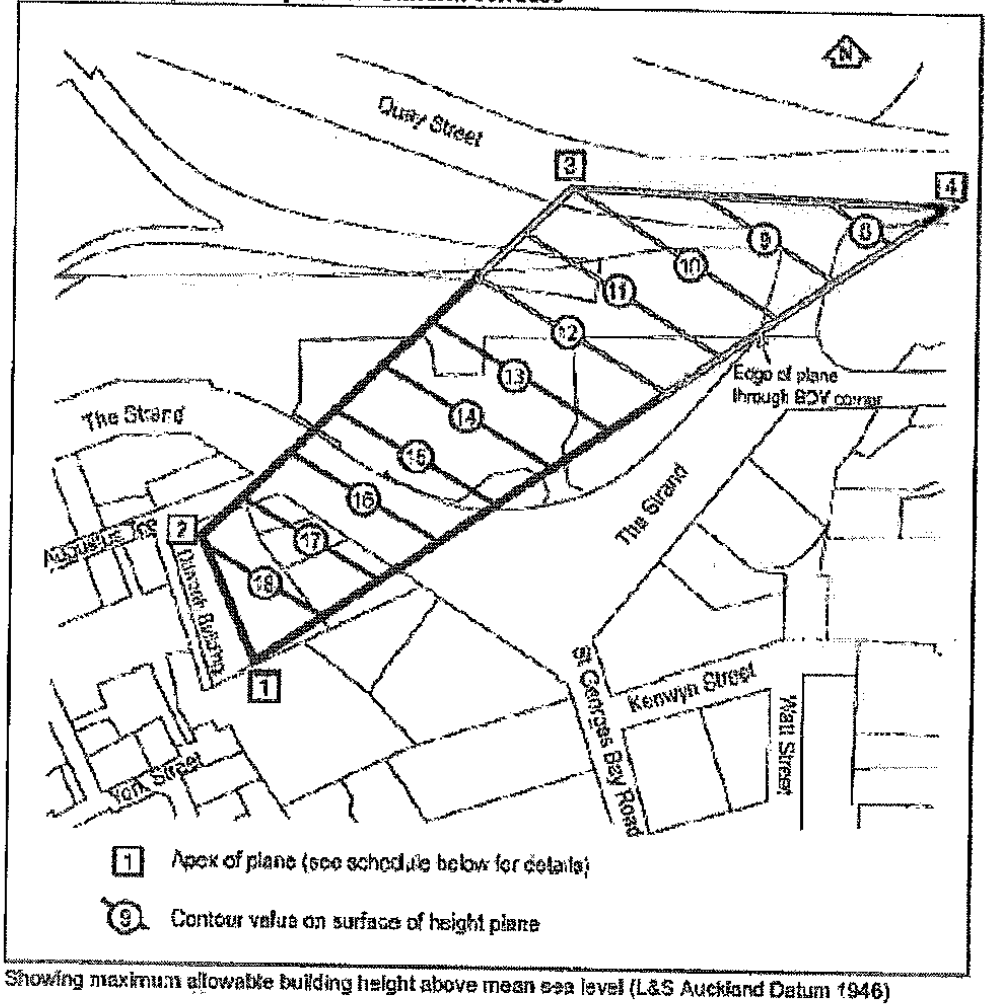
concerns the 65 affected Howick properties. For the reason just mentioned the general submissions identified by the IHP (and others) fairly raised the issues that HRRA are now seeking to re-litigate though specifically in relation to the 65 identified properties. I see no broader unfairness by upholding the IHP decision on scope as it affects those properties.

The Viewshaft on the Strand

[241] The SHL proceedings have been brought by way of judicial review and relate to the recommendation of the IHP and the decision of the Council in relation to the Dilworth terraces view protection plane (Viewshaft)**.** The IHP's Report on hearing topics 050-054 - City Centre and business zones (July 2016) recommended that the "origin point of the viewshaft be relocated on The Strand, as shown in the revised viewshaft diagram accompanying the text of the Unitary Plan." The Council accepted the IHP's recommendation.

[242] The Dilworth Terraces are a row of heritage houses at the top of the escarpment above The Strand. The Notified Plan proposed the inclusion of the Dilworth Terraces View Protection Plan (Proposed Viewshaft). The Proposed Viewshaft is a development control located in 1.4.4.6 of the Notified Plan. The purpose of the Proposed Viewshaft is to manage the scale of development to protect the view of the Dilworth Terraces from the eastern end of Quay Street. The effect of the Proposed Viewshaft is that the height of a building, including any structure on the roof of a building, subject to the Proposed Viewshaft must not exceed the height limits specified on Figure 4: View protection plan for Dilworth Terraces. The Proposed Viewshaft contains Figure 4:

Figure 4: View protection plane for Dilworth Terraces



Showing maximum allowable building height above mean sea level (L&S Auckland Datum 1946)

[243] SHL's property at 117-133 The Strand, Parnell (Property) was not affected by the Proposed Viewshaft. In the Notified Plan, the Property was zoned Light Industry, which imposes a 20 metre height limit on buildings within that zone. Primary submissions on the Proposed Viewshaft were made by Ngati Whatua Whai Rewa Ltd (submission 872); New Zealand Historic Places Trust (Heritage New Zealand Pouhere Taonga) (submission 371); The Strand Bodies Corporate (submission 1615); Dilworth Body Corporate (submission 6152); and Charles R Goldie (submission 6496).

[244] The IHP recommended that the Property be rezoned to Business Mixed Use, which imposes a height limit of 18 metres. The IHP also recommended relocating the

Proposed Viewshaft to The Strand. The IHP did not identify the relocation as being beyond the scope of submissions made in respect of Topic 050.

[245] The Council accepted the recommendation that the Proposed Viewshaft be relocated to The Strand (Decisions Viewshaft). The Property is affected by the Decisions Viewshaft. The Decisions Viewshaft imposes a lower height limit than in the underlying zone in the northern portion of the Property, ranging from 12 metres on the Property's frontage to The Strand to approximately 17 metres on the Property's north-western boundary. Resource consent as a non-complying activity is required to infringe the height limit imposed by the Decisions Viewshaft.

SHL's claim

[246] The first cause of action in the SHL proceedings is that the IHP applied the wrong legal test. SHL claims that:

> [44] In making its recommendation regarding the Proposed Viewshaft, the [Panel] acted pursuant to an error of law in breach of section 144 of the [Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA)].

[247] SHL says that:

(a) the only submissions relevant to the Viewshaft did not seek the relocation of the origin of the Viewshaft "in the manner" of the IHP's recommendation;

(b) as a consequence of applying the incorrect legal test (or misapplying the correct legal test) the IHP made a recommendation that was beyond scope and failed to identify it as such, and therefore:

(c) the IHP made an error of law.

[248] SHL identifies parts of Whai Rawa's submission that relate to the Viewshaft. In particular:

> That changes be made to the PAUP ... and in particular make provision for ... an amendment to the area affected by the Dilworth Terraces Special Height Plane. (submission point 3)
>
> The Dilworth Terraces View Protection Plane (1.4.4.6 and any associated assessment criteria) are reviewed and further investigated in accordance with Council's report and any resulting amendments to the relevant provisions, as a result of the further investigation be implemented. It is recommended that views from the Strand potentially be explored. (Submission point 37.)

[249] The scope issue was addressed at the Topic 050 hearing, in particular in the legal submissions for the Council, Whai Rawa, and the Dilworth Terraces Body Corporate:

(a) the Council's and Whai Rawa's position was that the option of the Viewshaft being moved to The Strand was reasonably and fairly raised in Whai Rawa's submission; but

(b) Dilworth Terraces Body Corporate's position was that the amendments to the Viewshaft proposed by Whai Rawa were beyond the jurisdiction for the IHP to consider because the submission was vague and uncertain and "sought no more than a review of information and the implementation of possible outcomes of that review."

Argument

[250] The Council and Whai Rawa contend that:

(a) The Whai Rawa submission and the SDR sufficiently signalled the potential for the Viewshaft to be shifted to affect the Strand site, with specific reference to:

> Review and further investigate development control 4.6 'Dilworth Terraces View Protection Plane' (and any associated assessment criteria) in accordance with the Council's report and implement any resulting amendments to the relevant provisions. Also explore views from The Strand. Refer to details in submission at page 14/25 of volume 4.

(b) SHL was not diligent about protecting its interests, having made submissions on its property only;

(c) The Viewshaft only partially affects the development of the SHL properties;

(d) Changes of this nature were to be expected, given among other things the prospect of zone changes;

(e) Other submitters actively engaged on the merits of the Viewshaft and Dilworth Terraces Body Corporate, and opposed the Whai Rawa relief sought on jurisdictional grounds (and so demonstrating that affected persons had sufficient notice of the submission); and

(f) If the IHP has erred, the matter should be referred back to the IHP for reconsideration.

[251] SHL contends:

(a) The Whai Rawa submission does not expressly seek relief in the form of removing the Viewshaft from its land;

(b) The Whai Rawa submission was categorised by the theme "City centre zone" while the SHL site was zoned Light Industry and sought rezoning to Mix Use, so had no interest in searching the SDR as it relates to City Centre zone;

(c) At the hearing Whai Rawa proposed three solutions, none of which were addressed in the submission;

(d) The SHL property was the only additional property affected by the by the relocation;

(e) The Council has effectively shifted the burden of the Viewshaft from one owner to another without affording the affected owner an opportunity to be heard; and

(f) To be a logical consequence of a submission, the submission must be clear about the prospect for the recommended change – but there is no specificity in the submission as to what is meant by "amend".

Assessment

[252] The Whai Rawa submission literally seeks that "views from the Strand potentially be explored" and records that Whai Rawa "is keen to work with the Council to resolve this issue and amend the plane accordingly." It therefore provides jurisdictional scope to address identification of views from the Strand and to amend the Viewshaft.

[253] But there is no clear suggestion in the submission that the Viewshaft will be relocated to the SHL site. The SDR also does not provide a clear signal that the Viewshaft may be shifted to the SHL site. If anything, the SDR notations relied upon by the Council suggests a relatively confined scope for change insofar as it summarises the relief as "refine the location and extent of the Dilworth Terraces Height Plane as it applies to the Quay Park Precinct, which is not obviously relevant to SHL, and then the other submission point somewhat vaguely suggests '[r]eview and investigate development control 4.6 "Dilworth Terraces View Protection Plane"… in accordance with the Council's report.*"* It makes no mention of an alternate Viewshaft affecting SHL's land.

[254] Other parties participated in the Viewshaft hearings as primary submitters. But their participation does not suggest that with reasonable diligence SHL would have appreciated the potential affect of the Whai Rawa submission on its property. These primary submitters sought that the proposed Viewshaft be retained in its existing form or deleted. There was nothing obvious in the background reportage or the Whai Rawa submission to reasonably signal to SHL the prospect that the Viewshaft might move to its properties.

[255] It is also relevant that the relocation of the Viewshaft is disenabling of SHL while enabling of Whai Rawa. It reduces SHL's capacity to develop its site while increasing the capacity to develop Whai Rawa's site. I agree with SHL that submissions seeking greater enablement for the submitter at the direct expense of another landowner

should be framed with sufficient specificity to secure the involvement of the affected landowner.

[256] Accordingly, unlike the seachange that was foreshadowed in relation to residential zoning generally, the issues raised by the Whai Rawa submissions were discrete, yet had the acute disenabling effect of relocating the Viewshaft to cover the SHL site. Greater specificity was required in order to fairly put SHL on sufficient notice of the potential effect of the submission on it. It was neither reasonable nor fair to amend the Viewshaft's location to directly affect the SHL site without at least affording SHL an opportunity to be heard.

55 Takanini School Rd

[257] The property at 55 Takanini School Road, Takanini (the Site) is located on the eastern side of Takanini School Road between Popes Road to the north and Manuroa Road to the south. The Site's main frontage is along Takanini School Road. The northern portion of the Site adjoins 3 Popes Road to the north and abuts the southern portion of 296 Porchester Road (WGL's land) to the east. Both the adjoining properties are zoned Light Industry.

[258] The northern portion of the Site was split-zoned under the Auckland Council District Plan Papakura Section as Industrial 1 in the northern portion and Residential 8 in the southern portion.

[259] The Notified PAUP retained the split-zoning of the Site. This reflected the mix of surrounding land use including light industry to the north and predominately residential to the south.

[260] The Site was subject to one submission, that of the land owner Takanini Central Limited ("TCL"). The submission provided:

> i) Rezoning of the southern portion of the site to Mixed Housing Suburban under the PAUP to ensure efficient use of land in accordance with the Residential 8 zoning of the site, and Part 2, Section 7(b) of the Act;
>
> ii) Inclusion of rules equivalent to the Takanini Structure Plan Area 6 for the Residential 8 zone for subdivision and residential development as

stand-alone rules for the southern portion of the site under the PAUP within the Takanini Sub-Precinct A area; and

iii) Inclusion of the rules equivalent to the operative Industrial 1 zone for retail activities, studio warehousing, offices and residential development as stand-alone rules for the site under the PAUP within the Takanini Sub-Precinct A area;

iv) And specifically new rules that have the following effect:

a. Retail activities ancillary to, and part of a permitted activity on the same site are a Controlled Activity provided that retail activities do not occupy more than 30% of the gross floor area of the industry and retail premises combined, or 200 square metres, whichever is the lesser;

b. Studio warehousing development is a Controlled Activity where it complies with development controls such as shape factor, building design and lot layout;

c. Office activities ancillary to an industrial activity on the site and the office GFA exceeds 30% of all buildings on the site or 100m2 is provided as a Restricted Discretionary Activity;

d. Retail activities ancillary to, and part of a permitted activity on the same site that occupy more than 30% of the gross floor area of the industry and retail premises is a Discretionary Activity;

e. Office activities ancillary to an industrial activity that exceeds 30% of all buildings on site or 100m2 is a Discretionary Activity;

f. Residential activities complying with internal noise standards, is a Discretionary Activity.

[261] The TCL submission requested that the dual zoning as notified be retained over the Site, but requested that the southern part of the property be upzoned from SHZ to MHS. The zoning as notified of that part of the property with a common boundary with the WGL land was Light Industrial (the same zoning as the WGL property) and no change was requested to that zoning.

[262] At the hearing a planning consultant giving evidence on behalf of TCL asked that the whole of the site be zoned residential and the IHP in its Recommendation Report agreed with that request, removing the Light Industrial zone. The result creates a direct interface between an industrial and a residential zone to the detriment of the WGL property in respect of permitted uses, development controls and performance standards.

[263] The Council adopted without alteration the recommendation of the IHP, purportedly on the submission by TCL. This uplifted the Light Industry zone on the northern portion of the TCL site. Although this was not requested by the TCL submission, the IHP recommendation did not state that the zoning decision was made outside the scope of any submission.

Submissions identified by IHP

[264] The IHP identified the TCL submission as providing jurisdiction.

Preliminary issue

[265] The Council contended that the WCL appeal was never identified in any minutes or correspondence as suitable for resolution as a test case on scope. It also says that it is not suitable for determining preliminary scope issues, though the reason for this is not stated.

[266] On the merits, the Council submits that the upzoning of the entire TCL site is an example of the application by the IHP making consequential amendments to the PAUP based on the combination of generalised submissions and site specific upzoning. It is noted that two area by area submissions confer scope (HNZC 839-8217 and Suzanne and Alan Norcott 6214-27). It is also noted that WCL was a submitter on the TCL submission but chose not to attend the hearing and conversely was an active participant on Topic 081. The Council was supported in its submission by Equinox (a mortgagee in possession of the TCL site).

