RJ Davidson Family Trust v Marlborough District Council

Court of Appeal
22, 23 November 2017; 21 August 2018
Cooper, Asher and Brown JJ

CA97/2017; [2018] NZCA 316

Resource management – Role of purpose and principles – Resource consent applications – Whether pt 2 an operative provision – Overall broad judgment approach – Sustainable management purpose – King Salmon case – Whether approach in King Salmon to plan changes applicable to resource consent applications – Application of relevant plan considerations – New Zealand Coastal Policy Statement – Resource Management Act 1991, ss 5, 6, 7, 8, 55, 55(2), 55(3), 57, 58(a), 58(d), 58(e), 58(f), 58(gb), 67(3), 104(1), 104(1)(b), 171, 171(1), 274, pt 2 and sch 4 – Resource Management Amendment Act 2013, s 125 – Resource Management (Forms, Fees, and Procedure) Regulations 2003.

Statutes – Interpretation – Role of purposes and principles – Whether operative provisions – Application of purposes and principles in other provisions – Meaning of "subject to Part 2" – King Salmon case – Resource Management Act 1991, ss 5, 6, 7, 8 and 104(1).

This case concerned an important issue about the role of pt 2 (ss 5–8) of the Resource Management Act 1991 (the Act), in the consideration by consent authorities of applications for resource consent. It raised the issue of what was meant by the words "subject to Part 2" in s 104(1) of the Act.

The appellant applied to the Marlborough District Council for resource consent to establish and operate a mussel farm adjacent to and surrounding the southern end of an unnamed promontory, jutting out into the northern end of Beatrix Bay in Pelorus Sounds. The Marlborough District Council declined the application. The appellant appealed to the Environment Court. The site of the proposed farm was within the Coastal Marine Zone 2 in the Marlborough Sounds Resource Management Plan (the Sounds Plan). The activity required consent as a non-complying activity under the Sounds Plan. The site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. The King Shag was a nationally endangered species. Having reviewed the relevant objectives and policies, the Environment Court expressed doubt that the Sounds Plan could be said to fully implement pt 2 of the Act, identifying in particular the risk of extinction of the King Shag, an event of low probability but high potential impact. The potential adverse effects on King Shags was one of the main factual issues considered by the Environment Court. The New Zealand Coastal Policy Statement 2010 (NZCPS) was also relevant to the application. It was important, because at the time of the Environment Court decision, the NZCPS had not been implemented in the Sounds Plan. As the application required consent for a non-complying activity,

the Environment Court could only grant consent if either s 104D(1)(a) or (b) of the Act applied. The Court therefore turned to consider the merits of the application having regard to the statutory considerations set out in s 104(1) of the Act. The Court considered that the decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*) had the effect that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the "intervening statutory documents", there was no need to look at pt 2 of the Act. Weighing the proposal under the Sounds Plan and the NZCPS, the Court judged that the "undoubted benefits" were outweighed by the costs it would impose on the environment. The Environment Court dismissed the application.

The appellant appealed raising four questions. Of particular relevance, was the question of whether the Environment Court had erred in failing to apply pt 2 of the Act in considering the application for resource consent under s 104. The High Court held that the reasoning in *King Salmon* (relating to a plan change) applied to s 104(1) of the Act, because the relevant provisions of the planning documents, including the NZCPS, had already given substance to the principles in pt 2 of the Act. It considered *King Salmon* applied equally to s 104 considerations as it did to a plan change. The High Court pointed out that even if the Environment Court had paid specific attention to pt 2, it was not clear that the enabling provisions of pt 2 would have been given pre-eminent consideration. In any event, the Environment Court had taken into account the likely net social benefits in assessing the effects of the proposal. It had also found that issues under s 7(b) of the Act, which required decision makers under the Act to have particular regard to the efficient use and development of natural and physical resources, was largely irrelevant because it did not deal with the protection of resources. Finally, the Judge concluded that the appellant had not identified any deficiency in the relevant planning instruments to justify resort to pt 2 in accordance with *King Salmon*.

Leave to appeal to the Court of Appeal was granted on the following questions of law: (a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents? (b) If the first question was answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Held: 1 The position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority was required to have regard, clearly showed that a consent authority must have regard to the provisions of pt 2 when it was appropriate to do so. The change made in 1993 was plainly designed to preserve the preeminent role of pt 2 (see [47]).

2 In the case of applications for resource consent however, it could not be assumed that particular proposals would reflect the outcomes envisaged by pt 2. Such applications were not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents might not furnish a clear answer as to whether consent should be granted or declined. And, while s 104, the key machinery provision for dealing with applications for resource consent, required they be considered having regard to the relevant planning documents, it plainly contemplated reference to pt 2. In any event, as could be seen from the provisions of pt 2,

each of ss 6, 7 and 8 began with an instruction, which was to be carried out "[i]n achieving the purpose of this Act", thus giving s 5 a particular role (see [51], [52]).

3 Given the particular factual and statutory context addressed by the Supreme Court, it could not properly be said the Court in *King Salmon* intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. The Supreme Court made no reference to s 104 of the Act nor to the words "subject to Part 2". Given the frequency with which pt 2, as well as the "overall judgment" approach, had historically been referred to in decision-making on resource consent applications, if the Supreme Court's intention had been to reject that approach it would be very surprising that it did not say so. Further, the Supreme Court's comments on the "overall judgment" approach was of a general nature. Lastly, the statutory language in s 104(1) plainly contemplated direct consideration of pt 2 matters (see [66], [67], [68], [70]).

4 Where applications for resource consent fell for consideration under other kinds of regional plans and district plans, the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). It might be that a fair appraisal of the policies meant the appropriate response to an application was obvious. If it was clear that a plan had been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that had regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. Equally, if it appeared the plan had not been prepared in a manner that appropriately reflected the provisions of pt 2, that would be a case where the consent authority would be required to give emphasis to pt 2. If a plan that had been competently prepared under the Act, it might be that in many cases the consent authority would feel assured in taking the view that there was no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. That was the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8 (see [73], [74], [75]).

Result: The appeal was dismissed.

Other cases mentioned in judgment

Auckland City Council v John Woolley Trust [2008] NZRMA 260 (HC).

Batchelor v Tauranga District Council (No 2) [1993] 2 NZLR 84 (HC).

Central Plains Water Trust v Synlait Ltd [2009] NZCA 609, [2010] 2 NZLR 363.

Dye v Auckland Regional Council [2002] 1 NZLR 337 (CA).

Man O'War Station Ltd v Auckland Council [2017] NZCA 24, [2017] NZRMA 121.

McGuire v Hastings District Council [2000] UKPC 43, [2002] 2 NZLR 577.

New Zealand Transport Agency v Architectural Centre Inc [2015] NZHC 1991, [2015] NZRMA 375.

Queenstown Airport Corp Ltd v Queenstown Lakes District Council [2013] NZHC 2347.

Queenstown Lakes District Council v Hawthorn Estate Ltd [2006] NZRMA 424 (CA).
R J Davidson Family Trust v Marlborough District Council [2016] NZEnvC 81.
R J Davidson Family Trust v Marlborough District Council [2017] NZHC 52, [2017] NZRMA 227.
R J Davidson Family Trust v Marlborough District Council [2017] NZCA 194.
Unison Networks Ltd v Hastings District Council [2011] NZRMA 394 (HC).
Wilson v Selwyn District Council [2005] NZRMA 76 (HC).

Appeal

The appellant appealed against a decision of the High Court declining its application for resource consent under the Resource Management Act 1991.

JDK Gardner-Hopkins and *BS Carruthers* for the appellant.
JW Maassen, *N Jessen* and *MWG Riordan* for the respondent.
JC Ironside for Kenepuru and Central Sounds Residents Association Inc and Friends of Nelson Haven and Tasman Bay Inc as Interested Parties.

Cur adv vult

The judgment of Cooper, Asher and Brown JJ was delivered by
COOPER J.

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Introduction

[1] This case concerns an important issue about the role of Part 2 of the Resource Management Act 1991 (the Act), in the consideration by consent authorities of applications for resource consent. It raises what is meant by the words "subject to Part 2" in s 104(1) of the Act.

[2] Section 104(1) sets out the matters which a consent authority must have regard to. They include any actual and potential effects on the environment of allowing the activity, and any relevant provisions of various planning documents which are listed in s 104(1)(b). The consent authority is directed to have regard to these matters "subject to Part 2".

[3] There are four sections in Part 2 of the Act. The first is s 5 which states the purpose of the Act and sets out a definition of "sustainable management". Section 6 sets out matters of national importance which are to be recognised

and provided for by all persons exercising functions and powers under the Act. Section 7 sets out another list of matters to which persons exercising functions and powers are to have "particular regard". Finally, s 8 requires functionaries under the Act to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). It is clear that Part 2 is of central importance to the scheme of the Act.

[4] It is also necessary to consider the extent to which the reasoning of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, a case involving an application for a plan change, should be applied in the case of applications for resource consent.[1]

[5] In form, the appeal is a second appeal with the leave of this Court against a determination of the High Court.[2] This Court granted leave to pursue two questions on the second appeal.[3] Before setting those questions out it will be appropriate to give some background.

A proposed mussel farm

[6] The appellant applied to the respondent for resource consent to establish and operate a mussel farm adjacent to and surrounding the southern end of an unnamed promontory jutting out into the northern end of Beatrix Bay in Pelorus Sounds. The proposed farm would be in two separate blocks: one, lying to the southeast of the promontory, 5.166 hectares in area, and the other lying to the southwest, comprising 2.206 hectares, having a total area of 7.372 hectares. The farm would consist of a number of lines with an anchor at each end, and a single warp rising to the surface. At the surface would be a "backbone" with dropper lines extending to approximately 12 metres depth (not to the sea floor). Each structure set would be spaced 12 to 20 metres apart. In addition to mussels, the application sought to cultivate scallops, oysters and algae.[4]

Environment Court decision

[7] The application was heard by an independent commissioner, retired Environment Court Judge Kenderdine on 21 May 2014, and in accordance with her decision, the application was declined by the Council on 2 July 2014. The appellant then appealed to the Environment Court. Two incorporated societies, Kenepuru and Central Sounds Residents Association Inc, and Friends of Nelson Haven and Tasman Bay Inc, who had lodged submissions on the application, joined in the Environment Court appeal under s 274 of the Act, in support of the Council's decision.[5]

[8] The site of the proposed farm was within the Coastal Marine Zone 2 in the Marlborough Sounds Resource Management Plan (the Sounds Plan). In that zone, marine farms are provided for (within 50–200 m of the shore) as discretionary activities. Because the proposed farm would extend beyond 200 m from the shore, the activity required consent as a non-complying activity under r 35.5 of the Sounds Plan.

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

2 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 [High Court judgment].

3 *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194.

4 This description of the application is taken from the Environment Court's decision, *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [5] [Environment Court decision].

5 Those societies appeared as parties in this Court ("the interested parties").

[9] The Sounds Plan, which became operative on 28 February 2003 is a combined district, regional and regional coastal plan. Relevant provisions of the Sounds Plan were reviewed by the Environment Court in its judgment, which confirmed the Council's decision.[6] Those provisions dealt with natural character, indigenous vegetation and habitats of indigenous fauna, landscape and public access. The site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. The King Shag is a Nationally Endangered species in the *New Zealand Threat Classification System* published by the Department of Conservation, with a stable population of between 250–1,000 mature individuals.[7]

[10] The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

[11] Having reviewed the relevant objectives and policies, the Environment Court expressed doubt that the Sounds Plan could be said to fully implement pt 2 of the Act, identifying in particular the risk of extinction of the King Shag, an event of low probability but high potential impact.[8] The potential adverse effects on King Shags was one of the main factual issues considered by the Environment Court.

[12] The New Zealand Coastal Policy Statement 2010 (NZCPS) was also relevant to the application. It was important, because at the time of the Environment Court decision, the NZCPS had not been implemented in the Sounds Plan.[9] The Environment Court identified as particularly relevant provisions in the NZCPS Policies 6(2) and 8(b) (aquaculture), 11 (indigenous biodiversity), 13 (preservation of natural character), and 15 (natural features and natural landscapes).

[13] Having identified the relevant provisions of the Sounds Plan and the NZCPS, the Environment Court turned to a comprehensive consideration of the effects of the proposal. It found:

(a) The proposal was unlikely to add any adverse cumulative effects to the water in Beatrix Bay that were more than minimal in the context of larger "natural" variations. However, whether there would be changes to the food web in a way that affected the King Shags was unknown.[10]

(b) There were unlikely to be adverse effects on the rocky reef system adjacent to the proposed farm.[11]

(c) There would only be very minor (if any) independent or cumulative effects on the intertidal zone.[12]

(d) There would be adverse effects on King Shag habitat, adverse effects on the populations of New Zealand King Shags and their prey and a low probability (very unlikely but possible) that the King Shag would become extinct as a result of the application.[13] The Court however considered it could not assess these effects against the effects of other

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6 Environment Court decision, above n 4, at [137]–[153].
7 At [97].
8 At [153].
9 At [155].
10 At [184].
11 At [189].
12 At [190]–[192].
13 At [206].

major environmental "stressors" (pastoral farming, exotic forestry, deforestation, dredging and trawling as well as river flood events and oscillations in weather patterns).[14]

(e) The proposal would compromise the integrity of the adjacent promontory from a visual/aesthetic/natural character perspective: this would be a significant adverse effect. [15]

(f) The cumulative effect, on top of the accumulated effects of the other mussel farms in the area would be significant. This would be contrary to Policy 13(1)(b) of the NZCPS.[16] Policy 13(1)(b) of the NZCPS requires significant adverse effects to be avoided so as to preserve the natural character of the coastal environment and protect it from inappropriate use and development.

(g) There would be no more than minor adverse effects on navigational safety.[17]

(h) Adverse effects on fishing and access were likely to be minor.[18]

(i) While noting it had received "minimal evidence" on the issue of economic effects, the Court accepted there would be a "producer surplus and consumer surplus which would give benefits to society".[19] It was also prepared to take into account social benefits of employment, but it could not make any quantitative comparison of net benefits of the proposed marine farm with the net benefits of the status quo.[20]

[14] As the application required consent for a non-complying activity the Environment Court could only grant consent if either s 104D(1)(a) or (b) applied. These so called "gateway tests" provide respectively that a consent authority may grant a non-complying activity consent only if it is satisfied that either the adverse effects of the activity on the environment will be minor or the application is for an activity that will not be contrary to the objectives and policies of a relevant plan. On the basis of its consideration of the proposal's effects the Court was satisfied that there would be significant adverse effects on the environment. This meant it could only contemplate granting consent if the application could be brought within s 104D(1)(b). On this issue, the Court was satisfied that the application could not be said to be contrary to the objectives and policies of the Sounds Plan as a whole, although that was what it described as a "close-run judgment".[21]

[15] The Court therefore turned to consider the merits of the application having regard to the statutory considerations set out in s 104(1) of the Act. At the outset, the Court addressed the words "subject to Part 2" which precede the list of matters to which the Council must have regard set out in paragraphs (a) to (c) of the subsection. The Court considered that the decision in *King Salmon*

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14 At [207].
15 At [225].
16 At [233].
17 At [239].
18 At [243].
19 At [244].
20 At [244]–[245].
21 At [249].

had the effect that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the "intervening statutory documents", there is no need to look at pt 2 of the Act.[22] It held:

> [260] We accept that in this proceeding we are not obliged to give effect to the NZCPS, merely to "have regard to" it, and even that regard is "subject to Part 2" of the RMA. However, logically the *King Salmon* approach should apply when applying for resource consent under a district plan: absent invalidity, incomplete coverage or uncertainty of meaning in that plan or in any later statutory documents which have not been given effect to, there should be usually no need to look at most of pt 2 of the RMA. We note that the majority of the Supreme Court in *King Salmon* was clearly of the view that its reasoning would apply to applications for resource consents.
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> (Footnotes omitted.)

[16] The last sentence in that extract from the Environment Court's decision had a footnote reference to *King Salmon* at [137]–[138], to which we will refer below.

[17] Turning (as required by s 104(1)(a)) to the actual and potential effects of allowing the activity the Court gave this summary of its findings which took into account other identified "stressors" in the area:[23]

> (1) likely net social (financial and employment) benefits;
> (2) a likely significant adverse effect on the natural feature which is the promontory;
> (3) likely significant cumulative adverse effects on the natural character of the margins of Beatrix Bay;
> (4) likely adverse cumulative effects on the amenity of users of the Bay;
> (5) very likely minor adverse impact on King Shag habitat by covering the muddy seafloor under shell and organic sediment, an effect which cannot be avoided (or remedied or mitigated);
> (6) very likely a reduction in feeding habitat of New Zealand King Shags;
> (7) very likely more than minor (11% plus this proposal) accumulated and accumulative reduction in King Shag habitat within Beatrix Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and
> (8) as likely as not, no change in the population of King Shags, but with a small probability of extinction.

[18] Considering the proposal in terms of the relevant policies in the Sounds Plan, the Court concluded that "on balance" resource consent should be refused on the basis that the proposal would inappropriately reduce the habitat of King Shags, contrary to a key policy requiring adverse effects to be avoided on areas of significant ecological value.[24]

[19] The Court then turned to the NZCPS, recording its view that the site was not in an appropriate area having regard to adverse effects on King Shag habitat

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22 At [259].
23 At [269].
24 At [274].

which could not be avoided as directed by Policy 11.[25] The Court also relied on the precautionary approach contained in Policy 3 of the NZCPS. Its discussion of this aspect of the case concluded with the words: "[n]o party argued that the NZCPS was uncertain or incomplete so there is no need to apply the "subject to Part 2" qualification in s 104 RMA."[26]

[20] Weighing the proposal under the Sounds Plan and the NZCPS, the Court judged that the "undoubted benefits" were outweighed by the costs it would impose on the environment. It noted in particular that the proposal did not avoid or sufficiently mitigate:[27]

> (1) the direct minor effect of changing a small volume of the habitat of King Shag;
> (2) the accumulative effect — with other existing mussel farms in Beatrix Bay — of an approximate 11% reduction in the surface area of that soft bottom habitat on King Shag, even acknowledging that there are other suitable foraging areas within Pelorus Sounds which have not been quantified;
> (3) the more than minor adverse effects on the landscape feature of the northern promontory; and
> (4) the addition to the already significant adverse accumulated and accumulative effects on the natural character of Beatrix Bay.

High Court judgment

[21] The appellant's appeal to the High Court raised four questions. For present purposes, we only need to be concerned with the first which asked whether the Environment Court erred in failing to apply pt 2 of the Act in considering the application for resource consent under s 104.

[22] Cull J noted the Supreme Court's conclusion in *King Salmon* that the NZCPS gave substance to the principles in pt 2 of the Act in relation to New Zealand's coastal environment.[28] She also referred to the discussion of s 5 in *King Salmon*, noting the Supreme Court's observation that it was not intended to be an "operative provision" under which particular planning decisions are made.[29]

[23] The Judge considered that the Supreme Court had rejected the "overall judgment" approach in relation to the "implementation of the NZCPS in particular", as the approach would be "inconsistent with the elaborate process required before a national coastal policy statement can be issued ...".[30] The Judge then held that the reasoning in *King Salmon* applied to s 104(1), because the relevant provisions of the planning documents, including the NZCPS had already given substance to the principles in pt 2 of the Act.[31] She considered *King Salmon* applied equally to s 104 considerations as it does to a plan change.[32] She also accepted a broad submission that had been made to her by

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25 Policy 11 of the NZCPS seeks to protect indigenous biological diversity in the coastal environment, including amongst other things by avoiding adverse effects of activities on indigenous taxa that are listed as threatened, and on the habitats of indigenous species.
26 Environment Court decision, above n 4, at [287].
27 At [282].
28 High Court judgment, above n 2, at [73].
29 At [74], referring to *King Salmon*, above n 1, at [151].
30 At [75], referring to *King Salmon*, above n 1, at [136] and [137].
31 At [76].
32 At [78].

the respondent that it would be inconsistent with the scheme of the Act and *King Salmon* to allow regional or district plans "to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications".[33]

[24] Dealing with a specific argument that the Environment Court had erred by not applying ss 5(2) and 7(b) of the Act, the Judge pointed out that even if the Environment Court had paid specific attention to pt 2, it was not clear that the enabling provisions of pt 2 would have been given pre-eminent consideration.[34] In any event, the Environment Court had taken into account the likely net social benefits in assessing the effects of the proposal.[35] It had also found that issues under s 7(b), which requires decision makers under the Act to have particular regard to the efficient use and development of natural and physical resources, was largely irrelevant because it did not deal with the protection of resources. Finally, the Judge concluded that the appellant had not identified any deficiency in the relevant planning instruments such as would justify resort to pt 2 in accordance with *King Salmon*.[36]

The appeal to this Court

[25] This Court granted leave to appeal on the following questions of law:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

(b) If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

[26] The balance of this judgment will address the first question. As will become clear, the terms of the answer we give to the first question effectively dictate the answer to the second.

First question – consideration of pt 2 of the Act

Appellant's submissions

[27] Mr Gardner-Hopkins for the appellant presented a comprehensive argument based on the text and purpose of s 104(1), its legislative history and the wider scheme of the Act. He submitted that the approach taken in *King Salmon* to plan changes should not apply in the case of applications for resource consents. Rather, in considering resource consent applications, pt 2 of the Act must be considered as well as the statutory documents referred to in s 104(1), and in the case of conflict pt 2 will prevail.

[28] Counsel noted that the words "subject to Part 2" have often been construed, in the context of cases involving resource consents, as enabling or requiring reference to the provisions in pt 2 of the Act. Cases where such references have been made include decisions of this Court, including *Queenstown Lakes District Council v Hawthorn Estate Ltd* in which it was said:[37]

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33 At [77].
34 At [85]. The Judge was contrasting the "enabling" aspects of the definition of sustainable management in s 5(2) with protective provisions in s 5 and elsewhere in pt 2.
35 At [86].
36 At [88].
37 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

> [50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:
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> > ... Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to ...

[29] The words "[s]ubject to Part II" in the statute as it then was were subsequently relocated in subs (1) but that does not detract from the argument. In addition, in *Central Plains Water Trust v Synlait Ltd* this Court said:[38]

> Section 104(1) requires the consent authority inter alia to comply with the overarching provisions of Part 2. Among the matters to which the authority is required by Part 2 to have particular regard is the efficient use of natural and physical resources (s 7(b)). That theme (1) consideration is of very great importance. It is recognised not only by the RMA but increasingly within the general principles of law which provide a context for adjudication.

[30] In addition, Mr Gardner-Hopkins was able to refer to various High Court judgments taking the same approach.[39] Numerous Environment Court decisions could also be quoted for the same proposition.

[31] Counsel noted that the expression "subject to Part 2" also occurs in s 171(1) of the Act in the context of considering notices of requirement. The drafting of s 171(1) follows a similar pattern to that of s 104(1), requiring consideration, "subject to Part 2", of the effects on the environment of allowing the requirement, as well as the provisions of any relevant policy statement or plan. Section 171 was considered by the Privy Council in *McGuire v Hastings District Court*.[40] Writing for the Board, Lord Cooke discussed the various provisions in pt 2 of the Act before noting that s 171 is expressly made subject to pt 2, including ss 6, 7 and 8. He wrote: [t]his means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.[41]

[32] Similar observations were made in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council*.[42] And in another case involving a requirement, Brown J took the same approach, distinguishing *King Salmon* on the basis that the relevant statutory provisions discussed in the latter did not include the phrase "subject to Part 2".[43]

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38 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [92(a)].

39 *Wilson v Selwyn District Council* [2005] NZRMA 76 (HC) at [79]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [67] and [72]; and *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

40 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

41 At [22].

42 *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].

43 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015]

[33] Mr Gardner-Hopkins traced the history of s 104 noting that as originally enacted, pt 2 was listed as one of the matters to which a consent authority was to have regard; it was the seventh in a list that began by referring to any relevant rules of a plan or proposed plan, then mentioned relevant policies or objectives of such plans, then national policy statements, the NZCPS and regional policy statements as well as other matters. That drafting approach led the Full Court of the High Court to observe that although the section directed the consent authority to have regard to pt 2, it was "but one in a list of such matters and is given no special prominence".[44]

[34] It was shortly after that the Act was amended, placing the words "subject to Part 2" near the beginning of the section. The Ministry for the Environment produced a departmental report on the Resource Management Act Amendment Bill, in April 1993. The report was provided for the Chairman of the Planning and Development Select Committee, to assist its consideration of the Bill. At page 62, the observation was made:

> The main change to section 104 was the rewriting of section 104(4). This was done to clarify that Part [2] was not one of a list of matters that had to be had regard to but was an overriding matter, as it is with the whole Act including the next section, 105, where decisions are made on applications.

[35] Consistent with this, when introducing the Resource Management Act Amendment Bill 1993, the Minister for the Environment said:[45]

> Part [2] of the Resource Management Act sets out its purpose and the key principles of the Act. It is fundamental, and applies to all persons whenever exercising any powers and functions under the Act. The current references in the Act in Part [2] are being interpreted as downgrading the status of Part [2]. Amendments in this Bill restore the purpose and principles to their proper over-arching position.

[36] Mr Gardner-Hopkins supplemented these arguments by reference to the fact that under sch 4 of the Act, every application for resource consent must include an assessment of the activity "against the matters set out in Part 2". This was not a requirement of the legislation as originally enacted, but the result of s 125 of the Resource Management Amendment Act 2013. Once again, it is relevant to note the explanation given in the departmental report on what was then the Resource Management Reform Bill 2012. That document referred to the proposed new sch 4 as requiring applications to consider provisions of the Act and other planning documents relevant at the decision-making stage of the application process. There was a specific reference to pt 2 of the Act as well as any relevant documents listed in s 104(1)(b) including the district or regional plan and any relevant national environmental standards.[46]

[37] Later in that document, it was observed:[47]

> Part 2, which sets out the purpose and principles of the RMA, is the part against which decisions under section 104 are made. Ultimately, all decisions on resource consents must demonstrably contribute towards the purpose of the Act.

NZRMA 375 at [117].

44 *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 (HC) at 89.

45 (15 December 1992) 532 NZPD 13179.

46 Ministry for the Environment Departmental Report on the Resource Management Reform Bill 2012 (April 2013).

47 At 82.

[38] This reform found its way into the forms provided in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. A new Form 9, the prescribed form for an application for resource consent states, in paragraph eight: "I attach an assessment of the proposed activity against the matters set out in Part 2 of the Resource Management Act 1991." This form was required to be used from 3 March 2015.[48] The Supreme Court's decision in *King Salmon* had been delivered over 10 months earlier on 17 April 2014.

[39] In the balance of his submission, Mr Gardner-Hopkins addressed various arguments as to why the Supreme Court's decision in *King Salmon* should be confined to cases involving plan changes, the context in which the decision arose.

[40] Here, he emphasised the different statutory framework, discussed by the Supreme Court, including s 67(3) of the Act, under which a regional plan must "give effect to", amongst other things, any NZCPS.[49] He also referred to the Supreme Court's conclusion that by giving effect to the NZCPS, the Council would necessarily be acting "in accordance with" pt 2, obviating any need for that part to be referred to again. Caveats to this were invalidity, incomplete coverage or uncertainty; in those instances, reference to pt 2 might be justified and provide assistance, as opposed to pt 2 being referred to as a matter of course. Mr Gardner-Hopkins argued that there was nothing in *King Salmon* that suggested the Supreme Court intended its decision would be applied to resource consent applications as well as plan changes. Mr Gardner-Hopkins also endeavoured to confine the Supreme Court's observations about s 5 and the other provisions in pt 2 not being "operative" provisions to the plan and plan change context. He submitted that the language of s 104(1) and its direct reference to pt 2 must give the latter something of an "operative" role and function. On the approach taken in *McGuire*, pt 2 might override the other matters required to be considered in s 104(1) in the case of conflict.

[41] In the present case, Mr Gardner-Hopkins submitted that the Environment Court erred by not having regard to pt 2, wrongly regarding itself as precluded from doing so by *King Salmon*. The High Court had wrongly concluded the reasoning in *King Salmon* precluded resort to pt 2 because the relevant provisions of the planning documents including the NZCPS had already applied pt 2. Although the Environment Court had referred to s 7(b), it had found it largely irrelevant, and the High Court was not justified in concluding that the Environment Court would have arrived at the same outcome had it applied pt 2 as a whole, including those aspects of it that were enabling. Instead, the Environment Court had regarded the issues as effectively determined by the relevant plan and NZCPS provisions it discussed. This was to elevate the planning documents above pt 2, instead of affording the latter its "overarching" significance.

Respondent's submissions

[42] For the respondent, Mr Maassen submitted that the Environment Court was bound to apply the NZCPS by reason of its correct assessment that the NZCPS was neither uncertain nor incomplete and, consequently, there was no reason to apply the "subject to Part 2" qualification in s 104. The clear outcomes mandated by the NZCPS were faithful expressions with greater

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48 See reg 7 of the Resource Management (Forms, Fees and Procedure) Amendment Regulations 2014.

49 Section 67(3)(b).

particularity of the requirements of pt 2 on indigenous biodiversity, which was the kernel of the case. In advancing this argument, Mr Maassen contended that the Environment Court had not purported to shut out resort to pt 2 in an appropriate case; however, in view of its findings on the NZCPS there was no need to consider pt 2. To the extent that the Environment Court had also implied that pt 2 should not be considered where the provisions of the regional coastal plan were clear, Mr Maassen disagreed. Depending on the circumstances of the case, there could be a valid contention that the provisions were deficient in meeting the objectives in pt 2. That was not the case here, because the outcomes sought to be achieved by the Sounds Plan were harmonious with the relevant policies in the NZCPS.

[43] Mr Maassen argued that the words "subject to Part 2" in s 104(1) did not authorise case-by-case resort to pt 2 in the context of resource consent applications, uninfluenced by clear directions of the planning documents. In this respect, he submitted the Act contemplates "planning" as opposed to "ad hoc" decision-making. The public are entitled to expect that planning strategies will be implemented and to organise their lives and make investment decisions based on those strategies; decisions made under s 104 should be informed by the policy of the relevant planning documents.

[44] In argument, Mr Maassen's position was clarified to the extent that in accordance with the reasoning in *McGuire*, he accepted pt 2 must be considered, and would override the provisions of planning instruments in the event of a conflict. As he put it, there must be no barriers to a decision-maker's access to pt 2. However, a conclusion that the provisions of a relevant policy statement or plan were comprehensive in achieving the outcomes contemplated by pt 2 would not constitute such a barrier. He placed some weight on observations made by Fogarty J in *Wilson v Selwyn District Council*.[50] Fogarty J said:

> [79] Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part [2], to have regard to it, "shall have regard". The qualifier "subject to Part [2]", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part [2], in the context of the application for this resource consent.

[45] In accordance with this approach, Mr Maassen submitted that the appropriate starting point is the proposition that the plans fulfil their purpose in achieving pt 2, but the consent authority could form a reasoned opinion upon scrutiny that the relevant provision does not pursue the purpose or one or more of the provisions of pt 2 in the context of the application for the particular resource consent. Mr Maassen argued such an approach was consistent with *King Salmon* because of the starting assumption that plans were fulfilling their intended purpose.

Analysis

[46] Section 104(1) provides:

> **104 Consideration of applications**

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50 *Wilson v Selwyn District Council*, above n 39. Fogarty J's interpretation of "the environment" in that case was reversed by this Court in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, above n 37, but this Court did not criticise what was said at [79].

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
  (a) any actual and potential effects on the environment of allowing the activity; and
  (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
  (b) any relevant provisions of—
    (i) a national environmental standard:
    (ii) other regulations:
    (iii) a national policy statement:
    (iv) a New Zealand coastal policy statement:
    (v) a regional policy statement or proposed regional policy statement:
    (vi) a plan or proposed plan; and
  (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
...

[47] For the reasons addressed by Mr Gardner-Hopkins summarised above[51] we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so. As Mr Gardner-Hopkins demonstrated, the change made in 1993 was plainly designed to preserve the preeminent role of pt 2, containing as it does the statement of the Act's purpose and principles. As we understand it, there was in the end no contest between the present parties about the consent authority's ability to refer to pt 2 in an appropriate case.[52]

[48] That conclusion also follows from the provisions in pt 2 itself. Sections 5–8 of the Act provide:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
  (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

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51 At [27]–[38].

52 Although we did not call on the interested parties orally at the hearing, their written submissions were to the same effect.

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

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [Repealed]

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources,

> shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[49] The Supreme Court observed in *King Salmon* that s 5 was not intended to be an "operative provision", in the sense that particular planning decisions are not made under it.[53] It went on to observe that the hierarchy of planning documents in the Act was intended to:[54]

> ... flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.

[50] These statements of the law are of course binding on this Court and, with respect, an accurate description of the relationship between the planning documents and pt 2. In summary, the structure of the Act requires pt 2 to have a direct influence on the content of the planning documents. While other provisions express the machinery by which that process is achieved, they are underpinned by pt 2. Thus, to give just one example, s 63(1) of the Act states that the purpose of the preparation, implementation, and administration of regional plans is to assist a regional Council to carry out any of its functions in order to achieve the purpose of the Act. So there is a direct link to s 5 where the purpose of the Act is set out.[55]

[51] In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt 2. Such applications are not the consequence of the planning processes envisaged by pt 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2.

[52] In any event, as can be seen from the provisions of pt 2 set out above, each of ss 6, 7 and 8 begins with an instruction, which is to be carried out "[i]n achieving the purpose of this Act", thus giving s 5 a particular role. Further, in each case the instruction is given to "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources". We consider those instructions must be complied with in an appropriate way in disposing of any application for a resource consent, and indeed it is untenable to suggest to the contrary. That conclusion would apply even without the words "subject to Part 2" in s 104(1); but they underline the conclusion. As the Privy Council said in *McGuire* ss 6, 7 and 8 constitute "strong directions, to be borne in mind at every stage of the planning process".[56] While it is true, as the Supreme Court in *King Salmon*

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53 *King Salmon*, above n 1, at [151].
54 At [151].
55 To similar effect is s 59 which enacts that the purpose of a regional policy statement is to "achieve the purpose of the Act" in various stated ways; and s 72 which states the purpose of district plans in the same language that is used for regional plans, thus embracing the purpose of the Act.
56 *McGuire v Hastings District Council*, above n 40, at [21].

observed, that s 5 is not a provision under which particular planning decisions are made, the reference to pt 2 in s 104(1) enlivens ss 5–8 in the case of applications for resource consent.

[53] The real question is whether the ability to consider pt 2 in the context of resource consents is subject to any limitations of a kind contemplated by *King Salmon* in the case of changes to a regional coastal plan. The answer to that question must begin with an analysis of what was decided in *King Salmon*.

[54] At the outset, it may be noted that *King Salmon* concerns the same plan, the Sounds Plan, with which we are concerned in the current appeal. It should also be noted that the judgment was written on the assumption that because no party had challenged the NZCPS there was acceptance that it conformed with the Act's requirements, and with pt 2 in particular.[57] That assumption remains appropriate.

[55] The second point to note is that what was in issue on the appeal determined by the Supreme Court was a proposed change to the Sounds Plan to accommodate a salmon farm at Papatua in Port Gore. The Board of Inquiry appointed to determine the plan change at first instance determined that the area affected was of "outstanding natural character and landscape value." If implemented, the proposal would have very high adverse visual effects. The directions in Policy 13(1)(a) and Policy 15(1)(a) of the NZCPS would not be given effect to.[58] Those policies are respectively:

> 1. To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character ...
>
> ...
>
> 1. To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment ...

[56] Notwithstanding its conclusions on these issues, in applying s 5, the Board considered that the appropriateness of the area for aquaculture, specifically for salmon farming, weighed heavily in favour of granting consent. Consequently, the proposed zone would be appropriate.[59]

[57] The Supreme Court in *King Salmon* held that the relevant directions in Policies 13 and 15 of the NZCPS had the overall purpose of preserving the natural character of the coastal environment, and protecting it from inappropriate use and development. If an affected area was "outstanding", such adverse effects were required to be avoided. In less sensitive areas, the requirement was to avoid "*significant* adverse effects".[60] "Avoid" was to be interpreted as meaning "not allow" or "prevent the occurrence of".[61]

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57 *King Salmon*, above n 1, at [33].
58 At [19].
59 At [19].
60 At [62] (emphasis added).
61 At [62].

[58] The Court noted that under s 67(3) of the Act, a regional plan must give effect to any national policy statement, any NZCPS and any regional policy statement. To "give effect" was to implement, and this was a matter of "firm obligation".[62]

[59] It is clear that the Court considered the NZCPS would not be given effect to if the plan were changed as proposed, because of the Board of Inquiry's finding that implementing the change would result in significant adverse effects on areas with outstanding natural character and landscape. And, as this Court observed in *Man O'War Station Ltd v Auckland Council*, the "overall judgment" approach was rejected because of the prescriptive nature of the relevant provisions in Policies 13 and 15 of the NZCPS and the statutory obligation to give effect to them.[63] The policies were specific and clear in what they prohibited. As the Supreme Court in *King Salmon* said:[64]

> [The Board] considered that it was entitled, by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. ... The policies give effect to the protective element of sustainable management.

And following that:

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

[60] There were other relevant aspects of the statutory context that underpinned the Supreme Court's approach. These included s 58(a) of the Act which empowered the Minister, by means of the NZCPS, to set national priorities in relation to the preservation of the natural character of the coastal environment.[65] This was clearly fundamental to what we consider to be a contextual rejection of the "overall judgment" approach.[66] For example, the Court said:[67]

> The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one.

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62 At [77].
63 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121 at [56]–[57].
64 *King Salmon*, above n 1, at [153].
65 The discussion of the provisions of s 58 here and in the following paragraphs reflect its form prior to the enactment of the Resource Legislation Amendment Act 2017.
66 At [118]–[121].
67 At [118].

[61] The Court applied a similar analysis to s 58(d), (f) and (gb), which enabled the Minister to include in an NZCPS objectives and policies concerning the Crown's interests in the coastal marine area, the implementation of New Zealand's international obligations affecting the coastal environment and the protection of protected rights.

[62] We note also the Court's discussion of s 58(e) of the Act, which provides that an NZCPS may state objectives or policies about matters to be included in regional coastal plans for the preservation of the natural character of the coastal environment. That may include "the activities that are required to be specified as restricted coastal activities" because of their "significant or irreversible adverse effects" or because they relate to areas with "significant" conservation value. The Court observed:[68]

> The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[63] In this context, the Court also mentioned ss 55 and 57. It noted that s 55(2) relevantly provided that if a national policy statement so directs, a regional council must amend a regional policy statement or regional plan to include specific objectives or policies to give effect to matters specified in a national policy statement. Section 55(3), which provides that a regional council must also take "any other action that is specified in the national policy statement" and other related provisions made clear a regional council's obligation to give effect to the NZCPS and the role of the NZCPS as what the Court described as a "mechanism for Ministerial control".[69]

[64] Significantly the Court also addressed applications for private plan changes. The ability to make such applications was held not to support adoption of an "overall judgment" approach, essentially because the decision-maker would always have to take into account the region wide perspective that the NZCPS required.[70]

[65] The Court referred to "additional factors" that supported rejection of the "overall judgment" approach "in relation to the implementation of the NZCPS." This included the general point that it would be inconsistent with the elaborate process required before an NZCPS can be issued, and secondly the uncertainty that would be created by adoption of the "overall judgment" approach.[71]

[66] We see these various passages in the judgment as part of the Court's rejection of the "overall judgment" approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the

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68 At [121].
69 At [125].
70 At [135].
71 At [136].

Court intended to prohibit consideration of pt 2 by a consent authority in the context of resource consent applications. There are a number of additional reasons which support this conclusion.

[67] First, the Court made no reference to s 104 of the Act nor to the words "subject to Part 2". If what it said was intended to be of general application across the board, affecting not only plan provisions under pt 4 of the Act, but also resource consents under Part 6, we think it inevitable that the Court would have said so. We say that especially because of the frequency with which pt 2 has historically been referred to in decision-making on resource consent applications. The "overall judgment" approach has also frequently been applied in the context of resource consent applications. If the Supreme Court's intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious from the preceding discussion, but note in any event that in its discussion of whether the Board had been correct to utilise the "overall judgment" approach the Court's reasoning was expressly tied to the "plan change context under consideration". It was in that context that the Court said the "overall judgment" approach would not recognise environmental bottom lines.[72]

[68] Secondly, we do not consider that what the Supreme Court said at [137]–[138] indicates it intended its reasoning to be generally applicable, including to resource consents, as the Environment Court considered was the case. The Supreme Court's observation at the outset of [137] that the "overall judgment" approach creates uncertainty is certainly of a general nature, but the context is established by what immediately follows:[73]

> The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes.

[69] We accept that the Court went on to refer to Environment Court decisions allowing appeals from the District Council with the result that renewal applications for marine farms in the Marlborough Sounds were declined. It contrasted this with the Board's decision in the case before it, as an illustration of the uncertainties that arise. We consider this was simply underlining the possibility of different outcomes where an overall judgment is applied. This is a long way from establishing that the Court intended to proscribe an "overall judgment" approach in the case of resource consent applications generally.

[70] Thirdly, resource consents fall to be addressed under s 104(1) and, as we have demonstrated, the statutory language plainly contemplates direct consideration of pt 2 matters. The Act's general provisions dealing with resource consents do not respond to the same or similar reasoning to that which led the Supreme Court to reject the "overall judgment" approach in *King Salmon*. There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various

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72 At [108].
73 At [137].

matters of obligation discussed above. Nor can there be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

[71] Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

[72] On the other hand, if a proposal were affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.

[73] We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans. In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".[74]

[74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary

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74 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].

to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[75] If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[76] We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS.[75] While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions.

[77] As we have seen, the High Court Judge apparently considered that the reasoning in *King Salmon* applied with equal force to resource consent applications as to plan changes. She appears to have proceeded on the basis that consent authorities will not be permitted to consider the provisions of pt 2 in evaluating resource consent applications, unless the plan is deficient in some respect. For the reasons we have given, we do not consider that is correct, and it is contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process".[76]

[78] However, in the circumstances of this case the error is not significant and the Judge was clearly correct when she held that it would be inconsistent with the scheme of the Act to allow regional or district plans to be rendered ineffective by general recourse to pt 2 in deciding resource consent applications.

[79] In the present case, as has been seen, the Environment Court based its decision to dismiss the appeal on the impact of the proposal on the habitat of King Shags, adverse effects on landscape and the natural character of Beatrix Bay. In terms of the NZCPS, the site was inappropriate having regard to the adverse effect on King Shag habitat which could not be avoided, contrary to Policy 11. As has been seen, in terms of the Sounds Plan, the site of the proposal was within an "Area of Ecological Value" with national significance as a feeding habitat of King Shags. Associated policies drew attention to the likely adverse effects of proposals on feeding habitat, the probability of a decrease in numbers of King Shags, the probability of adverse effects occurring and the probability of adverse effects being avoided, remedied or mitigated. The Sounds Plan included objectives that sought to protect significant fauna and their habitats from the adverse effects of use and development, and policies that sought to avoid the adverse effects of land and water use on areas of significant ecological value.

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75 *King Salmon*, above n 1, at [90].
76 *McGuire v Hastings District Council*, above n 40, at [21].

[80] The Environment Court's decision was clearly justified having regard to the NZCPS and the Sounds Plan. It took the approach, justified by *King Salmon*, that there was no need to apply the "subject to Part 2" qualification in s 104(1) because there was no suggestion that the NZCPS was uncertain or incomplete.[77] It also decided "on balance" that the proposal should be rejected if considered solely in terms of the Sounds Plan.[78] Although it had earlier said the Sounds Plan did not fully implement pt 2 of the Act, this was referring in particular to the risk of extinction of King Shags, a matter clearly dealt with in the NZCPS in any event.[79]

[81] We do not discern any error in this approach. If there had been reference to pt 2, it could not have justified a decision that departed from what the NZCPS required. In our view, while the Court might properly have considered pt 2 more extensively than its passing reference to s 7(b), the thrust of the relevant NZCPS policies and the Sounds Plan could not properly have been put on one side calling pt 2 in aid.

[82] Having regard to the foregoing discussion we agree with Cull J's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications, providing the plans have been properly prepared in accordance with pt 2. We do not consider however that *King Salmon* prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome. That was so in the present case because of both the NZCPS and the Sounds Plan.

Result

[83] These conclusions lead us to answer the questions posed as follows:

(a) Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer: Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.[80]

(b) If the first answer is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer: No.

[84] The appeal is dismissed.

[85] Normally we deal with costs on the basis of submissions made by the parties at the conclusion of the hearing. In this case, although we heard the parties at that stage we consider that it will be appropriate for brief submissions

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77 Environment Court decision, above n 4, at [287].
78 At [274].
79 At [153].
80 We note that the Environment Court could have relied on pt 2 to fill the gap left by the shortcomings it had identified in the provisions of the Sounds Plan dealing with King Shags, but there was no need to do so having regard to the provisions of the NZCPS that it applied.

to be filed having regard to the outcome of the appeal. We invite submissions accordingly. They should deal not only with the substantive appeal but also costs on the application for leave to appeal which was opposed by the respondent.

[86] Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

Orders

A The questions of law are answered as follows:

Question:

a Did the High Court err in holding that the Environment Court was not able or required to consider pt 2 of the Resource Management Act 1991 directly and was bound by its expression in the relevant planning documents?

Answer:

Yes, but because there were no reasons in this case to depart from pt 2's expression in the relevant planning documents, the error was of no consequence.

Question:

b If the first question is answered in the affirmative, should the High Court have remitted the case back to the Environment Court for reconsideration?

Answer: No.

B The appeal is dismissed.

C Leave is granted for the parties to file submissions on costs, limited in each case to no more than five pages in length, to be filed within 15 working days of delivery of this judgment.

Solicitors for the appellant: *Russell McVeagh* (Auckland).
Solicitors for the respondent: *Cooper Rapley Lawyers* (Palmerston North).
Solicitors of the interest parties: *Ironside Law Ltd* (Nelson).

Reported by: Rachel Marr, *Barrister*

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-03234

AND UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal against Environment Court decision No A56/2006 under s299 of the Resource Management Act 1991
BETWEEN	PAPAKURA DISTRICT COUNCIL Appellant
AND	HEATHER BALLANTYNE Respondent
AND	AUCKLAND REGIONAL COUNCIL Interested Party

CIV 2006-404-3269

AND UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal against Environment Court decision No A56/2006 under s299 of the Resource Management Act 1991
BETWEEN	AUCKLAND REGIONAL COUNCIL Appellant
AND	HEATHER BALLANTYNE Respondent
AND	PAPAKURA DISTRICT COUNCIL Interested Party

Hearing: 26 April 2007

Counsel: S M McAuley & J P Hassall for Papakura District Council
R B Enright & I M Fraser for Auckland Regional Council
R B Brabant for Ms Ballantyne

Judgment: 20 December 2007

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 20 December 2007 at 5pm pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

DLA Phillips Fox, Auckland
Kensington Swan, Auckland

[1] Heather Ballantyne owns a 5407m^2 triangular piece of land wedged between the Southern Motorway and Great South and Quarry Roads, in the Papakura District, two kilometres from the township of Drury. The land is bare and unused. Ms Ballantyne wishes to develop it by constructing a 28 unit motor inn.

[2] The Papakura District Council has refused consent to the proposal as inconsistent with its District Plan. The Auckland Regional Council has refused consent to discharge waste and storm water. The Environment Court on 16 May 2006, however, granted to Ms Ballantyne under s 104 of the Resource Management Act 1991 the consent denied her by the District Council and both the Council and the Regional Council appeal that decision.

[3] The Environment Court held that under the District Plan the proposal constitutes 'travellers' accommodation', a discretionary activity, deserving of consent. The site lies in a fringe rural area. The proposal is consistent in scale with classes of use open as of right that would have the same or similar effects, particularly visual effects. Any adverse effects can be mitigated by conditions. Grant of consent will not compromise the integrity of the District Plan.

[4] The Court considered it no impediment that the land lies beyond the metropolitan urban limit set by the Auckland Regional Policy Statement. The proposal, the Court held, is inherently neither urban nor rural. The size and nature of the proposal is not out of keeping with its immediate surrounds. The land, though classified rural, is small and triangular, compressed between three busy roads in an area already compromised. Other commercial enterprises exist nearby. Even if the proposal is inherently urban, the Court held, the activity, if allowed, would not challenge the strategic direction of the Policy Statement.

[5] This decision, the Auckland Regional Council contends, is wrong in law, and materially, principally in two respects. First, the Court misinterpreted and misapplied the Policy Statement. The motel complex proposed does constitute 'urban development'. It does cut across the strategic direction identified. Secondly, in concluding, under s 104(2) that any adverse effects would flow from permitted uses, the Court again erred. Such uses could only be notional possibilities at best. The

Papakura District Council makes common cause with the Regional Council in both respects.

[6] The Court, the District Council says, was wrong to conclude that the proposal constitutes a discretionary activity under the District Plan worthy of consent. The adverse effects the Court excluded as inevitable for any activity permitted assume activities that were entirely fanciful. What is proposed constitutes instead a non-complying activity adverse to neighbourhood amenity and the rural environment. Consent ought to have been denied. Both seek to have the case remitted for rehearing.

Decision under appeal

[7] In granting consent under s 104 the Environment Court considered first whether the proposal is worthy of consent under the Papakura District Plan, then whether, because the site lies beyond the metropolitan urban limit fixed by the Auckland Regional Policy Statement, the proposal constitutes 'urban development' and is incompatible with the strategic direction identified.

[8] The Court had no need to consider the Regional Council's decision refusing consent to discharge waste and storm water. In opposing the primary consent sought, as it does still, the Regional Council accepts that if the primary consent is granted those secondary consents would have to be also.

[9] The Court began, as indeed it ended, with the site itself, which it described as relatively small, generally flat, covered in pasture with some weeds, without natural water or shelter, bounded on three sides by roads; the Southern Motorway to its back and Great South Road to its front, the latter intersected by Quarry Road to give access to the motorway. Bounded, as it is, and hemmed by pylons and overhead transmission lines, the Court described the site as 'degraded'.

[10] The Court found the lands surrounding the site less than pristine. Though the land across the Great South Road is zoned rural residential, on Great South Road itself there are five commercial activities within 300 metres: a home upholstery

business, a trailer depot for racing cars, a building relocation specialist, a plant nursery and a shed building business. A number of glass houses, a plant nursery and a chicken processing plant lie within 500 metres.

[11] As to the proposal itself, access to which is intended to be from Great South Road, the Court remarked, the intent is that it be fully fenced and landscaped; in this foreshadowing, if obliquely, its ultimate conclusion.

District Plan

[12] Turning to the District Plan, the Court first considered, under s 77B(4)(iv)(c) whether the activity proposed is discretionary or non-complying. A discretionary activity must comply, it said, with the 'standards, terms or conditions' applying. If it does not it becomes non-complying (and is then to be assessed, not under s 104, but more stringently under s 104D).

[13] The motel complex proposed, the Court said, is a form of 'travellers' accommodation', under rule 7.1.4 of section 2 of the District Plan, and that can encompass conference centres, restaurants, recreation facilities, shops and other amenities. All are discretionary activities as long as they comply with rule 8.12 the intent of which is, as it confirms itself, to ensure that the rural character and productive potential of the land are not compromised.

[14] There is, the Court said, no issue as to two of the five requirements rule 8.12 makes, or as to one aspect of a third. The site has ready access to an arterial or principal road (subpara (a)). It is adequately insulated from other nearby rural properties (subpara (b)). Effluent waste water and refuse can be disposed of acceptably (subpara (d)(iii)). The three requirements in issue, the Court said, are these:

> (b) The proposed development is of a type and scale which lends itself to a rural environment.
>
> (d) The proposed development should have minimal impact on the amenity of the neighbourhood and not unduly detract from the character of the area in which it is to be situated.

(e) Land shall not be developed for travellers' accommodation unless ...

(ii) The values of the natural landscape are maintained and enhanced.

[15] The Court found, for reasons that it gave shortly after, that all three are met. Consequently, that the activity proposed is discretionary, to be assessed under s 104(1), against five considerations: the District Plan (subs (1)(b)(iv)); the actual or potential effects on the environment (subs (1)(a)); the Regional Policy Statement, including a proposed change, change 6 (subs (1)(b)(iii)); the need to respect the integrity of both regional and district plans and precedent (subs (1)(c)); and finally Part 2 of the Act (subs (1)).

[16] There is no contest, the Court said, as to the following factors affecting, or features of, the proposal: traffic noise, glare, services, earthworks and reverse sensitivity. The real issue, the Court said, is as to:

> the effects on rural character and the provisions of the relative statutory instruments that aim to protect the rural character and plan integrity and precedent.

[17] As to the District Plan, the Court recorded, two of the three relevant purposes are not in issue: the need to protect productive land and to provide a range of rural lifestyles. The only issue is as to the third, whether the activity proposed enables the rural character to be retained, and that is to be assessed against two of the Plan's objectives: to retain the rural character of Papakura (6.1.1.a), and to conserve and enhance features of the rural environment contributing to the natural character of the area (6.1.7.). Also policy 6.1.2.a: the Council's duty to consider whether to withhold consent where the activity proposed could have a significant adverse effect on the rural character of the particular area; an issue to be assessed under the guidelines in section 8.29. Also policy 6.1.8.c: the need to avoid, minimise or remedy offsite impacts and to protect waterways, remnant indigenous vegetation and land form. Finally, the Plan's extensive discretionary activity assessment criteria.

[18] The Court then turned to the likely effects of the proposal the most prominent of which, it found, are visual. As to those effects, the Court held however, the catchment is restricted. Bounded by roads, the site is offset from any other and that is

likely to be reinforced if the proposal is allowed. Trees are to be planted, many parallel to the roads.

[19] Moreover, the Court held, the District Plan, section 2 part 129, recognises that rural character is not absolute. A scale applies and subjectively. This particular area, the Court considered, is a fringe rural area, neither remote nor urban and in transition. Its character is already affected by existing commercial uses, by relatively small scale residential development, pylons and transmission lines, and by the motorway. If the site is developed as proposed, the Court found, motorists will see increasingly less of it, as will residents and workers. Planting will screen the motorway and improve the landscape.

[20] The planners, the Court noted, differed. Ms Ballantyne's planner concluded that the effect on rural amenity or character in the immediate area will not be adverse. The proposal will enhance amenity. The District Council's planner considered that the size, scale, intensity and design of the proposal make its effects significantly adverse. To test that the Court looked, under s 104(2), to what can be done as of right.

[21] In the rural Papakura zone, the Court found, farming is permitted but not factory farming. Horticulture is permitted and with that glass or green houses. Single household units are permitted, and accessory buildings. As to bulk and location, the maximum height limit is 10 metres, the front yard 10 metres. Residential buildings cannot be within 10 metres of land designated for motorway. The Council's planner confirmed that there are no controls limiting building size in square metres, or continuous building length, or site coverage; that close board fences are permitted. The Court itself identified the height in relation to the boundary: three metres plus the shortest horizontal distance.

[22] There are a number of activities, as of right, the Court concluded, that can have effects akin to those of the proposal, particularly visual effects, and thus the essential elements of the rural character of the area will not be adversely affected to a significant extent if the activity is allowed; the test propounded by policy 6.1.2.a.

Regional policy statement

[23] The Court next recognised that the Auckland Regional Policy Statement, operative since 31 August 1999, sets the strategic direction for integrated management of the region's resources central to which is the metropolitan urban limit, policies 2.5.2, 2.6.1; the limit beyond which the site in question lies.

[24] The policy reasons for urban containment, the Court said, are these: to minimise adverse effects of urban developments on regionally significant resources (2.6.3); to integrate the way in which the natural and physical resources of rural parts of the region are managed, in part to avoid any significant adverse effect on the environment (2.6.4); to make regional and local plans consistent one with another (2.6.5). Amongst the reasons for these policies, set out in 2.6.6, the Court singled out this:

> The Strategic Direction of the RPS (the Regional Policy Statement) is dependent on the ability to manage growth and control adverse effects. This results in the separation of urban and rural areas and is primarily achieved through the definition of urban limits and management of activities, including subdivision, in rural areas.

[25] Four defined concepts the Court considered, have a bearing: 'containment', 'metropolitan urban limits', 'rural character', and 'urban development'; the two latter of which function by contrast. 'Rural character' is to be inferred from "the distinctive combinations of qualities which make an area 'rural' rather than 'urban'". 'Urban development' is 'development which is not of a rural nature'.

[26] The Policy Statement, the Court recognised, is to be amended. Proposed change six, as it then was, confirmed the existing strategic direction and metropolitan urban limit but offered a new definition of urban activities that includes visitor accommodation comprising self contained units. In this respect and others the Court gave this proposed change no weight. The submissions phase was only just complete.

[27] Finally, the Court confirmed the inherent significance of the metropolitan urban limit: it has always been recognised as the key to sustainable management, and that remains clear beyond doubt: *Runciman Rural Protection Society v Franklin*

District Council CIV 2004-485-001787 20 December 2005, Courtney J; *Stark & Waitakere City Council v Auckland Regional Council* [1994] NZRMA 126, 138.

[28] The Court described its duty under s 104(1) as being to 'have regard' to the Policy Statement, by giving it 'genuine attention and thought'. It had also, the Court said, to consider each other factor in s 104(1) and to accord to each the relative weight that the proposal itself calls for. How far the tenets of the Regional Policy Statement apply, the Court found also, can differ:

> one factor which would affect their importance is whether granting a proposal which would offend the prescriptions contained in the Regional Policy, would challenge the strategy of managing urban expansion in a controlled manner, protecting rural character and protecting productive skills.

[29] All agreed, the Court said, that 'travellers' accommodation' is, taking up Courtney J's distinction in *Runciman*, 'neither inherently rural nor urban'. Whether it is the one or the other is to be assessed against the three criteria, the Court held, that define 'urban development'; primarily 'its scale, density, visual character, and the dominance of built structures'.

[30] As to that, the Court found, there can be no generic standard. Rural areas differ. The definition of 'rural character' speaks of 'the distinct combination of qualities which makes an area rural rather than urban.' One can be pristine, another highly compromised. Here, the Court held, the land is at that latter extreme. It is 'highly compromised'. Thus, the Court considered, the proposal is not disproportionate in scale and activity to what exists nearby, especially if mitigated by landscaping; in this taking some account of a long existing and highly prominent building location business to the north, though recognising that the Council questioned its legality.

[31] The Court then moved to the second of the three features of 'urban development', 'whether it relies on reticulated services and generates traffic', and held any such effects minimal. As to the third, 'whether it is an activity (such as manufacturing) which is usually provided for in urban areas', the Court held that

'travellers' accommodation' can be both urban and rural. In size and nature, the Court considered, this proposal is not out of keeping.

[32] Even if the proposal does constitute 'urban development', the Court went on to say, it does not challenge the Policy Statement's strategic direction: the need to contain urban growth or protect rural character. It is a proposal 'to provide travellers' accommodation on ... (a) small triangular piece of land, wedged ... between three busy roads amidst a compromised rural area.' The Court's conclusions are consistent.

Conclusions

[33] The concepts of precedent and plan integrity, the Court said, tend to be interrelated and can be relevant but are not mandatory. Much depends on whether what is proposed is contrary to the objectives and policies of the statement or plan, and singular or usual: *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at para [42] – [49]; *Rodney District Council v Gould* [2005] 11 ELRNZ 165, Cooper J; *Norwood Lodge v Upper Hutt City Council* HC Wellington, CIV 2004-485-2068, 9 September 2005, Wild J.

[34] The activity here proposed, the Court reiterated, is a discretionary activity worthy of consent under the District Plan; and, because the Court found the site 'unusual', without precedent effect:

> ... The site is isolated in the sense of being surrounded by a motorway and two other roads. Unlike a larger site to the north, it is known as a wasteland and has been virtually abandoned for many years. The site is too small to carry out any substantive rural activity, and ... a house, or bed and breakfast establishment, would not be suited to this compromised environment.

[35] Speaking of the Policy Statement, the Court said that if, despite its own conclusion, the proposal does constitute 'urban development' contrary to the policy of urban containment, the statement's objectives will not be compromised:

> The proposed motor inn would not be out of keeping with the character of the surrounding area and, ... utilises an infrastructural wasteland. It provides travellers' accommodation close to a busy motorway and in the circumstances would not ... compromise the strategy of managing urban expansion in a controlled way. ... the proposal would not compromise the

> strategy of protecting rural character. It is accepted that it will not compromise the objectives of protecting productive soils.

[36] In exercising its discretion to grant the consent sought under s 104, the Court found that there were positive effects to the proposal that were not contested:

> The proposal would utilise a rather unattractive and considerably compromised site. To this extent it is an efficient use of resources. It would also provide work, and serve a useful purpose in providing travellers' accommodation close to main arterial roads.

[37] The Court was satisfied that there are no other reasonable and available sites within the vicinity at which such an activity might be better located.

Principles of law

[38] This appeal is to be decided, it is accepted, in terms of the Resource Management Act 1991, as amended in 2003, but not as amended in 2005; and according to a body of principle the most immediately relevant elements of which I now outline.

[39] Each of the four factors to which the Court must have regard under s 104(1), when considering whether to consent to an activity - the principles in Part 2, the effects on the environment, actual or potential, the relevant provisions of any policy statement or plan, and any other relevant and reasonably necessary matter - must be accorded 'genuine attention and thought'. What significance each has is for the decision maker. That will depend on what the activity proposed itself makes significant. There is no hierarchy of factors or order of analysis: *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308; [1999] NZRMA 481 (HC).

[40] The ability s 104(2) now gives to 'disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect', expresses in essence the baseline test propounded at common law but modifies it in two ways. First, it is no longer mandatory. It is discretionary. Secondly, permitted uses no longer form part of the baseline. They are to be considered instead under s 104(1)(c). Otherwise the common law still applies: *Rodney District Council v Eyres Echo-Park*

Ltd [2007] NZRMA 1, Allan J. The baseline analysis may not now extend, however, from the subject site to any that is in the vicinity, the receiving environment: *Queenstown Lakes DC v Hawthorn* [2006] NZRMA 424, CA.

[41] The right of appeal given by s 299(1) is in point of law only and that has the usual reach. The errors of law that it can encompass include applying a wrong legal test, coming to a conclusion without any or any reasonable evidence, and taking into account irrelevant and failing to take into account relevant factors, but always allowing some latitude as to fact and with an eye to whether any error is truly material to the outcome: *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145, 153; *Stark v Auckland Regional Council* [1994] NZRMA 337, 340.

[42] On an appeal this Court's task is first to interpret for itself the aspect of the planning instrument in issue and only then to consider whether the Court under appeal has misinterpreted and misapplied it. This Court has no right to assess for itself the merit of the activity proposed and, if its view differs from that of the Court under appeal, to conclude that that Court must have misinterpreted the planning instrument: *Dye v Auckland Regional Council* [2002] 1 NZLR 337, 345, para [25].

[43] Where, as here, the effects, in the wide sense defined in s 3, are to be assessed primarily, if not exclusively, by reference to a planning instrument all elements may have a part to play. The analysis is not to be made in a vacuum. It is not to be confined just to the part that is operative. Where there is ambiguity or obscurity especially, every element, including the objectives and policies and methods, can be germane: *Powell v Dunedin City Council* [2004] 3 NZLR 721, 730; *J Rattray & Son Ltd v Christchurch City Council* [1984] 10 NZTPA 59, CA.

[44] That does not mean that the analysis, particularly of objectives and policies, which can be stated at a high level of abstraction and often converge to a theme from several standpoints, must include every last iteration. There is no call to pile Pelion on Ossa. What counts is whether the Court appealed from has accurately appreciated their 'basic thrust': *Dye v Auckland Regional Council* [2002] 1 NZLR 337, 343, para [13]; *Rodney District Council v Gould* [2006] NZRMA 217, Cooper J, para [32].

[45] Whether a proposal impinges on the integrity of a planning instrument, or has precedent effect, can be legitimate concerns where the proposal has features that are usual and will recur. Where, however, the proposal is 'truly exceptional, and can properly be said to be not contrary to the objectives and policies ... (applying), such concerns may be mitigated, may not even exist': *Rodney District Council v Gould*, 240, para [102].

[46] Finally, the fact that the Court under appeal has not referred to a witness by name and has not said explicitly whether it accepts the evidence given or not, and why, does not of itself constitute an error of law. Where, for instance, the evidence is opinion evidence as to how the activity proposed is to be classified according to a planning instrument, the Court can respond to the case of the party that called the witness without referring to the witness: *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, Ronald Young J; *Rodney District Council v Gould*, 243, 113.