[267] Mr Brabant for WGL maintains that:

(a) A decision on scope will resolve the WGL appeal;

(b) TCL sought to retain Light Industry zoning for the northern portion of the relevant site;

(c) The other two submitters did not seek upzoning of the TCL site to Mixed Use;

(d) WGL was lead to believe that TCL was only seeking to upzone the southern portion of its site and that this was confirmed in TCL's expert's primary evidence.

(e) The prospect of upzoning the TCL site was only raised in TCL's expert's supplementary evidence at the hearing date;

(f) The final zoning map produced by the Council did not refer to the upzoning of the northern portion of the site; and

(g) The generic submissions relied upon by the IHP and the Council to establish scope are inapposite as they relate to upzoning of residential zones, not industrial zones.

Assessment

[268] I agree with Mr Brabant that the generic submissions relied upon by the IHP, such as the HNZC submissions addressing residential zones, do not obviously signal the potential for residential upzoning in locations such as the TCL site which were notified as light industrial. I also consider that Mr Brabant makes a cogent point that WCL had no reason to thoroughly review submissions seeking upzoning of residential sites, but the TCL submission does raise the prospect of Mixed Use in an adjacent location. This would appear to confer jurisdictional scope on the basis that rezoning the whole site, instead of only part of it, is a reasonably foreseeable consequence of an integrated planning approach. But, the matters raised by Mr Brabant (though largely in reply[174]) bring into play broader considerations of fairness, and in particular whether in the peculiar circumstances of the case, being the limited basis upon which TCL sought to upzone the northern portion of its site, together with the TCL expert's primary expert evidence and position adopted by the Council planning team, WGL was effectively misled into assuming that the northern portion of the site was never at risk of upzoning to MHU. While not as stark as the SHL case, the disenabling effect of the recommended change, combined with the TCL submission and primary evidence raises natural justice considerations.

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[174] In fairness to Mr Brabant and WGL several of the matters raised by the Council were not foreshadowed to Mr Brabant in advance of the presentation of the case for WGL.

[269] While, as counsel submits, this is not a 'scope' case, I am nevertheless satisfied that it was not fair and reasonable in the specific circumstances of this test case to treat the extension of the Mixed Use Zoning to the northern portion of the TCL site as appropriate without affording WCL an opportunity to submit on the consequences of that upzoning for its site.

The Albany North Landowners' Group site

[270] ANLG pleads that the Council erred in law by zoning the ANLG site Future Urban Zone (FUZ) where:

(a) this was not sought in any submission; and

(b) the requirement under s 144(8) of the Act, for the Panel to identify any recommendations that are beyond the scope of submissions, was not met.

[271] In comparison to other test cases where the spatial application of zones has informed the zoning applied to individual sites, the ANLG case relates to the zoning of a discrete block of land, where the zoning of adjacent land or a zoning pattern has not determined the zoning applied.

[272] ANLG's Notice of Appeal pleads:

(a) The Proposed Plan as notified proposed that ANLG site be zoned a mix of Large Lot Residential and Countryside Living.

(b) The submission by ANLG sought that the ANLG site be rezoned either:

  (i) A mix of Mixed Housing Suburban and Single House Zones;

  (ii) Or, if that zoning was not successful, FUZ.

(c) By legal submissions dated 29 April 2016, ANLG formally withdrew its alternative relief seeking FUZ. This was confirmed by letter dated 2 May 2016.

(d) No other submissions sought FUZ for the ANLG site or specifically addressed zoning of the ANLG site.

(e) The ANLG site is the only land in this location to be zoned FUZ. Accordingly, the zoning is not consequential to zoning of adjacent land or required in order to achieve a coherent zoning pattern.

(f) There is no general submission or further submission which would provide scope for the FUZ zoning of the ANLG site.

[273] The submission, which was later withdrawn, provided:

> The Group seeks the following changes to the PUP:
>
> …
>
> (c) Change the zoning of the land inside the new RUB to the Future Urban Zone.
>
> The reasons for the Group's requested changes are set out in parts 4.2 - 4.5 below. The reasons are supported by the following technical reports:
>
> - Infrastructure Assessment Report, dated May 2013, and addendum dated February 2014, prepared by Terra Consultants, attached, marked B;
> - Transport assessment report, dated 31 May 2013, prepared by Traffic Design Group, attached, marked C;
> - Landscape and Visual Assessment, dated May 2013, prepared by LA4 Landscape Architects, attached, marked D; and
> - Urban Design Assessment, dated May 2013, prepared by Urbanismplus, attached, marked E;
> - Stormwater assessment, dated February 2014, prepared by Stormwater Solutions, attached, marked F.

Argument

[274] Ms Baker-Galloway for ANLG submits, in short, that the imposition of a "FUZ" zoning was not reasonably and fairly raised by any submission, given that ANLG had withdrawn its submission seeking that relief. Nor, she submits, was it necessary to achieve vertical or horizontal integration. The central complaint therefore is that the IHP found scope to impose a FUZ zoning on the ANLG's land simply to give effect to the RPS when there was no jurisdiction to do so. I also understand that the recommended changes in the final form are more disenabling that the PAUP as notified.

[275] The Council responded that the withdrawal of the ANGL submission did not remove scope, because ANGL sought to extend the RUB to its site, which if granted, required the IHP to assess the most appropriate form of complementary zoning for the site. The selection of FUZ, in preference to declining the relief altogether or imposing immediate upzoning to Mixed Use, was an evaluative decision available to the IHP. The

Council also identified other submissions which, it says, provided scope for FUZ, including the following submission:

(a) Robert Harpur (957-3): "Cut back on the greenfields developments planning in the RUBs in the south, north west and north of Auckland";

(b) Harold Waite (939-7): "Cut back the areas zoned for Mixed Use Housing and terrace housing and have a staged release for development"; and

(c) Kevin Birch (6253-1): "Reconsider the FUZ and rural areas rezoned Residential and apply appropriate zonings which take into account infrastructural constraints."

Assessment

[276] I agree with the Council. ANGL, by seeking to extend the RUB to its location, must have known that the IHP would be required to ensure that the new zoning applicable to the land within the RUB was the most appropriate form of land use for the site. In this particular case, the IHP identified FUZ as the most appropriate zoning for that part of the site within the RUB. It is not for this Court to test the merits of that assessment. It is a fairly clear example of providing relief that is somewhere between that sought by the submitter and the notified plan.

[277] Significantly also, ANGL, by seeking FUZ, signalled to the world that this might be a potential outcome and so there can be no challenge based on orthodox scope grounds. Indeed in seeking FUZ as an alternative relief, ANGL must have, at least at the time of making the submission, understood the FUZ zoning to be a suitable option. This then aligns with the other submissions noted by the Council seeking a measure of control in relation to land incorporated within an extended RUB.

[278] I also understand that ANGL had the full opportunity to challenge the merits of the FUZ zoning at the hearing. If that is the case, then the substantive basis for the appeal is weak. If I were to reverse the IHP decision on scope grounds that would likely mean that the ANGL would need to persuade the Environment Court that it was "unduly

prejudiced" by the imposition of the FUZ. [175] That prospect must be small. While that cannot by itself provide a basis for disallowing an appeal based on lack of scope, given the clear natural justice purpose of the scope provisions, the error in this particular case, if any, lacks materiality.

Man O'War Farm

[279] Man O' War pleads that the Council erred in law by including an amended definition of "Land which may be subject to coastal hazards" in the AUP which was not sought in any submissions, without the requirements of s 144(8) of the Act being met (by the IHP). Paragraph 14 of Man O' War's amended Notice of Appeal pleads as follows:

> The grounds of this Part (C) of the appeal are as follows:
>
> (a) when notified, the Unitary Plan set rules for activities (including buildings and structures) on land which may be subject to natural hazards (Part 4.11 of the Unitary Plan as notified).
>
> (b) The appellant opposed these provisions with reference to the phrase "land which may be subject to natural hazards" as applied under Policy 1 of section CS.12 of the Unitary Plan as notified, and as then defined under the Unitary Plan.
>
> (c) The Hearings Panel recommended and Auckland Council adopted revised definitions of such areas including a new definition of "Land which may be subject to coastal hazards" as including any land which may be subject to erosion over at least a 100 year timeframe. No submissions to the Unitary Plan requested such a revised definition.
>
> (d) A reader of the Unitary Plan will not be able to determine including with reference to the Unitary Plan maps, whether land in coastal areas falls within that definition, and as such the definition and the provisions of the Unitary Plan triggered by the definition are void for uncertainty and ultra vires.

[280] By way of relief, Man O'War seeks that the revised definition be deleted, and/or a declaration whereby the substantive issue regarding the provisions of the Unitary Plan triggered by the revised definition could be addressed by the Environment Court.

[281] The notified definition of "Land which may be subject to natural hazards" was:

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[175] Local Government (Auckland Transitional Provisions) Act 2010, s 156(3)(c).

Any land:

- Within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18-degrees)
- On any slope with an angle greater than or equal to 1 in 2 (26-degrees)
- At an elevation less than 3m above MHWS if the activity is within 20m of MHWS
- Any natural hazard area identified in a council hazard register/database or GIS viewer.

[282] Policy 1 (Section C5.12 of the PAUP as notified) stated:

1. Classify land that may be subject to natural hazards as being:
    a. within a horizontal distance of 20m from the top of any cliff with a slope angle steeper than 1 in 3 (18 degrees)
    b. on any slope with an angle greater than or equal to 1 in 2 (26 degrees)
    c. at an elevation less than 3m above MHWS if the activity is within 20m of MHWS
    d. any natural hazard area identified in the councils' natural hazard register, database, GIS viewer or commissioned natural hazard study.

[283] A number of submissions made on the definition were submitted to the Court, however, it became clear during the hearing that the relevant submission for the purposes of scope was that of Bernd Gundermann, which sought the following relief:

> Recognise that development in coastal areas needs to be considered with a significantly larger time frame. Planning for coastal areas must exceed 100 years.

[284] The IHP's recommended definition, which was accepted by the Council was:

Any land which may be subject to erosion over at least a 100 year time frame:

(a) within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees); or

(b) at an elevation less than 7m above mean high water springs if the activity is within:

(i) Inner Harbours and Inner Hauraki Gulf: 40m of mean high water springs; or

(ii) Open west, outer and Mid Hauraki Gulf: 50m of mean high water springs.

Any land identified as being subject to one per cent annual exceedance probability (AEP) coastal storm inundation (CSI).

[285] The specific scope issue raised by this test case is whether the following aspect of the IHP's recommended amended definition of "land which may be subject to coastal hazards":

... any land which may be subject to erosion over at least a 100 year timeframe

was reasonably and fairly raised in the course of submissions.

Argument

[286] Mr Williams, for Man O War, submitted:

(a) Relevant submissions sought greater certainty and the IHP recommended the opposite by incorporating an indefinite aspect into the criteria for land use requiring resource consent - that is "land which may be subject to erosion over at least a 100 year timeframe";

(b) The IHP recommendation could not have been reasonably anticipated by an affected land owner and therefore was out of scope, especially given the degree of uncertainty arising from the indefinite aspect;

(c) While there were submissions that sought that the Unitary Plan show, identify or make "quantifiable" areas affected by coastal erosion, the recommended definition does none of these things;

(d) Prejudice arises to all of the coastal properties falling within the expanded areas now referenced in the expanded definition;

(e) Submitters could have reasonably anticipated that a longer term management approach might be applied to planning for coastal hazards, extending over 100 years, and accounting for climate change, but they

could not have anticipated being left uncertain as to whether they were caught by the coastal hazard provision requiring resource consent;

(f) The hearings process, including mediations and expert conferral about the definition of coastal hazards did not expand the scope of the submissions – citing *Waipa*; and

(g) The substantive issue raised by Part C of the Man O' War appeal is closely related – namely the indefinite aspect means the relevant provision is ultra-vires for lack of certainty.

[287] The Council responded:

(a) The changes at issue occurred as part of a broader restructure of the natural hazards provisions that was developed through two comprehensive rounds of mediations and hearings;

(b) The amended definition was within the scope of submissions addressed to the defined phrase "land which may be subject to natural hazards" as "coastal hazards" is a subset of the more general "natural hazards";[176]

(c) The amendment is consistent with Policy 24 of the New Zealand Coastal Policy Statement (NZCPS) which notes that "Hazards risks, over at least 100 years, are to be assessed…";[177]

(d) The specific amendment is a reasonably foreseeable consequence of the submissions, including the Gundermann submission noted at [283], particularly given the requirement to achieve consistency with the NZCPS; and

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[176] Referring to submissions, for example, by Tonkin and Taylor seeking the following relief: "re examine the
definition of "land that may be subject to natural hazards".

[177] Department of Conservation *New Zealand Coastal Policy Statement 2010* (3 December 2010).

(e) The amended definition is not indefinite – it has specific parameters including a horizontal distance of 20m landward of any coastal cliff with a slope angle steeper than 1 in 3 (18 degrees).

Assessment

[288] I do not agree with the basic premise underlying Man O' War's scope challenge. The Gundermann submission plainly brought into frame the prospect of changes to the coastal hazard provisions to enable assessment of coastal erosion "over at least a 100 year timeframe". When the broader submissions seeking definitional change are then also taken into account, a land owner of coastal property should have appreciated that one method to achieve the Gundermann relief could be via definitional change and the qualifying criteria for applications for resource consent. When that is overlaid with Policies 24 and 25 of the NZCPS, and the statutory requirement to give effect to it in regional and district level policy, there can be no serious complaint when the consenting criteria bring in 'an over 100 year' timeframe for assessment.

[289] It is unnecessary for me to resolve whether the hearings process cured any underlying lack of scope.[178] But what the hearing and mediation process (as described by the Council[179]) reveals is that the definitional issue was thoroughly ventilated. This supports the conclusion that the submissions put that issue squarely on the table. It also mitigates the prospect of substantive unfairness, insofar as it appears both sides of the argument were considered.

[290] As to the ultra vires issue, this test case procedure was not triggered to address that issue. I therefore do not propose to resolve it, save to encourage the parties to think about the workability of an indefinite threshold as a criterion for resource consent.

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178 As noted by Mr Williams, Wylie J in *General Distributors v Waipa District Council*, above n 91, deprecated reliance of the hearings process to expand the scope of the Plan change as notified. The relevance of that dicta to the present case is contestable. That case concerned whether an explanatory note that was not subject to the Plan Change application could be changed. Wylie J found it could not and that evidence given about it could not expand the scope of the plan change.

179 I was not taken to a record of the process on this aspect.

Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

[291] The Council submits that issues of scope must be resolved by way of judicial review of the IHP decision on scope. It says that Council had no jurisdiction to accept or decline a determination that a recommendation was within scope. It could only decide whether the recommendation should be accepted or rejected.

[292] Strand Holdings Limited submits that it could only proceed by way of judicial review because it did not have an appeal right, not having submitted on the provisions subject to the IHP recommendation in dispute.

[293] Character Coalition, Auckland 2040, Albany North and Man O' War contend that a decision by the Council based on an erroneous assumption that a recommendation is in scope must be appealable on a point of law. This is important because the decision to accept the recommendation as in scope, when it was not, unlawfully deprived them of the ability to pursue a substantive right of appeal to the Environment Court.