Metropolitan urban limit: s 104(1)

[47] The first issue is whether the Court was right to conclude that the proposal deserves consent, under s 104(1) even though the site lies outside the metropolitan urban limit fixed to serve the strategic objectives set by the Auckland Regional Policy Statement.

[48] Was it open to the Court to conclude that the proposal does not constitute 'urban development' and thus may be constructed outside the urban limit? And to conclude also that, even if it does constitute 'urban development', in conflict with the policy of containment that the metropolitan urban limit serves, it will not compromise any strategic objective that this policy of constraint itself serves?

[49] A related issue is this: did the Court err in failing to consider relevant evidence from the Regional Council's planning witness Ms Blair?

Urban or rural development

[50] The Regional Council contends, relying on *Runciman*, that it was not enough for the Court to conclude as it did that the proposal is neither inherently rural nor urban. The Policy Statement seeks to ensure that 'urban development' remains within metropolitan limits. Fundamental to that is whether the activity proposed is or is not 'urban development'.

[51] The metropolitan urban limit, it says, prevents urban sprawl and is especially important where the urban and the rural begin to merge. Then rural areas inevitably become degraded and if the fact of degradation were decisive, that could lead to sprawl by stealth. The moment an urban activity is permitted others will follow. The area may remain classified rural. It will become urban.

[52] The definition of 'urban development', therefore, it contends, is and has to be generic. It is 'development which is not of a rural character' and that must be set against the statements of intent, the objectives and policies, in the Policy Statement. The definition is then to be contrasted with those of 'rural character' and 'rural activities'; and what is relevant is the activity proposed on the subject site, not the uses of the surrounding land, the receiving environment.

[53] The definitions of 'agriculture', 'containment', 'industrial and trade activities', 'intensification', 'metropolitan urban limits', 'primary production' and particularly 'rural character' and 'rural land/area', 'rural production and processing activities' and 'urban area', it says, all point to a single conclusion: that rural development involves primary production activities, or activities that are dependent functionally on the rural resource base.

[54] Yet the Court, it contends, treated the various indicia in the definition of 'urban development' as a checklist. It did not interpret the definition consistently with the principles informing the Policy Statement. It focused on the rural character of the surrounding area, the receiving environment, making unexceptional any activity in what may arguably have become a degraded area.

[55] It did not assess whether the proposal was functionally dependent on the rural resource base. Instead it relied on an irrelevant factor, that the proposal was 'not out of keeping with its rural surrounds'. It read down the Policy Statement by drawing on the District Plan; an inferior instrument.

[56] In these various ways, the Regional Council contends, the Court misinterpreted the definition of 'urban development' and concluded wrongly that the proposal is not of that character. I am unable to agree.

[57] The fundamental point of reference, as the Court understood, is the definition of 'urban development', which says this:

> Urban development – means development which is not of a rural nature. Urban development is differentiated from rural development by its scale, density, visual character, and the dominance of built structures. Urban development may also be characterised by a reliance on reticulated services (such as water supply and drainage), by its generation of traffic and includes activities (such as manufacturing), which are usually provided for in urban areas.

[58] The first sentence proposes an antithesis. It states that 'urban development' is not of a 'rural nature'. It does not define what 'rural nature' is. The second sentence, by contrast, enables, indeed requires that antithesis to be worked through by reference to four criteria: scale – relative dimensions or degree; density – denseness or mass per volume; visual character – visual qualities or characteristics; dominance of built structures – relative prominence within the environment. Singly or together they must invite the conclusion that what is proposed is urban, not rural, in character.

[59] The third sentence, by further contrast, invites but does not require an inquiry into whether the proposal relies on reticulated services, is characterised by generation of traffic, and includes activities usually provided for in urban areas. These are further illustrative and discretionary indicia.

[60] In the conclusions that it reached the Court was, I consider, faithful to these indicia and to the definition of 'rural character', which fleshes out the antithesis:

> Rural character – means the distinctive combinations of qualities which make an area 'rural' rather than 'urban'. These include the dominance in the landscape of natural vegetation and primary production regimes and the

> absence or subservience of man-made structures other than those related to primary production or to other activities for which provision is made in the District Plan applying to that area.

[61] The Court was entitled to conclude that the activity proposed, 'travellers' accommodation', both inherently and consistently with the District Scheme, is neither rural nor urban and, consistently with *Runciman*, to pass beyond the generic to the particular. That is precisely what the second sentence of the definition of 'urban development' calls for.

[62] The Court was as entitled to conclude that the rural environment in which the development is proposed to take place is highly compromised and that the scale and intensity of what is proposed, taking into account the landscaping offered, will not be disproportionate. The Court's conclusion, founded on the absence of the indicia in the third sentence in the definition, was equally open to it, was as its conclusion that the development is not 'out of keeping with its rural surrounds'. The assessment called for has to extend beyond the site to that contiguous; and, if that wider area is less than pristine, that has to be relevant.

[63] The Regional Council is too absolute then when it argues that only primary productive activities, or any activity dependent on such activities, are contemplated as rural activities. The Court made no error in omitting to assess whether the proposal was 'functionally dependent upon the rural resource base'. That is not called for. The two definitions, 'urban development' and 'rural character', are antithetical and particular precisely because, as the Policy Statement itself recognises, activities in rural areas can be so diverse. Whether an activity is consistent or inconsistent with others in an area zoned rural is not to be decided abstractly or formulaically. The Court's particular findings were called for and were open.

[64] These conclusions mean that, strictly, I need not consider whether the Court misinterpreted and misapplied the objectives and policies in the Regional Policy Statement. I shall say something about that, however, in case I am wrong in this first conclusion and also because the Regional Council contends that the Court ought to have referred to the evidence of its planning witness, Ms Blair, in that respect also.

Policy statement objectives and policies

[65] The Court, the Regional Council accepts, correctly identified three policy statement objectives relevant to urban containment: all go to the strategic direction of the Auckland region. No less relevant, the Regional Council contends, is objective 2.5.1.1

> To ensure that provision is made to accommodate the region's growth in a manner which gives effect to the purposes and principles of the Resource Management Act, and is consistent with these Strategic Objectives and with the provisions of this RPS.

[66] To give meaning to that objective, the Council submits, it needs to be set amongst the inter-linking policies that implement it. Given the Court's conclusion that the proposal is contrary to the Policy Statement's policy of urban containment, it says, the Court should have concluded that the proposal is contrary to this primary objective as well and those related. Equally, the Court should have reached the identical conclusion as to objectives 2.5.1.2 and 2.5.1.5 and policies 2.5.2 and 2.6.1, which concern the adverse effects on the environment of urban development beyond metropolitan limits.

[67] Having then found the proposal contrary to the policy of urban containment, in this complete sense, the Court should also, it contends, have found the proposal in conflict with the strategic direction of the Policy Statement. Any activity contrary to a policy in the statement must be contrary to the objective it serves. That is consistent with section 62 of the 1991 Act, which prescribed the form such statements are to take.

[68] Once again I am unable to agree. The further objectives the Council argues for, and their related policies, are tangential, even irrelevant. Objective 2.5.1.1, which requires that effect be given to the 1991 Act, adds nothing. Nor does objective 2.5.1.2, which concerns the environment of metropolitan Auckland. Not objective 2.5.1.5, which speaks of protecting, avoiding, remedying and mitigating. That was never in issue.

[69] Conversely, the conclusions the Court reached as to the strategic objectives that it did identify, and correctly as the Regional Council accepts, were open to it and involved no error of law.

[70] The Court was entitled to conclude that objective 2.5.1.3, which calls for soil resources, amenity values, rural character, landscape values and mineral resources to be protected, will not be compromised. Soil resources are not in issue. This is a wasteland. Amenity values, rural character and landscape values are not either. They can be addressed by landscaping. Mineral resources never became an issue. This proposal was never regionally significant in any of these respects.

[71] The Court was equally able to say that objective 2.5.1.6, which promotes traffic efficiency, will not be compromised and will be served. Traffic movements, the Court recorded, are not in issue. It saw advantage in travellers' accommodation close to a busy motorway. That was an efficient use of what the Court described as an 'infrastructural wasteland'.

[72] The Court was entitled, for reasons already given, to conclude that objective 2.5.1.8, which requires the region's natural and physical resources to be managed in an 'integrated manner', will not be compromised. In this, and in the other conclusions it reached, the Court was entitled to conclude that the policy of urban containment, that would otherwise preclude this proposal, ought not to be given literal effect. That applying that policy would serve no objective in the Policy Statement that is relevant.

Omission of Blair evidence

[73] Finally, in this respect, the Court made no error of law, I consider, when it omitted to refer to the evidence of Ms Blair, whom the Regional Council called as an expert planning witness at the point of the appeal. That may have been desirable. It was not essential.

[74] In large part Ms Blair recapitulated the uncontroversial purposes and effects of the Policy Statement, a matter rather for submissions, and that called for no

finding on the part of the Court. The Court was entitled to respond to the Regional Council's case as it did, relying on its own appreciation of the Policy Statement.

[75] Ms Blair's evidence only became evidence in the strict sense when she expressed her opinion as to whether the proposal constitutes 'urban development' against the critical criteria - scale, density, visual character and the dominance of built structures. When, also, she characterised the area within which the site lies as a highly vulnerable rural fringe and contrasted what is proposed with existing commercial activities. These were the aspects of her evidence to which the Court did need to respond, though without any iron necessity to name her.

[76] In concluding that the proposal does not constitute 'urban development', against the criteria, the Court offset the applicant's planning witnesses, of whom there were two, against the two planning witnesses called for the District Council, whose evidence was consistent with that of Ms Blair. In preferring the former witnesses, as it was entitled to do, the Court can be taken to have answered Ms Blair's concerns as much as those of the District Council's planners.

[77] The Court did not compare and contrast in any detail what is proposed with the other commercial activities in the area. It did answer the contrast in this sense. Ms Blair said that the overt commercial character of other enterprises is mitigated in various ways. By how far, for instance, they sit back from the road and how masked they are. The Court did make findings as to these issues which more than suffice. The site as it is, the Court held, is bare and degraded and will be developed and landscaped. The buildings will not be disproportionate in scale and, though close to the road, will be increasingly masked by trees.

[78] The result is that, though the Court omitted to mention Ms Blair by name, or refer to her evidence, it made no error of law. Had indeed the Court adverted to Ms Blair's evidence, that would have made no difference. In one fashion or another it responded to each point she made, as it happens adversely to the Regional Council.

Baseline test: s 104(2)

[79] Both Councils contend that the Environment Court erred in failing to direct itself as to its discretion whether or not to apply the statutory baseline test set out in s 104(2); or, if it did direct itself as to the fact of the discretion, it erred in not evaluating whether to exercise it. Instead the Court assumed that the baseline should apply.

[80] The second and necessarily related issue the two Councils pose is this: did the Court have any sensible basis for the comparison it chose to make? Did it have evidence to support the permitted activities it used to make the comparison called for - a plant nursery, a large house and accessory building such as garages, storage or packaging, glass houses and implement sheds of the same or similar scale, size and intensity as the development proposed? Should it have disregarded these activities as 'fanciful'? Did it fail to consider whether and to what extent the proposed activity might be of a different character?

[81] There is also a related but distinct issue. Did the Court make accurately the comparison that it made? Was it right in its understanding of the bulk and location requirements in R 8.15 of the District Plan?

Decision to invoke discretion

[82] In its decision, the Court did advert to the need for a 'judgment ... to be made whether to disregard adverse effects'; the discretion given by s 104(2). It then went on to identify the relevant adverse effects, which it thought principally visual, and having considered the activities that can take place as of right, and compared them in bulk and location with what is proposed, found the effects that they would have would be virtually indistinguishable.

[83] The Court may not have elucidated its discretion and desirably it should have. But it is clear as to how and why it exercised its discretion as it did; and in this it complied with the minimal duty to give reasons presently recognised, to give

'outline reasons' to show why and how it directed its mind: *Lewis v Wilson & Horton* [2003] 3 NZLR 546, 566, para [81].

[84] That, the Councils contend, was not enough. The baseline test at common law excluded any comparison that was 'fanciful' and, for that reason presumably, it is contended that the Court should have directed itself as to the nature of its discretion under s 104(2), and considered whether even to embark on the comparison of activities and effects that permits.

[85] Tested against five questions recently identified by the Environment Court in *Lyttleton Harbour Landscape Protection Assn Inc v Christchurch City Council* (CA 55/06, 11 May 2006), para [21], as ways to decide whether s 104(2) ought to be invoked, the District Council argues indeed, the Court's decision to exercise the discretion cannot be justified. Those questions are these:

- Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?
- Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?
- If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?
- Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?
- Is a permitted activity within which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not to be invoked?
- Might application of the baseline have the effect of overriding Part II of the RMA?

[86] The Environment Court in that case did not suggest, however, that these questions constitute a threshold to be passed before section 104(2) can be invoked; let alone a fivefold test. They are questions drawn from the cases as instances of the ways in which the issue can arise. They go to the single question whether it is possible and sensible to embark on a comparison, or whether that would be a

notional, even fanciful, exercise. Seen in that way, they have real usefulness. They remain susceptible of a global answer and that, I think, is all that is called for here.

[87] The principal point that the District Council takes, which I understand the Regional Council to share, is that no reasonable comparison of activities and effects can be made. The District Plan permits rural activities. It does not permit travellers' accommodation on the scale proposed.

[88] Rule 7.1.2, which governs the rural zone, identifies as the main activities envisaged farming, horticulture, forestry, recreations and reserves. It permits single household units, buildings accessory to, or an essential adjunct of, any permitted activity, or any household unit. It contemplates farm stay accommodation and some other less proximate activities. It conditionally permits plant nurseries.

[89] The only activity remotely similar to 'travellers' accommodation', both say, is farm stay accommodation but that is confined to a single household unit. That is quite different in scale from 'travellers' accommodation,' listed as a discretionary activity under rule 7.1.4 and defined by reference to 'accommodation unit'; a 'unit comprising a building or part of a building intended to be used as part of a motel, hotel, complex of holiday flats or motor and tourist lodge'.

[90] Again I am not persuaded. The Court was alive to the adverse effects of the proposal. It took them from the evidence of the District Council's planner: the effect on rural character and amenity because of the size, scale, intensity and design of the proposal; the inconsistency in design and layout with those of a typical rural activity. In this way the Court identified the relevant issues. With one exception, to which I will return, it identified accurately the relevant permitted activity development controls governing size, scale, density and design.

[91] The District Council argues also that the proposal exudes a different character. It is typically urban not rural. That seems to me merely its basic proposition restated.

[92] The District Council next contends that the comparators were 'fanciful' for a second reason. Ms Ballantynes's planner accepted that many permitted activities are neither viable nor likely. But the Court, when considering what type and scale of development could occur as of right, was not required to set out on that inquiry.

[93] In *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473, at para [25], the Court of Appeal held that whether a permitted development is 'likely' or 'credible' is not relevant unless, the Court said, the comparator is a 'very remote possibility'. The usual position is as the Court outlined it in para [26], a position that must still apply under s 104(2):

> The starting point is what is allowed under the relevant plan and that any permissible use qualifies under the permitted baseline test unless in all the circumstances it is a fanciful use.

[94] The activities that the Court in this case identified for the purposes of comparison were, I consider, well available for that purpose. They are not to be relegated to very remote possibilities.

[95] The District Council's final line of defence is that that the effect of applying the permitted baseline is to override Part 2 of the Act, by reducing the distinction between what is proposed, which is urban in character and scale, and what is permitted in a truly comparable sense, thus nullifying the elements of the District Scheme that otherwise apply: the need to conserve and enhance those features of the environment that contribute to natural character (objective 6.1.7); and the Council's duty to consider when granting resource consent whether what is proposed would adversely affect the rural character of the particular area in a significant way (policy 6.1.2.a).

[96] This again seems to me no more than another way of reiterating the Council's basic argument without adding to its force.

Inaccurate comparison

[97] In applying the baseline test, it is next contended, the Court assumed that structures had only to be offset from the boundaries by five metres, and rule 8.1.5 of the District Plan requires 10 metres.

[98] Whether or not that is so the Court did elicit from the District Council's planner that there are no permitted activity controls limiting building size, continuous building link or site coverage, and also identified the appropriate height in relation to boundary. That seems to me to be the evidence that was truly relevant.

[99] If then the Court made an error that seems to me relatively insignificant and certainly not material to the conclusion that the Court reached, or any basis for allowing the appeal.

Extraneous factor

[100] Finally, it is contended, in making its baseline assessment the Court was distracted by an irrelevant factor; as it is said to have confirmed when it remarked at the end of its baseline analysis that its conclusion was compatible with 'the test' in policy 6.1.2.a of the District Plan. I see nothing in this either. The Court had already made its critical findings. It did not elevate the test in policy 6.1.2.a to one that it had to satisfy itself. It made no related finding.

Conclusion

[101] The Court was entitled to conclude, I consider, that the activity proposed does not constitute 'urban development' beyond the metropolitan urban limit fixed by the Auckland Regional Policy Statement but that, if it does, it remains compatible with the strategic direction that statement sets.

[102] The Court was entitled equally to decide as it did, I consider, that Ms Ballantyne's proposal constitutes a discretionary, as opposed to a non-complying activity, and that from every pertinent standpoint under the Papakura District Plan

the activity proposed will not be incongruous in its rural setting. The Court applied the statutory baseline test without error.

[103] The Court was entitled to conclude, finally, I consider, that the site of the proposal, a relatively small, bare and unused triangular piece of land, wedged between the Southern Motorway and two roads, is so singular that consent to the proposal will not impinge on the integrity of two planning instruments; that it will not create any adverse precedent; and that indeed, and if only exceptionally, it is compatible with the objectives, if not the policies, of both instruments.

[104] The appeals brought by the District and Regional Councils will each be dismissed. Ms Ballantyne is entitled to costs, as I should have thought at Scale 2B, and disbursements. If that can be agreed, both are to be fixed by the Registrar. Otherwise the Councils' memoranda are to be filed and served by the end of January 2008 and that for Ms Ballantyne within the succeeding 10 working days.

P.J. Keane J

BEFORE THE ENVIRONMENT COURT

Decision No. [2012] NZEnvC 72

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals under section 120 of the Act
BETWEEN	PORT GORE MARINE FARMS Applicant
AND	SANFORD LIMITED (ENV-2007-CHC-208 AND ENV-2009-CHC-178) Applicant and Appellant
AND	CLIFFORD EDGAR MARCHANT (ENV-2007-CHC-204 AND ENV-2009-CHC-179
AND	FRIENDS OF NELSON HAVEN AND TASMAN BAY INCORPORATED (ENV-2009-CHC-180) Appellants
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Court: Environment Judge J R Jackson
Environment Commissioner H M Beaumont
Environment Commissioner A J Sutherland

Hearing: at Blenheim on 6 to10 December 2010 and 7 to 9 March 2011
Final submissions received 6 June 2011

Counsel:

J Hassan and J Meech for Sanford Limited
M Hunt for J T Marine Farms Limited
P Milne and F Sing for C E Marchant and Friends of Nelson Haven and Tasman Bay Incorporated
M Radich for Marlborough District Council

Date of Decision: 23 April 2012

Date of Issue: 26 April 2012

DECISION

A: Under section 291 of the Resource Management Act 1991 the appeals by Port Gore Marine Farms and Sanford Limited are refused and the appeals by C E Marchant and Friends of Nelson Haven and Tasman Bay Incorporated are allowed.

B: The Environment Court:

(1) confirms the decision(s) of the Marlborough District Council and declines consent for the Pool Head mussel farm in Port Gore;
(2) cancels the decision(s) of the Marlborough District Council and declines consent for the Gannet Point South mussel farm in Port Gore;
(3) cancels the decision of the Marlborough District Council and declines consent for the Gannet Point North mussel farm in Port Gore.

C: This decision is final in relation to each of the three marine farms referred to in Order B except in relation to one aspect of section 165ZH of the Act. In respect of that provision:

(1) subject to (2) to (5) below this decision shall come into effect on the date eighteen calendar months after delivery of the decision, so that the applicants may each harvest the mussels on their respective lines as at the date of this decision under the existing coastal permits as defined in that section;
(2) the existing permit holders must comply with all relevant conditions of the existing coastal permits until all mussel lines and supporting structures are removed;
(3) the existing permit holders may not seed or otherwise install any new mussel lines from the date of this decision;

(4) nothing in (1)-(3) above shall be interpreted as the grant of new coastal permits to the applicants or any of them; and

(5) no other rights under section 165ZH and/or (if applicable) section 124 of the Act are extended or created by Order (1) above.

D: Leave is reserved for one month to any party to apply to amend Order C if it is ambiguous or otherwise unworkable.

E: Costs are reserved. Any application is to be made within 20 working days of this decision being issued, and any reply is to be lodged and served within a further 15 working days.

REASONS

Table of Contents Para

1. Introduction

1.1 The issues

[1] Should the resource consents for three high-yielding mussel farms in Port Gore be renewed or not? That question is raised by these proceedings under the Resource Management Act 1991 ("the RMA" or "the Act"). The three sites are close to the southeastern shores of Port Gore on the southern side of Cook Strait. Port Gore is a large bay between Capes Lambert and Jackson on the outer edge of the Marlborough Sounds and is known as the resting place of the Soviet cruise liner *Mikhail Lermontov* which sank on 16 February 1986 after hitting rocks off Cape Jackson.

1.2 Background to appeals

1.2.1 The applicants and the existing farms

[2] There are two applicants for three mussel farms on the eastern side of Port Gore: Sanford Limited ("Sanford") which has applied for two farms, and J T Marine Farms Limited, a company which trades as Port Gore Marine Farms ("PGMF"). All the applications are for permits on sites which contain farms at present : the Pool Head farm (owned by Sanford), the Gannet Point South farm (also owned by Sanford), and Gannet Point North (owned by PGMF). The three farms are shown on the attached map[1] marked "A". The PGMF farm is not named, but is shown as being two areas (described below) north of Gannet Point. The coastal permits for these farms have expired, but are

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1 S K Brown, evidence-in-chief, annexure 2 [Environment Court document 12].

running on[2] while these appeals are resolved. Each of the farms has a complex history, which we will now attempt to summarise.

Pool Head Marine Farm

[3] Sanford's Pool Head marine farm was established in 1998. It covers 12.75 hectares and appears as one farm. However, it originated as two distinct farms, with the smaller three-hectare farm (permits #U050218 and #U941459 together making site 8175) originally owned and established by Kiwi Marine Farms Limited. Site 8501, covering 9.75 hectares (#U950263 and MPE115) and site 8175 fit together to form a rectangular area. The total area of 12.75 hectares is laid out in three blocks with six longlines (each approximately 140 metres long) in each block giving a total of 2,520 metres approximately[3]. There are 1,062 surface structures at this site[4].

[4] The current applications for the Pool Head farm were lodged with the council on 15 May 2008. In 2009, the Hearing Committee declined Sanford's applications for renewed coastal permits for the Pool Head marine farm. Sanford has appealed that decision.

Gannet Point South Marine Farm

[5] Sanford's Gannet Point South marine farm was established in 1993 and purchased by Sanford in 2001. By application lodged on 22 July 2004 Sanford sought a permit to replace permit #U941458 and MPE27 for the existing six hectare marine farm (site 8176). The marine farm is currently configured in two blocks with six long lines (110 metres long) on each[5]. There are 708 surface structures on this farm[6].

[6] In 2007, the Hearing Committee appointed by the Marlborough District Council granted consent to the Gannet Point marine farm for a ten year consent term expiring 1 September 2017. Sanford appealed the term granted and instead seeks a consent term of 20 years.

Gannet Point North Marine Farm

[7] PGMF's marine farm is also located at Gannet Point. It is situated to the north of Sanford's Gannet Point marine farm. The site is consented as two blocks, one of 3.02 hectares and one of 2.98 hectares, north of Gannet Point. Twenty longlines each of 110 metres length, a total of 2,200 metres, were consented but only 18 longlines have been installed. The installation requires up to 611 black floats and 40 red floats, one at each end of each longline[7]. The application we are considering was filed with the MDC

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2 Under section 165ZH of the RMA.

3 D Herbert, evidence-in-chief 27 July 2010, para 11 [Environment Court document 5].

4 D Herbert, supplementary evidence 29 September 2010, para 21 [Environment Court document 5A].

5 D Herbert, evidence-in-chief para 15 [Environment Court document 5].

6 D Herbert, supplementary evidence 29 September 2010, para 21 [Environment Court document 5A].

7 R D Sutherland, rebuttal evidence November 2010, para 15 [Environment Court document 17C].

on 17 July 2008. The council granted consent for a (short) term of eight years expiring 1 September 2017.

1.2.2 The appeals and the parties

[8] Sanford has appealed to this court in respect of both its mussel farms. Appeal ENV-2007-CHC-208 is against the council's limiting the grant of consent for a mussel farm at Gannet Point South to a term of ten years. Sanford's appeal ENV-2009-CHC-178 is against the council's decision to refuse consent altogether for the Pool Head farm.

[9] Mr C E Marchant (ENV-2007-CHC-204 and ENV-2009-CHC-179), a resident of Cockle Bay which is inshore of Pool Head (which is to the west) and Gannet Point (to the north), and Friends of Nelson Haven and Tasman Bay Incorporated ("FNHTB"), a public interest incorporated society (ENV-2009-CHC-180) have appealed against the council's decisions consenting to the Gannet Point farms. They have also joined the Sanford appeals as section 274 parties.

[10] A number of other section 274 parties have joined the appeal proceedings. Several[8] have elected to give evidence on their own behalf and on behalf of Clifford Marchant and FNHTB.

1.2.3 Procedural matters

[11] There are three procedural matters we should record. First we note that the reason the 2007 appeals have taken a long time to come to a hearing is that in 2008 the Environment Court ruled that the appeals relating to the Gannet Point South marine farms should be adjourned so that they could be heard with any appeals in relation to the re-consenting of the other two marine farms. No commercial harm has been done to the mussel farmers in the meantime because Sanford has continued operations on the farms under section 165ZH of the RMA.

[12] Secondly, prior to the hearing Judge Jackson disclosed to the parties that some time prior to 4 November 1996 he had variously acted:

- for J T Marine Farms Limited or its principal on other marine farming related matters;
- for FNHTB at different times on other matters (not in the Marlborough Sounds); and
- (possibly) for the original applicant for a marine farm at Pool Head farm or on other proposed marine farms on the eastern side of Port Gore.

All parties consented to the judge being part of the court to hear and decide the appeals.

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[8] Paul Eglinton, Andrew Crawford (for Sounds Air) and Ronald Marriott.

[13] Thirdly, as discussed with counsel at the end of the hearing, the court's members had hoped to carry out an inspection of Port Gore, the proposed sites, and the adjacent land. Unfortunately, changing circumstances and our other commitments have not allowed us the time to visit the area so we have to make a decision without that benefit. However, we have all visited the Marlborough Sounds for professional and personal reasons over many years, so we are not unfamiliar with the Sounds as a whole or with marine farms within the Sounds.

1.3 Further details of the mussel farms

1.3.1 Footprints and location

[14] If granted, the mussel farms will continue to be located in the same place as the existing marine farms. The applicants seek some minor boundary adjustments. In respect of Sanford's Pool Head marine farm, a GPS survey undertaken in 2002 showed differences between actual consented and as-built boundaries. Under the authority of special remedial Government legislation[9], this was purportedly rectified by application granted by the council in 2008 (after the permit had expired).

[15] Part of the existing (as-built) Gannet Point South farm has also been discovered to be outside the currently consented area. Because Sanford considered this was only slight, it did not apply under the special legislation. Instead Sanford now proposes to remedy that by seeking consent only for the area that is both currently occupied and consented[10]. The essential change is that the Gannet Point South marine farm will not extend as far offshore, when compared to the existing marine farm.

[16] PGMF is only seeking new resource consents for that part of its existing operation which is within its legal (i.e. consented) boundaries.

1.3.2 Proposed modifications to traditional mussel farms

[17] A minor change from Sanford's existing marine farms is that the new consents are for the harvesting of mussels only, whereas the expired consents also enable harvesting of scallops and oysters (although they have always been operated only as mussel farms). More importantly, both applicants are proposing to construct and operate their mussel farms differently from the traditional method used by the existing farms. We now briefly describe the differences between techniques.

Standard surface mussel farms

[18] The long-established practice is to allocate rectangular (more or less) areas in which mussel farmers may establish their farms. A number of longlines, or backbones, are then installed parallel to the longer sides of the allocated area. These are 24-28 mm diameter ropes up to 200 metres or more in length supported by floats in the water surface at regular intervals. Floats are normally black, approximately 1 x 0.5 metres in

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9 The Aquaculture Reform (Repeal and Transitional Provisions) Act 2004.

10 D Herbert, evidence-in-chief paragraphs 13, 17-19 [Environment Court document 5].

plan and may have up to 0.3 metres protruding above the water surface. They are thus visible as a rectangular array over distances of two kilometres or more.

[19] The longlines are held in position by inclined warp ropes secured to anchors placed in the seabed. Vertical ropes (droppers) extend from the longlines down to depths of 10 or 12 metres. Their length is limited either by water depth or by the depth to which light can penetrate. Mussel spat is deposited onto the droppers (seeding) and develops to a condition appropriate for harvesting. Development time is 15-18 months dependent upon temperature and light conditions and on the availability of food. Farms must be visited by service vessels for seeding and harvesting. Periodic checking and maintenance visits are also required.

The PGMF proposal for a partly submerged mussel farm

[20] Principally to mitigate visual effects PGMF proposes a partially submerged mussel farm. Each longline in the proposed farm would be formed as a semi-rigid structure comprising two ropes separated with wooden spacers. The structure will be supported one to two metres below the water surface by attached subsurface floats and by surface floats at 20 metre centres. It will be anchored to the sea bed using inclined warp ropes and block or screw anchors as for a surface farm[11].

[21] The proposal is to install two blocks of each with ten longlines 100 metres long at 16 metre spacing between lines in the same position as the existing farm. The total line length would be 2,000 metres compared with the 2,200 metres of the existing farm. Up to 400 black surface floats will be required whereas 611 such floats are used on the existing farm[12]. The number of red surface floats will remain unchanged at 40.

[22] Partly submerged structures have been successfully trialled through one growing cycle in the Marlborough Sounds[13]. For PGMF, Mr Sutherland commented that it is a proven system which has the benefit of significantly reducing the number of surface floats without changing the basic model for marine farming[14]. No change is proposed to the size, colour and layout of the navigation buoys and the reflectors will not change from those presently installed[15]. There is thus no mitigation with respect to lighting effects. Indeed, as we shall see later, new lighting requirements may be more visible than at present.

Sanford's proposal for near fully submerged farms

[23] Sanford's original applications should be read together with the Memorandum of Counsel for Sanford, dated 29 July 2010, which seeks modifications to these

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11 R D Sutherland, supplementary evidence September 2010, Appendix A [Environment Court document 17A].

12 R D Sutherland, rebuttal evidence November 2010, para 15 [Environment Court document 17B].

13 R D Sutherland, evidence-in-chief July 2010, para 22 [Environment Court document 17].

14 R D Sutherland, rebuttal evidence November 2010, para 31 [Environment Court document 17B].

15 R D Sutherland, supplementary evidence September 2010, para 3C [Environment Court document 17A].

applications so that they are for subsurfacing. That is, Sanford is no longer seeking consent for surface farming (other than for a transitional period of 21 months[16] which we will discuss later if necessary). The reason for the amendment is that Sanford has recognised that the Gannet Point and Pool Head farms are in a special location[17]. In order to reduce visual effects of the farms Sanford proposes a fully submerged farm, which is an adaptation of the surface farm structure. Under the standard technique the longlines hang down from surface floats. In a submerged farm they float up towards the surface, restrained by anchors in the sea bed. Such an approach is only in the developmental stage[18]. It has not been tried in New Zealand but submerged mussel farms are found in France, the United Kingdom and on the east coast of the United States[19].

[24] Each longline would comprise two parallel ropes 140 metres long held apart by spreader floats at two metre centres. The longlines would be further supported at each end by a three tonne buoyancy float and by one tonne buoyancy floats at 20 metre centres. At low tide the tops of the three tonne floats will be 2 to 2.5 metres below the water surface. Droppers eight metres long will be suspended from the longlines[20].

[25] The structure will be anchored to the sea bed by four screw anchors, one vertically beneath each three tonne float and one at each end to which an inclined warp rope is attached. This rope will extend from the three tonne float at a 1:2 slope in line with the structure to the anchor point. In addition two tonne weights will be placed on the sea bed vertically below and attached to each one tonne float. At 50% of full crop the longlines will be essentially horizontal four metres below the water surface at low tide. For less than 50% of full crop the longlines will curve upwards reaching to within 2.75 metres of the water surface at low tide midway between each one tonne float when there is no crop. For more than 50% of full crop the long line will curve downwards.

[26] As recorded earlier, Sanford proposes that the submerged farms be located on the sites of its existing farms at Pool Head and Gannet Point. At Pool Head there will be six longlines each of 280 metres length and four longlines each of 140 metres length, a total of 2,240 metres (cf 2,520 in the existing farm). At Gannet Point six longlines each of 220 metres are proposed so the total length of line (1,320 metres) is unchanged[21]. To facilitate harvesting a light submerged line will extend across the gap between adjacent longlines. Using a grapnel the harvesting vessel will raise this line and thus the

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16 D Herbert, supplementary evidence paragraphs 5-9 [Environment Court 5A].

17 D Herbert, evidence-in-chief 27 July 2010, para 29 [Environment Court document 5].

18 D Herbert, evidence-in-chief 27 July 2010, para 28 [Environment Court document 5].

19 G C Teear, statement of evidence in reply 1 December 2010, para 7.4 [Environment Court document 6].

20 D Herbert, supplementary evidence 29 September 2010, Figure 3 [Environment Court document 5A].

21 D Herbert, supplementary evidence 29 September 2010, para 14 [Environment Court document 5A]; G C Teear, evidence-in-chief, Attachment B [Environment Court document 6].

longlines. In this way the buoyant pickup lines originally proposed to be attached to each one tonne buoy are no longer required for lifting the longlines[22].

Navigation lighting

[27] Once installed the only surface features will be five navigation buoys at each farm: one at each corner and one at the midpoint of the offshore boundary. The buoys will have yellow IALA[23] "A" special mark spar buoys fitted with radar reflectors and lights. Recently the harbourmaster has required that lights be mounted at least two metres above the water surface, be visible for at least two nautical miles (compared with the current requirement of one nautical mile) and are to flash five times every 20 seconds. Thus there will be 75 flashes each minute from each farm[24].

1.3.3 Transitional period

[28] Sanford sought that a transitional period be provided for the change from surface to subsurface marine farming. Mussels are grown on an approximately 18 month cycle. However, weather, sea and seasonal conditions all affect the rate of growth. Flexibility needs to be built in so that existing mussel crops can be allowed to develop to full maturity. Accordingly, Sanford requested a 21 month transitional period[25].

[29] Once the existing crops are removed (and presumably not replaced), to construct the submerged farms Sanford intends to remove all components of the existing farms except for the anchors which will remain in the sea bed. Two days[26] will be required to remove a line and replace it with the submerged structure[27]. Messrs Herbert and Teear discussed the construction of the subsurface marine farms further in their evidence[28].

[30] As we have said, PGMF's proposal is for a modified version of the traditional surface mussel farm. At the hearing PGMF also advanced an alternative position. As we understood Mr Hunt, if the court considers it might not be able to consent to mussel farming on the Gannet Point North site unless there was a move towards subsurface farming similar to Sanford's suggestion, then the court might impose a review condition on the PGMF consent. That proposal was opposed by Mr Milne on the general ground that it was too late (and unfair) for PGMF to change its position; and on the specific ground that a review condition cannot require a consent holder to do anything and thus does not necessarily mitigate any adverse effects, although it may have that result if the

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22 G C Teear, statement of evidence in reply1 December 2010, paragraphs 6.9 and 6.10 [Environment Court document 6].

23 IALA = International Association of Marine Aids to Navigation and Lighthouse Authorities (see www.maritimenz.govt.nz/Publicationsandforms/commercial-operations).

24 D Herbert, supplementary evidence 29 September 2010, paragraphs 33-35 [Environment Court document 5A].

25 D Herbert, supplementary evidence, paragraphs 7-9 [Environment Court document 5A].

26 D Herbert, evidence-in-chief paragraphs 34-35 [Environment Court document 5].

27 D Herbert, evidence-in-chief 27 July 2010, paragraphs 34 and 35 [Environment Court document 5].

28 D Herbert, evidence-in-chief paragraphs 34-35 [Environment Court document 5]; G G Teear, evidence-in-reply paragraphs 6.1-6.5 [Environment Court document 6].

council does review the condition. Mr Hunt responded on the general point that it is never too late to mitigate a proposal. We have some doubts about that, given the warning by the Supreme Court in *Waitakere City Council v Estate Homes Limited*[29] about the Environment Court considering a different application than that considered by the council. However, in the specific circumstances we consider enough of the appellants' witnesses responded to the specifics of such a concept for us to be able to consider it.

[31] As for Mr Milne's specific criticism, we will consider the potential mechanisms for changing the proposal to a fully sub-surface consent if we decide that such a farm is appropriate on all the merits.

2. The existing environment of Port Gore

2.1 Overview

[32] Maps show that Port Gore is approximately an irregular parallelogram with its long sides running northeast-southwest. The long sides are the ridges running down to Cape Lambert and Cape Jackson, the latter being at the northwestern entrance to Queen Charlotte Sound. The short southwestern edge of the bay is backed by a ridge running from Mt Furneaux (823 metres above sea level). The relatively short northeastern mouth of the bay – it is seven kilometres from cape to cape – is open to Cook Strait. The place of Port Gore between the Strait and the Marlborough Sounds is shown on the attached map marked "B".

[33] The first impression of Port Gore from Cook Strait is of stark bare headlands and coastal cliffs which grow in size and bush cover. The ridges rise to the southwest, all with a backdrop of native bush along the southern face of Port Gore.

[34] Floating on the surface of Port Gore there are three groups of mussel farms : a larger set at Melville Cove, several at Pig Bay, and – on the eastern side of Port Gore – the three existing mussel farms at Pool Head[30] and Gannet Point (two) with which we are concerned in these proceedings. For the purposes of these proceedings, since the mussel farms' coastal permits have expired (or at least should be treated as if they have expired), the planners agreed[31] that we must imagine the existing environment as if the Pool Head and Gannet Point mussel farms are not there[32]. There are no jetties or wharves anywhere in Port Gore except in Melville Cove.

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29 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112; [2007] 13 ELRNZ 33; [2007] 2 NZLR 149; [2007] NZRMA 137.

30 As we have recorded, technically there are two marine farms at Pool Head, but they look like and, we understand, are managed by Sanfords as one.

31 J C Kyle, evidence-in-chief para 28 [Environment Court document 21]; S M Dawson, evidence-in-chief para 23 [Environment Court document 22].

32 There is one exception to this – under section 104(2A) – which we have already indicated we will consider in our discussion of section 7(b) of the Act.

[35] Various commercial activities (e.g. farming, tourism, diving, fishing, flight charters etc) associated with its land and sea resources take place within Port Gore. The witnesses all agree that houses, farm buildings, an air strip, woodlots, roads, tracks, electricity lines and fence lines are visible from places around the bay, as are extensive areas of native bush around the southern side of the bay.

2.2 The terrestrial neighbours of the mussel farms

[36] From south to north the landowners on the eastern side of Port Gore are:

- Maori owners of land held under the South Island Landless Natives Act 1906;
- the Marchant family who own a property at Cockle Bay in the southeastern corner of Port Gore;
- the Surgenor family who have a bach in Cockle Bay also; Ms G K Surgenor gave evidence[33] supporting Mr Marchant;
- the Eglinton family whose bach is at Onapopoia to the north of Cockle Bay and Gannet Point; Mr P Eglinton gave evidence[34] supporting Mr Marchant;
- the Harvey family which owns about 360 hectares on the Port Gore side of Cape Jackson at the Kaitangata Bluffs, east of Black Head. Ms K D C Gerard, a section 274 party, gave evidence[35] about the effect of the marine farms on her parents' property and the amenities it enjoys;
- the Marriott family for whom Mr R E Marriott gave evidence[36] as a section 274 party supporting the Marchant and FNHTB appeals.

Five of the principal landowners on the eastern side of Port Gore (or their families) oppose the mussel farms. While we have heard evidence from members of those families, we have treated it with caution especially where it conflicts with, and/or is not supported by, independent expert evidence. We accept that they are not objective about the presence or continuation of the three marine farms we are considering.

[37] Access to the land at the southeastern and eastern side of Port Gore is principally by a rough private road from the Titirangi Road. This road is largely invisible from the sea and consequently reduces the perceived naturalness of the area very little. There are also two landing strips on the Marchant land at Cockle Bay in the southeastern corner; and there is a walking track which comes over the ridge from Ship Cove in Queen Charlotte Sound. In calm conditions several beaches or rocky foreshores can be landed on, but otherwise access from the sea is difficult. There are no jetties on this side of the bay.

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33 G K Surgenor, evidence-in-chief [Environment Court document 34].
34 P Eglinton, evidence-in-chief [Environment Court document 33].
35 K D C Gerard, evidence-in-chief [Environment Court document 31].
36 R E Marriott, evidence-in-chief [Environment Court document 25].

[38] Mr Marchant and his family are the only permanent residents of the area. They live at Cockle Bay and look northwest towards the Pool Head site which is 890 metres away at the closest point[37], and northwards to the Gannet Point South site which is 1.13 kilometres away[38]. A little further north in Cockle Bay is the Surgenor bach. This is only occupied intermittently and is 1.10 kilometres from the Pool Head site and 940 metres from the Gannet Point South site[39]. From the bach there are open views of both existing marine farms.

[39] Several witnesses referred to the noise from use of the Marchant's airstrip[40]. Port Gore Tours Limited offers scenic flights into, and accommodation at, Cockle Bay in the southeastern corner of Port Gore. The appellant, Mr Marchant, whose family runs the business, estimated that there are approximately 120 (or perhaps 210) return flights per year[41]. Each use of the airstrip only lasts a few minutes on landing[42], and (we infer) on take-off. Compared with the hours which would be taken by mussel barges on every visit[43], we consider the existing environment is generally peaceful[44]. The noise from aircraft is only a very minor adverse effect on the Port Gore environment.

[40] The Eglinton bach, over the hill to the north of Cockle Bay and elevated above the sea, is 270 metres from the Gannet Point North site and one kilometre from the South site[45]. Mr Eglinton gave an impressionistic description of the qualities he enjoys at his property. His evidence was supplemented by the evidence of Ms D J Lucas, a landscape architect, who confirmed that the Gannet Point North farm is visible, at a range of about 200 metres, from Mr Eglinton's bach. Prior to the hearing there were some remnant stock on this land, and there is no specific protection for the reverting bush on the Eglinton land.

[41] East of the Eglinton bach, the Harvey bach is 470 metres from the Gannet Point North farm. A member of the Harvey family, Ms K D C Gerard who lives at Hopai Bay in Pelorus Sound but has holidayed in Port Gore since 1984, wrote careful and quite balanced evidence. She described[46] the coastal (including kohekohe[47]) forest growing on her parents' land, and said this has been assessed as regionally significant. It is protected under a Queen Elizabeth II National Trust Covenant.

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37 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].

38 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].

39 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].

40 E.g. C G Godsiff, evidence-in-chief para 13 [Environment Court document 10].

41 Transcript p. 762 lines 8 and 36-38.

42 C E Marchant, evidence-in-chief para 188 [Environment Court document 27].

43 C E Marchant, evidence-in-chief para 188 [Environment Court document 27].

44 If each round trip generates noise within Cockle Bay which lasts ten minutes from when it is first heard to when the aircraft disappears over the ridge towards Picton, then at 120 return trips x 10 minutes (÷ 60), the total aircraft noise would be 20 hours per year, i.e. less than one day.

45 J A Bentley, evidence-in-chief Table 1 [Environment Court document 13].

46 K D C Gerard, evidence-in-chief para 1.11 [Environment Court document 31].

47 *Dysoxylum spectabile*.

How wild and remote is eastern Port Gore?

[42] One of the values that most of the owners of land on the eastern side of Port Gore say that they enjoy is its remoteness. Their landscape witness, Ms Lucas, described the various values of Port Gore including the transient values[48] (and especially the contrasts between stormy and calm conditions) that it enjoys. She also described the 'natural darkness'[49] of Port Gore, its very high aesthetic values[50]; and its value to tangata whenua : Cape Jackson's Maori name is Te Taonui-a-Kupe[51] and the Harvey property named "The Footsteps" refers to the footsteps of Kupe (Te Ope-a-Kupe) in the bay below their property – east of Onapopoia. In the end she concluded that it contains "exceptional wild and scenic values"[52]. The applicants' witnesses considered the "remoteness" or "wildness" values of any part of Port Gore only perfunctorily in their evidence-in-chief[53]. Only after caucusing[54] and in cross-examination did Mr Brown give his view that southeastern Port Gore was "not truly remote or wild"[55]. He attributed that to the level of modification of the "inner bay". Two other landscape witnesses, Messrs Carter and Bentley, agreed at caucusing but gave no evidence on the issue.

[43] Mr Kyle, the planner called for the applicants, described Port Gore as "... a remote and rugged location"[56], and he confirmed in cross-examination that it has "... wild and scenic and remote characteristics[57]. He qualified that in his rebuttal evidence by writing that while it is "remote" it is not "... truly remote"[58].

[44] Remoteness is an elusive quality. It has measurable and non-measurableness aspects. In sociological and economic studies remoteness is often measured simply as the road distance to a service centre[59]. Remote is often taken to mean a site has restricted accessibility to goods, services and opportunities for social interaction, whereas 'very remote' means that there is very little accessibility to these things. On that basis the eastern side of Port Gore is certainly remote by New Zealand standards. For recreationalists for whom the journey is as important as the destination – in this context that means boaties other than fisherman including yachties and kayakers – remoteness has another value because it adds to the challenge and time taken to travel.

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48 D J Lucas, evidence-in-chief para 126.7 [Environment Court document 15].

49 D J Lucas, evidence-in-chief para 113 [Environment Court document 15].

50 D J Lucas, evidence-in-chief para 126.5 [Environment Court document 15].

51 "The large spear of Kupe", D J Lucas, evidence-in-chief para 139 [Environment Court document 15].

52 D J Lucas, evidence-in-chief para 126.10 [Environment Court document 15].

53 J A Bentley, evidence-in-chief Appendix 3 [Environment Court document 13]; K J Heather, evidence-in-chief Appendix B paragraphs 50 and 73 [Environment Court document 19].

54 Landscape witnesses' caucusing statement para 9 [Environment Court document 12B].

55 Transcript p. 166.

56 J C Kyle, evidence-in-chief para 69 [Environment Court document 21].

57 Transcript 8 March 2011 p. 594 at lines 3-5.

58 J C Kyle, rebuttal evidence para 6.12 [Environment Court document 21B].

59 see http:/www.health.gov.au/pubs/hfsocc/ocpanew6a.htm: The Accessibility/Remoteness Index of Australia (ARIA).

We have also recorded that the land and sea of Port Gore tend to be separately accessible – the land at Cockle Bay for example is principally accessed by road or by air, and very rarely from the sea. There are (as we have recorded) no jetties in eastern Port Gore. Conversely the sea is largely accessed by boat from around the capes. We consider that eastern Port Gore is also remote in the more subjective sense.

[45] As for "wildness", Ms Dawson, the planner called by the Council, agreed[60] that the modifications of the Port Gore environment such as the houses, the airstrip and the (past) farming have an effect on the wildness of the area. Mr Kyle stated that wildness is a matter of personal perception[61] and not all visitors may consider the area wild. In our view there are a number of indications in the applicants' own evidence that suggest that Port Gore is quite remote and/or wild. For example, Mr Godsiff, a tourism operator called by them, said that Port Gore is difficult to access for recreation, and the mussel farm managers said the same of access for servicing and harvesting of mussel farms.

[46] On a calm, blue day we have no doubt that Port Gore would not be seen by many people as particularly wild. However, it is notorious that New Zealand is the Saudi Arabia of wind. Being on Cook Strait's margins, Port Gore only has a minority of fine calm days. On the majority of days in the year Port Gore as a whole would look wild and feel remote when (if) accessed. In fact, except by land it is quite difficult to access as we have recorded. Any boat trip around Cape Lambert and (especially) Cape Jackson is potentially an exciting experience, as two members of the court know from experience. We find that Port Gore is on average remote and wild, but not very remote nor very wild (although on occasions it undoubtedly is).

Regeneration of eastern Port Gore

[47] Several families have taken steps[62] to remove introduced weeds and pests and to encourage native regeneration. Indeed Mr Marriott has set up a scheme to claim carbon credits presumably under the Climate Change Response Act 2002 and the Climate Change Response (Emissions Trading) Amendment Act 2008. We will consider the extent and rate of success below when setting out the evidence about the terrestrial ecology of the area.

2.3 Amenities for recreation

[48] Port Gore is also used widely for recreation. Mr C G Godsiff, a director of a tourism company with many years' experience working in Marlborough, was called to give evidence for the two mussel farming companies. We accept that his experience entitles him to be treated as an expert on what many visitors find attractive in the Marlborough Sounds. In his opinion Port Gore is often difficult to access because of

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60 Transcript p. 626.

61 Transcript p. 530.

62 K D C Gerard, evidence-in-chief paragraphs 1.11 and 1.12 [Environment Court document 31]; R E Marriott, evidence-in-chief paragraphs 30 and 32 [Environment Court document 25].

sea and weather conditions. Many more places are more accessible and have "... more to offer in terms of scenic ... amenity or matters of interest"[63]. However, Mr Godsiff's view of the recreational activities and possibilities of Port Gore was rather limited as the evidence of the next witness showed.

[49] On the other hand, Mr Marchant and FNHTB called Mr R J Greenaway, a recreational planning consultant with extensive experience throughout New Zealand. He described Port Gore as having several important recreation values[64]:

- It provides a remote and scenic recreational boating opportunity;
- It provides a remote and scenic recreational opportunity for tourists and other visitors to the area;
- It is an element of the Queen Charlotte Wilderness Park tourism venture. This is a private extension to the Queen Charlotte Track running from Ship Cove to Cape Jackson offering trampers accommodation at Anakakata Lodge in a remote setting;
- It is ... an important t recreational fishing area at other times; and
- It is home to the wreck of the Mikhail Lermontov and the Lastingham and is one of only 19 "*spectacular or popular sites*" for recreational diving in the South Island identified by the Ministry of Agriculture and Forestry in its social value mapping of New Zealand's coastal waters.

[50] Mr Hassan and Ms Meech were critical of Mr Greenaway's evidence, submitting that little weight should be attached to it because the "recreational opportunity spectrum" on which his evidence "focussed" is not recognised in any of the relevant documents, and as he acknowledged in cross-examination is "fluid" and may be adjusted depending on what it is being used for[65]. We are very conscious of those criticisms and record that we always find Mr Greenaway's references to and reliance on the "recreational opportunity spectrum" quite difficult. However, the basic concept(s) that there are varieties of types of recreational experience which, in part, depend on the setting in which they occur is, we suppose, a first step towards being consistent in analysis and comparisons. Further, as we shall see, the now operative New Zealand Coastal Policy Statement 2010 expressly contains an objective[66] requiring maintenance and enhancement of "recreational opportunities" of the coastal environment. So with caution we are prepared to rely on Mr Greenaway's evidence since it was not challenged by opposing evidence to any degree. Nor was it really damaged by specific cross-examination.

[51] Mr Greenaway described how (well out of sight of Port Gore) on the other side of Cape Jackson and within Queen Charlotte Sound approximately 30,000 people walked or biked the Queen Charlotte track in 2004/5[67]. At its northern end in the sound

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63 C G Godsiff, evidence-in-chief para 7 [Environment Court document 10].

64 R J Greenaway, evidence-in-chief para 4.5 [Environment Court document 26].

65 Transcript pp 719-720.

66 Objective 4, NZCPS 2010 p. 9.

67 P Sutton 2005 Queen Charlotte Track User Research 2004-5 (DOC) referred to in R J Greenaway para 4.21 [Environment Court document 26].

that track terminates at Ship Cove. Only a few walkers continue to the north on the 'Outer Queen Charlotte Track' from Ship Cove. This starts with a strenuous climb up to the ridge from Mt Furneaux to Cape Jackson which separates Queen Charlotte Sound from Port Gore and then follows the ridge northeast to a lodge at Anakakata Bay[68] (and beyond to Cape Jackson) on the privately owned Queen Charlotte Wilderness Park. Once on the ridge they have views down into Port Gore. Mr R Marriott, one of the owners of the park, gave evidence[69] that about 500 people stay at the lodge – which is on the Queen Charlotte side of the ridge – each year.

[52] Mr Greenaway pointed out that in the South Island there are only two small stretches of coast which provide relatively easy cruising – the Abel Tasman National Park and the Marlborough Sounds. He described Banks Peninsula and Stewart Island as more challenging. That said, Port Gore can only be approached by boat after navigating around either Cape Lambert, to the northwest or Cape Jackson to the northeast. Because both headlands are exposed to the full marine conditions of Cook Strait, often exacerbated by strong tides, Port Gore is suited to, and is used by more skilled and well-equipped boaters[70]. There is an anchorage in the corner behind Gannet Point in Cockle Bay in south or southeast conditions, and in Melville Cove in winds from the northern semicircle[71].

[53] As for fishing : according to Mr Greenaway[72] it is relatively difficult to find sheltered and relatively accessible[73] inshore line fisheries around New Zealand – they are found only on the Abel Tasman coast and in the Marlborough Sounds. He considered that Port Gore is[74] 'significant in itself' and part of the 'nationally significant network represented by the Marlborough Sounds'. Ms D J Lucas, a landscape architect called for Mr Marchant and FNHTB, recorded that on fine days, when conditions allow access from Picton around Cape Jackson – or from the west around Cape Lambert – there may be up to ten recreational boats fishing on the eastern side of Port Gore, particularly at Gannet Head, and/or sheltering down around Cockle Bay.

[54] Mr Greenaway considered Port Gore is nationally important for recreational diving. A company called 'Go Dive Marlborough' operates from a lodge in Melville Cove and runs multi-day diving trips within the bay[75]. Most of the dives are on the wreck of the *Mikhail Lermontov* which the New Zealand Natural Maritime Record

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68 Anakakata Bay and its lodge are in Queen Charlotte Sound.

69 R E Marriott, evidence-in-chief para 9 [Environment Court document 25].

70 R J Greenaway, evidence-in-chief para 4.19 [Environment Court document 26].

71 R J Greenaway, evidence-in-chief para 17 [Environment Court document 26] referring to The New Zealand Cruising Guide Central Area, K W J Murray and R von Kohorn, 1999.

72 R J Greenaway, evidence-in-chief para 4.8 [Environment Court document 26].

73 We infer it is relatively accessible for fishermen compared with other water users – yachts and kayakers – because the former tend to have faster, more powerful boats and can thus travel to and from Port Gore more quickly.

74 R J Greenaway, evidence-in-chief para 4.8 [Environment Court document 26].

75 R J Greenaway, evidence-in-chief para 4.11 [Environment Court document 26].

describes[76] as "one of the largest and most accessible diving wrecks of the modern era". About 20% of the dives are on the wreck of the *Lastingham*, a 67 metre twin-mast iron sailing ship which sank in about 10 to 20 metres of water of 1884. The diving company ran 26 live-ashore trips in 2009/2010 – a total of approximately 200 divers visiting the bay for two or more days. That appears to represent about half of the diving activity in Port Gore[77].

2.4 The marine ecology of Port Gore

[55] Dr Kenneth Grange, a marine ecologist, described the existing marine environment and the effects of the marine farms continuing to operate. There was no challenge to his evidence[78] in which he described the shoreline of Port Gore as comprising a mixture of rocky reefs and boulders descending to sand and then muddy sand further offshore. Much of the sea floor of the embayment lies at 30-40 m depth. Dr Grange identified three areas of particular ecological value – Outer Port Gore (horse mussels, scallops and red algae), Melville Cove (large reef area) and Gannet Point (tubeworms)[79]. The Gannet Point area is listed in the district plan with its particular ecological value described as *unique subtidal communities on unusual subtidal landform,* and given a status of national significance[80].

[56] A survey undertaken by NIWA described this *sill community* as a shallow-water (<10–20 metres) benthic assemblage around and south of Gannet Point characterised by tube-building polychaetes, horse mussels, hermit crabs, cushion stars, kina, sea cucumbers and scallops. While the distribution of species overlapped, horse mussels and scallops were generally found in deeper areas (10–20 metres) with tubeworms further inshore (<10 metres)[81]. So the beds of tubeworm colonies were from 50 metres to around 100–150 metres from the shore and the horse mussel beds were seaward of these. This sill community is concentrated around Gannet Point itself some 150 metres south-west of the PGMF Gannet Point North farm and 50 metres to the north of the Sanford Gannet Point South farm. It includes the southern part of the undeveloped consent area adjacent to Site 8176[82]. Dr Grange was of the opinion that the rocky reef, boulder and cobble areas, between these marine farms and the shoreline, are sensitive tubeworm habitats[83].

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76 R J Greenaway, evidence-in-chief para 4.9 [Environment Court document 26] – referring to http://www.nzmaritime.co.nz/lermontov.htm.

77 R J Greenaway, evidence-in-chief para 4.11 [Environment Court document 26].

78 K R Grange, evidence-in-chief [Environment Court document 9].

79 K R Grange, evidence-in-chief paragraphs 15–17 [Environment Court document 9].

80 K R Grange, evidence-in-chief para 2.4 [Environment Court document 9A].

81 K R Grange, evidence-in-chief Appendix 11 *Supplementary survey of Gannet Point* at page iv [Environment Curt document 9].

82 K R Grange, evidence-in-chief paragraphs 40–45 [Environment Court document 9] and 3.1–3.3 [Environment Court document 9A].

83 K R Grange, evidence-in-chief paragraph 51 [Environment Court document 9] and supplementary at para 8.2 [Environment Court document 9A].

[57] Dr Grange considered the existing marine farms have changed the benthic marine communities through the accumulation of shell debris and mussels beneath the farms. The debris does not extend beyond the immediate environment, not even as far as the anchor blocks[84].

2.5 The terrestrial ecology of the Cape Jackson peninsula

[58] Two ecologists, Dr R Bartlett and Dr J Roper-Lindsay, and a number of lay witnesses described the terrestrial vegetation and ongoing revegetation of the slopes surrounding Gore Bay and the immediate context of the marine farms at Pool Head and Gannet Point. Drs Bartlett and Roper-Lindsay were agreed that the three marine farms would have no influence on terrestrial ecological processes[85]. Further, their evidence was to inform the evaluation of natural character of the terrestrial part of the eastern Port Gore coastal environment.

[59] Dr Bartlett explained that ecological significance is commonly assessed by considering ecological context, representativeness, rarity and distinctiveness. Viability may also be a factor. She considered that an understanding of the ecological values contributed to an understanding of naturalness, which in turn contributed to an understanding of natural character[86].

[60] Dr Bartlett then first described the broader context of the hillsides surrounding Port Gore. She noted that the upper parts of the south western slopes were covered by primary indigenous forest which extended down some gullies. Lower slopes supported manuka[87] and kanuka[88] at various stages of regrowth with broadleaf tree species and ferns in the gullies. The south eastern slopes were more varied with patches of broadleaf forest in gullies, expanses of kanuka across the mid slopes and sparse tauhinu[89] shrubland in overgrown pasture[90].

[61] Dr Bartlett provided a more detailed description of the vegetation at Pool Head and Gannet Point. We reproduce her summary[91]:

> The kanuka-manuka scrub and forest that provides the immediate context to the foreshore and lower slopes in the vicinity of Pool Head provides continuity of cover but is recently developed vegetation of lower diversity. The slopes above Gannet Point support exotic pasture on which tauhinu, flax, manuka and kanuka vegetation is regenerating. Broadleaved shrubland, scrub and forest is regenerating in patches according to previous clearance and disturbance activities.

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84 K R Grange, evidence-in-chief para13 [Environment Court document 9].
85 Joint statement para 3 [Environment Court document 7C].
86 R M Bartlett, evidence-in-chief paragraphs 20–25 [Environment Court document 7].
87 *Leptospermum scoparium*.
88 *Kunzea ericoides*.
89 *Ozothamnus leptophylla*.
90 R M Bartlett, evidence-in-chief paragraphs 29-30 [Environment Court document 7].
91 R M Bartlett, evidence-in-chief para 34 [Environment Court document 7].

Overall Dr Bartlett considered that areas of significant natural value were restricted to the upper slopes, areas identified in the Plan or gazetted reserves. Early successional forests do provide connectivity between higher forested areas and in places there is a continuum from ridge to the coast. Dr Bartlett concluded that the areas adjacent to the Pool Head and Gannet Point farms did not qualify as significant with respect to section 6(c) of the Act[92].

[62] Perhaps more relevantly, since section 6(c) of the RMA is not an issue in the proceedings, but section 6(a) is, Dr Bartlett responded to a description by Ms Marchant of the vegetation as "a mixture of both virgin and regenerating forest with the overall effect being one of cohesion and natural-looking pattern of growth". Dr Bartlett agreed with Ms Marchant that natural processes were clearly at work but considered the patterns of growth to be influenced by both past and present human activities. In particularly the ongoing retirement of pastures is evident in areas of exotic grassland, shrubland, young and older kanuka regeneration[93]. When asked about her approach to assessing naturalness Dr Bartlett replied[94]:

> I was describing the degree to which natural processes have been allowed to re-assert themselves over the modifications that have taken place previously. So if you are looking at an area of, for arguments sake, exotic pasture, certainly as I said before, there are natural processes at work. But in terms of the continuum to development of a highly natural ecosystem fully functioning with a range of, with diverse vegetation present, in such vegetation the naturalness is extremely high because those natural processes have achieved dominance over the modifications that have taken place previously. And whether that is, as in this case, human induced.

[63] We accept the descriptions of Drs Bartlett and Roper-Lindsay that there is a mosaic of vegetation types on the land in the vicinity of the three marine farms. The stages of succession indicate the times since farming ceased or burning had taken place. They noted the effects of animal pests including possum browsing in kohekohe[95] trees and pig damage. They recognised the intentions of the present landowners to encourage regeneration of indigenous vegetation but noted that they could not predict the aspirations of future landowners.

[64] Pool Head was regarded by the experts as more advanced in regeneration than Gannet Point although it still shows a variation and patchiness in understorey vegetation and overall condition of the canopy. The vegetation is likely to progress, retaining a mix of kanuka canopy on the ridges and dry slopes, with broadleaf forest patches in the gullies, over the next 10 to 20 years. At Gannet Point the pattern of human modification

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92 R M Bartlett, evidence-in-chief para26 [Environment Court document 7].
93 R Bartlett, evidence-in-reply para13 [Environment Court document 7A].
94 Transcript (2010) at p. 93.
95 *Dysoxylum spectabile*.

was considered likely to remain evident, with early successional shrubland likely to be dominant, over the next 10 to 20 years[96].

[65] Dr Roper-Lindsay discussed the "naturalness" of the terrestrial ecosystems of Port Gore. She observed that "[n]aturalness has been widely used for many years as a nature conservation criterion in New Zealand and elsewhere"[97]. She defined naturalness of an ecosystem as "... a state characterised by the lack of human disturbance and intervention"[98] but conceded it "... is impossible to measure empirically"[99]. She wrote that "naturalness" is sometimes also used as a criterion for assessing significance under section 6(c) of the RMA. If that is so we consider (in passing) that is a practice to be discouraged for two reasons. First the three tests for significance under section 6(c) referred to by Dr Bartlett (see above) are already complex and not without their ambiguities[100]. Secondly "naturalness" is a quality that expressly needs to be assessed in respect of the character of the coastal environment and of landscapes under section 6(a) and (b) respectively of the RMA. The concept is, in our view, complicated enough to understand without also introducing a similar idea in section 6(c) – which does not refer to "natural" habitats at all.