Assessment

[294] The IHP is empowered to make recommendations that are within or beyond the scope of submissions[180] and is obliged to identify recommendations that are beyond scope.[181] The Council is empowered to make decisions on the recommendations. It may accept or reject the recommendations.[182] It does not need to hear evidence, and may only consider submissions and evidence tabled with the IHP.[183] If the Council rejects the recommendation, then it must provide an alternative solution that is within scope of the submissions. Section 148(3) makes clear however that the Council may accept recommendations that are beyond the scope of the submissions on the proposed plan. The Council is strictly circumscribed by s 148(4) to issue a decision accepting or rejecting the recommendation. A decision to accept a recommendation may include alteration with minor effect or to correct a minor error. The Council had 20 working days to make its decisions.

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180 Local Government (Auckland Transitional Provisions) Act 2010, s 144(5).
181 Section 144(8)(a).
182 Section 148.
183 Section 148(2).

[295] Section 158 confers a limited right of appeal to the High Court as noted at [85].

[296] Section 158(5) incorporates sections 299(2) and 300 - 307 of the RMA in terms of appeals. Notably, s 308 enacting a right of appeal to the Court of Appeal is not included. Section 159 then preserves the right of judicial review, but a person must not apply for judicial review of a decision made under s158 in respect of a decision unless the person lodges the judicial review and appeal together. Unless impracticable, the appeal and review must be heard together.

[297] Given the foregoing, it is tolerably clear that the Council decision making power is binary – it must either accept or reject the recommendations, and it must do so quickly. It does not expressly or by necessary implication contemplate a decision accepting a recommendation while at the same time rejecting an IHP finding about scope. This is reinforced by the appeal rights procedures. Section 156 confers a limited right of appeal on submitters in relation to any decision of the Council rejecting the IHP's recommendation or to any person in relation to any decision by the Council to accept a recommendation where "the Hearings Panel had identified the recommendation as being beyond the scope of submissions". Section 158 then confers a right of appeal to this Court on the Council's decisions to accept a recommendation on the provisions of the plans while s 159 preserves the right to seek judicial review, presumably in relation to the IHP's decisions on, among other things, scope, which triggers an orthodox administrative law issues of procedural fairness.

[298] But this does not mean that on appeal the High Court cannot examine whether the IHP decision on scope was unlawful. The purpose of any appeal on a point of law is to test the legality of the Council decision. While the issue of scope is essentially about procedural fairness, a recommendation assuming scope when there was none is contrary to the scheme and policy of public participation of Part 4 and the RMA. It is unlawful. Plainly, the Council cannot lawfully accept an unlawful recommendation. If that were not the case, the right of appeal to the High Court would be largely meaningless. For example, any failure by the IHP to ensure that the recommendation complied with the matters specified at s 145 would be beyond challenge.

[299] There will be persons, like SHL, who having not submitted on the relevant provision, only have recourse to a remedy through judicial review. The availability of judicial review is most obviously directed to this type of applicant who has not had any say on a relevant provision in the proposed plan. Conversely, the scheme of the RMA envisages that submitters cannot judicially review a decision while they enjoy rights of appeal. In any event, the availability of judicial review to correct error presents no bar to the High Court appellate procedure on the issue of scope.

What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

[300] This Court on appeal may, having found error of law, make any decision it thinks should have been made.[184] This is significant in the present case, because the full corrective power on appeal avoids, where appropriate, the need to refer the relevant aspect of the decision back to the Council or IHP, though this power is used sparingly.[185] In the present context that logically means that if this Court declares that a recommendation is out of scope or otherwise unlawful, it may make any decision the Council could have made, including to accept or reject an out of scope recommendation. Of course this Court may decide to refer the matter back for reconsideration by the Council. This may be most appropriate approach where the error as to scope bears on the substantive merits of a provision and policy considerations.

[301] The position is slightly different in relation to the power to grant relief under judicial review. The exercise of supervisory jurisdiction is corrective not substantive. Unless the correction results in a different decision, this Court will ordinarily refer the matter back to the person empowered by Parliament to make the decision.[186] In this case the special scheme of Part 4 must colour this orthodoxy. It has an inbuilt system for addressing out of scope recommendations, namely the right of appeal to the Environment Court. It is permissible and preferable in this context to correct an unlawful decision on scope only to the extent necessary to trigger this appeal right.

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184 High Court Rules 2016, rule 20.19.
185 *Taylor v Hahei Holidays Ltd* [2006] NZRMA 15 (CA).
186 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [97].

Outcome

[302] The answers to the preliminary questions are:

(a) Did the IHP interpret its statutory duties contained in Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) lawfully, when deciding whether its recommendations to the Council were within the scope of submissions made in respect of the first Auckland Combined Plan?

Yes

(b) Did the IHP have a duty to:

(i) Identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets?

No

(ii) Identify when it was exercising its powers to make consequential alterations arising from submissions?

No

(c) Was it lawful for the IHP to:

(i) Determine the scope of submissions by reference to another submission?

Yes

(ii) Determine the proper scope of a submission by reference to the recommended Regional Policy Statement?

Yes

(d) To what extent are principles (regarding the question of scope) established under the Resource Management Act 1991 case law relevant, when addressing scope under the Act?

See discussion at [101]-[136]

(e) Did the IHP correctly apply the legal framework in the test cases?

(i) Mt Albert – Yes

(ii) **Glendowie** – **Yes**

(iii) **Blockhouse Bay – Yes**

(iv) **Judges Bay – Yes**

(v) **Wallingford Street – Yes**

(vi) **Howick** – **Yes**

(vii) **Strand Holdings Limited – No**

(viii) **WGL – No**

(ix) **Albany – Yes**

(x) **Man O War – Yes**

(f) Are the appellants'/applicants' allegations against the Council concerning the IHP's determination on issues of scope appealable pursuant to the Act and/or reviewable?

Both

(g) What relief can the High Court grant the appellants/applicants if the IHP and/or the Council acted unlawfully in respect of the IHP's determination on an issue of scope under the Act?

See discussion at [300]-[301]

Effect of Judgment/Relief

[303] The purpose of resolving the test cases was to provide affected appellants with guidance on the issue of scope. It will be for them to decide whether and to what extent they wish to pursue their appeals in light of my decision. It should be evident that I consider the appeals concerning residential upzoning and the Albany and Man O' War appeals should be dismissed on the question of scope, while the SHL and WGL appeals should be upheld on the same issue. My current view is that the SHL and WGL matters should now be referred to the Environment Court for resolution.

[304] The parties are invited to file a joint memorandum in respect of relevant appeals for case management purposes within 10 working days. A further case management conference will be set down in relation to the scope appeals on the first available date thereafter.

Costs

[305] The parties have leave to seek costs. Submissions no longer than three pages in length are to be filed within 10 working days, unless the parties agree otherwise.

APPENDIX A		
SUBMISSIONS RELIED UPON BY THE IHP		
GENERAL SUBMISSIONS		
Submitter	Number	Summary of submission (as published by Auckland Council on its website)
Minister for the Environment and Ministry of Business, Innovation and Employment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations
	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).

	839-3	Amend the PAUP to encourage housing choice in the residential zones.
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban intensification around centres, frequent transport networks and facilities and other community infrastructure.
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.
	6099-2	Delete the 'construct' of density from all sections of the plan.
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.
	6099-5	Reduce the size of the Single House zone.
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.
	6099-10	Delete all density controls.
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3

	6212-3	Retain policies.
	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.
Generation Zero	5478-3	Retain the compact city model.
	5478-4	Retain the requirement for no more than 40 per cent of new dwellings to be located outside the 2010 MUL.
	5478-36	Amend rules to increase dwelling capacity within existing urban boundaries as per Regional Policy Statements.
	5478-57	Retain up-zoning in areas around New Lynn, Avondale, Glen Innes, Panmure and Papatoetoe.
	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific suggestion to rezone the properties.
	839 A + C series maps	
	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.
	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO MT ALBERT		
Housing New Zealand Corporation	839-4295	Rezone 18,20,16, TASMAN AVENUE,11,9,13, SEGAR AVENUE, Mount Albert from Mixed Housing Suburban to Mixed Housing Urban.
	Remaining Reference Numbers	Each submission reflects the above: a specific request to rezone HNZC properties.
	839 A + C series maps	
Rose Dowsett	303-3	Rezone properties on Carrington Road, Mt Albert from Mixed Housing Suburban to Mixed Housing Urban.

Joseph Erceg	7276-2	Rezone all of Wairere Ave, Mt Albert, from Single House to Mixed Housing Suburban.
John Childs	4903-1	Rezone 16 Knight Avenue, Mt Albert from Single House to Terrace Housing and Apartment Buildings and other properties within Knight Avenue to Terrace Housing and Apartment Buildings
Anton Sengers	4895-1	Retain Mixed Housing Suburban zone for 45 Alberton Avenue, Mt Albert
	4895-45	Retain Mixed Housing Suburban zone on 47 Alberton Avenue, Mt Albert
Pantheon Enterprises Ltd	2516-1	Retain the Mixed Housing Suburban zone at 45 Alberton Avenue, Mount Albert.
	2516-49	Retain the Mixed Housing Suburban zone at 47 Alberton Avenue, Mt Albert.
Vincent Carl Heeringa	1430-1	Rezone 1 Mt Albert Rd, Mt Albert from Single House to Mixed Housing.
Hiltrud Gruger, Gregor Storz	968-1	Retain the current residential District Plan provisions in the area referred to as the Springleigh Estate, and bordered by the Western Railway, Oakley Creek, Unitec and Woodward Rd, Mt Albert
Auckland Council	5716-2802	Rezone 3 Raetihi Crescent, Mount Albert (Lot 33 DP 17374) and 5 Raetihi Crescent, Mount Albert (Lot 32 DP 17374) from Mixed Housing Suburban to Single House. Refer to submission, Volume 4, page 3/35 and Attachment 538, Volume 20.
	5716-2848	Rezone part of 33 Ennismore Road, Mount Albert (Pt Lot 11 DP 19853) from Single House to Mixed Housing Suburban. Refer to submission, Volume 4, page 5/35 and Attachment 580, Volume 20.
Gavin Logan	6083-3	Rezone 15 Harbutt Avenue, Mt Albert to Terrace Housing and Apartment Buildings.
NZ Institute of Architects	5280-118	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5280-123	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5280-124	Rezone land within Mount Royal Avenue, Mount Albert Road, La Veta Avenue , Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban with a review of the special character overlay.
	5280-117	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban
Urban Design Forum	5277-116	Rezone land on McLean Street, Richardson Road, Mount Albert Road, Woodward Road and New North Road, Mt Albert as shown in the submission [refer to page 3/104], from Single

		House, Mixed Housing Urban and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
	5277-115	Rezone land on New North Road, Richardson Road, Mount Albert Road and Duart Avenue, Mt Albert as shown in the submission [refer to page 3/104], from Single House, Mixed Housing Suburban to Mixed Housing Urban.
	5277-117	Rezone land on Kingsland Street and New North Road, Kingsland as shown in the submission [refer to page 3/104], from Single House to Terrace Housing and Apartment Buildings.
	5277-121	Rezone land on Allendale Road, Mount Albert Road and Richardson Road, Mt Albert as shown in the submission [refer to page 5/104], from Single House to Mixed Housing Suburban zone with appropriate heritage protection.
	5277-124	Rezone land on Burns Avenue and Northcroft Street, Takapuna as shown in the submission [refer to page 7/104], from Single House and Mixed Housing Suburban to Terrace Housing and Apartment Buildings.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GLENDOWIE		
Housing New Zealand Corporation	839 A + C series maps	
CIT Holdings	6240-1	Rezone 14-30 Waimarie Street, St Heliers, from Single House to Mixed Housing Suburban.
Rental Space Ltd	6969-5	Rezone 5 and 9 The Rise, St Heliers, from Single House to a zone that reflects the existing characteristics and recognises the potential for further development, such as Mixed Housing Suburban, and provides for a density of at least 5 residential units on the land with a building height of 8 to 10m.
	6969-1	Reject the Single House zone, and related provisions, at 5 and 9 The Rise, St Heliers.
Auckland Presbyterian Hospital Trustees Ltd	4429-4	Rezone St Andrews retirement village at 207 Riddell Road, Glendowie and all St Andrews landholdings in Glendowie from Special Purpose - Retirement Village to Mixed Housing Urban.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO BLOCKHOUSE BAY		
Area A – Lynbrooke Avenue area		
Housing New Zealand	839 A + C series maps	
Area B – Barton and Wade Street area		
Geoff Bennett	2791-9	Rezone 42 Connaught St, Blockhouse Bay from Single House to Mixed Housing Suburban.

Housing New Zealand	839 A + C series maps	
Area C – Keats Place Bolton Street area		
Housing New Zealand	839-4193	Rezone 85B,77,75,73,85A,71,83,69,87D,81,87B,87C,79,87A, BOLTON STREET,24,39,37,43,41, MARLOWE ROAD, Blockhouse Bay from Single House to Mixed Housing Urban.
	839 A + C series maps	
Area D – Boundary Rd to Whitney Street area		
Housing New Zealand	839-722	Retain Single House at 9, JAMAICA PLACE, Blockhouse Bay.
	839-631	Retain Single House at 28, JAMAICA PLACE, Blockhouse Bay.
	839-1226	Retain Single House at 174,172, WHITNEY STREET, New Windsor-Blockhouse Bay.
	839-1225	Retain Single House at 69, MULGAN STREET, New Windsor.
	839 A + C series maps	
Carson Duan	6164-1	Rezone 45 Boundary Road, 87 and 89 Dundale Avenue, Blockhouse Bay from Single House to Mixed Housing.
Brian and Ruby Lowe	2468-1	Rezone 49 Boundary Road, Blockhouse Bay from Single House to a higher density zone to enable subdivision.
Ellen Ma	42-1	Rezone 87 and 89 Dundale Avenue Blockhouse Bay from Single House to Mixed Housing.
NZ Institute of Architects	5280-263	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Urban Design Forum	5277-261	Rezone land on Rosamund Avenue, John Davis Road and Boundary Road, Mount Roskill as shown in the submission [refer to page 58/104] from Single House to Mixed Housing Suburban.
Mohammed Faruk	9409-1	Rezone 29 Dundee Place, Blockhouse Bay, so it can be subdivided into 2 sections or provide for the house or granny flat to be extended [inferred].
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO JUDGES BAY		
Housing New Zealand	839 A + C series maps	

Masfen Holdings Ltd	5968-16	Delete the Special Character Residential Isthmus A, B and C overlay from 21 and 23 Judges Bay road and 17 and 23 Bridgewater Road, Parnell.
Rolf and Peter Masfen	6411-1	Delete the overlay from sites 102 and 102A St Stephens Avenue and 12 Rota Place. Parnell.
Civic Trust Auckland	6444-101	Rezone Gladstone Road from Parnell to Taurarua Terrace from Terrace Housing and Apartment Buildings to Single House.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO GREY LYNN		
Housing New Zealand	839 A + C series maps	
NZ Institute of Architects	5280-11	Acknowledge that the PAUP has had significant residential intensification removed from it when compared with the draft Plan. There is a need to relook at all the methods providing for and restricting residential intensification including the spatial location of residential and business zoning, overlays including the volcanic view shaft, height sensitive areas and heritage and character areas if the aspirations of the Unitary Plan are to be achieved [refer to page 9-10/39]. Review and amend the application of different zones based on the examples provided in the submission [refer to pages 1-104/104] and to address concerns raised in the submission.
SPECIFIC SUBMISSIONS RELIED ON BY THE IHP IN RELATION TO TAKANINI		
Takanini Central	4986-1	Rezone southern portion of 55 Takanini School Road, Takanini to mixed housing suburban
NO SPECIFIC SUBMISSIONS RELIED ON BY THE IHP FOR HOWICK. SEE GENERAL SUBMISSIONS ABOVE.		

APPENDIX B			
KEY GENERAL SUBMISSIONS TO THE IHP			
Submitter	Number	Summary of submission (as published by Auckland Council on its website)	Key Quotes
Minister for the Environment	318-1	Adjust the zoning, overlays, development controls and other rules to provide sufficient residential development capacity and land supply to meet Auckland's 30 year growth projections and the development objectives of the PAUP and the Auckland plan	"I seek that the zoning, overlays, development controls and other rules be adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high market demand – to meet Auckland's long-term (30 year) growth projections, as well as the development objects of the AUP itself."
	318-3	Improve the PAUP integrity by reconciling its polices and methods with its RPS level objectives. The approach for doing this should focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations	" I seek that the Proposed AUP's policies and methods be reconciled with its RPS-level objectives, improving the AUP's integrity, and that the approach for doing this focus on increasing development capacity to provide housing supply and choice across a wide range of new and existing locations."
Housing New Zealand Corporation	839-2	Amend the PAUP to ensure that the residential zones enable urban intensification, at a scale necessary to provide 70% of the City's residential demand as the population grows (refer to page 4/10 of vol 2 of the submission for details).	"…the provisions of the residential zones are not sufficiently enabling of urban intensification (particularly urban regeneration) at a scale that is necessary to provide for 70% of the City's residential demand as the population grows. Failing to enable or provide for appropriately located and designed residential growth within the urban area will mean the Unitary Plan will not be consistent with, nor aid the implementation of, the strategic directions identified in the Auckland Plan."
	839-3	Amend the PAUP to encourage housing choice in the residential zones.	"…the provisions of the residential zones do not sufficiently encourage housing choices that are both necessary to support the social and economic demands of Auckland's community and are identified as appropriate in the Regional Policy Statement sections of the Proposed AUP."
	839-5	Recognise that the PAUP unreasonably differentiates against multi-unit developments, which could discourage urban regeneration projects.	"…the Proposed AUP provisions unreasonably differentiate against multi-unit developments…the potential outcome of the higher 'consenting hurdles' of this approach will discourage urban regeneration projects (in favour of more ad-hoc infill type developments) and potentially result in both poorer urban design outcomes…and potentially in the failure to achieve the desired urban uplift sought."
	839-17	Amend the PAUP to consistently apply the Regional Policy Statement direction for urban	"With respect to residential zoning…there has been inconsistent application of the Regional Policy Statement direction for urban intensification opportunities around

		intensification around centres, frequent transport networks and facilities and other community infrastructure.	Centres, Frequent Transport Networks and facilities and other community infrastructure (e.g. education facilities).”
	839-18	Amend the PAUP to increase the extent of areas zoned for greater residential intensification to achieve the desired urban uplift, and to support other significant resources (e.g. the public transport network.)	“In particular, Housing New Zealand is concerned that the extent of areas zoned for greater residential intensification is not sufficient to achieve the desired urban uplift, nor to support other significant resources (e.g. the public transport network).” “To this end, Housing New Zealand is concerned that substantial rezoning is required to achieve the outcomes of the Auckland Plan and the Regional Policy Statement. In response, Housing New Zealand seeks the rezoning of a notable proportion of its land. Table 3 provides a summary of property specific rezoning submissions. These specific property submission points are made in addition to the submission matters that Housing New Zealand has made with zone, overlay and precinct provisions (Table 1). In this regard, it is important to note that the specific relief identified in terms of zoning requests is contingent on the provisions of the District Plan zones, overlays and precincts (to achieve the outcomes that Housing New Zealand is seeking). In summary, rezoning requests are made for the following broad reasons: a. There are a number of Housing New Zealand properties and sites that are within walking access of Frequent Transport networks and facilities, education and other social facilities and/or centres such that they warrant a zoning that would enable further urban intensification from that currently proposed (e.g. a shift from proposed zonings of Single House and Mixed Housing Suburban to Mixed Housing Urban, Terrace Housing and Apartments or in a few cases to Mixed Use); b. There are a few Housing New Zealand properties and sites where the zoning proposed in the Proposed AUP is inconsistent with the current development pattern on or surrounding the site and it is considered an alternate zone is more appropriate to these sites’ existing or proposed zoning; c. There are a number of Housing New Zealand properties that appear to have been ‘down-zoned’ (compared with either existing zoning or surrounding zoning) on the basis of infrastructure constraints (primarily flood hazard notations). It is submitted that these areas are better managed through the

			application of Overlays to address resource values/issues (such that if these issues can be addressed, the wider zoning pattern appears appropriate for the site); d. There are a few Housing New Zealand properties and sites that appear to have been 'down-zoned' (compared with either existing zoning or surrounding zoning) on the basis of Overlays (particularly built character/heritage). These values are also mapped and identified through Overlays and it is considered more appropriate to retain that method to manage these resource values. Managing resource values through both Zone and Overlay provisions essentially results in double-layered management of a single resource value, which is considered an overly onerous process which potentially undermines the philosophical approach to managing land use matters through a standardised suite of Zones while managing resource values through the applications of Overlays; and e. There are a few Housing New Zealand sites where Housing New Zealand considers that alternative zonings will better enable it to deliver positive social and community outcomes (meeting the social and economic wellbeing of the community."
Ockham Holdings Ltd	6099-1	Replace all residential zone provisions and zoning maps to achieve the outcomes set out in the submission.	"At the overarching level the submitter seeks the following relief; …"that the Council declines the PAUP in respect of all residential zoning provisions and zoning maps. That the residential provisions be reformulated to achieve the outcomes set out below."
	6099-2	Delete the 'construct' of density from all sections of the plan.	"Remove the PAUP 'construct' of density from all sections of the plan."
	6099-3	Merge the Mixed Housing Urban and Terrace Housing and Apartment Buildings zones to create a new Terrace Housing and Apartment Buildings zone.	"Merge all MHU and THAB zoned land to create a new THAB zone."
	6099-4	Rezone all land in the Mixed Housing Suburban zone to Mixed Housing Urban (MHU) zone and	"Rezone as MHU all areas zoned MHS under the notified PAUP…Apply the new MHU zone to all residential sites with access off all main arterials and connecting

		apply the new MHU zone to all residential sites with access off all main arterial and connecting road such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extent of the Single House zone accordingly. Refer to Figure 1 showing arterials and collectors where the MHU should be applied on page 26/92 of the submission.	roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road and so on"
	6099-5	Reduce the size of the Single House zone.	"Decrease the size of the Single House zone."
	6099-6	Extend the Terrace Housing and Apartment Buildings (THAB) zone to cover all residential sites located with five minutes walking distance of all main arterials and connecting roads such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc; and reduce the extend of the Mixed Housing Suburban and Single House zones accordingly. Refer to Figure 1 showing example of where the THAB zone should be applied on page 26/92 of the submission.	"Enlarge the THAB zone to all residential sites located within 5 minutes' walk of all main arterials and connecting roads – such as New North Road, Sandringham Road, Dominion Road, Mt Eden Road, Manukau Road, Great South Road, Pt Chevalier Road, Great North Road etc and reduce the extent of MHS and Single house zone accordingly."
	6099-7	Rezone all land within 10 minutes walking distance of train stations and transport nodes (except for Business zoned land) to Terrace Housing and Apartment Buildings zone.	"Zone all land within 10 minutes' walk of train stations and transport nodes [which is not Business zoned] as THAB."
	6099-10	Delete all density controls.	"Remove all density related controls for the residential zones and Mixed Use zone except that for the Single House zone a minimum subdivision gross site area of 400m2 should apply to any new lots."
Property Council New Zealand	6212-2	Review all rules and requirements in the PAUP to ensure they achieve the RPS objectives and policies 2.1 and 2.3	
	6212-3	Retain policies.	

	6212-4	Review all rules and requirements to ensure they achieve the RPS targets for urban growth.	
Auckland Property Investors Association Inc	8969-2	Extend the Terrace Housing and Apartment Buildings zone to more sites, particularly along arterial roads and within 700m walk of railway stations and centres.	"We submit that more sites particularly along all arterial roads, within 700 metres walk away from railway stations, town centres and shopping centres should have a THAB zone classification."
	8969-3	Combine the Mixed Housing Urban and Suburban zones to a single zone encompassing 50% of all residential sites in Auckland and apply the proposed Mixed Housing Urban controls to it.	"We submit that there should be a return to a single Mixed Housing Zone encompassing approximately 50% of all residential sites in Auckland, and this should have the same planning controls of the Mixed Housing Urban Zones as set out in the PAUP notified on 30 September 2013."
Ministry of Business, Innovation and Employment	6319-1	Align policies and rules with strategic objectives to provide sufficient capacity for growth including through appropriate density provisions and zoning.	"MBIE's concern with the Unitary Plan as proposed is that it does not follow through on its strategic objectives (which are generally supported) with appropriately-aligned policies and rules: - By not providing sufficient capacity through which appropriate zonings and density provisions to meet Auckland's forecast growth"
	6319-2	Align policies and rules with strategic objectives to provide sufficient capacity for growth including freeing development from complicated policies and rules.	"…By failing to free development from complicated policies and rules that will create high transaction costs, thereby limiting innovation and responsiveness of supply to demand."
	6319-4	Amend the zoning, overlays and development controls and other rules such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections and proactively enable efficient growth in areas of high market demand.	"The general relief sought is that: - Where necessary to achieve alignment with the objectives of the Auckland Plan and the Regional Policy Statement sections of the Proposed Unitary Plan are adjusted and amended such that they do not constrain provision of sufficient residential development to meet Auckland's long term (30 year) growth projections, and proactively enable efficient growth in areas of high market demand."
	6319-7	Enable more residential development through green field expansion and by enabling greater density in existing neighbourhoods.	"Unless supply is increased it is unlikely that a substantial change in house prices will be achieved, given increasing demand and restricted supply, unless the proposed Unitary Plan enables more residential development through both greenfield expansion, and just as importantly, by enabling greater residential densities in existing neighbourhoods."
	6319-8	Amend zoning provisions to correct the misalignment between areas of high demand and the areas where growth is provided for.	"…the misalignment between the regional level objectives and the district-level provisions are expressed through: … - A deliberate down-zoning apparent between the draft Unitary Plan released

			in March 2013, and the proposed version, creating a misalignment between areas of high demand and the areas where growth is provided for, which may create additional uncertainty for infrastructure providers, and additional cost to housing provision as developers challenge through out-of-zone consents, the development rules and zonings in order to achieve economically viable development."
	6319-10	Clarify why many zoning decisions across the city have been made. Inefficient use of market attractive land and protecting the micro amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole.	"There is little justification for why many zoning decisions across the city have been made – i.e. why ostensibly market-attractive areas near transport and employment etc have been zoned at low densities (or lower densities than indicated in the draft Auckland Unitary Plan in March 2013). Inefficient use of market attractive land while protecting micro-amenity of neighbourhoods in the short term will seriously compromise the macro-utility of the city as a whole, and detract from the overarching vision of Auckland as the world's most liveable city – attractive, economically efficient and socially equitable."
	6319-11	Amend the zoning, overlays and density rules to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement to provide sufficient development capacity.	"MBIE seeks amendment to the zoning and density rules pertaining across the region to re-establish and ensure alignment with the strategic objectives of the Auckland Plan and the Regional Policy Statement sections of the proposed Unitary Plan, with the zoning, overlays and development controls and other rules adjusted to provide sufficient residential development capacity and land-supply – particularly in areas of high-market demand – to meet Auckland's long-term (30 year) growth projections."
Community of Refuge Trust (CORT)	4381-2	Reject the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument that their areas are somehow special due to their character, identity and heritage.	"CORT opposes the Compact City notion that large segments within the city (Single House + Mixed Housing Suburban zones) can avoid responsibility for intensification based on the argument contained within 3.3 that their areas are somehow special due to their character, identity and heritage. The Council already has existing tools to protect these characteristics if they are truly unique. To argue that 85% of the city including the Single House, Large Lot, Rural & Coastal and Mixed Housing Suburb zones are all special zones that exclude medium density housing is a counterproductive to the success of the Compact City model."
Tim Daniels	4600-1	Retain compact city model approach to intensification.	"I fully support the compact city model approach to intensification, in particular the concept of land within and adjacent to centres, frequent public transport routes and facilities being the primary focus for residential intensification."
	4600-2	Retain density approaches in zoning particularly the no density provision allowed for in the Terrace Houses and Apartment Buildings and Mixed Housing Urban zone.	"I also fully support the approaches to density in the zoning approaches especially the no density provision allowed for in THAB and within mixed housing urban as this will provide for additional growth in areas where public transport is highest and allows for sustainable development of the city."