[66] Dr Roper-Lindsay wrote that she considered naturalness in ecosystems in terms of the elements, patterns and processes[101]. In the context of nature conservation she considered naturalness to be an ecosystem state characterised by the lack of human disturbance and intervention. Areas with a high proportion of indigenous species were considered more natural. She considered there to be a spectrum of ecological naturalness – from areas of unmodified habitat with a high proportion of indigenous species to artificial man-made places with only exotic species or no biota present[102]. For practical purposes she used a five step scale to assess "ecological naturalness[103]. We now include her table and scale:

Level of naturalness	**Description**
Low	Managed land – e.g. farm, forest, garden. May have common native birds, invertebrates, but introduced species and processes dominate. Human management ongoing

96 Joint statement by Dr Ruth Bartlett and Dr Judith Roper-Lindsay, paragraphs 1–2 [Environment Court document 7C].

97 J Roper-Lindsay, evidence-in-chief para 35 [Environment Court document 8] referring to K F O'Connor, F B Overmars, M M Ralston (1990) *Land Evaluation for nature conservation* ..., Conservation Sciences Publication No. 3, Department Of Conservation, Wellington.

98 J Roper-Lindsay, evidence-in-chief para 35 [Environment Court document 8].

99 J Roper-Lindsay, evidence-in-chief para 39 [Environment Court document 8].

100 Dr Bartlett stated that there might be a fourth ("viability").

101 Thus alluding to policy 13(2)(a) of the NZCPS 2010 which we discuss later.

102 J Roper-Lindsay, evidence-in-chief paragraphs 29–45 [Environment Court document 8].

103 J Roper-Lindsay, evidence-in-chief para 45, Table 1 [Environment Court document 8].

Low-medium	Early naturalisation – e.g. paddock recently retired from grazing, unmown roadside. Some native plants, native invertebrates, birds. Introduced species still dominate
Medium	Mid-stage naturalisation – e.g. paddock with native shrubland vegetation invading. Pasture grasses still dominate ground cover, native birds visit area; native invertebrates in native plants but pests (e.g. wasps) still present
Medium-high	Late stage naturalisation. Shrubland canopy forming; pasture species not thriving; forest/shrubland native birds, invertebrate, lizards present, possibly breeding; introduced pests and weeds still present
High	Uncleared forests, older shrublands; coastal cliffs; reserves. Native species plants and animals dominant; most weeds and pests under management and low in numbers/not breeding or spreading …

[67] On her five-step scale, Dr Roper-Lindsay considered the vegetation at Pool Head to be of medium-high naturalness (late stage naturalisation/shrubland canopy forming) with the upper slopes/ridge lines being of high naturalness (uncleared forest, older shrubland)[104]. She considered the shoreline and upper slopes at Gannet Point to be dominated by native vegetation and of medium-high naturalness, perhaps with some areas of high naturalness. The mid slopes at Gannet Point were of low-medium (early naturalisation/recently retired paddock) to medium naturalness (mid-stage naturalisation/native shrubland invading)[105]. We record those opinions but note that a scale of naturalness of habitats is not the same as a scale of naturalness of landscapes or of natural character of the coastal environment.

[68] The ecological experts did not mention that there is a freshwater *Carex solandri* wetland behind the foredunes at Cockle Bay. This is located on the Marchant property and supports[106] rare plant[107] and bird species (fernbirds). This dune and wetland complex is mapped as site 2/16 in the Sounds Plan[108]. Introduced pampas grasses and cattle have been removed[109].

2.6 The natural character of the coastal environment

[69] Under section 6(a) of the RMA we must first recognise and then protect the coastal environment of Port Gore from inappropriate use and development. Before we can decide whether any one or more of the proposed farms is inappropriate development (and we leave that to Part 6 of this decision) we must first identify how natural that coastal environment is.

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104 J Roper-Lindsay, evidence-in-chief para 59 [Environment Court document 8].
105 J Roper-Lindsay, evidence-in-chief paragraphs 73–75 [Environment Court document 8].
106 D J Lucas, evidence-in-chief paragraphs 106 and 107 [Environment Court document 15].
107 e.g. *Epilobium pallidiflorum*.
108 Map 72 [Volume 3, Sounds Plan].
109 D J Lucas, evidence-in-chief para 107 [Environment Court document 15].

[70] It seems to have been common ground amongst the parties and witnesses that the coastal environment in the vicinity of Port Gore includes all the waters of the bay and the land up to the crest of the surrounding ridgeline (running from Cape Jackson in the northeast through the high points : Oterawhanga, Mt Furneaux, the Saddle on the road and north down the ridge to Cape Lambert at the western head of Port Gore. That much is clear, but there were rather different approaches in the analysis of the coastal environment's character, and in particular to its "natural character'. We have described how two professional ecologists identified the "natural character" of the terrestrial component in ecological terms. Obviously that is highly relevant to establishing the natural character of eastern Port Gore.

[71] However, since naturalness is an anthropomorphic concept we consider that the evidence of at least some of the landscape architects is useful on this topic. Both Ms D J Lucas, called by Mr Marchant, and Mr S K Brown, called by Sanford, expressed an opinion on this topic. The ecologists considered naturalness in ecosystems in terms of the natural elements, natural patterns and natural processes. However, as the NZCPS 2010 shows, the 'natural character' of the coastal environment[110] and the naturalness of outstanding landscapes[111] are features dependent on more than identification of their relatively objective 'characteristics'.

[72] Neither Mr Bentley nor Mr Carter[112] considered the NZCPS 2010 at all and the latter was confused in his terminology. In the end, as counsel for Sanford pointed out[113], the difference between Mr Brown and Ms Lucas was "... as to the proper *adjective* for describing the ... [naturalness] of Port Gore". Mr Brown considered it was "high"[114], Ms Lucas "outstanding"[115]. On balance we prefer Mr Brown's assessment.

[73] The Marlborough Sounds Resource Management Plan ("the Sounds Plan")[116] also gives some assistance in identifying natural characteristics. Chapter 2 (Natural Character) identifies landforms, indigenous flora and fauna (and their habitats), water and water quality, scenic or landscape values, and cultural heritage values as contributing[117] to natural character. Other components of natural character are recognised[118] as being identified in other chapters of the Sounds Plan.

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110 New Zealand Coastal Policy Statement 2010, policy 13.
111 New Zealand Coastal Policy Statement 2010, policy 15.
112 T F Carter, evidence-in-chief [Environment Court document 14].
113 Final submissions for Sanford, para 61 [Environment Court document 40].
114 Mr Brown's summary in relation to the coastal environment around Pool Head was that it "... displays a high level of perceived natural character". S K Brown, evidence-in-chief para 54 [Environment Court document 12].
115 Ms Lucas considered it showed a "very high" natural character. D J Lucas, evidence-in-chief para 110 [Environment Court document 15].
116 In fact, the Sounds Plan is a combined regional, regional coastal, and district plan under the RMA.
117 Policy 2.2/1.3 of Chapter 2 Natural Character (Sounds Plan p. 2-4].
118 Policy 2.2/1.4 of Chapter 2 Natural Character [Sounds Plan p. 2-4].

[74] Neither the waters nor the surrounding land of Port Gore are pristine, but we find that, on a general spectrum from very natural through highly modified to urban/industrial, the coastal environment of Port Gore ranks as highly natural.

2.7 The landscape(s) of Port Gore

[75] Two of the four landscape architects called – Mr Brown[119] and Ms Lucas, agreed that eastern Port Gore is an outstanding natural landscape[120]. A third, Mr T F Carter, called by PGMF, was of the opinion that only the "Outer Bay" was an "Outstanding Natural Landscape or Feature"[121]. In doing so he described[122] the Inner Bay as including the Gannet Point (Onapopoia) mussel farms. That approach is wrong at law in that he should have imagined the "existing environment" without the Gannet Point marine farms.

[76] The landscape architect called for the council, Mr J A Bentley, pointed out[123] that the Sounds Plan identifies three areas within Port Gore as "Areas of Outstanding Landscape Value":

- Cape Jackson south to Waimatete;
- the cliff faces of Kaitangata east of Black Head;
- the eastern side of Cape Lambert (on the other side of Port Gore).

In Mr Bentley's opinion there are[124] "other elements" within Port Gore which are outstanding natural features. He expressly stated[125] that the "lower slopes extending from Gannet Point in the east to Pig Bay in the west should not be considered an outstanding natural feature due to previous modifications ..." even though the "forested ridgeline"[126] above them is, in his view, an "outstanding natural feature of Port Gore". He did not consider in his evidence-in-chief whether Port Gore or a part of it is an outstanding natural landscape.

[77] Mr Carter disagreed[127] with Mr Brown and Ms Lucas where they each concluded that the Inner Port Gore was an outstanding natural landscape. In his evidence-in-chief he wrote[128]:

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119 S K Brown, evidence-in-chief para 14 [Environment Court document 12].
120 Under section 6(b) of the RMA.
121 T F Carter, evidence-in-chief para 50 [Environment Court document 14].
122 T F Carter, evidence-in-chief para 26 [Environment Court document 14].
123 J A Bentley, evidence-in-chief para 5.29 [Environment Court document 13].
124 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
125 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
126 J A Bentley, evidence-in-chief para 5.30 [Environment Court document 13].
127 T F Carter, rebuttal evidence para 8 [Environment Court document 14B].
128 T F Carter, evidence-in-chief para 52 [Environment Court document 14].

> I do not consider at this point Inner Port Gore is an outstanding natural landscape and see no reason to challenge the "designation"[129] in the [Sounds Plan].

He was referring there to the Sounds Plan's description of areas within the Marlborough Sounds as outstanding landscape areas. Mr Carter expressly[130] treats those as being outstanding natural landscapes within the meaning of section 6(b) of the RMA. He then wrote that Mr Brown and Ms Lucas' conclusions were not justified by the Sounds Plan which does not include Inner Port Gore as an outstanding natural landscape.

[78] For PGMF Mr Carter criticised Ms Lucas when she wrote[131]:

> The whole of the inner Port Gore character area, and also the whole of the greater Cape as a feature, should be assessed together not further subdivided.

He stated that assessment at that scale had two difficulties[132]:

> The first is that it does not address the issue of landscape scale in relation to the potential effects of proposed marine farming activity. I identified in evidence this factor as the viewing distance and visibility.

We consider he is simply wrong about that as a matter of law. The principal (but not the only) relevance of landscape to the RMA is that section 6(b) requires outstanding natural features to be recognised and protected (from inappropriate development). Before what is inappropriate can be assessed, a qualifying landscape has to be recognised. In fact, as the court has pointed out before[133], it is necessary:

(1) to identify the landscape in which a proposal is set;
(2) to ascertain whether the landscape is natural and, if so, how natural; and
(3) to assess whether any natural landscape is also outstanding.

[79] The question of the size (as opposed to the location) of the proposal is usually irrelevant to identifying the landscape. Sometimes there may be a large proposal in a small landscape such as an enclosed valley. Often, as here, there may be a relatively small proposal in a very large landscape. The question of the scale of a proposal may be highly relevant to how adverse any effects are, but it is almost always irrelevant to the recognition of the landscape in which it is set.

[80] Mr Carter's second criticism was that[134] "when assessed at the very large scale utilised by Ms Lucas other landscape values are improperly drawn into the assessment".

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129 Scare quotes added to show he is not using the word in a technical sense.
130 T F Carter, rebuttal evidence para 8 [Environment Court document 14B].
131 D J Lucas, evidence-in-chief para 22.5 [Environment Court document 15].
132 T F Carter, rebuttal evidence para 5 [Environment Court document 14B].
133 For example see *High Country Rosehip Orchards Limited v Mackenzie District Council* Decision [2011] NZEnvC 387 at [74].
134 T F Carter, rebuttal evidence para 6 [Environment Court document 14B].

That may not necessarily be the case but we agree with Mr Carter that some of the factors identified by Ms Lucas have a tenuous relationship to the landscape of Inner Port Gore. As examples he identified[135] her references to the historical values associated with Ships Cove (and its use by Captain Cook) and to the biophysical values of Mt Stokes. We agree about the former, but can see why at least the eastern flanks of Mt Stokes can be conceived as part of the landscape of Inner Port Gore.

[81] We do not accept the slicing and dicing approach of Mr Bentley and Mr Carter when it comes to assessment of landscapes and features under section 6(b) of the Act. While the Sounds Plan may initially appear to support their approach, on a more careful analysis it does not do so. As we shall see, the scheme of the Sounds Plan is that the integrating concept when considering at least section 6(a) to (c) of the RMA is in paragraph (a) which requires recognition and protection (where appropriate) of the natural character[136] of the coastal marine area. In *Kuku Mara Partnership (Forsyth Bay) v The Marlborough District Council*[137] the court concluded that:

> The provisions of ... Chapter [5 of the Sounds Plan] ... make it clear that although the objective and policies of that chapter are intended to apply specifically to areas identified as having outstanding landscapes, they also apply to all other areas where substantial activities ... are being considered.

The landscape assessments of "areas of outstanding landscape value" must be read in that context and in the light of two other aspects of the plan : first that the Sounds in their entirety are treated as having "outstanding visual values"[138]; and secondly, that the "areas of outstanding landscape value" are a visual-based assessment[139] not an overall landscape assessment.

[82] In his closing submissions counsel for PGMF tried to bolster the evidence of Mr Bentley and Mr Carter by submitting that[140]:

> [t]he concept of outstanding both in terms of the simple meaning of the word and the place of that term at the top of a hierarchy of values must mean that it is of the highest quality genuinely justifying the epithet outstanding. It has to be ranked number 1 with a meaningful distinction between that ranking and lesser landscape an important ingredient to the validity of the scale.

We do not accept that : while we agree it is important not to dilute the quality that goes to make a natural landscape outstanding, we consider that Mr Hunt has overstated the legal test in section 6(b) of the RMA. We consider that while outstandingness (of landscapes) must be close to the top, at least one and possibly two values come higher :

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135 T F Carter, rebuttal evidence para 6 [Environment Court document 14B].

136 Policy 1.5 and Explanation [Sounds Plan p. 2-4].

137 *Kuku Mara Partnership (Forsyth Bay) v The Marlborough District Council* Decision W25/2002 at [486].

138 Para 5.1.1 – Chapter 5 Landscape [Sounds Plan p. 5-1].

139 2.3 Methods [Sounds Plan p. 2-5].

140 Final submissions for PGMF para 46 [Environment Court document 41].

"uniquely superior" and "the best". For example, in Pelorus Sound, Tennyson Inlet might be seen as uniquely superior and Ngawhakawhiti as simply the best. However, we do not discount Messrs Carter's or Mr Bentley's opinions on this ground because there is no evidence that they were applying Mr Hunt's incorrect test.

[83] It is a serious defect of Messrs Bentley and Carter's evidence that they were not considering areas that could realistically, in the Port Gore context, be described as landscapes. It is easy to divide a landscape up into smaller components ("units" or features) with lower landscape qualities, but it is meaningless in terms of the section 6(a) recognition of landscapes to do so. Landscapes need to be outlined and considered as wholes.

[84] We prefer the assessment of the two more senior and experienced landscape architects, Mr Brown and Ms Lucas, that (at least) the eastern half of Port Gore is an outstanding natural landscape. There was some fine distinction making by counsel in their cross-examination of Ms Lucas, and indeed a worrying conflation by Ms Lucas of a "landscape" and a "feature" in answer to a question from the court[141]. That approach is wrong. Parliament used the two words separately, and as the Environment Court has explained, under the RMA a feature is a component of a landscape : *Wakatipu Environmental Society v Queenstown Lakes District Council*[142]. Despite that conclusion, we consider it did not undermine her evidence in any significant way. In any event she was of the same opinion as Mr Brown and his evidence on this issue was not seriously challenged.

[85] In the end we think Ms Lucas' approach is much closer to the spirit of section 6(b) and (now) policy 15 of the NZCPS 2010 than Mr Carter's so we prefer her conclusion that Inner Port Gore is an outstanding natural landscape. Further, in the Sanford proceedings, Mr Brown assessed the "southeastern part of Port Gore … [as] an Outstanding Natural Landscape, despite the presence of human activities and structures …"[143] (our underlining) and we find that evidence to be compelling.

[86] That finding is generally consistent with the decision of the court in *Kaikaiawaro Fishing Co Limited v Marlborough District Council*[144]. There the Environment Court was considering applications for marine farms at two sites further north on the western side of Cape Jackson : one site at Kaitangata and the other at Waimatete Bay. In response to the evidence of a witness who said that the impact of the two proposed

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141 Transcript (2010) p. 414.

142 *Wakatipu Environmental Society v Queenstown Lakes District Council* [2000] NZRMA 59. Thus to describe the Marlborough Sounds as a "feature" of the Marlborough District as a whole is not to use "feature" in the section 6(b) sense. To avoid confusion we recommend that looser meanings of the word "feature" are avoided in any proposed amendment plan for the district/region.

143 S K Brown, evidence-in-chief para 50 [Environment Court document 12].

144 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999.

marine farms on the landscape of the Port Gore coastline was "low indeed", the court stated[145]:

> But it is not the general modified landscape of Port Gore which is in issue in this case. It is the *outstanding landscape of the area in which the marine farms are to be* (chiefly) *located.* The qualification is important to recognise and becomes more so in the context of s.6 of the Act.
>
> It follows that the effects of the application in each bay [are] required to be determined both on its own merits and collectively. We therefore approached the bays initially as two separate entities and then together in the context of the Cape Jackson-Black Head landscape. For it is the relatively highly unmodified area [around the sites] which is in issue and which draws the traveller in to inquire as to its attributes more closely. The total landscape of Port Gore is so broad that it is only on close inspection that the viewer becomes aware of the natural qualities of its individual parts. On our site visit, undertaken by launch, we gathered a much greater appreciation of what is involved.

We are slightly troubled by the smaller landscape identified by the court there (although it still has a coastline that is 11 kilometres long). It seems to us in the *Kaikaiawaro* decision the concept of a landscape as a large discrete area could have been used, given the immense scale[146] of Port Gore, to reasonably analyse the eastern side of the bay as a separate landscape from the western (Melville Cove) side. The important point for present purposes is that the court in *Kaikaiawaro* found the eastern side of Port Gore (at least from Cape Jackson to Black Head) to be an outstanding natural landscape.

3. The statutory framework and the legal issues

3.1 Which version of the RMA applies to each application?

Pool Head : pre-2008 amendments

[87] Sanford lodged its coastal permit application for the Pool Head mussel farm on 14 May 2008. Therefore, its status must be assessed in accordance with the Act, as though the 2009 and later amendments to the RMA had not been made[147]. However, we remind ourselves that section 88A(2) of the Act directs that we must assess the merits of the proposals under the versions of the relevant subordinate statutory instruments which are current or proposed at the date of the hearing.

Gannet Point South : pre-September 2004 amendments

[88] Sanford lodged its application for the Gannet Point South mussel farm on 21 July 2004. Therefore, the status of the application must be assessed in accordance with the RMA, as though the 2005 and 2009 amendments to the RMA had not been made[148].

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145 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999 at [105] and [106].

146 *Kaikaiawaro Fishing Co Limited v Marlborough District Council* Decision W84/1999 at [5].

147 Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 160(3).

148 Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 160(3) and Resource Management Amendment Act 2005, section 131(1)(b).

Gannet Point North

[89] PGMF lodged its application for the Gannet Point North mussel farm on 17 July 2008 which means that it should be treated under the same law as Sanford's Pool Head application.

3.2 The relevant RMA provisions

[90] In summary, in coming to our decision the court must, always subject to Part 2 of the Act, have regard to[149]:

- section 104 which outlines the matters (i.e. effects, policies, plans, other matters) to be considered when determining any resource consent application;
- section 104B which provides that consent may be granted for a discretionary activity, and that conditions can be imposed on that consent; and
- section 108 which relates to conditions.

[91] The relevant instruments we must have regard to under section 104(1)(b) are:

- the New Zealand Coastal Policy Statement 2010 ("the NZCPS 2010");
- the Marlborough Regional Policy Statement ("the RPS"); and
- the Sounds Plan.

It is important to set out the relevant objectives and policies because they frame the prediction of possible effects.

[92] Also under section 104, subsection (2A) requires us to have regard to, for each marine farm, "... the value of the investment of the existing consent holder". We will consider and apply section 104(2A) when we turn to section 7(b) under Part 2 of the Act.

[93] There is one other set of documents we must consider : section 290A directs the court to have regard to the Commissioners' decisions on the applications. We record that, strictly, section 290A applies only to Sanford's Pool Head marine farm and PGMF's application and not to the Gannet Point South marine farm application[150], although we will, out of respect to the council's decision, consider its reasons for the last decision anyway.

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149 Section 104 RMA.

150 Section 290A was inserted, as from 10 August 2005, by section 106 of the Resource Management Amendment Act 2005 (2005 No 87).

3.3 The activities for which consents are sought and their status

3.3.1 Is each proposed mussel farm in an Aquaculture Management Area?

[94] At this point we have to enter the maelstrom which is the current law of aquaculture. That is because mussel farms are "aquaculture activities" within the meaning of that term as defined[151] in the RMA. It means:

> (a) ... the breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest if the breeding, hatching, cultivating, rearing, or ongrowing involves the occupation of a coastal marine area; and
> (b) includes the taking of harvestable spat if the taking involves the occupation of a coastal marine area; but
> (c) does not include an activity specified in paragraph (a) if the fish, aquatic life, or seaweed –
> (i) are not in the exclusive and continuous possession or control of the person undertaking the activity; or
> (ii) cannot be distinguished or kept separate from naturally occurring fish, aquatic life, or seaweed.

[95] Section 12A of the RMA then imposes a precondition to the grant of any consent for a marine farm. It provides that no person may occupy a coastal marine area for the purpose of an aquaculture activity except in an aquaculture management area ("AMA") in a regional coastal plan. Section 12A(1A) prevents applications for such coastal permits, except in an AMA.

[96] How are AMAs established? Section 165AB of the RMA provides that an AMA can be established by:

- Being included in a regional coastal plan or proposed regional coastal plan under section 165C (i.e. using the Schedule 1A process); or
- Becoming an AMA under section 44 or 45 of the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 ("the Aquaculture Reform Act").

[97] The relevant regional coastal plan for Port Gore is in the Sounds Plan. There are no express AMAs in the Sounds Plan because at the time it was made operative[152], the concept of an AMA did not yet exist. However, section 20 of the Aquaculture Reform Act deems all marine farming permits existing at 1 January 2005 to be coastal permits. The three existing mussel farms were deemed to have coastal permits by this section[153]. Then section 45(3) of the Aquaculture Reform Act provides that an area subject to a deemed coastal permit is also deemed to be an AMA for the purposes of the

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151 Section 2 of the RMA as substituted on 1 January 2005 by section 4(2) of the RM Amendment Act (No. 2) 2004.

152 In 2003.

153 Marine farming permit MPE128 relating to East Pool Head (site 8175) was issued on 5 March 1995, and replaced by U050218 on 2 August 2005. MPE115 relating to East Pool Head (site 8501) was issued on 27 June 1995, and the term extended on 21 May 2008. MPE127 relating to Gannet Point South (site 8176) was issued on 14 March 1995.

RMA. Accordingly, the applications are not prevented by section 12A(1) and (1A) of the RMA.

3.3.2 What activities are consents required for?

[98] The precondition (referred to in the previous part of this decision) having been satisfied, there are potentially three sets of activities for which the proposed mussel farms may need consents:

(1) to occupy the farm areas[154] for the purpose of marine farming;
(2) for construction and use of structures (the submerged farms) under section 12 of the RMA;
(3) for managing, in the coastal marine area, the effects on fishing and fisheries resources of aquaculture activities (the farming of greenshell mussels[155]) under section 30(2) of the RMA.

The first and second categories are straight-forward : the applications are required for activities to which section 12(1) and (2) of the RMA apply, i.e. activities including erection and use of structures (e.g. lines, buoys etc), associated disturbance of the seabed (e.g. installing anchors), and associated occupation of water space. As for the third set of activities, it is quite difficult to work out what the deemed coastal permits (former MAF licences) are. Fortunately, we do not have to resolve that because in these proceedings there is not evidence before us that any of the proposed mussel farms will cause adverse effects on the marine ecology of the areas in which they are each proposed.

3.3.3 What consents are required under rule 35.4 of the Sounds Plan?

[99] Rule 35.4 in the Sounds Plan[156] provides that (relevantly):

> Application must be made for a discretionary activity … for the following:
>
> …
> • Occupation of the coastal marine area;
> …
> • Disturbance of … seabed …;
> …
> • Marine Farms in [CMZ1] which are listed in Appendix D2;
> …
> • Structures in the coastal marine area …

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154 On the evidence for the applicants:
- in the case of site 8501, this is approximately 9.75 hectares;
- for site 8175 approximately 3 hectares; and
- for site 8176 approximately 6 hectares.

155 *Perna canaliculus*.

156 Sounds Plan pp 35-13 and 35-14.

Thus there are general provisions for certain activities or structures, and specific provisions for identified marine farms, including the three sites with which these proceedings are concerned. They are specifically listed in Appendix D2 by name and the council's reference number[157].

[100] The Sounds Plan's Zoning Map shows that all of Port Gore is zoned as Coastal Marine Zone 1 ("CMZ1") except for Melville Cove and the marine farms listed in Appendix D2. The map is accompanied by a notation which reads:

> Marine farms having the status of Controlled Activities in terms of Rule 2.5 exist within the Coastal Marine Zones J and 2 and in Port Gore within the Coastal Marine Zone 1 with the status of Discretionary Activities in terms of Rule 3. Maps and records of the detailed locations of those marine farms will be held by the Council pursuant to the requirements of Section 35 of the Resource Management Act 1991. [Underlining added]

The future tense in the last sentence is inaccurate. No detailed maps and records of any of the three mussel farms appear to have been held by the council at any time. At least, none were produced to us.

[101] In summary, the district rules require consent for the activities of occupation of space and erection and use of structures in the coastal marine area, disturbance of the seabed, and for marine farms listed in Appendix D2. Rule 35.4.1 then provides a list of general assessment criteria[158]. Some of these merely repeat the statutory considerations in section 104. Other effects-oriented criteria will be considered in Part 5 of this decision.

3.4 Jurisdictional issues

[102] A number of jurisdictional issues were raised for Mr Marchant and FNHTB. They include:

(1) whether the amended applications (changing from surface to sub-surface) by Sanford are within the scope of its original application;
(2) whether any parts of the applications are prohibited as being within the CMZ1 zone under the Sounds Plan;
(3) whether any parts of the applications are outside an Aquaculture Management Area (AMA) because the existing marine farms, and the applications to "renew" them which we are considering, are not on the sites previously approved by the Marlborough District Council. If that is so is the court deprived of jurisdiction in relation to those parts of the applications?

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157 Sounds Plan Appendix D2 p. App D-1.
158 Sounds Plan pp. 35-14 and 35-15.

(4) the effect of the Environment Court's decision in *Pelorus Wildlife Sanctuaries v Marlborough District Council*[159] as to the scope of section 121A(1A) of the RMA.

[103] The jurisdictional issues were raised at an unusual time. Mr Milne, counsel for Mr Marchant and others, stated throughout the management of these appeals towards a hearing, that there were jurisdictional difficulties facing Sanford and PGMF. However, the details of his arguments were identified rather later than we would have liked. Thus we heard over half the evidence before we were given the nearly full jurisdictional arguments for Mr Marchant, and all of the evidence before we received the complete submissions of Mr Milne and the submissions of counsel for the other parties on these issues. The reason for that delay is that Mr Milne always submitted that the court should hear and determine the substantive merits of the appeals before deciding the jurisdictional arguments because, he argued, if the court decided that it should not, on the merits, grant one or more of the mussel farms it would not need to resolve some or all of the legal issues. At the various judicial conferences the other parties acquiesced to that course, so, with some reluctance, the court agreed to it. Accordingly, we set aside the jurisdictional issues at present and will assume that the proposed mussel farms are within jurisdiction.

4. The policy and plan framework

4.1 The Marlborough Sounds Resource Management Plan

[104] The Sounds Plan[160], made operative on 28 February 2008, is a combined district, regional and regional coastal plan. It contains three volumes – one of objectives and policies and methods, one of rules and a final volume of maps.

[105] Volume 1 of the MSRP contains 23 chapters of which three are particularly relevant. They are emphasised in this list of the most important chapters:

Chapter 1.0	Introduction
Chapter 2.0	**Natural Character**
Chapter 3.0	Freshwater
Chapter 4.0	Indigenous Vegetation
Chapter 5.0	**Landscape**
Chapter 6.0	Tangata Whenua and Heritage
Chapter 7.0	Air
Chapter 8.0	Public Access
Chapter 9.0	**Coastal Marine**
Chapter 10.0	Urban Environment
...	
Chapter 22.0	Noise

159 *Pelorus Wildlife Sanctuaries v Marlborough District Council* [2010] NZEnvC 411.

160 Sounds Plan para 1.0 [page 1-1].

Chapter 23.0 Subdivision

Natural Character (Chapter 2.0)

[106] The introduction to the Natural Character chapter explains[161] that it provides an "integration mechanism" for natural character and supports other sections of the Sounds Plan. It contains one objective and that simply repeats section 6(a) of the RMA. Of more assistance are the implementing policies which, because of their importance, we quote in full. They are[162] (grammar as in the original):

Policy 1.1	Avoid the adverse effects of ... use or development within those areas of the coastal environment ... which are predominantly in their natural state and have natural character which has not been compromised.
Policy 1.2	Appropriate use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised, and where the adverse effects of such activities can be avoided, remedied or mitigated.
Policy 1.3	To consider the effects on those qualities, elements and features which contribute to natural character, including: (a) Coastal and freshwater landforms; (b) Indigenous flora and fauna, and their habitats; (c) Water and water quality; (d) Scenic or landscape values; (e) Cultural heritage values, including historic places, sites of early settlement and sites of significance to iwi; and (f) Habitat of trout.
Policy 1.4	In assessing the actual or potential effects of subdivision, use or development on natural character of the coastal and freshwater environments, particular regard shall be had to the policies in Chapters 3, 4, 5, 6, 12, 13 and Sections 9.2.1, 9.3.2 and 9.4.1 in recognition of the components of natural character.
Policy 1.5	Promote an integrated approach to the preservation of the natural character of the coastal and freshwater environments of the Marlborough Sounds.
Policy 1.6	In assessing the appropriateness of subdivision, use or development in coastal and freshwater environments regard shall be had to the ability to restore or rehabilitate natural character in the areas subject to the proposal.
Policy 1.7	To adopt a precautionary approach in making decisions where the effects on the natural character of the coastal environment, wetlands, lakes and rivers (and their margins) are unknown.
Policy 1.8	To recognise that preservation of the intactness of the individual land and marine natural character management areas and the overall natural character of the freshwater, marine and terrestrial environments identified in Appendix Two is necessary to preserve the natural character of the Marlborough Sounds as a whole.

[107] The explanation states:

> The above objective and policies seek to support other sections of the Plan in terms of their contribution to natural character and provide an integration mechanism for the management of natural character.

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161 Chapter 2.0 para 2.1 [Sounds Plan p 2-1].

162 Chapter 2.0, para 2.2 [Sounds Plan pp 2-3 and 2-4].

[108] The Sounds Plan's description of the natural character areas of the Marlborough Sounds are contained in Appendix 2 to the volume of objectives and policies. There are two natural character areas relevant to these proceedings. The proposed mussel farms are contained in the "D'Urville Island – Northern Cook Strait" Marine Character Areas[163]. The collective characteristics of the marine character area are described in the Sounds Plan as being[164]:

> Exposed; clear, cold oceanic waters, strong currents, off-shore reefs, stacks and islands; rich reef communities; bryozoans and horse mussel beds; massive tube worm colonies.

The adjacent land on the peninsula leading out to Cape Jackson is in the "Stokes"[165] terrestrial natural character area. The bedrock is siliceous Marlborough Schist and the landforms are mostly very steep or moderately steep, evenly contoured hill slopes[166]. The forests of "lower altitude hill slopes ... and coastal forests" (a description which covers the land adjacent to the mussel farm sites) is described as "severely compromised"[167]. However, as described above, that situation has improved somewhat over recent years through the actions of the landowners.

Landscape (Chapter 5.0)

[109] Chapter 5 (Landscape) of the Sounds Plan recognises that the Marlborough Sounds as a whole has "outstanding visual values". Then 'Areas of outstanding landscape value' are shown on the Landscape Maps in Volume 3. Relevantly Map 78 shows that the ridgelines to the east and south of Cockle Bay are "prominent ridges"; Maps 75 and 78 describe both Cape Jackson and the area of the Kaitangata Bluffs as "Area[s] of Outstanding Landscape Value". There appears to have been a deliberate policy to exclude any area of water as part of those particular areas[168].