	4600-3	Rezone areas around bus routes along strategic roads (e.g., Great North Road, New North Road and Dominion Road) to Terrace Housing and Apartment Buildings and Mixed Housing Urban.	"When you look at the zoning along the key bus routes along strategic roads such as Great North Road, New North Road and Dominion Road where high frequent buses are currently located and are going to be further enhanced by Auckland Transport investment strategy in coming years the zoning is not as high as it could be in parts. It is suggested that these areas and other similar roads should be re-considered in respect of there zoning and upzoned as appropriate to THAB and mixed housing urban zones."
Jacques Charroy	5116-1	Rezone (e.g. to Terrace Housing and Apartment Buildings) to increase the housing stock close to the city centre ie. in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn and Arch Hill.	"Transport and housing issues are intimately linked and could be best solved together by increasing the housing stock close to the city center, thereby reducing the need for transport, ie in the inner suburbs of Parnell, Mt Eden, Epsom, Mt Albert, Kingsland, Freemans Bay, Ponsonby, Grey Lynn, Arch Hill etc ... This is where densification of housing needs to happen first and be the most intense, regardless of what the few people living there at the moment want. The effect of this would be a more manageable transport system, giving the residents of these areas the choice of walking or biking to downtown Auckland as an alternative to taking the bus. This would help alleviate congestion much more readily than what the current plan would do."
Habitat for Humanity Greater Auckland Limited	3600-10	Delete the Single House zone.	"Habitat submits that the Single Housing Zone be abolished in an effort to ensure that the area within the RUB is able to be developed to its full potential."
Louis Mayo	4797-106	Rezone almost all of the Auckland Isthmus area as Mixed Housing, and delete all Single House zone within the Isthmus area.	"[A]lmost all of the Auckland Isthmus area should be included in the mixed housing urban zone. There is no reason for anywhere in the Isthmus to be in the single housing zone as it meets all the prerequisites for high-quality densification."
Ben Smith	4796-2	Reconsider allocation of residential zoning to ensure the Auckland Plan requirement of 60-70% of 13,000 new dwellings per year be built within the 2010 MUL.	"The Auckland Plan clearly outlines Auckland's housing shortage and the need for 13,000 new homes in Auckland every year for the foreseeable future. Point 129 of the Auckland Plan outlines 60% to 70% of total new dwellings inside the existing core urban areas as defined by the 2010 MUL. The Auckland Plan also specifies that the Council will be responsive to the strong demand for housing in Auckland and ensure that supply of housing meets demand. Point 132 of the Auckland Plan specifies that "The Unitary Plan will support this strategy. Auckland Council will implement enabling zoning across appropriate areas in the new Unitary Plan. This will maximise opportunities for (re)development to occur through the initial 10- to15-year life of the Unitary Plan, while recognising the attributes local communities want maintained and protected" …

			In order to achieve this objective, the Auckland Council should amend zoning allocation, building heights, and building coverage. … If the Proposed Plan is not declined, then amend it as outlined below: Pertaining to the zoning allocation of the Unitary Plan: - Re-zone some areas currently planned for Single Housing for the Mixed Housing Suburban Zone. - Re-zone some areas currently planned for Mixed Housing Suburban for the Mixed Housing Urban Zone - Re-zone some areas currently planned for Mixed Housing Urban for the Terraced Housing/Apartments Zone."
	4796-1	Upzone some areas of Auckland to provide for more housing. For example: Rezone areas of Single House to Mixed Housing Suburban, areas of Mixed Housing Suburban to Mixed Housing Urban and areas of Mixed Housing Urban to Terraced Housing and Apartment Buildings [no specific locations provided].	
Generation Zero	5478-2	Retain the compact city model.	
	5478-8	Amend Objective 2: Up to 70 per cent of total new dwellings by 2040 occurs is occurring within the metropolitan area 2010.	"Generation Zero supports the aim for 70% of urban growth over the next 30 years to be within the 2010 MUL….The wording need to confirm that, by 2040, 70 per cent of development is occurring within the 2010 MUL and that no more than 40 per cent of development has occurred outside the 2010 MUL."
	5478-57	Upzone across the urban area where this supports the Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport.	"These areas of upzoning alone are not enough to meet the 70% intensification target. Therefore we also give more general support to other areas of upzoning across the urban area where that upzoning supports the proposed Regional Policy Statement aims of intensifying near centres and in areas accessible to high quality public transport."
Cranleigh	7491-1	Rezone to provide for more density around areas where there is a high level of amenity, such as parks and coastlines, not just around town centres	"The PAUP identifies the importance of focusing density around town centres and major transport corridors. However, the principle of placing "greatest density" on greatest amenity areas has not been sufficiently leveraged. If we are to grow the

		and major transport corridors	attached housing and apartment market, then the opportunity to focus this lifestyle where there is a high level of amenity and a market demand for it is a great opportunity – areas such as parks and coastlines are an obvious example of this principle. The PAUP does not deliver on this.

APPENDIX C			
KEY FURTHER SUBMISSIONS TO THE IHP			
Submitter	Number	Submissions Opposed	Key Quotes
Auckland 2040	412	Oppose: Generation Zero	Support: "The submission by Generation Zero, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Auckland 2040 is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects and Urban Design Forum	" "
		Oppose: Property Council of New Zealand	" "
		Oppose: Housing New Zealand Corporation	" "
		Oppose:	" "

		Ockham Holdings Limited	
Character Coalition	2209	Oppose: Property Council New Zealand	Support: The submission by Property Council, if allowed, would have the effect of removing the distinction between the MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. The Character Coalition is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: New Zealand Institute of Architects	" "
		Oppose: Housing New Zealand Corporation	"In order to accommodate Auckland's residential growth, intensification within our existing suburbs will be required, but Council must ensure a development mix is sensitive to the existing character of Auckland's residential areas. Council must balance the need for intensification with the desirability, including economic, of retaining the residential character of the majority of the suburbs."
Howick Ratepayers and Residents Association	216	Oppose: New Zealand Institute of Architects and Urban Design Forum	"The submission by Institute of Architects and Urban Design Forum, if allowed, would have the effect of removing the distinction between the

Incorporated			MHS and MHU zones." "Not only would the maximum height and densities be similar but most significantly the requested increase in height would permit unrestricted apartment development across all residential areas other than those zoned SH. The submissions also seek a significant reduction in the SH zone and Character areas." "The MHU and THAB zones in PUP have been located primarily around arterial roads and commercial centres. These zones encourage removal of the existing housing and its replacement with high density and multi storey development. Howick Ratepayers and Residents Association Inc is not opposed to such zonings, but is opposed to development occurring in an uncoordinated, haphazard fashion…They also seek significant extension of those zones which will add further to the issues as expressed above."
		Oppose: Ockham Holdings Limited	" "
		Oppose: Generation Zero	" "
		Oppose: Property Council New Zealand	" "
		Oppose: Housing New Zealand Corporation	" "
		Support: Howick Ratepayers and Residents Association Incorporated	"It is a grave oversight of the Unitary Plan that Old Howick has not been gazetted as an Historic Heritage Suburb Area. We believe that Historic Howick must be recognised as a special "Village" and that the suburban nature of this Village based around second oldest Selwyn church in NZ and the traditional Pub, market place and village square and memorials to early Maori and Pioneers must be preserved at all costs."

			"We reject the progressive whittling away of protection for old Howick as seen in the maps below – from Heritage status to Single House with an overlay, to parts downgraded yet further to the Mixed Housing Suburban zoning." "We fear the haphazard approach to development which will be fostered any undifferentiated zoning as it stands whereby incongruous newly developed large edifices could be built in areas of predominantly pre 1944 homes leading to an ugly intrusion in a character landscape and devaluing the esthetic (sic) appearance of whole neighbourhoods."

174

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 34/02

BETWEEN	CLEARWATER RESORT LTD AND CANTERBURY GOLF INTERNATIONAL LTD Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent

AP 35/02

AND BETWEEN	CHRISTCHURCH INTERNATIONAL AIRPORT LTD First Appellant
AND	CANTERBURY REGIONAL COUNCIL Second Appellant
AND	CLEARWATER RESORT LTD AND CANTERBURY GOLF INTERNATIONAL LTD First Respondent
AND	CHRISTCHURCH CITY COUNCIL Second Respondent

Hearing: 11 December 2002 and 6 March 2003

Appearances: JK Guthrie and PD Horgan for Clearwater Resort Ltd
JG Hardie for Christchurch City Council
JM Appleyard for Christchurch International Airport Ltd and Canterbury Regional Council

Judgment: 14 March 2003

RESERVED JUDGMENT OF WILLIAM YOUNG J

Index

Introduction

[1] These appeals from a judgment of the Environment Court require me to determine the availability to Clearwater Resort Ltd and Canterbury Golf International Ltd of certain arguments which they wish to run in the Environment Court on their reference to that Court in respect of Variation 52 to the Christchurch City Council's proposed plan.

[2] I originally heard these appeals on 11 December last year. In the course of preparing this judgment, I reached a view that I needed some further clarification on some of the issues presented by the case and therefore convened a further hearing on 6 March.

The planning background

[3] For many years, the City Council has set out to limit residential and other noise sensitive development in the vicinity of Christchurch International Airport. The purpose has been to avoid or limit noise complaints associated with aircraft movements. Such complaints would put pressure on the operations of the airport. Christchurch International Airport Ltd ("CIAL"), which operates the airport, naturally wishes to limit, as far as possible, the potential for such complaints.

[4] The City Council's proposed plan was notified in 1995. The proposed plan has evolved over time and so has the detail of the policies associated with the protection of Christchurch International Airport. I will discuss the detail of these policies and their evolution shortly. At this point in the judgment, it is sufficient to note that these policies have been referenced to noise contours, a concept which requires some brief explanation.

[5] The 50 dBA Ldn noise contour comprises land which will receive average night and day noise levels of 50 dBA when the airport is fully developed. The 55 dBA Ldn and 65 dBA Ldn noise contours have corresponding meanings. SEL noise contours reflect single event noise levels associated with the take-off of a particular

type of aircraft. So the composite 65 dBA Ldn/SEL 95 dBA noise contour consists of land which, when the airport is fully developed, is within either the 65 dBA Ldn noise contour or the SEL 95 dBA noise contour.

[6] I will shortly deal with the way in which the proposed plan has referred to noise contours in the expression and implementation of the City Council's general policy of protecting Christchurch International Airport from noise complaints. I note at this point, however, that in all versions of the proposed plan, noise contour lines apparently identifying the noise contours referred to in the various plans have been depicted on the planning maps.

The Clearwater Resort

[7] For a number of years, Clearwater Resort Ltd and Canterbury Golf International Ltd and another associated company (New Zealand Golf International Plan Ltd) have been engaged in a residential golf and hotel development in an area of land north of Johns Road and South of the Waimakiriri River. I will generally refer to all the relevant companies, without differentiation, as "Clearwater". The land Clearwater is developing is in reasonably close proximity to the airport.

[8] In the City Council's proposed plan, as notified in 1995, the land then owned by Clearwater was made the subject of a special zone Open Space 3D. This zone has origins which predate the notification of the proposed plan.

[9] Within this zone, development must occur in accordance with a development plan which is provided for in the proposed plan.

[10] Clearwater has subsequently acquired adjoining land which is rurally zoned in the proposed plan.

The legislative background

[11] Section 2, Resource Management Act 1991, defines a "variation" as meaning an:-

> alteration by a local authority to a proposed policy statement, plan, or change under Clause 16A of the First Schedule.

A variation is itself within the definition of "proposed plan" in the same section.

[12] Clause 6 of the First Schedule provides:-

> Any person, including the local authority in its own area, may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified ...

Accordingly, a person may make a submission "on" a variation.

[13] The First Schedule provides for public participation in relation to the hearing of submissions and decisions made in relation to them. In accordance with this process, submissions are to be publicly notified and further submissions may be made in support of or in opposition to the submissions made under clause 6. The relevant local authority will usually then hold a hearing (under clause 8B, First Schedule). It will then makes its decisions as to whether to accept or reject submissions.

[14] Clause 10(2) and (3) of the First Schedule provides:-

> (2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.
>
> (3) The local authority shall give public notice of the fact that it has made its decisions, and the proposed policy statement or proposed policy plan shall be deemed to have been amended in accordance with those decisions from the date of notice.

[15] Clause 14 of the First Schedule provides:-

14. Reference Of Decision On Submissions And Requirements To The Environment Court

(1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court—

(a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or

(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,—

if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

[16] Clause 15 provides:-

15. Hearing By The Environment Court

(1) The Environment Court shall hold a public hearing into any provision or matter referred to it.

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

History

General

[17] There is a lengthy history to planning controls associated with Christchurch International Airport. For present purposes, however, it is sufficient to start with the position as it was under the proposed Christchurch City Plan as notified in 1995.

Proposed plan as notified in 1995

[18] In the proposed plan as notified, the 65 dBA Ldn, 55 dBA Ldn and 50 dBA Ldn noise contours were depicted on the planning maps.

[19] Policy 6.3.7 was in these terms:-

> To ensure that urban growth does not occur in a manner that could adversely affect the operations of City airports

In the Explanation and reasons, there was this elaboration:-

> In order to ensure the International Airport's operations can continue without undue restriction, urbanisation will be prevented where noise impacts are expected to be significant. While aircraft are expected to be quieter by the year 2000, movements are anticipated to be more frequent. As a result of projections in noise investigations, residential development will not be allowed to occur within the 65 LdN noise contour, and between the 55 and 65 LdN noise contours new residential development will be discouraged and all additions to existing dwellings will require to be insulated. Insulation against noise will be required for all new development between the 50 and 55 LdN noise contours. This policy is expected to protect both airport operations and all future residents from adverse noise impacts.

[20] Policy 6.3.9 in the plan as notified was addressed to "urban extensions". The Explanation and reasons made oblique reference to Christchurch International Airport:-

> The policy recognises however, that not all choice can be accommodated, and there are distinct limits to growth in some sectors (eg towards the international airport).

[21] Rules in the proposed plan as notified required insulation in residential units built between the 50 and 55 dBA Ldn noise contours. Within the 65 dBA Ldn noise contour, residential units were a prohibited activity.

[22] In this judgment I will refer to the proposed plan as notified as "the 1995 version of the proposed plan".

Plan as amended following the hearing of submissions

[23] Following the hearing of submissions, the Council amended the proposed plan in a number of respects.

[24] The prohibition on residential units was extended to land within a composite 65 dBA Ldn/SEL 95 dBA air noise boundary. This rendered redundant the

65 dBA Ldn noise contour which was no longer depicted on the planning maps. The requirement of insulation between the 50 and 55 dBA Ldn contours was removed and instead insulation was required only between the 55 dBA Ldn noise contour and the air noise boundary.

[25] Policy 6.3.9 was amended so that it relevantly read:-

> The policy recognises however, that not all choices can be accommodated and that there are distinct limits to growth in some sectors (eg towards Christchurch International Airport and within the 50 LdN dBA noise contour).

The amendment to Policy 6.3.9 was responsive to a submission addressed squarely to that policy. In an effort to ensure consistency with Policy 6.3.9 the City Council amended Policy 6.3.7 so that the Explanation and reasons recorded:

> It is important that there be no extensions to urban residential zones within 50 dBA Ldn contour to avoid disturbance from aircraft noise.
>
> Between the 50 dBA LdN noise contour and the Air Noise Boundary, new urban residential development and other noise sensitive uses and development will be discouraged ... .

This amendment was not responsive to any particular submission. Accordingly, it was declared by the Environment Court to be *ultra vires*, see *National Investment Trust v Christchurch City Council* (unreported, decision C/89/99, judgment delivered 5 November 1999).

[26] I will refer to the proposed plan as it stood following amendments made after the hearing of submissions but allowing for the decision in the *National Investment Trust* case as "the pre-Variation 52 proposed plan".

[27] From the Council's point of view there was an incongruity between Policies 6.3.7 and 6.3.9 as expressed in the pre-Variation 52 proposed plan. The 50 dBA Ldn noise contour was referred to only in Policy 6.3.9 which dealt generally with urban extensions. It was not referred to at all in Policy 6.3.7 which was focussed directly on airport operations. It was this incongruity which was the driver for the promulgation of Variation 52.

Variation 52

[28] The salient features of policy 6.3.7 as expressed in Variation 52 are as follows:-

1. The policy itself is in these terms:-

> To discourage urban residential development and other noise sensitive activities within the 50 dBA LdN noise contour around Christchurch International Airport.

2. The Explanation and reasons record that residential development and other noise sensitive activities are not to occur within the "Air noise Boundary" (defined by reference to the composite 65 dBA Ldn/SEL 95 dBA noise contour).

3. As well, the Explanation and reasons records:-

> The Outer Control Boundary, [ie the 55 dBA Ldn noise contour] which is a threshold for the requirement for insulation, and the Air noise Boundary are identified on the planning maps. The 50 dBA Ldn is also shown as the point of reference for the application of Policy 6.3.7.

4. The explanation to the Variation includes the following note:-

> The proposed Variation does **not** alter the noise contours in the Proposed Plan, nor does it change the rules relating to subdivisions and dwellings in Rural Zones with insulation requirements for residential and other noise-sensitive activities.

[29] Variation 52 attracted a number of submissions. In response, the Council appointed a Commissioner to hear and make recommendations on the submissions. These were heard in March 2001. The Commissioner reported on 5 May 2001.

[30] Clearwater was amongst the parties who made submissions. I will refer to the particular position of Clearwater shortly.

[31] For the purposes of this part of my judgment it is sufficient for me to say that:-

1. The Commissioner held that to achieve the purposes of the Act it was necessary to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour; and

2. Accordingly the Commissioner made recommendations the effect of which was to uphold the new Policy 6.3.7 as stated in Variation 52 although amendments were proposed in relation to the Explanation and reasons.

[32] The Commissioner's recommendations were accepted by the Council.

[33] It is not necessary for me to set out in detail the Explanations and reasons as proposed by the Commissioner and accepted by the City Council.

Subsequent proceedings with respect to Variation 52

[34] Clearwater has referred Variation 52 to the Environment Court.

The issues in the Environment Court on Clearwater's reference

[35] In order to understand the issues which the Environment Court must address on Clearwater's reference, it is necessary to discuss in a little detail the arguments which Clearwater wishes to advance.

[36] Clearwater sees Variation 52, both as promulgated and as amended in accordance with the Commissioner's recommendations, as inhibiting its ability to:-

1. Obtain variations to the development plan already in place in respect of the open space 3D zone;

2. Extend its development into its adjacent rurally zoned land..

[37] In its submission on Variation 52, Clearwater's principal contention was expressed in these terms:-

> 2.1 The adoption of a policy to discourage urban residential development and other noise sensitive activities within the 50 dBA Ldn noise contour around Christchurch International Airport unreasonably affects present and future development potential of Clearwater Resort Ltd and land in or adjacent to the Open Space 3D zone.

As well there were contentions that:-

> 2.3 The operations of Christchurch International Airport Limited can be satisfactorily protected ... if a policy calling for insulation against noise is adopted in respect of development between the 55 and 65 dBA contours, rather than a policy of discouraging new noise sensitive developments.

and

> 2.4 The physical location of the 55 dBA Ldn noise contour and the composite 95 SEL dBA/65 dBA Ldn contour are located at too great a distance from Christchurch International Airport. Justification for the location on the planning maps for the noise contours has not been provided for during the statutory processes leading to the proposed plan as it is today and the inclusion of the contours in the plan is accordingly unlawful and *ultra vires* the Resource Management Act 1991.

[38] Amongst the decisions it sought were:-

> 3.1 In Policy 6.3.7 the adoption of the 55 dBA Ldn noise contour in substitution for the 50 dBA Ldn noise contour contained in Variation 52.
>
> ....

3.5 That the planning maps be redrawn to show the correct contour locations if the contour locations on the map are shown to be incorrect.

...

3.8 That the SEL 95 dBA contour line and is associated influence on land use planning be removed from the Plan.

[39] In the Environment Court, on its reference, Clearwater is confined to arguments:-

1. Associated with material in or excluded from the proposed plan which was referred to in its original submission (see First Schedule, clause 14(1)); and,

2. This only to the extent to which such arguments can be said to be "on" Variation 52 (see clause 6, First Schedule).

[40] Clearwater wishes to challenge the accuracy of the lines drawn on the planning maps which purport to identify the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA Ldn and 50 dBA Ldn noise contours.

[41] The Christchurch City Council and CIAL are troubled at the prospect of a lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps.

[42] Accordingly, the Environment Court was invited to determine, as a preliminary issue, whether Clearwater could raise, on the hearing of its reference, the contention that the contour lines were inaccurately drawn.

[43] As will be apparent from what I have said, the fundamental argument which Clearwater wishes to advance on the reference is that a policy of discouraging new residential development and other noise sensitive activities is not appropriate for the 50 dBA Ldn noise contour and that such a policy should apply only in relation to the 55 dBA Ldn contour. Whether this argument is in fact available to Clearwater may, in the end, turn on the extent to which Variation 52 merely makes explicit what was previously implicit in the pre-Variation 52 proposed plan. At this point in proceedings, however, neither CIAL nor the City Council seek a ruling from me as

to the availability to Clearwater of this fundamental argument. Clearwater also did not invite me to rule in a definitive way on this point. So, I put this issue on one side.

The approach of the Environment Court in the decision which is under appeal

[44] The judgment of the Environment Court now under appeal contains a reasonably discursive review of the issues as presented by the parties and as perceived by the members of the Court.

[45] For present purposes, I can summarise the judgment fairly by saying that the Court concluded that:-

1. It is open to Clearwater to assert that the planning maps do not depict the relevant noise contours accurately; this in support of its contention that the contours as depicted do not provide an appropriate basis for the implementation of the policy enunciated in the new Policy 6.3.7.

2. It is not open to Clearwater to seek to have the relevant noise contours redrawn on the planning maps.

The appeals to this Court

[46] CIAL and the Canterbury Regional Council have appealed against the first of the two conclusions just referred to and Clearwater against the second.

Overview

[47] Challenges to the location of the lines on the planning maps representing the composite 65 dBA Ldn/SEL 95 dBA, 55 dBA and 50 dBA noise contours are only available if appropriate reference was made to them in the original submission (see

clause 14(1), First Schedule) and if such challenges are indeed "on" the variation (see para [39] above).

[48] So it is sensible to consider first the extent to which challenges to the location of the lines were made in Clearwater's submission and secondly the whether challenges to the location of the noise contour lines are fairly "on" Variation 52.

[49] There is some artificiality to this process. This is because CIAL in particular, wishes to argue in the Environment Court that Variation 52 merely made explicit what was already implicit in the pre-Variation 52 proposed plan. On the basis of this argument it wishes to seek to persuade the Environment Court that Variation 52 effected no alteration in substance to the pre-Variation 52 proposed plan. If this is so, then, for reasons which I will come to shortly, it might follow that there is no scope for Clearwater to challenge Variation 52. At the hearing on 6 March, however, CIAL made it clear that it did not wish me to determine this issue on this appeal. Clearwater also did not wish me to resolve this issue. On this point, I refer back to what I said in para [43] above and note that I will revert to this point again in para [76] and [78] below.

The extent to which challenges to the locations of the lines were made in Clearwater's submission

[50] I have set out already the relevant parts of Clearwater's submissions.

[51] It is clear that the locations of the composite 65 dBA Ldn/SEL 95 dBA and the 55 dBA Ldn noise contour lines were challenged, see para [37] above.

[52] There was no specific reference to the 50 dBA Ldn noise contour in the submission. Mr Guthrie, however, pointed to the general words in the second sentence of para 2.4 (see para [37] above). As well the relief sought in para 3.5 is generally expressed. Mr Guthrie also told me that if any one of the contour lines could be shown to be wrong, this would necessarily mean that the other lines were wrong.

[53] Because I am of the view that it is not open to Clearwater to challenge the location of the 55 dBA Ldn contour and the 65 dBA Ldn/SEL 95 dBA noise contours (see below) the last of the points made by Mr Guthrie is of no particular moment. Further, and despite Mr Guthrie's submissions, I have been left with the view that the most natural reading of the submission is that the location challenge is confined to the two lines specifically identified and that general and non-specific references to the lines should be either regarded as referring back to those lines or alternatively, in the case of para 2.4, possibly to a separate ground of challenge referenced to s32, Resource Management Act.

[54] I am therefore of the view that there is no challenge to the location of the 50 dBA Ldn noise contour line. To use the language of clause 14(1) of the First Schedule, the location of that line was "not referred to" in Clearwater's submission.

Whether challenges to the location of the noise contour lines are "on" Variation 52

General

[55] In addressing this question I will discuss the test for determining whether a submission is "on" a variation and then apply that test to the three contour lines in issue. This necessarily means that I will apply the test to the location of the 50 dBA Ldn noise contour despite the conclusion expressed in the preceding section of my judgment. I will do this to cover the contingency that it may later be held that I am wrong in concluding that the location of this noise contour line was not challenged by Clearwater in its submission on Variation 52.

The test for determining whether a submission is "on" a variation

[56] Whether a submission is "on" a variation poses a question of apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case.

[57] How should the Courts approach such a question?

[58] Obviously, such a question can only be answered by a Court as a matter of judicial assessment made in the general context of the scheme and purpose of the Resource Management Act.

[59] In the course of this dispute, three possible general approaches have been suggested:

1. A literal approach in terms of which anything which is expressed in the variation is open for challenge.

2. An approach in which "on" is treated as meaning "in connection with".

3. An approach which focuses on the extent to which the variation alters the proposed plan.

[60] Should a literal approach be taken?

[61] Such an approach was favoured by the Commissioner who heard the submissions on Variation 52 as is apparent from this passage from his report:-

> I read Clause 6 of the First Schedule – as modified in accordance with Clause 16A – as authorising the making of submissions "on the [Variation in the form that it has been] publicly notified ..." I therefore conclude that a submission may be made in respect to anything included in the text as notified, even if that submission relates to something that the Variation does not propose to alter. ... Conversely, it is not open to submit as to seek alterations of parts of the Proposed Plan not forming part of Variation 52 as notified. An example is the submissions which sought to raise again the question of whether the noise contours ought to be shown in the Planning Maps. The Variation as notified does not include any version of those maps. I record that I made my view in this regard clear at an early stage in the hearing and that, as a result, some submitters may well have refrained from developing submissions on that issue in the way that they might otherwise have done.

[62] The approach favoured by the Commissioner would leave a good deal to the idiosyncrasies of whoever drafts a particular variation. For instance, if a particular policy in a proposed plan is supported by three reasons (reasons (a) (b) and (c)) and the intention is to supplement these reasons with a fourth (reason (d)), the person drafting the variation might either replace the existing statement of reasons and set

out reasons (a), (b), (c) and (d) or simply specify that the existing reasons are to be supplemented by reason (d). On the Commissioner's approach, the first method would open up for challenge reasons (a), (b) and (c) (given that their text had been replicated in the variation) whereas the second approach would expose only reason (d) to challenge.

[63] For the reason just given, the Commissioner's approach might be thought to open up rather too much for challenge. But in another sense, it may be too restrictive. Say a line on a proposed plan purports to identify conclusively for all purposes associated with the plan a particular height contour (say 100 metres above sea level) and this line is the basis for design controls on residential units. Assume a variation which introduces a prohibition on residential development on land which is situated 100 metres above sea level. Assume as well a landowner whose property is on the wrong side of the line but who claims that the line is drawn too low on the hillside and that his property is in fact only 95 metres above sea level. In such a case, I would have thought that the land owner (who had perhaps been very happy with the design controls inserted by the proposed plan and for this reason had not previously bothered to challenge the location of the line) could fairly challenge the positioning of the line by way of submission on the variation and this irrespective of whether the planning maps were attached to the variation as notified. This is because the variation would involve a change of function for the contour line which would fairly open for challenge its location.

[64] Mr Guthrie's primary argument was that word "on" in the First Schedule to the Act should be construed as having a meaning akin to "in contact or connection with". He argued that the noise contours on the planning maps were a method for the implementation of Policy 6.3.7, as enunciated in Variation 52, and that a challenge to them could fairly be regarded as being "in connection with" Variation 52.

[65] I was not much attracted to Mr Guthrie's argument that "on" should be treated as meaning "in connection with". If so broad an approach were to be adopted it would be difficult for a local authority to introduce a variation to a proposed plan without necessarily opening up for re-litigation aspects of the plan which had previously been passed the point of challenge.

[66] On my preferred approach:-

1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

[67] I will amplify these two considerations briefly.

[68] The first of the considerations is consistent with the arguments addressed to me by counsel for CIAL and the City Council. It is also consistent with the approach taken in the Environment Court in the judgment under appeal. Further, it seems to me to be in conformity with the scheme of the Resource Management Act which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans.

[69] The second of the considerations is consistent with the judgment of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192. It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

The 50 dBA noise contour line

[70] It will be recalled that I am of the view that the location of this noise contour line was not challenged by Clearwater in its submission. For the purposes of this section of my judgment I will assume that the location of the line was challenged in the submission and address the question whether this notional challenge is "on" Variation 52. Obviously some of the arguments relevant to this issue are also relevant to questions associated with the other noise contour lines.

[71] There are two possible bases on which it might be argued that the challenge to the location of the 50 dBA Ldn contour is "on" the variation:-

1. Variation 52 specifically provides that the planning maps are conclusive as to the location of the relevant noise contours but this was not explicit in the policies expressed in the pre-Variation 52 proposed plan.

2. The function of the 50 dBA Ldn noise contour line is different under Variation 52 from its function under the pre-Variation 52.

[72] If the 50 dBA Ldn noise contour line depicted on the planning maps in the pre-Variation 52 proposed plan was indicative only, an alteration which made it conclusive as to location would fairly be open to challenge by submission. In other words, if the effect of Variation 52 was to treat this contour line as being definitive when it had previously only been indicative, a challenge to its location would be "on" Variation 52.

[73] I am, however, perfectly satisfied that the references in the proposed plan to the 50 dBA Ldn noise contour in the proposed plan both as notified and in its pre-Variation 52 form must be taken as referring to the area defined as such on the planning maps. There are two reasons for this conclusion:-

1. It would be a little odd if the noise contour lines depicted on the planning maps were indicative only.

2. At least one rule in the pre-Variation 52 proposed plan refers to the "50 dBA Ldn airport noise contour line" and this must be a reference to the line as depicted on the planning maps.

[74] Accordingly, I would not see the explicit provision in the new Variation 52 to the effect that the noise contour lines are definitive as amounting to an alteration to the position as it was under the pre-Variation 52 proposed plan. So, the statement in Variation 52 to the effect that the 50 dBA Ldn noise contour line is the reference point for the new policy does not, in itself, have the consequence that a challenge to the location of the line is "on" Variation 52.

[75] On the other hand it is well arguable that the 50 dBA Ldn noise contour line has a function under Variation 52 which differs appreciably from its function under the pre-Variation 52 proposed plan. The 50 dBA Ldn contour line is now intended to be the limit of new residential development (albeit with some minor exceptions). The precise definition of its role under the pre-Variation 52 proposed plan is open to debate, but it is certainly arguable that the discouragement of residential development within the 50 dBA Ldn contour is firmer under Variation 52 than it was previously.

[76] I note in passing that CIAL wishes to reserve its position as to whether Variation 52 simply makes explicit what was previously implicit. I heard a good deal of argument on this point. But at the second hearing (on 6 March) Ms Appleyard indicated that she was not seeking a ruling from me on this question. So, I will just have to deal with the appeal on the assumption that there is a change of function.

[77] Assuming (for the purpose of this appeal) that there is a change of function, does this have the result that a challenge to the location of the 50 dBA Ldn noise contour line is "on" Variation 52? The class of people who could be expected to challenge the location of this line under the 1995 version of the proposed plan is likely to be different from the class of people who could be expected to challenge its location in light of Variation 52 and the different significance attached to the lines in the two plans. This is sufficient, on my appreciation, to warrant the conclusion that a challenge to the location of the line is fairly "on" the variation.

[78] So, if the location of the 50 dBA Ldn noise contour had been "referred to" in Clearwater's submission and challenged, I would have held that this challenge was "on" Variation 52, subject to the proviso that it would still have been open to Clearwater to maintain in the Environment Court its general argument that Variation 52 merely makes explicit was previously implicit in the pre-Variation 52 proposed plan.

The 55 dBA Ldn and the composite 65 dBA Ldn/SEL 95 dBA noise contours

[79] The location of the lines depicting these contours was challenged explicitly in Clearwater's submission. Accordingly, the only question for determination in respect of these lines is whether these challenges are "on" Variation 52.