[110] The objective for landscape in the Sounds Plan mirrors section 6(b) of the RMA with an additional and rather mysterious emphasis on the management of "... the usual quality of the sounds". The implementing policy 5.3/1.1 is relevant. It is[169] to avoid, remedy or mitigate adverse effects of development and use "...on the visual quality of outstanding natural features and landscapes, identified according to criteria in Appendix One". The other five policies guide terrestrial development.

[111] We find the Sounds Plan quite confusing on landscape values for several reasons. First, despite identifying the whole of the Sounds as having outstanding visual values, it then identifies the "areas of outstanding landscape value" without identifying

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163 Appendix Two of Sounds Plan [p. Appendix Two – 64].
164 Appendix Two to Sounds Plan [p. Appendix Two – 64].
165 Appendix Two of Sounds Plan [p. Appendix Two – 40 and 41].
166 Appendix Two to Sounds Plan [p. Appendix Two-41].
167 Appendix Two to Sounds Plan [p. Appendix Two-42].
168 Elsewhere, e.g. in Tennyson Inlet, the sea is included in the area of outstanding landscape value – see Map 77 of the Sounds Plan.
169 Policy 5.3/1.1 [Sounds Plan p. 5-3].

what makes those two assessments different. Second, the category of landscapes which are (nationally) important under the Act – outstanding natural landscapes – are not identified. That is important because at least in Port Gore the "Areas of Outstanding Landscape Value" are too small to be described as "landscapes". A landscape is a broad encompassing area. Third, the implementing policy quoted above does not refer to the "Areas of Outstanding Landscape Value" but reverts to the statutory language[170] and refers to criteria in Appendix One of the Sounds Plan to guide decisions as to whether a section 6(b) landscape or feature is involved. With respect, the Sounds Plan is a very confusing document about landscape values, even for an informed reader. For a layperson it must be a nightmare.

[112] Chapter 5 also recognises the issue[171] that when deciding whether development is appropriate or not:

> ... the siting, bulk and design of structures on the surface of water can interrupt the consistency of seascape values and detract from the natural seascape character of a bay or wider area.

However, that concept does not appear to have moved into the policies.

The Coastal Marine Area (Chapter 9)

[113] The first objective for Chapter 9 is[172]to accommodate appropriate activities in the coastal marine area while avoiding, remedying or mitigating the adverse effects of those activities. Implementing policy 9.2/1.1 identifies the values which are to be maintained. They are conservation and ecological values, cultural and iwi values, heritage and amenity values, landscape, seascape and aesthetic values, marine habitats and sustainability, natural character of the coastal environment, navigational safety, other activities, including those on land, public access to and along the coast, public health and safety, recreation values; and water quality. Most of these are in issue to some extent on these proceedings[173].

[114] Policy 9.2.1/1.2 requires adverse effects of development to be avoided as far as practicable and otherwise mitigated or remedied. The only other relevant policies are 9.2.1/1.12 and 1.13. These state[174]:

> Policy 1.12 To enable a range of activities in appropriate places in the waters of the Sounds including marine farming, tourism and recreation.

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170 Of section 6(b).

171 Para 5.2.2, Chapter 5 Landscape [Sounds Plan p. 5-3].

172 Objective 9.2./1.1 [Sounds Plan p. 9-4].

173 The exceptions are:
- e) Marine habitats and sustainability;
- g) Navigational safety;
- i) Public access to and along the coast;
- f) Natural character of the coastal environment.

174 Policies 9.2.1/1.12 and 1.13 [Sounds Plan p. 9-6].

> Policy 1.13 Enable the renewal as controlled activities of marine farms authorised by applications made prior to 1 August 1996 as controlled activities, apart from exceptions in Appendix D2 in the Plan.

The Sounds Plan explains[175] that "The extent of occupation and development needs to be controlled to enable all users to obtain benefit from the coast and its waters". By itself policy 9.2.1/1.12 does not assist much because each of the applications concerns the conflicts between mussel farming on the one hand and tourism and recreation on the other. Policy 9.2.1/1.13 does not apply in these proceedings, because all the sites come within the exceptions in Appendix D2.

[115] The implementing methods include zoning and rules. Under the zoning provisions (shown in Volume 3 – Maps) the coastal marine area (other than port and marine areas) is divided into two zones numbered one and two. We have already described how in Coastal Marine Zone 1 marine farms are prohibited and in Coastal Marine Zone 2 marine farms are controlled or discretionary. The description of the methods explains that in the CMZ1 marine farms are prohibited because[176]:

> These areas are identified as being where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values.

Cross-examined by Mr Milne, Ms Dawson described that[177] as "the" explanation of the CMZ1. In her evidence-in-chief she wrote that the effect of the zoning was thus[178]:

> This Zone, its rules, implementation methods, and associated policies, set the context for the area within which these marine farms in Port Gore are to be considered – an area where the values are generally presumed to be incompatible with the establishment of marine farms. However, the sites in Appendix D2 [of the Sounds Plan] are specifically identified as anomalies within the CMZ1. There are no statements in the [Sounds Plan] which indicate any presumption that granting consents to these discretionary activities is … inappropriate or … appropriate.

We think that is a fair summary of the Sounds Plan's approach to the zone. That is consistent with the description of Chapter 9 in *Kuku Mara Partnership v Marlborough District Council*[179]:

> The difficulty with Chapter 9 as we pointed out in the Forsyth Bay decision[180] is that it rather offers all things to all people … so it comes back to matters of fact before the Court.

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175 Explanation of objective 9.2.1/1 [Sounds Plan p. 9-6].
176 Para 9.2.2 : Methods [Sounds Plan p. 9-7].
177 Transcript p. 629 line 40.
178 S M Dawson, evidence-in-chief para 20 [Environment Court document 22].
179 *Kuku Mara Partnership v Marlborough District Council* Decision W39/2009 at p. 196.
180 *Kuku Mara (Forsyth Bay) Partnership v Marlborough District Council* Decision 25/2002.

[116] The second objective[181] relates to water quality. No issue was raised in respect of it. The third coastal marine objective[182] relates to alteration of the foreshore and seabed. It seeks to protect the coastal environment by avoiding, remedying or mitigating any adverse effects of activities that alter the foreshore or seabed. Policy 9.4.1/1.1 identifies the same list of values as did policy 9.2.1/1.1 already listed. Later in the list of implementing policies there is a set of three which are potentially relevant. They are[183]:

Policy 1.7	Recognising (by way of controlled activity status) the importance of renewing the majority of existing marine farms authorised by applications made before 1 August 1996 while mitigating adverse effects on the environment by way of conditions.
Policy 1.8	Providing for minor adjustments to boundaries of resource consent areas for existing farms without increasing their size so as where necessary to reduce adverse effects or to recognise existing locations of farms.
Policy 1.9	Enable the adverse visual or ecological effects of particular farms to be addressed when the rules expressly provide for that.

In fact, policy 9.4.1/1.7 is not relevant because marine farming in the CMZ1 is not a controlled activity, but the other two policies are relevant. Policy 9.4.1/1.8 allows "minor adjustments" to marine farm boundaries which is important because in this case there is a mismatch between the existing mussel farms and the areas shown on the expired or expiring coastal permits issued under the RMA. Policy 9.4.1/1.9 suggests that certain adverse effects can only be addressed when the relevant rules say so, which puts emphasis on the wording of the rules.

[117] We have already described the relevant rules about marine farming in an earlier part of this decision.

4.2 The Marlborough Regional Policy Statement

[118] The Marlborough Regional Policy Statement ("MRPS") became operative in 1995 and is currently being reviewed. It was of course prepared under the old – now replaced – New Zealand Coastal Policy Statement. We have read the relevant objectives and policies in the MRPS and agree with Ms Dawson's opinion[184] that it gives only "broad guidance when it comes to consider any particular resource consent application". At law it probably does rather less than that in relation to applications within the coastal environment since the NZCPS 2010 came into force. The new national coastal policy statement makes rather sharper distinctions than the MRPS does.

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181 Objective 9.3.2/1 [Sounds Plan p. 9-10].
182 Objective 9.4.1/1 [Sounds Plan p. 9-16].
183 Policies 9.4.1/1.7 to 1.9 [Sounds Plan pp 9-17 and 9-18].
184 S M Dawson, evidence-in-chief Attachment H para 27 [Environment Court document 22].

[119] Briefly, the MRPS includes three sections relevant to these applications. They are:

- Part 5 Protection of Water Ecosystems
- Part 7 Community Wellbeing
- Part 8 Protection of Visual Features

[120] There is a broad water ecosystems objective[185] that the natural diversity of species and the integrity of marine habitats be maintained or enhanced. There is one relevant, rather bland implementation policy[186] that gives little direction to this.

[121] The principal objective as to community wellbeing in this section is[187]:

> To maintain and enhance the quality of life of the people of Marlborough while ensuring that activities do not adversely affect the environment.

A relevant policy[188] on amenity values seeks to:

> Promote the enhancement of the amenity values provided by the unique character of Marlborough settlements and locations.

[122] Objective 7.1.9 is also important even if it merely restates section 5(2) of the RMA. Its implementing policies include[189] (relevantly):

> [enabling] 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

– and some encouragement for aspiring marine farmers[190] in seeking to ensure:

> that no undue barriers are placed on the establishment of new activities ... provided that ... water ... and ecosystems [are] safeguarded and any adverse environmental effects are avoided, remedied or mitigated.

[123] The policy for the allocation of space for marine farms in the Regional Policy Statement states that allocations will be "... based on marine habitat sustainability, habitat protection, landscape protection, navigation and safety, and, compatibility with other adjoining activities"[191].

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185 Objective 5.3.10 [MRPS p. 44].
186 Policy 5.3.11 (Habitat disruption) [MRPS p. 44].
187 Objective 7.1.2 [MRPS p. 55].
188 Policy 7.1.7 [MRPS p. 57].
189 Policy 7.1.10 [MRPS p. 59].
190 Policy 7.1.12 [MRPS p. 60].
191 MRPS policy 7.2.10(d).

[124] The RPS contains a separate chapter on "Protection of Visual Features". The one general objective[192] is to maintain and enhance "... the visual character of indigenous, working and built landscapes". There are three policies to implement that objective. The first policy relates to "outstanding landscapes" and is to avoid, remedy or mitigate[193] "... the damage of identified outstanding landscape features arising from ... (relevantly) the erection of structures". The second policy is to "promote the enhancement of the nature and character of indigenous, working and built landscapes by all activities which use land and water"[194].

[125] Those two policies are rather vague as to what they apply to. Fortunately the third is a little clearer. It is[195] to preserve the natural character of the coastal environment. The explanation to that policy includes the statements that "Natural character includes the land and water ecosystems of the coast, and the interactions within and between those ecosystems"[196] and that "Managing natural character enables resource users to address the effects of their activities on the environment".

[126] The identified methods for protection of visual features include establishing "controls in resource management plans" – thus authorising the rules in the district plan. There is also a very interesting explanation and example for these methods. It states[197]:

> Major changes in the landscape occur when new elements are first introduced which conflict with the character already there. For example, the first mussel farm into a bay changes the bay from a smooth water surface, while additional mussel farms merely add to the change.

None of the witnesses referred to that example, but we consider it may be of assistance, although we always need to bear in mind that this is primarily an evidential matter for each of the particular three applications we are considering.

4.3 The New Zealand Coastal Policy Statement 2010

[127] The witnesses agreed that the New Zealand Coastal Policy Statement 2010 ("the NZCPS 2010")[198] is relevant. The following parts of the objectives are particularly relevant[199]:

> **NZCPS 2010 Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:

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192 MRPS objective 8.1.2.
193 MRPS policy 8.1.3.
194 MRPS policy 8.1.5.
195 MRPS policy 8.1.6.
196 Explanation to MRPS policy 8.1.6.
197 Explanation to Methods 8.1.7 MRPS.
198 This came into force on 3 December 2010.
199 We have omitted all references to subdivision as irrelevant for the purposes of these proceedings.

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

...

NZCPS 2010 Objective 4

To maintain and enhance the public open space qualities and recreation opportunities of the coastal environment by:

- recognising that the coastal marine area is an extensive area of public space for the public to use and enjoy;

...

NZCPS 2010 Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- ...
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- ...
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate use, and development.

[128] To achieve those objectives there are many policies. Relevantly, general policy NZCPS 2010/4 requires integrated management of natural and physical resources in the coastal environment. Policy 5 deals with land or water "held" under other Acts and is not relevant to these proceedings.

[129] NZCPS 2010 policy 6(2) is important[200] because in relation to the coastal marine area it requires recognition of:

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200 Policy 6(2) relates to the coastal environment generally and is much less relevant to these proceedings.

a. ... potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, ...
b. ... the need to maintain and enhance the public open space and recreation qualities and values of the coastal marine area;
c. ... a functional need [for some activities] to be located in the coastal marine area, and [to] provide for those activities in appropriate places;
...

We note that different parts of policy 6 may pull in different directions, and this case is a good example of that.

[130] The more general NZCPS 2010 policies 6(2)a and c are then elaborated on with a specific policy for aquaculture which is obviously important in this case:

NZCPS 2010 Policy 8: Aquaculture

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

a. including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
   i. the need for high water quality for aquaculture activities; and
   ii. the need for land-based facilities associated with marine farming;
b. taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
c. ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

We note that in this case a. and c. are not relevant, the first because we are not concerned with the approval of a regional policy statement or plan; the latter because on the evidence water quality is not an issue. We will discuss policy 8b when we consider the efficient use of the water resource of Port Gore under section 7(b) of the Act. For present purposes it is sufficient (but important) to note that marine aquaculture might be found room for in the coastal environment : it has nowhere else to go.

Natural character of the coastal environment

[131] Then follows two policies on natural character and landscapes which are highly relevant in these proceedings. They are (relevantly):

NZCPS 2010 Policy 13: Preservation of natural character

1. To preserve the natural character of the coastal environment and to protect it from inappropriate use, and development:
   a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
   b. avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment; including by:

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

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

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

a. natural elements, processes and patterns[201];

b. biophysical, ecological, geological and geomorphological aspects;

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

d. the natural movement of water and sediment;

e. the natural darkness of the night sky;

f. places or areas that are wild or scenic;

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

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

NZCPS 2010 Policy 14: Restoration of natural character

Promote restoration or rehabilitation of the natural character of the coastal environment, including by:

a. identifying areas and opportunities for restoration or rehabilitation;

...

c. where practicable, imposing or reviewing restoration or rehabilitation conditions on resource consents ..., including for the continuation of activities; and recognising that where degraded areas of the coastal environment require restoration or rehabilitation, possible approaches include:

i. restoring indigenous habitats and ecosystems, using local genetic stock where practicable; or

ii. encouraging natural regeneration of indigenous species, recognising the need for effective weed and animal pest management; or

iii. creating or enhancing habitat for indigenous species; or

iv. rehabilitating dunes and other natural coastal features or processes, including saline wetlands and intertidal saltmarsh; or

v. restoring and protecting riparian and intertidal margins; or

...

[132] There have been some decisions of the Environment Court about the meaning of "natural character" in section 6(a) of the RMA but they probably now need to be read in the light of the NZCPS 2010 objective 2 which is (relevantly) "To preserve the natural character of the coastal environment and protect natural features and landscape values through ... recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution ...".

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201 We see policy 13(2)(a) as potentially confusing because it is our understanding that it is standard (but, with respect, not very useful) landscape architectural practice to describe a "landscape" as a combination of natural "elements, processes and patterns". Here the same usage is being applied to the "coastal environment".

The implementing policy 13(2) then requires "Recogni[tion] that natural character is not the same as natural features and landscapes or amenity values ..." Regrettably, that policy is not as clear as it might be. It seems odd to state that generic "natural character" is not the same as "natural features and landscapes", the latter being the subject of policy 15. The distinction seems obvious because it is a comparison of different categories (apples and oranges) : the first item is a quality (or characteristic) – naturalness – and the second category is a set of (descriptions of) places which may have that quality or characteristic to a greater or lesser degree. To understand the distinction we simply need to point out that "natural character" does not exist by itself : the NZCPS 2010 and indeed the RMA itself always speak of the "natural character" or "natural[ness]" of something : the coastal environment in the first case[202] and a feature or landscape in the second[203].

[133] It is perhaps also worth pointing out that under the NZCPS 2010 "natural character" is a more objective quality than the "outstandingness" of natural landscapes (and/or features). As we shall see shortly a number of values of outstandingness do not also apply to the identification of natural character in policy 13.

[134] Mr Milne submitted in relation to policy 13 of the NZCPS 2010 that it:

> only requires adverse effects on natural character to be avoided where that character is outstanding or where the effects would be significant ...

So far we agree, but he then continued by stating[204] that the policy "... does not detract from the over-riding requirement to preserve natural character". We agree with counsel for Sanford that is wrong. There is no absolute protection in section 6(a) of the RMA : protection is only from inappropriate development. To implement that the NZCPS 2010 policy 13(1)(a) states that adverse effects of activities on natural character in areas with outstanding natural character should be avoided : but that is as far as the policy goes (or can go).

[135] Policy 13 of the NZCPS 2010 contains a two part process for identifying[205] and assessing[206] natural character or naturalness. The first step – identification of natural character – places the coastal environment (or feature or landscape) being considered in the range from pristine through modified to highly modified after considering the list in policy 13(2). It should be noted that in both steps the identification and assessment of "ecological aspects" is only one of a number of matters to be considered. The second step is then to assess the coastal environment on an evaluative scale which expressly

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202 Under section 6(c) of the RMA.
203 Under section 6(b) of the RMA.
204 Final submissions for Mr Marchant, para [430] [Environment Court document 39].
205 Policy 13(c) and 13(d), policy 14(a) and policy 15(c) [New Zealand Coastal Policy Statement 2010].
206 Policy 13(c) and policy 15(c) [New Zealand Coastal Policy Statement 2010].

includes outstanding[207], high[208], and degraded. That rather suggests a full five point scale to us, with medium and low between high and degraded.

Natural features and landscapes

[136] This policy states:

> **NZCPS 2010 Policy 15: Natural features and natural landscapes**
>
> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate use, and development:
>
> a. avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
> b. avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment; including by:
> c. identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
> ...

A list of ten characteristics or values then follows. Most of them have been covered in our discussion of the landscape's naturalness but there are several matters which contain more evaluative elements. They are:

> (iv) aesthetic values including memorability and naturalness;
> ...
> (vi) transient values;
> (vii) whether the values are shared and recognised;
> (viii) cultural and spiritual values for tangata whenua ...;
> (ix) historical and heritage associations; and
> (x) wild or scenic values;

These evaluative elements are in addition to the identification and assessment of the "natural character" or "naturalness" elements of the landscape or feature in question.

[137] It is important that under policy 15 any adverse effects on outstanding natural landscapes and features should be avoided, whereas in other parts of the coastal environment only "significant" adverse effects need to be avoided. Policy 15(a) is applicable here since we have found that eastern Port Gore is an outstanding natural landscape.

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207 Policy 13(1)(a) [New Zealand Coastal Policy Statement 2010] : this point on the scale of values for coastal environments is particularly interesting because it is adopted from section 6(b) of the Act.

208 Policy 13(1)(c) [New Zealand Coastal Policy Statement 2010].

Conclusions as to policies 13 and 15

[138] We tentatively consider that the relationship between policies 13 and 15 of the NZCPS 2010 is this : policy 13 recognises that the quality of "natural character" of the coastal environment is likely to be different in most cases from the "naturalness" of landscapes generally. In particular, the coastal environment is likely to have headlands, dunes, reefs and surfbreaks[209] or the sound and smell of the sea[210] which will not be components of most landscapes. Policy 13 is not saying that "natural character" is different from "naturalness", merely that naturalness in the coastal environment requires identification of (usually) some different qualities from terrestrial activities. But where policy 15 does differ from policy 13 is in imposing a second evaluative step.

[139] Aspects of the lists in policies 13(2) and 15(c) are relevant both for the identification and the assessment, although some are more obviously useful for the latter evaluation : e.g. experiential attributes[211], wild or scenic values[212].

5. Predictions as to effects of the proposals

5.1 Introduction

[140] There are two preliminary issues. First we need to bear in mind that we must imagine the environment, for the purposes of section 104(1)(a) of the Act, as if the three marine farms are not actually in it. We were not referred to any direct authority on that, but it is a logical consequence of the expiry of the earlier permits. If we had to take the continued presence of the farms on site into account it would undermine any persons' claims to be adversely affected. To that extent the question we asked at the beginning of this decision is slightly inaccurate : the case is not, at law, about whether resource consents should be renewed but, subject to section 104(2A) which we discuss later, whether they should be granted.

[141] We now clear away several predicted adverse effects which we find are likely to be adequately dealt with by conditions. That is important because when considering effects under section 104(1)(a) of the RMA we must consider mitigated effects : *Elderslie Park Limited v Timaru City Council*[213]. We now consider those effects. The evidence, produced by the opponents of the mussel farms, was that the farms would be likely to cause adverse effects on the environment of Port Gore first in the form of "noise pollution" by music, and secondly from creating rubbish which is washed up on its shores. As to the first : historically crews working on mussel farms often played music at high volumes and the sound carried readily over the sea's surface to adjacent boats and especially occupiers of houses and baches on adjacent shorelines. In this case both Sanford and PGMF accepted that a condition restricting music (in fact we were told this is now fairly standard) should be imposed if consent is granted.

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209 Policy 13(2)(c) [New Zealand Coastal Policy Statement 2010 p. 17].
210 Policy 13(2)(h) [New Zealand Coastal Policy Statement 2010 p. 17].
211 Policy 13(2)(h) [New Zealand Coastal Policy Statement 2010].
212 Policy 15(c)(x) [New Zealand Coastal Policy Statement 2010].
213 *Elderslie Park Limited v Timaru City Council* [1995] NZRMA 433 (HC).

[142] As for the second type of nuisance, Ms Gerard described[214] the problem of rubbish (floats, cut-off pieces of mussel lashing) on beaches. Similarly, Mr Marchant gave evidence including photographs of the quantities of rubbish that he and his family find on the beach in front of their home. Again the applicants accepted a condition as appropriate to deal with that. We will look at the efficacy of the proposed condition later (if we need to).

[143] Mr Marchant complained that the MDC has failed in the past to enforce conditions. We make no finding about that at this stage except to point out that any person – including Mr Marchant – may apply[215] to the Environment Court for enforcement orders to ensure conditions of resource consents are complied with, if there is evidence of non-compliance. Of course, if we get to the stage for any of the applications that we think it should be granted, the past history of compliance (or not) with conditions may affect the conditions to be imposed on the new consent.

5.2 Effects on ecology and natural character

[144] When considering the effects of any of the farms on the marine ecosystem(s) it is reasonable in these circumstances to infer that the (future) effects of the proposed mussel farms will be very similar to the effects of the existing farms on nearly the same locations. Certainly that seems to be the basis on which Dr Grange made his assessment of likely effects. He observed that less than 10% of the water passing through the farms was filtered by the mussel crops leaving well over 90% of the phytoplankton available for the rest of ecosystem. Deposition of faeces and pseudofaeces[216] was very low and largely confined to the boundaries of the farms. Dr Grange considered this to be ecologically sustainable. He considered the resulting benthic environment under the farms is relatively diverse with an increased number of predatory starfish and other mobile invertebrates. He observed a higher diversity of fish species, cushion stars and kina than on the adjacent muddy seabed[217].

[145] Dr Grange considered the proposal to submerge the farms will result in a slightly lower stocking density and an immeasurable reduction in effects[218]. Overall he considered the marine ecological effects of the operation of the farms over a number of years to be minor and the continued operation to pose no risk to the surrounding water column and benthic communities, including the sensitive habitats at Gannet Point[219].

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214 K D C Gerard, evidence-in-chief para 1.16 [Environment Court document 31].

215 Any application should be accompanied by an affidavit giving as much detail as possible about the alleged breaches.

216 Our understanding of "pseudofaeces" is that they are particles which a mollusc has rejected as food – they are wrapped in mucus and expelled without passing through the mollusc's digestive system.

217 K R Grange, evidence-in-chief paragraphs 26–52 [Environment Court document 9] and 5.3–7.2 [Environment Court document 9A].

218 K R Grange, evidence-in-chief paragraphs 53–54 [Environment Court document 9].

219 K R Grange, evidence-in-chief para 63 [Environment Court document 9] and 8.2–8.3 [Environment Court document 9A].

We accept the evidence of Dr Grange that the effects of the existing marine farms operating within Port Gore have been minor and the proposed continued operation would pose no risk of increased effects. We note that the effects are localised and largely reversible once structures have been removed.

Trends in land use

[146] Mr Ronald Marriott owns the northern part of Cape Jackson and runs what he described as a "remote experience" business that includes a walking track – the Outer Queen Charlotte Track – between Ship Cove and the tip of Cape Jackson. He saw the Cape Jackson peninsula as a recreational reserve[220] stretching for 90 kilometres from the tip at the northern end to Anikiwa[221].

[147] Mr Marriott stated that all landowners on the Cape Jackson peninsula had stopped farming and instituted pest and weed management programmes to promote native revegetation. He considered that it took only 10 years for native cover to erase the signs of farming, 30 years to establish a "proper native forest", and 60 years to establish a forest that "only an expert would know had ever been cleared"[222].

[148] Mr Roy Grose, an employee of the Department of Conservation ("DoC"), appeared in response to a witness summons. He has visited the Port Gore area over the last 20 years and observed the pattern of pasture being replaced by native vegetation. He considered the revegetation to have been aided by goat control by the Marchants and their neighbours, complemented by sporadic possum control. Wilding pines have been removed. Mr Grose has sensed a change in the attitude of the private land owners with a number actively encouraging native regeneration, recognising the value of its role in storing carbon and taking a more holistic approach[223].

[149] Mr Grose noted the riparian strip, generally 20 metres wide, around the entire Port Gore coastline being managed by DoC to provide access and preserve natural values along the coast. Adjoining landowners are encouraged to allow regeneration of native vegetation. He acknowledged the leadership shown by the Marriott family converting from sheep farming, controlling animal and weed pests, and putting 500 hectares of their property into a carbon sink scheme[224] (by which we infer he meant an emissions trading scheme as explained earlier).

Predictions on likely changes in terrestrial ecology

[150] The regeneration of native vegetation in this part of Port Gore (taking place following the retirement of farming land) and the value of the resulting ecosystem are

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220 In a non-legal sense strictly, a "recreation reserve" is as explained in section 17 of the Reserves Act 1977.

221 R E Marriott, evidence-in-chief paragraphs 5–11 [Environment Court document 25].

222 R E Marriott, evidence-in-chief paragraphs 30 and 36 [Environment Court document 25].

223 R T Grose, evidence-in-chief paragraphs 29–31 [Environment Court document 28].

224 R T Grose, evidence-in-chief paragraphs 32–38 [Environment Court document 28].

both increasing. We have found that a mosaic of vegetation and habitat value exists across the various properties and the ecological naturalness is highest along the ridgeline, where there is mature forest, and along some parts of the shore, where there is relatively undisturbed coastal vegetation. The mid slope areas exhibit a range of values from recently retired pastures to early succession shrubland with canopy closure. It seems likely that the regeneration will continue and active pest management efforts by the local community will assist in maintaining and increasing the ecological values of the terrestrial environment.

[151] We have described how Dr Bartlett considered the vegetation cover at Pool Head to be visually natural albeit she considered this perceptual element to be only one component of natural character. She described the vegetation as relatively young and the process of regeneration affected by introduced mammals. She considered that the vegetation would develop into a diverse forest of high ecological value but not within the 20 year timeframe proposed by Sanford for its consent[225]. At Gannet Point Dr Bartlett considered that a high degree of naturalness was unlikely to develop over a 20 year period particularly given the continued grazing of the lower slopes by goats and stock[226]. During cross-examination Dr Bartlett noted that Cockle Bay, with its former pasture and the airstrip, exhibited the least regeneration when compared to Gannet Point and Pool Head[227].

[152] Dr Roper-Lindsay noted that many of the factors that had modified the terrestrial ecosystem at Pool Head and Gannet Point were now absent or declining in influence. Based on her observations and discussions with the community she considered the naturalisation process would continue raising the level of naturalness in ecological terms[228].

5.3 Likely direct effects on the environment

Servicing and harvesting visits

[153] Visits will be necessary for setting up the mussel farms, seeding the lines with spat, regular maintenance, and for harvesting. One of the ways in which to begin to assess the likely number of visits by boats to the mussel farms is to look at the records of visits to the existing farm. PGMF's records of visits to the Gannet Point North site show a range of 9 to 15 visits per month with durations ranging from 48 to 79 hours/month[229]. Estimates of servicing requirements for the partially submerged farm are 11 to 13 visits per month with monthly durations ranging from 54 to 71 hours[230]. These figures are very similar to those recorded for the existing farm. We see no

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225 R M Bartlett, evidence-in-chief para 62 [Environment Court document 7].

226 R M Bartlett, evidence-in-chief para 63 [Environment Court document 7].

227 Transcript at p. 81.

228 J Roper-Lindsay, evidence-in-chief paragraphs 88–92 [Environment Court document 8].

229 R D Sutherland, supplementary evidence September 2010, Appendix D [Environment Court document 17A].

230 R D Sutherland, supplementary evidence September 2010, p. 6 [Environment Court document 17A].

mitigation arising from the partially submerged farm with respect to either frequency or duration of visits.

[154] For Sanford, Mr Herbert estimated that the time required to service the existing marine farms was 19.22 hours/month and 15.2 hours/month for Pool Head and Gannet Point respectively[231] with the total number of visits to the two farms being recorded as 217 over two years which equates to nine visits per month[232]. We do not understand why the estimated service duration of 19.22 hours/month for the Pool Head farm differs so much from the recorded 48 to 79 hours/month for the nearly equivalent sized PGMF farm. We suspect the records are not very accurate, as answers to cross-examination by Mr Milne acknowledged.

[155] Mr Herbert suggested the submerged farms would be visited fortnightly for checking the structures and the crop (26 visits/year). In addition visits will occur each 18 months to each line for harvesting and seeding[233]. For the 16 lines in the two farms this amounts to approximately 20 visits/year. The total of 46 visits/year or four visits/month is less than half his estimate for the existing farms noted above. Presumably it is on this basis that Mr Herbert anticipated that the change from surface to subsurface marine farming operations would not of itself necessitate an increase in the number or duration of visits by Sanford's vessels once the farms are operational[234].

Effects on visibility

[156] Mr Hassan submitted that:

> ... subsurface technology will result in a dramatic reduction in surface features. For the Pool Head marine farm, there are currently approximately 1,062 surface floats and for the Gannet Point marine farm approximately 708, which are laid out in a uniform rectangular grid of surface floats typical of marine farms[235]. The existing marine farms also have four marker floats which are located at each corner of the marine farms.

In fact, we predict that the structures visible above the water will be more imposing than that due to the requirements by the Marlborough harbourmaster, Captain A van Wijngaarden. He has indicated that each subsurface farm should be marked by five special marker "IALA" spar buoys on each farm (three on the offshore boundary, two on the landward boundary) which will be fitted with radar reflectors, lights and top marks[236]. Their purpose is to ensure that navigational safety requirements are met[237].

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231 D Herbert, evidence-in-chief 27 July 2010, Tables 1 and 2 [Environment Court document 5].

232 D Herbert, supplementary evidence 29 September 2010, para 38 [Environment Court document 5A].

233 D Herbert, supplementary evidence 29 September 2010, paragraphs 42 and 43 [Environment court document 5A].

234 D Herbert, supplementary evidence 29 September 2010, para 46 [Environment Court document 5A].

235 D Herbert, supplementary evidence paragraphs 17, 18 and 21 [Environment Court document 5A].

236 D Herbert, supplementary evidence para 33 [Environment Court document 5A].

237 A van Wijngaarden, evidence-in-chief para 8 [Environment Court document 18].

Otherwise we accept there will be no other above-surface features to the marine farms (other than when the vessels are working on the lines)[238].

Lights at night

[157] The lights (on the spar buoys) are likely to be very noticeable : it is common ground that there will be 9,000 flashes every hour[239] if all three farms are consented. Further, the lights will be brighter[240] than the existing lights because they need to be visible at two kilometres.

Summary

[158] In comparison with the existing farms we predict that there will be in each case (and accumulatively):

- greatly reduced visibility of the farm during daylight hours;
- an increased effect of lighting at night time;
- no increase and possibly some reduction in the frequency and duration of visits by service vessels.