[80] It is perfectly clear that the relevant contour lines depicted on the planning maps in the pre-Variation 52 proposed plan were intended to be definitive. I say this given the rules to which Ms Appleyard referred at the hearing on 6 March. Indeed this is rather more obvious than the corresponding position in relation to the 50 dBA Ldn contour line which does not figure so prominently in the rules in this version of the proposed plan. So the fact Variation 52 specifically references the policies enunciated to the contour lines as drawn cannot be regarded as having the consequence that a challenge to the contour lines is "on" Variation 52.

[81] At the hearing on 5 March Mr Guthrie accepted that these contour lines serve the same function under Variation 52 as they do in the pre-Variation 52 proposed plan.

[82] It follows that the challenge to their location is not "on" Variation 52 and may not be persisted with in the Environment Court on the hearing of its reference.

Other issues

[83] The arguments of counsel on all sides covered a broad range of issues, not all of which are addressed in this judgment.

[84] Because I have held that it is not open to Clearwater to challenge the locations of the various contour lines, it follows that there is no occasion for me to consider whether it would be appropriate to permit Clearwater to seek relief from the Environment Court involving the redrawing of the lines, an issue upon which I heard much argument. As well, given my conclusion that the locations of the lines are not open to challenge, I see little scope for the possible application of s293, Resource Management Act, another topic upon which I had the benefit of much argument. Further, given my conclusions, there seems little point in me reviewing complaints as to lack of specificity in the submission made by Clearwater. Arguments associated with such complaints were advanced to me by both CIAL and the City Council.

[85] That said, I will reserve leave to the parties to revert to me in relation to any outstanding issue; this to cover the contingency that there is something material in the arguments advanced to me which I have overlooked.

Disposition

[86] Accordingly, I dismiss the appeal by Clearwater and allow the appeal by CIAL and the Canterbury Regional Council. I hold it is not open to CIAL to challenge the locations of the noise contour lines which I have mentioned.

[87] CIAL, the Canterbury Regional Council and the City Council are entitled to costs which are to be fixed by the Registrar on a 2B basis.

[88] As indicated, I reserve leave generally to the parties to revert to me.

William Young J

Signed at 4.55 pm on 14 March 2003

Solicitors:
Anderson Lloyd Caudwell, Christchurch, for Clearwater Resort
AJ Prebble, Christchurch, for Christchurch City Council
Chapman Tripp Sheffield Young, Christchurch, for Christchurch International Airport Ltd and Canterbury Regional Council

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

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

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

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

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

(1) the appeal is allowed;

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

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

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

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

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

E: Costs are reserved.

REASONS

Table of Contents Para

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1. Introduction

1.1 The issue: should the land be rezoned residential?

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

1.2 The vineyard and its landscape setting

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

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

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

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

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

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

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

1.3 Plan Change 59

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4 What matters must be considered?

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

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

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

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

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

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

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

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

21 Section 74(1) of the Act.

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

23 Section 75(3) RMA.

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

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

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

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

B. Objectives [the section 32 test for objectives]

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

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

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

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

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

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

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

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

[18] In relation to A above:

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

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

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

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

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

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

1.5 The questions to be answered

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

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

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

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

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

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

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

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

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

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

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

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

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

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

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

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

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

2.2 The Wairau Awatere Resource Management Plan

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

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

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

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

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

Urban environments (Chapter 11)

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

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

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

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

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

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

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

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

The rural environment (Chapter 12)

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

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

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

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

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

The explanation continues:

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

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

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

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

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

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

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

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

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68 Objective 12.7.2 [WARMP p 12-23].

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

70 WARMP Vol 3 Maps 146 and 147.

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

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

Noise (Chapter 22)

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

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

...

Subdivision (Chapter 23)

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

Rules

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

2.3 NZS 6805: the Air Noise Standard

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

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

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

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

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

1.4.2 *The outer control boundary*

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

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

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

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

1.8 Explanation of tables

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

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

Table 2

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

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

Table 2 states:

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

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

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

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

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

They preferred the first interpretation[81].

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

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

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

2.4 Plan Changes 64 to71

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

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

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

3.1 Section 32 RMA

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

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

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by —
> (a) ...
> (b) ...
> (ba) ...

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

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

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

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

(4) For the purposes of the examinations referred to in subsections (3) and ... an evaluation must take into account —
(a) the benefits and costs of policies, rules, or other methods; and
(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (4) For the purposes of the examinations referred to in subsection (3) and (3A) an evaluation must take into account —
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

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

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

> If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

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

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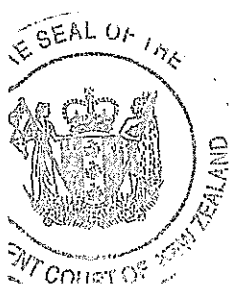
96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

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



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

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

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

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

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

4.1 Introducing the issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Employment land

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

The Marlborough Growth Strategies

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

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

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

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

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

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

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

The council's approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CVL's approach

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

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

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

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

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

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

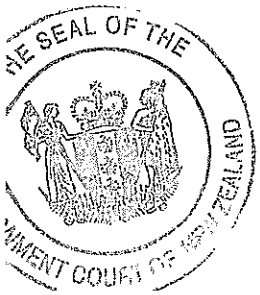
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose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

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

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

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

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



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

Findings

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

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

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

4.3 Residential supply and demand

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

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

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

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

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

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

4.4 Airports

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

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

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

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

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

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

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

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

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

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

4.5 Noise

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

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

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

Current airport activity

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

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

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

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

165 Exhibit 35.1.

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

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

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

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

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

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

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

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

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

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

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

- fixed wing 96.1
- helicopter 8.0

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

Future noise

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

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

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

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

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

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

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

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

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

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

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

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

- fixed wing 187.1
- helicopter 39.7

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

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

The 55 dB Ldn contours

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

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

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

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

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

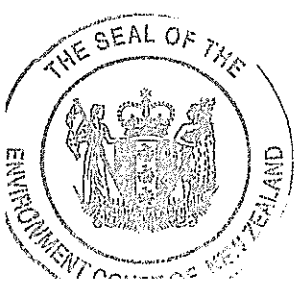
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

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

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

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

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



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

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

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

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

Findings

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

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

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

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

Noise mitigation measures

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

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

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

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

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

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

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

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

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

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

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

5.1 Giving effect to the RPS

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

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

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

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

5.2 Implementing the objectives of the WARMP

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

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

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

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

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

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

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

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

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

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

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

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

5.3 Considering Plan Changes 64 to 71

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

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

6. Does PC59 achieve the purpose of the RMA?

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

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

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

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

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

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

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

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

6.1 Sections 6 and 7 RMA

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

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

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

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

6.2 Section 5(2) RMA

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

256 Closing submissions for Omaka para 172.

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

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

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

7. Result

7.1 Having regard to the MDC decision

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

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

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

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

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

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

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

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

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

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

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

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

124. The difficulties are:

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

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

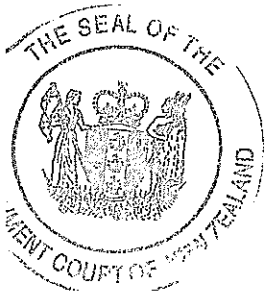
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

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

[179] On balance the Commissioners considered that:

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

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



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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

7.3 Outcome

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

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

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

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

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

For the court:

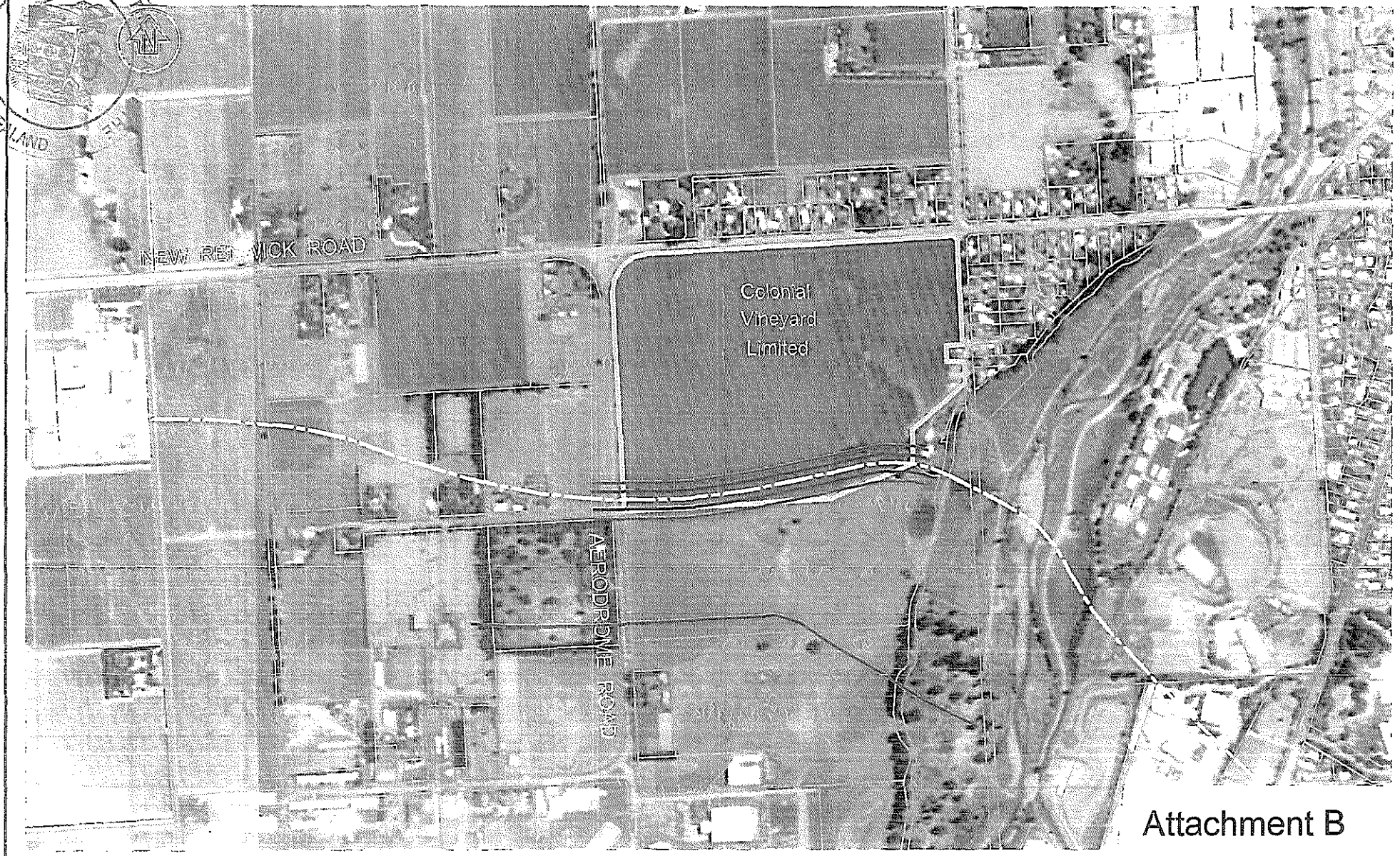
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

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

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

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

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

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DATE 09.09.2013	SHEET 25	ISSUE A
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ATTACHMENT 1

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 214/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Appeals pursuant to that Act from Decision No W53/93, and Decision ENF 210/92 of the Planning Tribunal

BETWEEN COUNTDOWN PROPERTIES (NORTHLANDS) LIMITED and COUNTDOWN FOODMARKETS NEW ZEALAND LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 215/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeal thereunder from Decision No W53/93 of the Planning Tribunal

BETWEEN FOODSTUFFS (OTAGO/SOUTHLAND) PROPERTIES LIMITED

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

AP 216/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of An Appeals pursuant to that Act from Decision No W53/93 and Decision ENF 210/92 of the Planning Tribunal

BETWEEN TRANSIT NEW ZEALAND

Appellant

AND THE DUNEDIN CITY COUNCIL

Respondent

AND M L INVESTMENT COMPANY LIMITED and WOOLWORTHS (NZ) LIMITED

Second Respondent

Coram: Barker J (presiding)
Williamson J
Fraser J

Hearing: 1,2,3,4,7,8 February 1994 (in Christchurch)

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

Date of Judgment: 7 March 1994

JUDGMENT OF THE COURT

Introduction:

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

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early

stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit NZ Limited ('Transit') that his client had reached a settlement with the first respondent, the Dunedin City Council ('the Council') and the second respondents, M L Investment Company Limited and Woolworths (NZ) Ltd, (called collectively 'Woolworths'). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the Council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were -

(a) Countdown Properties (Northlands) Limited and Countdown Foodmarkets New Zealand Limited (collectively called 'Countdown'); and

(b) Foodstuffs (Otago/Southland) Limited ('Foodstuffs').

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the

greater Dunedin region, the Council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the 'city', as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

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

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

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

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

Both appellants operate supermarkets within the same general area in or near the Dunedin central business

district. They lodged submissions in opposition to the plan change with the Council and appeared at a hearing of submissions before a Committee of the Council. Dissatisfied with the Council's decision in favour of the plan change, they initiated references to the Tribunal under clause 14 of the First Schedule to the RMA ('the First Schedule'). The concept of a 'reference' of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by S.299 of the RMA but are similar in scope to those conferred by the TCPA.

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

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

(a) whether the Council could change its transitional district plan; and

(b) whether the Council could lawfully complete the evaluation and assessments required by S.32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the Council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard, lasted 16 sitting days; its reserved decision occupies some 130 pages. The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both

expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

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

Chronology:

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

envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the Council's expenses in undertaking the exercise.

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

Some 15 submissions on the plan change were received by the Council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in S.32 of the RMA, was presented to the Council Planning Hearings Committee by a Mr K. Hovell, a consultant engaged by the Council to advise it on the proposed change. It was found by the Tribunal as fact, that the analysis required by S.32 (to be discussed in some detail later) was not prepared by the Council

until after the hearing of submissions. Obviously therefore, no draft S.32 report was available for comment at the public hearing of the submissions.

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

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

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

Approach to Appeal:

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

(a) Applied a wrong legal test; or
(b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or
(c) Took into account matters which it should not have taken into account; or
(d) Failed to take into account matters which it should have taken into account.

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

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.

See **Environmental Defence Society v Mangonui County Council** (1988), 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief. **Royal Forest & Bird Protection Society Inc v W.A. Habgood Ltd** (1987), 12 NZTPA 76, 81-2.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke, P in **Northern Milk Vendors' Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

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

Grounds 1, 2 and 3:

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

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

3. **The Tribunal misconstrued S.32 and S.39(10(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's S.32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.**

These grounds are concerned with the Council's duty under S.32 of the RMA and can be dealt with together by a consideration of the following topics -

(a) Was the Council correct in not fulfilling its duties under S.32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the Council right to carry out the S.32 analysis after the public hearing of submissions but before it published its decision?

(b) Should the Council have made a S.32 report available to persons making submissions on the plan change?

(c) Was the Council's actual S.32 report an adequate response to its statutory responsibility?

(d) If the Council was in error in its timing of the S.32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal an independent judicial body before which all relevant matters were canvassed?

S.32 of the Act at material times read as follows

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

subsection (2), any person described in that subsection shall -

(a) Have regard to -
  (i) the extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and
  (ii) other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
  (iii) the reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise, and

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

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

(2) Subsection (1) applies to -

(a) The Minister, in relation to -
  (i) the recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53;
  (ii) the recommendation of the making of any regulations under section 43.