However, we need to bear in mind that the proper comparison in each case is with eastern Port Gore with no marine farms.

5.4 Effects on amenities of residents and terrestrial visitors

[159] The opponents of the mussel farms allege that the mussel farms will individually, or together if more than one is granted, reduce the amenities of Port Gore not merely by being there but also because of the number of visits from boats servicing the mussel farms. Ms G K Surgenor described[241] how when she stands on the beach at Cockle Bay she can see marine farms to the left (Pool Head) and the right (Gannet Point South). She said that "the farms are a constant reminder of human industrialisation of the landscape".

[160] For her part Ms K D C Gerard was concerned about the impact of, in particular the effect of PGMF marine farm on the visual amenity further north. She properly conceded[242] in her evidence-in-chief that none of the existing marine farms is visible from her family's bach at the Kaitangata Bluffs but described them as being[243] "... a large visual component" on the drive in and as being visible from many parts of the property. Her main concern was that the farms[244]:

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238 D Herbert, supplementary evidence para 20 [Environment Court document 5A]; G C Teear, evidence-in-reply para 8.3 [Environment Court document 6].

239 C E Marchant, evidence-in-chief para 171 [Environment Court document 27].

240 C E Marchant, evidence-in-chief para 171 [Environment Court document 27].

241 G K Surgenor, evidence-in-chief para 21 [Environment Court document 34].

242 K D C Gerard, evidence-in-chief para 1.14 [Environment Court document 31].

243 K D C Gerard, evidence-in-chief para 1.14 [Environment Court document 31].

244 K D C Gerard, evidence-in-chief para 1.17 [Environment Court document 31].

> ... interfere with the remote, wild and peaceful experience that this area offers to us, our visitors and all who value the place ... It is not just about visual impacts, it is about the noise from harvesting and service vessels, the lighting at night and the pollution of our beaches.

[161] We have described the location of Mr Eglinton's bach which is 270 metres[245] from the closest point on the Gannet Point North mussel farm. During the day he will, on his uncontradicted evidence, hear[246]:

> The sound of the motor being placed into forward and reverse gear, people talking, radios [blaring], bangs from metal on metal.

From his verandah he will be able to see the IALA-standard spar lights on the farm blinking[247] and the floodlights of any vessels working into the night[248].

[162] PGMF tried to undermine this evidence first by reference to its obvious subjectivity, and secondly by the submission from Mr Hunt that in reality the effects cannot be as bad as he describes because he still goes to and enjoys his property as he described in his stream of consciousness way. We find it implicit in Mr Eglinton's description that when describing the attractions of his bach and surrounds he was not describing a day when a servicing boat was working down in front of it (at a distance of more than 270 metres downhill).

[163] The Gannet Point South farm is one kilometre[249] away and not visible from Mr Eglinton's bach although its noises may, depending on wind and sea conditions, be heard from there. Elsewhere on his property the southern marine farm is visible from the hillslopes, which will be subjected to the same type of effects previously identified.

How visible will the new mussel farms be?

[164] For several reasons the opinions of the landscape architects on the visibility of each of the proposals were quite tentative. That was in part caused by Sanford's proposed mussel farms having not been tried[250] before in a commercial setting in the Marlborough Sounds, and partly because the details of Sanford's amended proposal only came to the other parties as late as August 2010 (Sanford)[251] and September 2010 (PGMF)[252] – well after the notices of appeal had been lodged[253].

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245 J A Bentley, evidence-in-chief p. 18 [Environment Court document 13].
246 P Eglinton, evidence-in-chief para 31 [Environment Court document 33].
247 P Eglinton, evidence-in-chief para 29 [Environment Court document 33].
248 P Eglinton, evidence-in-chief para 31 [Environment Court document 33].
249 J A Bentley, evidence-in-chief p. 18 Table 1 [Environment Court document 13].
250 W R MacDonald, evidence-in-chief para 28 [Environment Court document 4].
251 The jurisdictional issues raised by this, we have already parked to decide at the end of this decision.
252 D J Lucas, evidence-in-chief para 229 [Environment Court document 15].
253 W R MacDonald, evidence-in-chief para 27 dated 27 July 2010 [Environment Court document 4].

Pool Head and Gannet Point South farms

[165] It was on the advice of the landscape architect Mr S K Brown that Sanford proposed to submerge its two mussel farms, because he said that he could not support the effects of the farms as they are at present. That was, of course, very proper advice which demonstrated Mr Brown's professionalism and independence. Thus we put considerable weight on his opinion as to the effects of each of the two submerged farms. In his view that would have a very positive effect in relation to both operations by "dramatically reducing the overall presence and effects of marine farming"[254] on this part of Port Gore. He based that conclusion on his assessments that:

- in the day, from shallower viewing angles (such as from Cockle Bay) the profile of the farms would be "... effectively reduced to four buoys, of which two are painted black"[255], and as a result would look like a group of moorings, not like a conventional mussel farm;
- at night the two warning lights would be visible at the two outer corners of each farm[256].

He also acknowledged that harvesting methods would not alter[257], and that from elevated viewpoints the profile of the underwater lines would still be visible[258]. We prefer Mr Brown's evidence to that of Ms Lucas in respect of the likely daylight visibility of the proposed farms.

Other effects of visiting boats

[166] However, we are uneasy about Mr Brown's initial assessment of the other effects of the farms. First he rather underestimated the effects of visiting boats – he referred to harvesting, but as we have recorded, servicing also brings vessels to the farms frequently; secondly his assessment of the lights at night was rather superficial.

[167] In his evidence in reply Mr Brown considered the evidence of Ms Lucas on those issues. Mr Brown accepted that the navigable hazard requirements will increase the likely visibility of the five spar buoys on each farm – they must now be visible at a range of two kilometres, whereas one kilometre suffices at present[259]. He agreed in reply[260] that:

> ... the night-time lights are still likely to affect perceptions of the relative solitude, quietude and remoteness of Port Gore and its margins – to some degree – although any such assessment is

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254 S K Brown, evidence-in-chief para 78 [Environment Court document 12].
255 S K Brown, evidence-in-chief para 72 [Environment Court document 12].
256 S K Brown, evidence-in-chief para 75 [Environment Court document 12].
257 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
258 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
259 Although Mr Marchant gave evidence that the lights have not been installed on the PGMF farm, and have not been working on the Sanford farms.
260 S K Brown, evidence-in-reply para 23 [Environment Court document 12C].

> contextualised by the presence of residential lights around Cockle Bay and Melville Cove together with lights aboard any vessels moving within the bay itself.

He considered that the effects of the lights are acceptable[261].

[168] As for visiting boats Mr Brown relied on updated information from Mr Herbert (for Sanford) as to vessel visits. He considered that the 11 to 28 metre vessels used by Sanford for servicing and harvesting would be apparent but not "... dominant or highly intrusive elements"[262] within Port Gore. He claimed[263] to have discussed servicing in evidence-in-chief but the only reference to vessels we can find is the one we have mentioned, which refers to "harvesting"[264]. His assessment in reply was informed by his view that inner Port Gore is not pristine, and so[265]:

> Ms Lucas has carried the idea of 'maintaining and enhancing amenity values' to a level that is excessive, given the historic working nature of much of Port Gore and multiplicity of recreational, productive, scenic and other values that still apply to it.

While we agree that Ms Lucas may have overstated the impacts of the servicing and harvesting of vessels, and of the spar lights at night (although not by much), we are also concerned that Mr Brown has not stepped back and recalled his primary assessment of the inner Port Gore. Further, it is of real concern that he did not address these effects in detail in his evidence-in-chief.

[169] Further, Mr Brown's evidence on the effects of vessels was slightly equivocal. In his evidence-in-reply he wrote[266]:

> In my opinion, the 11-28 m long vessels employed by Sanford will be apparent, but hardly dominant on highly intrusive elements within Port Gore's seascape. They will also, depending upon the sea state and wind direction, be audible at times. But these factors do not persuade me that such vessels, or indeed other vessels of a similar size used for recreation and pleasure, are inappropriate within the Bay's maritime setting.

Mr Brown is a very thoughtful witness but it appears to us he has applied a wrong test when he considers whether the activities will be "dominant or highly intrusive". Further, it is the effect of the activities in the context of the policies protecting the outstanding natural landscape which he should be assessing, not their effect within the "maritime setting" (for which there exists no policy to set the parameters). Conversely, in answer to a question in cross-examination, he expressed his belief that Port Gore does not have to be treated like a national park[267], and that is putting the test too high as well.

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261 S K Brown, evidence-in-reply para 24 [Environment Court document 12C].
262 S K Brown, evidence-in-reply para 29 [Environment Court document 12C].
263 S K Brown, evidence-in-reply para 25 [Environment Court document 12C].
264 S K Brown, evidence-in-chief para 73 [Environment Court document 12].
265 S K Brown, evidence-in-reply para 30 [Environment Court document 12C].
266 S K Brown, evidence-in-reply 1 December 2010 para 29 [Environment Court document 12C].
267 Transcript p. 163.

[170] Given our findings that the eastern side of Port Gore is an outstanding natural landscape, policy 15 of the NZCPS 2010 applies. That suggests any activity which has adverse effects should often be avoided, not only highly intrusive adverse effects.

[171] We predict that to a reasonable occupier of the Eglinton or Surgenor land and baches these effects will be more than minor. They will, as Mr Eglinton stated, supported by Ms Lucas, introduce an industrial feel to the area around the marine farm.

[172] We have already pointed out that Mr Carter, the landscape architect for PGMF, appears to have assumed the existing marine farms were part of the existing environment so his assessment of effects was based on an incorrect starting point.

[173] Mr Kyle, the planner called for both applicants, wrote that he approached the matter on the basis that harvesting, servicing, lighting and boat and machinery noise were not part of the existing baseline although he noted, for no good reason that we can see (given that admission), that harvesting and emission of noise from servicing boats are permitted activities. In any event, as Mr Milne observed, his evidence-in-chief on this was sparse. Sanford's counsel tried to remedy that by asking further questions by way of oral evidence-in-chief. Mr Kyle observed that on a recent (2011) visit the brightest light in eastern Port Gore was the Marchants' large illuminated TV, and concluded that "the lighting would not present effects that should be considered of such significance as to be adverse"[268]. That answer did not identify the policy framework in which he is assessing the intensity or scale of the effect and is therefore not very useful.

[174] Mr Hassan and Ms Meech in their final submissions for Sanford submitted in effect that the local residents and visitors were being inconsistent when they objected to the impacts of the marine farms. They wrote that[269]:

> ... [I]t is ... understandable that their appreciation for their own amenities such as aircraft, televisions and other structures and amenities will mean they will find their noise, lighting and other impacts acceptable, by contrast to how they feel about such impacts of the marine farms.

There is some validity to that point, but it cannot be pushed too far. We have already found that the noise from aircraft is a brief and minor intrusion compared with the noise of servicing and harvesting mussels. As for television and other lighting and their effects on eastern Port Gore, they are domestic effects which might, on a small scale, be expected in inner Port Gore.

[175] Ms Lucas, the landscape architect for Mr Marchant, wrote more on the effects of the servicing and harvesting operations on the amenities of occupants of the adjacent land. She assessed the effects of the Gannet Point North marine farm as having "very

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268 Transcript p. 531.

269 Final submissions for Sanford, 20 May 2011 para 37 [Environment Court document 40].

significant adverse effects on the experience of the natural character, natural landscape and amenity values of this shore"[270]. Her detailed evidence on this issue was cross-examined on at some length by Mr Hunt but without seriously undermining her opinions. He submitted that Ms Lucas "let herself down with a failure to balance her assessment of the PGMF from a sea based perspective"[271]. That strikes us as a debater's point : if no party or witness was suggesting the marine farms had adverse effects when experienced from the sea then we cannot see how it was a significant omission on Ms Lucas' part not to consider that. Similarly his criticism of her photographs showed perhaps that she did not edit their number as fully as she might have, but that is not a matter of substance. The court regularly makes allowances for the pressure under which expert witnesses have to prepare their evidence. We have considered whether it is appropriate for a landscape architect to express an opinion on the effects of activities on amenity values and conclude that it is: a good deal of landscape architecture is about creating, maintaining or improving amenities. That is subject to the proviso that all witnesses should assess effects in the light of the relevant policies.

[176] At this point we should consider the extent of any permitted baseline under section 104(2) of the RMA, because there would be no point in considering adverse effects on amenities if we should disregard them as part of a permitted baseline. While boats of any size have unrestricted access (subject to the laws of navigation) to the eastern side of Port Gore and to anchor there, we find it fanciful to think they would visit with anywhere near the frequency that commercial boats will visit this side of the bay to service one to three mussel farms. We are satisfied on the evidence that Cockle Bay is simply too open to winds from too many quarters to be used continuously for recreation. Further, while the emission of noise from mussel farming is a permitted activity, it is fanciful to think it will occur (indeed at law it cannot occur) unless one or more coastal permits is granted.

[177] In any event, given the uncontroverted evidence of Mr Marchant that, while he has always been opposed to these three marine farms, their substantive merits have never been considered by the Environment Court in either a district plan or resource consent context, we consider that in the exercise of our discretion[272] we should consider the (mitigated) noise effects from the marine farm operations. We should add that there was no evidence that noise from the operations in any way breached the rules of the Sounds Plan.

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270 D J Lucas, evidence-in-chief para 223 [Environment Court document 15].

271 PGMF: final submissions para 89 [Environment Court document 41].

272 Under section 104(2) of the RMA.

[178] It is of concern that the experts for Sanford and PGMF did not address the effects of servicing and harvesting the marine farms in their evidence-in-chief. Mr Hassan and Ms Meech submitted that the effects of those activities had been "thoroughly considered by Mr Kyle and Mr Brown in their evidence"[273] for Sanford, but omitted to record that their opinions were only expressed in evidence-in-reply and/or in cross-examination. If, as in this case, an expert's opinions on independent relevant matters not traversed in their evidence-in-chief are invariably and unhesitatingly consistent with the results of their earlier evidence on other matters that they have traversed, the court is entitled to be concerned about the objectivity and independence of those new opinions. While there is a suspicion of that in Mr Brown's evidence-in-reply, there is more reason for concern about Mr Kyle's evidence-in-reply (written and oral).

[179] An important aspect of the effect of servicing and harvesting of the mussel farms is that they are weather-dependent. Rough seas affect access as well as on-site operations so that the boats will not be working on the marine farms under these conditions. Counsel for Sanfords seemed to think that was beneficial for the amenities of the Cockle Bay and Cape Jackson residents. But that is not necessarily the case, rather the weather dependence of servicing and harvesting operations is likely to have the effect that on the fine[274] days on which residents of southeastern Port Gore are enjoying their amenities, that enjoyment is likely to be impaired (in their opinion) by the intrusion of boats servicing one or more of the marine farms. Mr Marchant pointed out[275] that "... if there's two weeks of norwesterlies there won't be much activity, but then there's a rush of activity after that".

5.5 Effects on wildness and remoteness

[180] In Mr Greenaway's opinion[276] Port Gore has high values of naturalness and remoteness which "... combine to give [it] a very high amenity value for those who live in or visit the area".

Effects on the amenity values of marine recreation

[181] As for the likely effects of one or more marine farms in this part of Port Gore on recreational values, Mr Greenaway's assessment of the existing surface mussel farms was that[277]:

- they compromise the ability to afford a 'remote' marine recreation setting by introducing a strong element of commercial development, via the presence of the farms, their buoys and lights, and their servicing by commercial vessels;

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273 Sanford final submissions, para 116 [Environment Court document 40].
274 Transcript p. 753 lines 43-46.
275 Transcript p. 753 lines 20-23.
276 R J Greenaway, evidence-in-chief para 3.1 [Environment Court document 26].
277 R J Greenaway, evidence-in-chief para 7.4 [Environment Court document 26].

- they adversely affect the natural character of the setting and so diminish the opportunity for a recreation experience which is differentiated from that available throughout the vast majority of [the] Marlborough Sounds.

[182] We have described how Mr Godsiff considered[278] that the tracks and tours offered by Mr Marriott were better suited to the needs of most visitors. In summary, he did not consider the proposed mussel farms would have any adverse effect on the amenity of tourists in the area, nor did he consider that the area had high access values.

[183] We consider Mr Greenaway accurately reflected the evidence when he wrote[279]:

> The focus by the Council and the [a]pplicants has tended to be on recreation use rather than the value of the area in terms of remote experience recreation and remote experience from a wider cultural perspective.

Since the council and applicants' evidence was simplistic and less comprehensive than Mr Greenaway's, we prefer the latter.

Gannet Point North

[184] Mr Greenaway referred to PGMF's proposal to halve the number of flotation buoys for its (surface) Gannet Point farms. He wrote[280]:

> This amended proposal makes no difference to my assessment of the effects of the proposal on natural character of the coastal environment, or on amenity values at Gannet Point and in the Port generally. The farms will still be substantially visible from the water and the land and have a similar frequency of attendance by service and harvesting vessels. If this farm continues it will, in my opinion, have the same or very similar detraction from amenity values and natural character as the present farm. This farm is an inappropriate use and development of the coastal marine area. It is and would be an anomaly in the heart of a remote and scenic area that is recognised in the Marlborough Sounds Resource Management Plan as being inappropriate for marine farming.

Pool Head and Gannet Point South

[185] In relation to the Sanford sites, Mr Greenaway wrote[281] of subsurface farms:

> ... if the sub-surface farms are approved, they will have a lesser impact on visual amenity than the current farms. I expect that this, in turn, will reduce the perception by recreational users of intrusion into an otherwise largely natural environment. However, in my opinion, the presence of the farms and the relatively frequent servicing by commercial vessels would still significantly compromise the 'remote' experience values and natural character of this part of Port Gore.

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278 C G Godsiff, evidence-in-chief para 8 [Environment Court document 10].
279 R J Greenaway, evidence-in-chief para 10.2 [Environment Court document 26].
280 R J Greenaway, evidence-in-chief para 9.3 [Environment Court document 26].
281 R J Greenaway, evidence-in-chief para 9.5 [Environment Court document 26].

Cross-examination did not significantly weaken Mr Greenaway's evidence, nor was there any competent witness for the applicants who gave a different view. In fact, the only passage that Mr Hunt appeared to refer to[282] as weakening Mr Greenaway's view of the remoteness of Port Gore was an answer by the witness to a question from the court where Mr Greenaway stated[283]:

> MR GREENAWAY: that would be part of my earlier answer I think – the concept that you are still in a setting that has got clearly – it is not an area that is I guess remote essentially, remote from obvious structures, obvious activity. I should not say – a lot of activity, obviously there are going to be boats coming in and out.

However, we consider that Mr Greenaway was not resiling from his view that Port Gore is remote, but was drawing attention to the role of boats within it, as the continuation of his answer a few lines later revealed[284]:

> ... You have got a setting where you can have remote values but with ... quite large palatial boats coming into it.

6. Overall evaluation

6.1 Introduction – weighing all relevant matters

[186] We consider first how better, on the evidence, to enable the people and communities of the Sounds to provide for their wellbeing[285]. The qualitative evidence that the mussel farms, individually or together, would add to the economic and hence social wellbeing of the Sounds communities, especially that at Havelock, was uncontroverted. In respect of the two Sanford farms, Mr W R MacDonald, the branch manager at Havelock, wrote[286] that they contributed 4.4% or 600 tonnes of the total mussels harvested by Sanford at Havelock within the last year. On Sanford's calculations[287] approximately one job is created by every 48 tonnes harvested so the production from farms represents over 12 jobs within Sanford's operations. The NZCPS 2010[288] requires us to take that into account, as we do : employment is always an important consideration, especially in these difficult times for the global economy and New Zealand export industries. On the other hand, for reasons we address shortly, if we were to refuse consent for any one (or more) of these marine farms then we are hopeful that new coastal water space can now be found elsewhere around Marlborough's coastline so that jobs would not be lost. That would take the sting out of Mr Herbert's concern that "... any reduction in mussel farm space may make it uneconomic to continue farming the rest of Sanford's mussel farms in the area"[289]. Equally, we consider that Mr Hunt's submission that "... it is nonsense to suggest

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282 PGMF final submissions para 171 [Environment Court document 41].
283 Transcript p. 731 line 23.
284 Transcript p. 731 line 33.
285 Under section 5 of the RMA.
286 W R MacDonald, evidence-in-chief para 25.1 [Environment Court document 4].
287 W R MacDonald, evidence-in-chief para 25.1 [Environment Court document 4].
288 NZCPS 2010 policy 8(b).
289 D Herbert, evidence-in-chief para 21 [Environment Court document 5],

relocation is an option where plainly it is not"[290] is now unlikely to be true, or at least not for much longer. We also recognise that at least for Sanford[291](and probably for PGMF) it is "critical" that Sanford has sufficient farms to enable it to achieve efficiencies of scale in use of its vessels and Havelock factory.

[187] An important positive aspect of each application is that mussel farms require high water quality and productive sites. Both those qualities are present for each of the three proposals, so policy 8(b) of the NZCPS 2010 would be achieved. A relatively minor positive effect is that the presence of a mussel farm might enhance fishing for some – there might be more snapper[292] to be caught.

Alternative sites

[188] For Sanford Mr MacDonald stated that it was very important to Sanford that its existing marine farms are reconsented because it is very difficult at present to create new space – new AMAs were not being created at the time of the hearing. Mr Hunt agreed that there are "real obstacles" securing alternative sites. We sympathise with the applicants : the approval of AMAs has been stalled for some years. However, the time it has taken us to deliver this decision (caused in substantial part by pressure of priority work as a result of the Christchurch earthquake sequence especially after February 2011) has largely remedied that situation by Parliament's enactment[293] of the Resource Management Amendment Act (No. 2) 2011 which came into effect on 1 October 2011 ("the 2011 Aquaculture Act"). Amongst the changes made by that Act are the removal of the requirement for AMAs to be established before resource consent applications may be made. So if we were to refuse any one or more of these applications before us, the disappointed applicant can try to re-establish elsewhere.

[189] We accept that if we were to approve any one or more of the marine farms that would not deplete the environmental capital of Port Gore for future generations[294]. Upon expiry of the term(s) of consent the marine farm structures (buoys, lines, anchors) can be removed with negligible lasting effect on the environment, according to Dr Grange's unopposed evidence[295].

6.2 Section 6 of the RMA

6.2.1 Introducing the matters of national importance

[190] Together with, or potentially against, those key positive matters under section 5(2) of the RMA we have to weigh various matters of national importance under sections 5(2)(a) to (c) and 6 of the Act, particularly:

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290 PGMF final submissions para 137 [Environment Court document 41].
291 W R MacDonald, evidence-in-chief para 25.3 [Environment Court document 4]
292 D Herbert, evidence-in-chief para 65 [Environment Court document 5].
293 NZS 2011/69.
294 Under section 5(2)(a) and (b) of the RMA.
295 K R Grange, evidence-in-chief [Environment Court documents 9 and 9A].

- recognition and protection of the natural character of the coastal environment;
- recognition and protection of the outstanding natural landscape of Port Gore.

There is an inherent tension between those two matters in these proceedings, at least when each of the proposals is considered at the level of the NZCPS because the natural character of the coastal environment of eastern Port Gore is only high, whereas we have found that the landscape is an outstanding natural landscape. That suggests we should explain our understanding of the relationship between section 6(a) and (b) of the RMA. It is this : while the coastal environment stretches around all of New Zealand's extremely long coastlines, and every segment of the coastal environment may be seen as part of one (or sometimes more than one) landscape or a (landscape) feature, relatively few parts of the coastal environment are in an outstanding natural landscape. So when a part of the coastal environment is also within, or coincides with, an outstanding natural landscape the landscape is at first sight (and depending on context) even more important to the national interest than the coastal environment is. The result is that adverse effects which may be appropriate in the coastal environment normally may be inappropriate in a coastal environment which is also an outstanding natural landscape. Conversely, even in an outstanding natural landscape, a proposal may be so important under section 5 that it is appropriate to allow it anyway.

6.2.2 Having regard to the New Zealand Coastal Policy Statement 2010

[191] Objective 2 of the NZCPS 2010 elaborates on section 6(a) of the RMA by suggesting areas of the coastal environment where various forms of development and use would be inappropriate and protecting them from such activities. This is (nearly) followed through in at least two places. First in NZCPS 2010 policy 8 on aquaculture which requires regional instruments to recognise the significant existing and potential contribution of aquaculture to well-being of local people and communities by providing for aquaculture in appropriate places; and secondly in policies 13(1)(c) and 15(d) and (e) by requiring that at least areas of "high natural character" be mapped or otherwise identified and that objectives and policies be included in the instruments. We wrote "nearly" about implementation of objective 2 because there is no policy which requires regional instruments to state where aquaculture might be inappropriate.

[192] As it happens the relevant regional coastal plan is the Sounds Plan and that has anticipated this policy by showing areas in the Marlborough Sounds where marine farms are generally appropriate and those where it is not. As outlined earlier, most of eastern Port Gore is in the CMZ1 where marine farming is prohibited. However, by making marine farming on each of the three sites with which we are concerned a discretionary activity, the Sounds Plan has effectively kicked the appropriateness of a farm on each back up the hierarchy of planning instruments, that is the Regional Policy Statement, the NZCPS 2010 and Part 2 of the Act itself.

[193] Under NZCPS 2010 policy 8 we have to take account of the economic benefits of aquaculture. We have described the skimpy evidence on that above and take it into account in coming to our overall conclusion. We must also take into account the social benefits. The evidence for Sanford was that the company is a relatively large contributor to the Marlborough economy. It employs 220 people and contracts up to 50 more. It spends approximately $15.5 million in wages and salary annually[296]. We accept that these three mussel farms are (at least together) regionally important for their benefits and have regard to that.

[194] Under policy 15 of the NZCPS 2010 we must avoid adverse effects of activities (such as mussel farming) on the outstanding natural landscape (including the seascape, as we have found it to be) of eastern Port Gore. Mr Kyle, the planner called for the applicants, did not mention this policy even in his rebuttal evidence[297] where he discussed the NZCPS 2010 generally. Ms Dawson, the planner called by the council, only referred to the old, now replaced, NZCPS.

[195] The closest that Mr Kyle came to mentioning policy 15 was when he wrote[298]:

> The key consideration is to determine whether the proposed marine farms are inappropriate in the context of the natural character and landscape values that apply in this particular location.

But he did not refer to the fact that there are different policies for the coastal environment[299] and for any outstanding natural landscapes[300] in that environment. That is particularly important since the landscape architect – Mr Brown – with whom he purported to agree[301] and whose view that "the Bay" was outstanding in landscape terms he accepted[302], was of the opinion that eastern Port Gore was an outstanding natural landscape which means that NZCPS 2010 policy 15 applies. Thus when coming to his view on the appropriateness of the Sanford proposals Mr Kyle has not told us why or how his view is compatible with policy 15(1) which requires that adverse effects should be avoided if an activity is to be found appropriate. We do not accept that Mr Kyle has undertaken a "careful assessment"[303] of the NZCPS 2010 and consequentially cannot give much weight to his conclusions.

[196] Mr Brown's answer in cross-examination was[304]:

> My point is that this is a landscape in which natural elements have primacy, but which also has a degree of modification and that the proposed [SPAR] buoys, lighting and even the vessels

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296 W R MacDonald, evidence-in-chief para 17 [Environment Court document 4].
297 J C Kyle, rebuttal evidence [Environment Court document 21B].
298 J C Kyle, evidence in reply para 8.6 [Environment Court document 21B].
299 NZCPS 2010 policy 13.
300 NZCPS 2010 policy 15.
301 J C Kyle, evidence-in-chief para 25 [Environment Court document 21].
302 Transcript p. 535 line 8.
303 Sanford final submissions para 214 [Environment Court document 40].
304 Transcript pp 171-172.

associated with the marine farms are consistent with that level of modification and the retention of the values that I have identified.

[197] Mr Hunt, counsel for PGMF, did not refer to the most relevant policies in the NZCPS 2010 (we discuss these below). It may be that was because of his "... acknowledge[ment] that the Part [2] issues trump the [NZCPS]"[305]. In one sense that is correct – the NZCPS is below and must implement Part 2 of the RMA. However, in an important way it is incorrect : the NZCPS 2010 implements and gives slightly more detailed guidance on the more open or opaque aspects of sections 5 and 6 of the RMA.

6.3 Having particular regard to section 7 matters

6.3.1 Introduction

[198] Of the list of matters in section 7 to which we are to have particular regard, the following were addressed in evidence:

> ...
> (b) The efficient use and development of natural and physical resources:
> (ba) ...
> (c) The maintenance and enhancement of amenity values:
> (d) Intrinsic values of ecosystems:
> ...
> (f) Maintenance and enhancement of the quality of the environments:
> (g) Any finite characteristics of natural and physical resources.

Paragraphs (f) and (g) are adequately subsumed in other discussion, but we should consider section 7(b), (c) and (d) separately. None of the other paragraphs are relevant.

6.3.2 Efficient use of resources (section 7(b))

[199] A cost-benefit analysis is not compulsory under section 7(b) of the RMA, even when matters of national importance are recognised as relevant : *Meridian Energy Limited v Central Otago District Council*[306]. However, nothing in the High Court's decision on that proceeding undermines the Environment Court's assumption that a cost-benefit analysis is very useful. Indeed, without it an assessment of efficiency under section 7(b) tends to be rather empty.

[200] It is, in theory, straightforward to calculate the net benefit of the two possible options open for the use (or protection) of the water space where each mussel farm is proposed to be located. The net benefit of the marine farm should be compared with the net benefit of the water space if empty of the farm. The latter benefit is more than zero because the water space has financial value for fishermen, social value for recreationalists, and is part of the district's environmental capital. There are three sets

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305 PGMF's final submissions para 113 [Environment Court document 41].

306 *Meridian Energy Limited v Central Otago District Council* [2010] NZRMA 477 at 116 (HC); [2011] 1 NZLR 482.

of persons[307] affected by the use or protection of the water space : producers (i.e. the mussel farmer), consumers (mussel eaters or exporters), and third parties affected by externalities. The latter can be positive (improved fishing around the mussel farm) or negative (loss of natural quality of the coastal environment). Then, adopting the formula stated in *Memon v Christchurch City Council*[308] the court, or the local authority at first instance, can ascertain the net benefit of the marine farm as follows:

> nb (farm) = ps + cs + pe – ne
> where:
> nb (farm) = net benefit of a marine farm
> ps = producer surplus
> cs = consumer surplus
> pe = positive externalities
> ne = negative externalities.

[201] If that calculation had been performed here for each mussel farm space we would have been able to make a more objective assessment of the economic (and social) value of the two scenarios (i.e. mussel farm or none[309]). Unfortunately, we were not informed of the (past) or present or forecast and discounted future income streams to be derived from each farm. We were merely informed that the two Sanford farms in eastern Port Gore represent "substantial" capital investment[310]. Nor did we hear argument as to whether, when calculating the producer surplus, we should treat wages in economists' conventional way (as a cost) or as a benefit. We suspect, but do not decide the issue, that the NZCPS 2010 effectively requires the latter in view of policy 8's differentiation between economic wellbeing and social and cultural wellbeing.

[202] We did, of course, receive evidence from a number of witnesses as to the employment opportunities created by the marine farms but none of that was put in a form which enabled us to quantify the social benefit of each proposal. Instead we are left with unquantified or qualitative assessments on both sides of the ledger. While such an analysis would have been very useful in these proceedings it was not provided by any party. Given the dearth of evidence, we are simply not able to make any quantitative assessment of which option for the water space of each proposed mussel farm provides a greater social, economic, or cultural benefit, and is thus a more efficient use of that part of the coastal environment. Of course, those problems pale into insignificance compared with the difficulties of putting a value on the externalities caused by having at least one mussel farm in eastern Port Gore.

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307 *Memon v Christchurch City Council* Decision C116/2003.

308 *Memon v Christchurch City Council* Decision C116/2003 at [76], quoting and adopting the evidence of an experienced economist, the late Mr P Donnelly.

309 Accordingly decision-makers simply have to make their best assessment of whether the net benefit of the proposed farm is negative or positive.