(b) The Minister of Conservation, in relation to -
  (i) the preparation and recommendation of New Zealand coastal policy statements under section 57'

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

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

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

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

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

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

"Any person may request a local authority to change its district plan and the plan may be changed in the manner set out in the First Schedule."

Clause 2 of the First Schedule requires -

"A written request to the local authority defining the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change".

An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

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

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

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within 3 months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). 'Any person' is entitled to make submissions in writing; clause 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the Council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form.

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

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

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

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

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

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

functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

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

(a) Read in the context of S.32(2) the word "adopting" as used in S.32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.

(b) The duties imposed by S.32 are to be performed before adopting", that is, before the change is made into an effective planning instrument.

(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.

(d) If Parliament had intended that in every case S.32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.

(e) A separate document of the local authority's conclusions on the various matters raised in S.32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.

(f) In relation to change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision than the planned change be approved in the revised form.

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

Interpreting the provisions of S.32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. S.32(2) describes the persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A

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

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

We do not accept this submission because the procedure in Clauses 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the changes its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that

procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

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

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

submission process. There can be no act or decision, inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

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

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

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

requested by a person other than the local authority or a Minister of the Crown".

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

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

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

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

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is 3 months away or if the request is frivolous,vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous S.32 investigation. It may not have time to do so even within the 3 months required under clause 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to 'adopt' it. It will have to consider the wider implications of a proposed plan change during a period limited by clause 28 to 3 months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a S.32 report being prepared. A local authority might not be therefore in a position to 'adopt' the plan change until it had the S.32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

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

However, the situation is different for those plan changes to which S.32(3) applies; i.e. plan changes

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

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

In this scenario, the difference between 'adopt' and 'approval' is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the Council or of a Tribunal direction on a reference may cause the local authority to find that its 'adopting' of the change was erroneous. However, with the plan change initiated privately, adopting comes at the time when the Council decides after hearing all the submissions that it should adopt the

change. Formal approval may follow later, depending on whether there are references to the Tribunal.

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

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

As to the argument that time is needed for a S.32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its S.32 evaluation of the proposal. If there were not time available within the 3 months, then there is power for the local authority under S.38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

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

S. 19 of the RMA is as follows -

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

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

appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to S.32.

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

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

> "No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is -

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
(b) An existing use allowed by S.10 (certain existing uses protected).
..."

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

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

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

We did not consider that there is any merit in this submission. S.39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under S.32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

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

These same criticisms were considered by the Tribunal which concluded that, while the Council's S.32 analysis report did not scrupulously follow the language of S.32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal

incorrectly permitted an inadequate compliance by the Council with its S.32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated -

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

Earlier it stated -

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

We agree with those views.

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

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the Council's decision and

S.32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced Counsel. We are conscious of the approach described in Calvin v Carr, (1980) AC 574, A J Burr Limited v Blenheim Borough, [1982] NZLR 1 and Love v Porirua City Council, [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the Council stage of hearing were cured by the thorough and professional hearing accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

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

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

relevant segments of the change as advertised with the counterparts in the Council's finished product.

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

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

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A

person making a submission is required by clause 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

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

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned

shall give its decision regarding the submissions and state its reasons for accepting or rejecting them". This is to be compared with Regulation 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall allow or disallow each objection either wholly or in part..." (Emphasis added)

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

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

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of

these topics were addressed at the hearing and all fell for consideration by the Council in its decision.

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

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

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

> time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful."

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

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

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

> "...it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement nd ordinances in its plan. It follows that when an

> authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised."

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

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

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in **Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council** (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have

appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

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

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the Council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the Council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the Council. More importantly, it is hard to envisage that any person who had not participated

in the Council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

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

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

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate;

because the jurisdiction to amend must have some foundation in the submissions.

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

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

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.

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

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

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

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

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

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

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

> "Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons."

The Tribunal went on to point out that clause 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within 3 months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred

and that the express provision for deferment in the First Schedule shows an intent by the Legislature that deferment is not intended for reviews that are more remote.

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

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

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

to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

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

Consideration of S.76 is required -

> "S.76.
>
> (1) A territorial authority may, for the purpose of -
>
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan,- include in its district plan rules which prohibit, regulate, or allow activities.
>
> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
>
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.
>
> (4) A rule may -
>
> (a) Apply throughout a district or a part of a district;
> (b) Make different provision for -
> (i) Different parts of the district; or
> (ii) Different classes of effects arising from an activity:

(c) Apply all the time or for stated periods or seasons;
(d) Be specific or general in its application;
(e) Require a resource consent to be obtained for any activity not specifically referred to in the plan."

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

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

Similar submissions about S.5, the new philosophies of the RMA and the need to abandon the mindset of TCPA procedures were given to the Full Court in **Batchelor v Tauranga District Council (No 2)** [1992] 2 NZLR 84; that

was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89 -

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

As in **Batchelor's** case, reference was made in the appellants' submissions to the speech in Hansard of the Minister in charge introducing the RMA as a bill. We find no occasion here to resort to our rather limited ability to use statements in parliamentary debates in aid of statutory interpretation. **Wellington International Airport Ltd v Air New Zealand Ltd**, [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

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

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

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

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

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

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

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of S.76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of landowners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA Act; in a planning context, this principle is demonstrated by such authorities as **Ashburton Borough v Clifford** [1969] NZLR 921, 943. Counsel submitted that S.9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by S.74(4)(e); that normal principles of

statutory interpretation should properly have applied to the construction of S.76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act. "We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in S.76(4) than deliberately excluded. The rule is clearly within the general scope of S.76(1) and we do not consider that it was ultra vires respondent's powers".

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

Mr Marquet referred to a decision of the Tribunal in **Auckland City Council v Auckland Heritage Trust** (1993), 1 NZRMA 69 where Judge Sheppard held that a reference

anywhere in a plan to a particular activity was sufficient to preclude the application of S.373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a Council to make different provisions for different parts of a district.

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

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

We reject this ground of appeal.

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

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

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

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

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

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

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

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

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

borne in mind the further factor derived from the absence of the word "specified".

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

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could no stand. This ground of appeal is also dismissed.

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

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

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

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

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

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

bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal - which is not permitted by the RMA. We therefore reject this ground of appeal.

Ground 24. **"The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable Tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following -**

> **Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds,**

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of

evidence and one which no reasonable Tribunal could have reached.

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

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

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

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

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

Grounds 15, 16, 17 and 18:

15. **"That the Tribunal erred in law by holding that S.290 of the Act did not apply to the references in Plan Change No 6."**

16. **"That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in S.32(1)."**

17. **"That the Tribunal misconstrued the Act when it held that it has the powers conferred by S.293, when considering a reference pursuant to clause 14."**

18. **"That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it."**

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

> **"Powers of Tribunal in regard to appeals and inquiries -**

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

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

The Tribunal held that S.290 did not apply because the proceedings were not an appeal against the Council's decision as such and that the Tribunal was not under the same duty as the Council to carry out the duties listed in S.32(1). It went on to say -

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

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that S.290 did not apply and in determining that it was not itself required to discharge the S.32 duties.

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

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

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

> "(2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference

> is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it."

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

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

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

We consider that, for the reasons given by the Planning Tribunal, it correctly determined that it had the powers

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

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

The general approach that the Tribunal has the same duties, powers and discretions as the Council is not novel. S.150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as S.290(1) and (2) of the RMA; in particular, S.150(1) provided that the Tribunal has the same "powers duties functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in **Waimea Residents Association Incorporated v Chelsea Investments Limited** (Davison CJ, Wellington, M.616/81, 16 December 1981).

There was no provision in the TCPA corresponding to S.32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even although it had the same powers and duties as the Council.

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

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

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

The Tribunal considered that in S.32(1), 'necessary' requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in S.32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential.

We agree with that view and do not consider that the Tribunal was in error in law.

We return now to the appellants' primary submission.

It is true that the Tribunal said (at p.128) -

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

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

> "We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory

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

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

In our view, the Tribunal applied the correct test when considering the relevant part of S.32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the Council to modify, delete or insert any provision which had been

referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the Council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

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

Ground 20. **"In considering Plan Change No 6 in terms of S.5 of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin district."**

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

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

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

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

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

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the Council had not specifically

stated the amendments sought and that that was final because it had not been appealed. Reference was made to S.295 of the RMA viz -

> "that a decision of the Planning Tribunal ... is final unless it is re-heard under S.294 or appealed under S.299."

It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

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

On the penultimate page of its decision the Tribunal stated -

> "The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change

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

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

In Port Otago Limited v Dunedin City Council (Dunedin, A.P.112/93, 15 November 1993, Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R.718A(2) of the High Court Rules empowers.

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

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

Section 300-307 of the RMA provide detailed procedure for the institution of appeals to this Court under S.299 and for the procedure up to the date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have

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

Result:

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

R D. Barker J.

Fraser J.

Solicitors: Gallaway Haggitt Sinclair, Dunedin, for Foodstuffs
Duncan Cotterill, Christchurch, for Countdown
Timpany Walton, Timaru, for Transit
Chapman Tripp Sheffield Young, Auckland, for Woolworths
Ross Dowling Marquet & Griffin, Dunedin, for Dunedin City Council

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2012-454-764
[2013] NZHC 1290

UNDER	the Resource Management Act 1991
BETWEEN	PALMERSTON NORTH CITY COUNCIL Appellant
AND	MOTOR MACHINISTS LIMITED Respondent

Hearing: 13 & 20 March 2013

Counsel: J W Maassen for Appellant
B Ax in person for Respondent

Judgment: 31 May 2013

JUDGMENT OF THE HON JUSTICE KÓS

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

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

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

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

Background

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

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

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.

(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.

(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

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

MML's site

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

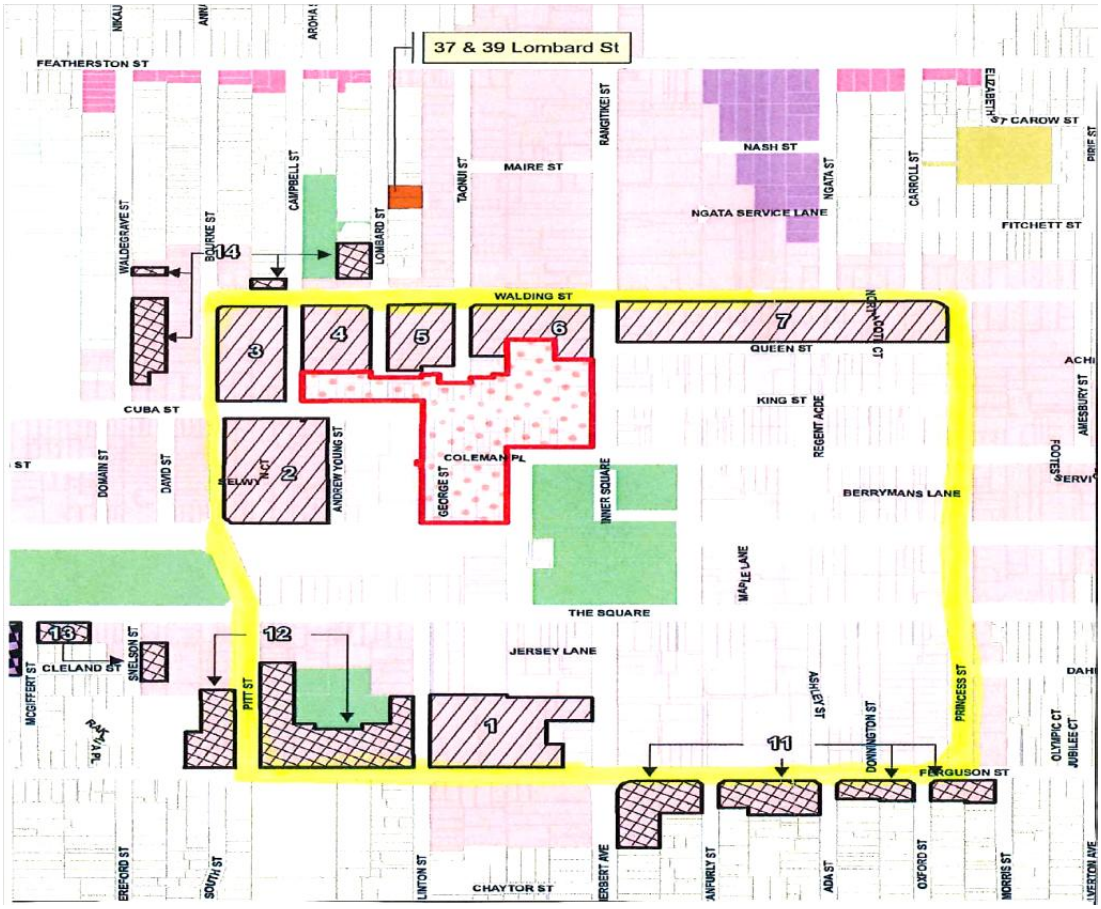
[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district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

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

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 hectares of currently residentially zoned land to OBZ. Most of this land is along the ring road.

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



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

MML's submission

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

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did

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

not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

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

Council's decision

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

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

Decision appealed from

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

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

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

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

(a) the extent to which MML's submission addressed the subject matter of PPC1; and

(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

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

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in schedule 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did clause 7 of Schedule 1 require the local authority to notify persons who might be affected by submissions. Instead just a

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

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

public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

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

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

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

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

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

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

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

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

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in

that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

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

Statutory framework

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

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

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

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

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

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

6 Section 32(4).

approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Secondly, there is the consultation required by Schedule 1, clause 3. Consultation with affected landowners is not required, but it is permitted.[8]

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

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

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

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

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7 Section 32(6).
8 Schedule 1, clause 3(2).
9 Schedule 1, clause 5(3)(b).

Making of submissions

(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

(2) The local authority in its own area may make a submission.

(3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).

(4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that –

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(5) A submission must be in the prescribed form.

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

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

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

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority

[10] Section 43AAC(1)(a).

notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.

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

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

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a

further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

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

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.
>
> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources

[11] See at [25] above.

> would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

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

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

> **Form of request**
>
> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or

plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].

(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

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

Issues

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

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

(b) Issue 2: Was MML's submission "on" PPC1?

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

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

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons

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

13 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

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

15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

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

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";

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

17 At [59].

(b) an approach in which "on" is treated as meaning "in connection with"; and

(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

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

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

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

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

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Secondly, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real

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[18] At [65].

opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

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

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

Halswater

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

(a) To further lower the minimum sub-division lot size; and

(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

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

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

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

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

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

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

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

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under clause 5

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22 At [38].
23 At [41].
24 At [42].

notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

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

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

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

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

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

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42

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25 At [44].
26 At [51].
27 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

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

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

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

Naturally Best

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

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

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[28] At [34].

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

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

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

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

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

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).

wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

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

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

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

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

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might

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[34] Nolan (ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

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

so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

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

[79] In contrast, the Schedule 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in clause 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about

by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

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

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

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed

in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

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

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

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

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

> for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

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

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

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

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

Conclusion

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

Summary

[91] To sum up:

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

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

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.
38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
39 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

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

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

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

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

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

Result

[92] The appeal is allowed.

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

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

Stephen Kós J

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