310 W R MacDonald, evidence-in-chief paragraphs 25 and 26 [Environment Court document 4].

[203] In the absence of quantified evidence it is worth pointing to the approach taken by the Sounds Plan on locating the point at which a mussel farm's benefits might be exceeded by the costs. Because at some point the marginal benefits of marine farms are outweighed by section 6(a) and (b) values – amongst others – the council has provided in its planning maps for most existing farms to be located in a zone – Coastal Marine Zone Two - where marine farming is provided for (as controlled or discretionary activities depending on location) and Coastal Marine Zone One where marine farming is prohibited. There is a policy decision in the Sounds Plan that in some places the other values in section 5(2) outweigh the economic values. That is exemplified by Attachment "B" to this decision, which is a copy of a map compiled by the Marlborough District Council showing "Marine Farms, Mooring(s) and Jetties in the Marlborough Sounds"[311]. That plan has to be read with some care because the moorings and jetties occupy a greater proportion of space on the map than they do on the water. However, it does give a general indication of the sharp contrast in the utilisation of the two principal sounds – with Queen Charlotte lined with jetties giving access to houses and baches, whereas the coastline of the more convoluted Pelorus and Kenepuru Sounds is dominated by marine farms (in blue on the map).

Is allocating space for marine farms a tragedy of the commons?

[204] Mr C Potton, a well-known photographer called for Mr Marchant and FNHTB, appeared to trespass rather beyond his expertise when he expressed his opinion[312] that Port Gore:

> ... is an area that largely defines itself [as] a larger "common ..."[313]. The well-known tragedy of the 'commons' is that, as it is parcelled out and given over to extractive uses, it inevitably becomes of diminishing value to the majority of people as a recreational and cultural resource. It loses its wild spirit and becomes like everywhere else that humans modify.

That is an insight in the last sentence which has been referred to by other witnesses, but we should point out that Mr Potton has made a (common) misinterpretation of the "tragedy of the commons". The phrase was first used by Garrett Hardin in 1968 in the journal *Science*. where he wrote[314]:

> The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

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311 R J Greenaway, evidence-in-chief Attachment 2 [Environment Court document 26].

312 C Potton, evidence-in-chief para 19 [Environment Court document 29].

313 Mr Potton actually used the plural 'commons' but it makes more sense in this sentence to think of Port Gore as a large common.

314 G Hardin, *Science* 162 (December 13, 1968) pp. 1243-1248. Also at (http://www.sciencemag.org/cgi/reprint/162/3859/1243.pdf).

...

> Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another ... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons rings ruin to all.

One of the principal points of the tragedy of the commons as Hardin perceived it, was precisely the opposite of Mr Potton's point : that the common had not been "parceled out" was part of the problem.

[205] In fact neither the 'Tragedy of the un-regulated commons' – as Hardin later conceded his paper was really about[315] – nor the parceling criticised by Mr Potton, really applies in this situation. We are faced with a situation where the council has, in its Sounds Plan, given some policy guidance as to where it might generally be appropriate to locate and operate marine farms, and where it is generally inappropriate. We consider the application of those policies shortly.

Existing investment in the mussel farms

[206] Because the applications are in respect of existing marine farms which are continuing to operate under section 165ZH of the Act until these appeals are resolved, we must have regard to[316] "the value of the investment of the existing consent holder". Mr Kyle[317] for PGMF and Ms Dawson for the council[318] stated this includes more than the cost of obtaining the original consent and the plant and lines on site. Mr Kyle said that the value included the returns to the occupier and the added value to factories, export earnings, and the economic wellbeing of a community. We have already recorded on these matters that there was no quantified evidence as to their net benefit.

[207] For the appellants Mr Marchant alleged[319] that the applicants had been making illegal gains because at least part of each of their marine farms was outside the (now expired) consent boundaries. We are unable to determine the truth of that allegation so proceed on the basis that the existing farms are (largely) correctly sited. Superficially, more cogent was the observation by Mr Marchant[320] that all the structures in the existing marine farms are removable and re-useable on another site. That was confirmed by Ms Dawson[321].

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315 G Hardin "Will commons sense dawn again in time". The Japan Times Online (http://search.japantimes.co.jp).

316 Section 104(2A) RMA 1991.

317 J G Kyle, evidence-in-chief para 78 [Environment Court document 21].

318 S M Dawson, evidence-in-chief para 50 [Environment Court document 22].

319 C E Marchant, evidence-in-chief para 164 [Environment Court document 27].

320 C E Marchant, evidence-in-chief para 164 [Environment Court document 27].

321 S M Dawson, evidence-in-chief para 50 [Environment Court document 22].

[208] We received only the briefest submissions[322] on what is meant by section 104(2A). The "existing investment" referred to might include any one or more of the following:

(1) the value of the plant and lines on site;
(2) the value of the current crop;
(3) the cost of the "renewal" application;
(4) a capitalisation of the likely returns;
(5) the net social benefit;
(6) the employment opportunities.

[209] If we were to consider the positive downstream or flow-on effects of the proposal as part of the investment of the existing consent holder we would also need to consider the negative effects, both direct and accumulative. Further, counting any of these matters as part of the "investment" of the existing consent holder would mean that they were all double-counted. We have already explained how the net benefit of a marine farm should be calculated and it includes the net present value of all those items.

[210] Since all other aspects of the (net present) value of existing (and proposed) investments are had particular regard to under section 7(b), there is only one item which is not counted and that is the net present value of stock on the lines at the expiry of the previous resource consents. It is important that, if resource consents are refused for any one or more of the farms under consideration, then any crop currently growing should not be wasted.

[211] The existing investment on these mussel farms is the mussel crop which is growing there at present and which cannot be harvested for up to 18 months (that being the average length of cycle for a mussel-line). All this suggests that if we are minded not to grant substantial new resource consents then we should consider granting brief consents to allow harvesting or at least ensure our decision does not take effect immediately.

[212] We consider that the witnesses and counsel have misconceived slightly what section 104(2A) is about. It does not require a consent authority to consider the costs of the application for "renewal" – they are sunk costs.

6.3.3 Maintaining and enhancing amenity values

[213] "Amenity values" are defined[323] in the Act as meaning:

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322 Sanford final submissions paragraphs 168 and 171 [Environment Court document 40]; PGMF final submissions paragraphs 131-139 [Environment Court document 41].

323 Section 2 of the RMA.

> ... those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

Despite that anthropocentric characterisation Sanford submitted both in opening[324] and closing[325] that:

> ... the yardstick of amenity values had to go beyond individual witness' perceptions. It needed to encompass a great community perspective, taking strong guidance from the [Sounds Plan].

We accept that is generally correct except for the word "great" which should be deleted : we do not understand why it was suggested. But certainly individual perceptions of the effects of a proposal on their future amenities will usually not be a sufficient guide to reasonableness of the effects : people do tend to resist change simply because it is different to what they know[326]. Essentially the test for effects on amenities is one of reasonableness in the given context and that can usually be better informed by reference to the district plan.

[214] On the evidence there appear to be three issues in relation to the effects on amenities:

(1) which of the lay witnesses were reasonable?
(2) what does the district plan say?
(3) how does the court assess the expert evidence?

[215] On the question of the lay evidence Mr Hassan and Ms Meech submitted[327] that the lay witnesses demonstrated "... highly selective subjective judgement with respect to the [proposals'] effects on amenity values". We consider counsels' examples in turn. The first was that Ms K Marchant[328] and her father, C E Marchant[329], gave little credit for the significant mitigation of the surface patterns of the Sanford mussel farms, yet could justify the Marchant airstrip as appropriate despite its strong visual footprint. Counsel are correct to some extent, although we have some sympathy for the Marchants' position : even an expert's objectivity would be stretched by a substantial last minute change in a proposal for two surface to two subsurface mussel farms. The Marchants had little time to reflect on the extent and implication of the changes.

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324 Sanford's opening submissions paragraphs 123-126 [Environment Court document 2].
325 Sanford's closing submissions para 85 [Environment Court document 40].
326 That is not the case in these proceedings since the marine farms (in a different, more intrusive form) are already on site.
327 Sanford's closing submissions para 89 [Environment Court document 40].
328 K Marchant, evidence-in-chief paragraphs 53 and 84 [Environment Court document 16].
329 C E Marchant, evidence-in-chief para 80 [Environment Court document 27].

[216] Secondly, counsel said that the Marchants had no tolerance[330] for navigational lights but were not troubled by the lights of houses in the Bay[331]. We consider that counsel for Sanfords cannot make much of this : as Mr Milne submitted[332]:

> the Marchant's television is not visible from the Cockle Bay beach, the Eglinton property or most other relevant viewpoints.

In contrast, the SPAR lights would be visible from all directions around Port Gore[333] – that is their function. That answer was criticised by Mr Hassan and Ms Meech[334]: "... it is not valid to dismiss the consideration of onshore lighting effects from viewpoints such as from the water itself". In fact, it is valid for two reasons : on the evidence the number of nights spent by boats in Cockle Bay is very small because it is so exposed; and secondly we infer that the Marchants would speedily install curtains (Mr Kyle, the planner for Sanford, commented[335] on their absence) if it made such a difference to these proceedings that we would grant consent because they had none.

[217] Finally, we accept, with some reservations (as expressed earlier), Mr Greenaway's evidence that recreational opportunities will be reduced in quality by the presence of one or more marine farms. Mr Hassan and Ms Meech submitted[336] that Sanford's marine farms will not "in any way constrain either land or water based recreation". In a limited physical sense that may be correct, but the farms would have indirect effects. We have found that we prefer Mr Greenaway's evidence to that of Mr Godsiff, and Mr Greenaway's evidence is that recreational opportunities will be lost. At least in relation to water-based recreation there is little evidential basis for that submission.

6.3.4 Intrinsic values[337]

[218] We were referred to *Director-General of Conservation v Marlborough District Council* where the Environment Court stated[338]:

> The narrow approach to recreational issues does not appear to us to recognise the **intrinsic value** to the Sounds as having some areas which **present as remote wilderness areas (such as this) left available for the wilderness experience by the few**.

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330 Cross-examination of Ms Karen Marchant – transcript p. 434; also K Marchant, evidence-in-chief para 99 [Environment Court document 16].

331 K Marchant, evidence-in-chief para 100 [Environment Court document 16]; C E Marchant, evidence-in-chief para 121 [Environment Court document 27].

332 Submissions for Marchants para 415 [Environment Court document 39].

333 Except where obscured by topography.

334 Sanford final submissions para 110 [Environment Court document 40].

335 Transcript p. 529.

336 Sanford final submissions para 139 [Environment Court document 40].

337 Section 7(a) of the RMA.

338 *Director-General of Conservation v Marlborough District Council* Decision W89/1997.

We are uneasy about that because we consider it conflates two different concepts – the enjoyment of the remoteness of an area, which is essentially an anthropocentric concept related to amenity values – as already discussed – and the intrinsic values of the ecosystems in that area. Both values have to be had particular regard to[339] under section 7, but the RMA treats them as separate things. Section 7(d) requires us only to have particular regard to the intrinsic values of ecosystems. Intrinsic values are defined[340] as:

> mean[ing] those aspects of ecosystems and their constituent parts which have value in their own right, including –
> (a) their biological and genetic diversity; and
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

These were not put in issue by the evidence.

6.4 Other matters[341]

The innovation of Sanford's sub-surface farming proposal

[219] We want to record how positively impressed we are with Sanford's innovative sub-surface marine farm proposal. Technically this is not a positive effect, but it appears to be a potentially very useful method of substantially mitigating the passive visual impact of mussel and other marine farms. When coming to our final decisions below we will assume that not only the Sanford proposals but also the PGMF proposal will eventually be totally sub-surface on the Sanford model described early in this decision, with the result that each marine farm will, at least during daylight hours, be much harder to see from land or water.

6.5 Outcome

General assessment

[220] We now assess the three proposals in terms of the General Assessment Criteria in rule 35.4.1.5 of the Sounds Plan[342] and in terms of the relevant NZCPS 2010 policies. First we consider the matters which are common to each of the proposed mussel farms. In terms of the likely effects of the proposal on the wider community[343] we recognise[344] the undoubted financial advantage to the applicants if the three mussel farms (or any of them) is allowed to continue. Allied to that, and indeed rather more important under section 7(b) of the Act, is the net economic benefit to society of the proposals.

[221] On the other side of the scales are the adverse effects of each of the mussel farms and activities on them on the amenities[345] of the occupiers of the neighbouring land. We also consider that the proposals (or any of them) will not contribute positively to the

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339 Section 7(c) and (d) respectively of the RMA.
340 Section 2 of the RMA.
341 Considerations under section 104(1)(c) of the RMA.
342 Sounds Plan pp. 35-14 and 35-15.
343 Rule 35.4.1.1.5.1 [Sounds Plan p. 35-14].
344 Policy 8 Aquaculture [New Zealand Coastal Policy Statement (2010) p. 15].
345 Rule 35.4.1.1.5.1(a) [Sounds Plan p. 35-14] and Rule 35.4.1.1.5.2 [Sounds Plan p. 35-15].

character[346] of the surrounding area – especially on land. (We consider this further under the NZCPS 2010 shortly.) Servicing of the farms and the night lights will visually intrude on the outstanding natural landscape of eastern Port Gore, and will detract from views which contribute to the aesthetic coherence of Port Gore. Each proposal will in a more than minor way diminish the natural character of the locality[347]. By themselves, we consider the cost of those adverse effects is unlikely to outweigh the benefits supplied to the community by the mussel farms.

[222] Another positive is that each mussel farm would largely maintain the future use potential of the renewable water resource[348]. The other factors in rule 35.4.1.1.5 are neutral in respect of the proposal.

[223] The direct and downstream employment opportunities are in favour of the proposals under the NZCPS 2010. However, we must also consider some powerful policies in relevant statutory instruments as to the preservation of natural character of the coastal environment and of outstanding natural landscapes and features. Most important are policies 13, 14 and 15 of the New Zealand Coastal Policy Statement 2010 because we have found that the coastal environment of the eastern side of Port Gore has outstanding natural character and is part of an outstanding natural landscape. The policies require[349] that adverse effects of activities on the natural character (or natural landscape) should be avoided. The witnesses for Sanfords or PGMF have barely referred to policies 13 or 15 at all. Mr Kyle, who might have been expected to analyse it, as the principal planning witness for both applicants, referred to it and then merely stated that he considered the three proposals are not "an inappropriate use"[350] because of the level of existing modification. That is of concern because potential adverse effects cannot, or at least should not, be assessed in a vacuum. All adverse effects are effects in terms of objectives or policies.

[224] The weight to be given to those policies is reinforced to some extent by the policies in the Sounds Plan. It has anticipated some of the policies[351] in the NZCPS 2010 by mapping different areas in the Sounds as either generally suitable for marine farming (the CMZ2) and those where it is not merely discouraged, but actually prohibited (the CMZ1). The map of the Sounds showing where there are existing or consented marine farms suggests quite strongly that areas where farming is prevented are important so as to maintain areas where the natural character of the coastal environment is not adversely affected by marine farming. We proceed on the basis that under the Sounds Plan marine farms are treated as being possibly justified, despite their anomalous presence in the CMZ1, by their historical presence and exceptional

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346 Rule 35.4.1.1.5.1(c) [Sounds Plan p. 35-15].
347 Rule 35.4.1.1.5.3(c) [Sounds Plan p. 35-15].
348 Rule 35.4.1.1.5.4(b) [Sounds Plan p. 35-15].
349 Policies 13(1)(a) and 15(1)(a) [New Zealand Coastal Policy Statement (2010) pp 15-17].
350 J C Kyle, evidence in reply para 8.5 [Environment Court document 21B].
351 Policy 13(1)(c) and (d) [New Zealand Coastal Policy Statement (2010) p. 17].

productivity. Given that rather unsatisfactory and open-ended guidance in the Sounds Plan, we now look at the higher guidance in the Marlborough Regional Policy Statement, the NZCPS 2010 and ultimately in Part 2 of the Act.

Conclusions on adverse effects

[225] We consider the effects of servicing and harvesting one farm and of its night lights would still be more than minor adverse effects on occupiers of adjacent terrestrial properties. Of course, the effects will fall rather differently on these occupiers depending on which farm is being considered. For example, the Eglinton property would not be affected much by either of the Sanford mussel farms; the Surgenor property would be minimally affected by the Gannet Point North farm, whereas the Marchant property would be affected by any of the three mussel farms, albeit considerably less by the Gannet Point North farm. That farm, of course, affects occupants of the Eglinton property most intensely.

[226] Any of the farms would have an adverse effect on the recreational users of the sea[352] by reducing the remoteness and natural character of eastern Port Gore.

[227] We are reassured that there is some independent confirmation in the MRPS that placing a "new" mussel farm in a bay is usually a major change to its environment. The methods for Chapter 8 of the MRPS include an explanation that[353]:

> Major changes in the landscape occur when new elements are first introduced which conflict with the character already there. For example, the first mussel farm into a bay changes the bay from a smooth water surface, while additional mussel farms merely add to the change.

That is important because while in this case (as we shall describe) the major adverse effects of the Sanfords' mussel farms will not be the passive effects on the surface of the water, but the active effects of harvesting, each of the farms can be regarded as the first one in the southeastern corner of Port Gore, and in Cockle Bay particularly. Thus, reinforced by the Sounds Plan, we find that if we were to grant consent to one mussel farm, then that first farm would be a major change to the natural character of eastern Port Gore.

Specific assessment matters

[228] At this point we must pause, step back and consider each of the proposed mussel farms separately. While it has been very useful to consider all three applications, and their likely accumulative effects together, it is also important that we consider each of the farms separately, as if it was the only one that we might grant.

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352 R J Greenaway, evidence-in-chief paragraphs 7.6 and 7.7 [Environment Court document 26].

353 MRPS method 8.1.7.

[229] We also have regard to the council's decision on each application[354]. All three of the council's decisions related to rather different (surface) mussel farms, compared with the subsurface proposals we are considering, so we infer that the adverse effects we have found to exist are not as adverse as the effects that the council considered in each case.

Pool Head

[230] The two decisions for this farm were notified (together) on 22 September 2009. As recorded earlier, the council refused consent to both applications because the application failed to adequately mitigate the adverse effects of the marine farm on the natural landscape in the area. The man-made structures would detract from the natural values of an area that is now in an advanced state of regeneration. The impact of a marine farm at this site was significant enough to be contrary to the Sounds Plan's objectives and policies relating to visual amenity, landscape and natural character; and the marine farm(s) would not promote the purpose of the Act; nor were they appropriate development of the coastal marine area.

Gannet Point South

[231] This decision was notified on 14 August 2007 so it was the first farm reconsented. Council relied on their finding that the environmental effects of the existing farm were within the anticipated "parameters" of the MSRMP. It was satisfied (as are we on the evidence) that the effects on the nearby "sill community" resulting from the marine farming activities would be not more than minor.

[232] The council's view on the relationship of the mussel farm with the adjacent land was interesting. It acknowledged that the land is changing from a "worked environment to one of high landscape value". On the basis that over time the continuing regeneration of vegetation cover may elevate the natural character of Port Gore to the point where marine farming activities in parts of the bay are no longer appropriate, it concluded that the consent should be granted but only for a term of ten years. The council contemplated that the appropriateness of the marine farm could be re-assessed then. That raises a number of considerations which are common to the Gannet Point North farm, to which we now turn.

Gannet Point North

[233] This decision was notified on 22 September 2009. The council decided that the application was consistent with the purpose of the Act. It concluded that any adverse effects are likely to be sufficiently mitigated as it seeks to undertake an activity that will provide economic benefits to the applicant as well as the wider community. Because the activity is discretionary the council considered that the Sounds Plan recognised and anticipated marine farming at this site (provided the effects could be mitigated) and

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354 Section 269A of the RMA.

therefore a farm was in keeping with the objectives and policies of the planning framework. With respect that was rather facile. The site is in the middle of the CMZ1 where all marine farming is prohibited, presumably because it does not meet the objectives and policies of the various planning instruments. The fact that mussel farming on the site is (anomalously) a discretionary activity must mean that just as there is no presumption that a farm on it does not meet the relevant objectives and policies, similarly there is no presumption that it does. The application should be considered on its merits and the council failed to do that.

[234] Again, because vegetation on the adjacent land was seen as not having reached the point where a marine farm would significantly detract from its natural character, the application was considered not to breach Part 2 principles. The council aligned the expiry date with the consent issued for the Gannet Point South marine farm by granting consent for a shorter term (eight years) to allow for further assessment then. The council did not state whether it found the site to be in an outstanding natural landscape. Nor did it consider the operative NZCPS, let alone the NZCPS 2010 which we must apply. In the circumstances we can put little weight on the fact that the council granted consent. We are encouraged in that finding by the fact that the council rather hedged its decision by granting a short term of eight years (two of which have nearly run already).

[235] While we predict that the adverse visual effects of this mussel farm on the Eglinton property will be minimal for any reasonable observer, we also predict that for up to a third of every month the servicing and harvesting boats will be a more than minor adverse effect on occupants of the Eglinton house and property. We consider that the boats will, since they must be added to the effects of other boats passing Gannet Point, have a moderately intrusive effect on the peace, privacy and quiet enjoyment of any reasonable person on the Eglinton property for more than a day or two.

[236] In PGMF's case there is one further positive benefit which we need to have regard to : it is that its lessee uses the mussels to produce a product "Lyprinol" that its witness, Mr Sutherland, said has therapeutic value. We could have had particular regard[355] to that claim if its net benefit had been quantified, but we give it some weight anyway. We agree with Mr Hunt that the PGMF Gannet Point North site is the site with the least conflict with existing land-based activities and is, from the Marchants' perspective, the least obtrusive. It is the marine farm we would be most likely to grant.

[237] Even if Mr Hunt is correct[356] (and we have found he is not) and the adverse effects of the PGMF mussel farm are only minor then that is enough to trigger policy 15(1) of the NZCPS 2010. That requires that adverse effects, even minor ones, should be avoided, (obviously minimal effects can be disregarded).

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355 Under section 7(b) of the RMA.

356 PGMF final submissions para 107 [Environment Court document 41].

Conclusions

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

[239] It is not necessary to determine the jurisdictional issues identified earlier in this decision.

Notes on the past and short-term future of the three marine farms

The previous history of the marine farms

[240] We have decided this case without reference to the prior history of the marine farms. However, we should record that Mr Marchant gave a detailed history (and copious exhibits) of the history of the three farms. Because we were running short of hearing time (the court was sitting in a leased room which had to be vacated for a prior booking) we requested that counsel for the applicants not cross-examine on these issues. Consequently, while the history might be relevant under section 104(1)(c) of the RMA, we are unable to consider it fully and fairly. We have assumed for the purposes of this decision that each of the expired farms was correctly established, but we do not make any finding that is so.

[241] However, we record that if this decision is appealed successfully and the proceedings, or any of them, sent back to the court we would need to hear further evidence on the history of the marine farms, because according to Mr Marchant's at present uncontroverted evidence there have been some rather irregular changes in the resource consents' location in the water and at least one *prima facie* curious retrospective approval of such a change by the council.

Post-hearing events

[242] Since the hearing Mr Marchant has, through counsel, complained that some mussel lines on the sites have been harvested and new lines put in place. We consider that the relevant owner was entitled to do that under their running on consents. While we have refused new consents, we consider that – especially in the light of section 104(2A) – some mechanism should be put in place to allow the marine farmers to harvest the lines at present in the water.

[243] Initially we were attracted to Mr Hassan and Ms Meech's idea[357] of granting short-term consents, but then we realised that a farmer could string those out by applying for a further renewal thus triggering section 165ZH again. The appropriate solution appears to be to refuse consent but to delay implementation of the decision for a maximum of eighteen months to allow all current lines to be harvested. No new lines

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357 Sanford, final submissions para 253 [Environment Court document 40].

should be sown in the meantime. In other words, if lines fall due for, and are harvested, within the next eighteen months they must not be replaced.

For the Court:

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J R Jackson
Environment Judge

Attachments:

A. The Pool Head and Gannet Point Marine Farm Licensing Areas ... (S F Brown, evidence-in-chief Attachment 2 [Environment Court document 12])
B. General Location Plan (S F Brown, evidence-in-chief Attachment 1 [Environment Court document 12])
B. Map of Marine Farms, Moorings and Jetties in the Marlborough Sounds (R J Greenaway, Appendix 2 [Environment Court document 26]).

Jacksoj/Jud_Rule/D/Port Gore Marine Farms v MDC.doc

Queenstown Central Limited v Queenstown Lakes District Council

High Court Invercargill CIV 2012-425-405
12–14 February; 19 April 2013
Fogarty J

Resource consents — Appeals — Errors of law — Future environment — Plan changes as future environment — "Minor" — Minor not a numerical quantity — Scheduling — Adjourning hearings — Declining to adjourn hearing not an error of law — Trade competitors — Property developers not trade competitors — Interpretation Act 1999 s 5; Resource Management Act 1991 ss 2, 3, 5, 30, 31, 87, 87B, 87I, 94A, 96, 101, 104, 104A, 104B, 104C, 104D, 105, 272, 308A and 308B.

The Franklin Flats area is on the outskirts of Queenstown. The Queenstown Lakes District Council District Plan zoned the Franklin Flats area as Rural General. The plan, however, recognised that the area would eventually become urbanised.

Part of Franklin Flats had been developed, but other parts remain undeveloped. Under plan change 19 the Council proposed to rezone the undeveloped part of Franklin Flats for urban activities. It was proposed that certain parts of the Franklin Flats area would be zoned exclusively for industrial use.

The Council's decision on the proposed plan change was the subject of a number of appeals. While the appeals were pending, Foodstuffs (South Island) Ltd applied to the Council to construct a PAK'nSAVE supermarket in the proposed industrial area of Franklin Flats, and Cross Roads Properties Ltd applied for consent to erect a Mitre 10 Mega alongside the supermarket.

Because the operative zoning was Rural General, the proposed uses were non complying under the District Plan. However, under ss 87 and 87B of the Resource Management Act 1991 (the RMA), both applications were treated as discretionary applications.

The Council declined the supermarket application. The Environment Court overturned that decision on appeal. The Environment Court found that the effect of the supermarket on the environment would be minor, because the proposal under the Plan Change to zone the area exclusively for industrial purposes was not part of the reasonably

foreseeable environment. The Council appealed the Environment Court's decision.

Held: (granting the appeal)

(1) Land suitable for industrial use around Queenstown was scarce. The Environment Court could not consider the adverse effects of using land for retail activities, which was suitable for industrial activities, without having regard to Queenstown's future need for industrial land, and the objectives in the operative plan to provide for that in the Franklin Flats area. Section 104D of the RMA calls for a real world analysis without artificial assumptions creating an artificial future environment. The Environment Court therefore erred in not taking into account the possible exclusive industrial zoning of the site under the plan change as part of the reasonably foreseeable environment (see [66], [68], [69], [70], [71], [72], [73], [74], [76], [77], [78], [79], [80], [82], [83], [84], [85]).

Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323, [2001] NZRMA 481, (2001) 7 ELRNZ 193 (CA) distinguished.

Dye v Auckland Regional Council [2002] 1 NZLR 337, [2001] NZRMA 513, (2001) 7 ELRNZ 209 (CA) distinguished.

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

(2) The Environment Court erred by applying a numeric analysis of 20 per cent to its interpretation of "minor" in s 104D of the RMA. By doing so it substituted the statutory standard for a different one. "Minor" is a question of degree. The purpose of s 104D(1)(a) is to allow applications for non complying activities, which may or will be contrary to the objectives and policies of an operative or proposed plan, where the adverse effect is so "minor" that it is unlikely to matter. It is wrong to approach "minor" as indicating something in the order of 20 per cent of loss (see [92], [95], [96], [97], [98], [99], [100], [101], [102], [103], [104], [105], [106], [107], [108], [109], [110], [111], [112], [113], [114], [115], [128]).

Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337, (2005) 11 ELRNZ 346 referred to.

(3) The analysis under s 104(1)(a) of the Act is not made against the specific content of proposed plans. That is the role of s 104(1)(b). The analysis under subs (1)(a) is an inquiry into whether the Court is satisfied that there will be no more than a minor effect on the environment in the future. That involves envisaging what the future environment may be (see [123]).

(4) The Environment Court did not err in law by not adjourning the hearings until after the Plan Change decision. That was an issue of scheduling in the Environment Court, and the High Court does not interfere with such decisions. Furthermore the Act requires that applications are dealt with promptly, so the Environment Court's decision to hear the application could not be an error of law (see [141], [142], [143]).

(5) The Environment Court erred by classifying Queenstown Central Limited as a trade competitor of Shotover Park Limited. The Environment Court was aware that neither company was directly active as retailers, but found them to be trade competitors due to their association with competing supermarket companies. Queenstown Central and Shotover Park are property developers. Property developers develop property with an eye to the market for that property, but that does not make them participants in the trade of the use to which the property is likely to be put. There is no justification for extending the phrase "trade competitors" to property developers competing for the best use of land (see [154], [155], [156], [157], [158], [159], [160], [161]).

Other cases mentioned in judgment

Cross Roads Properties Ltd v Queenstown Lakes District Council [2012] NZEnvC 177.

Queenstown Airport Corporation Ltd v Queenstown Lakes District Council [2013] NZEnvC 14.

Queenstown Central Ltd v Queenstown Lakes District Council [2013] NZHC 817.

Resource consents

The Queenstown Lakes District Council appealed a decision of the Environment Court which found that the building of a supermarket in an area which was proposed to be for exclusive industrial use would have effects that were no more than minor.

J Young for Shotover Park Ltd.
J Gardner-Hopkins and *E Matheson* for Queenstown Central Ltd.
T Ray and *J Macdonald* for Queenstown Lakes District Council.
N Soper and *A Ritchie* for Foodstuffs (South Island) Ltd.
G Todd for Cross Roads Properties Ltd.

FOGARTY J.

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Road map

[1] *There are two resource consent applications at issue: one application by Foodstuffs to build a PAK'nSAVE at Frankton Flats, and another by Cross Roads Properties to build a Mitre 10 Mega, also at Frankton Flats. Queenstown Lakes District Council (QLDC) declined the Foodstuffs application. The Cross Roads application went directly to the Environment Court. The Environment Court granted both applications. Now the Environment Court's decisions have been appealed to the High Court. The High Court is releasing two separate decisions, one for each application.*[1] *This is necessary as there are separate rights of appeal. Both decisions need to be read together.*

Introduction and summary of both the Foodstuffs and the Cross Roads appeals decision

[2] This summary endeavours to collect in one place the reasoning of both decisions.

[3] The Resource Management Act 1991 (the RMA) requires applications for consent to be processed promptly; even on the eve of a proposed plan for the locality becoming operative; even when the applications are in conflict with what is being proposed.

[4] There is a tension, not resolved by a rule, rather guided by standards, between the consent authority's duty to process the applications and the duty to do so having regard to the proposed plan for the locality.

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1 This decision and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

[5] In 2012, the Environment Court was seized with two applications for consent to establish a PAK'nSAVE supermarket and a Mitre 10 Mega on the Frankton Flats, being undeveloped land adjacent to the airport at Queenstown. These were significant applications, taking up about 4 ha of a 42 ha area of undeveloped rural zoned flat land. The land is identified for urban development in objective 6 of the operative district plan. To implement objective 6, including to provide for industrially zoned land, there is a proposed plan, PC19. The Council had heard submissions for and against it, and reached a decision. There have been numerous appeals against that decision, and those appeals were pending before another division of the Environment Court, already part heard. Neither the PAK'nSAVE nor the Mitre 10 Mega proposals are permitted in the proposed plan change.

[6] The two applications for consent were for two large scale retail developments, Foodstuffs, 2.8 ha, and Cross Roads, 1.82 ha, to be located in the proposed E1 and E2 zones, but located significantly in the E2 zone, abutting the eastern access road and partly encroached on the pure industrial zone E1. E2 is for light industrial activities with some provision for retail. As PC19(DV) stood at the time, area E, including E1 and E2, provided for industrial activities with limited retail activities. These applications were not permitted by proposed plan PC19.

[7] The Council, via a Commissioners' decision, had declined the PAK'nSAVE application. On appeal, the Environment Court, by a majority, held that a PAK'nSAVE would have only "minor" adverse effects on the environment, and, unanimously, would not on the whole be contrary to the objectives and policies of PC19. Having gone on to consider the merits of the application, having regard to the proposed change, the Environment Court granted the application.[2] Commissioner Fletcher dissented from the finding that the PAK'nSAVE proposal would have only a "minor" adverse effect. He considered the loss of future supply of industrially zoned land to be an adverse effect that was more than "minor". He otherwise agreed with the decision. The Environment Court similarly split on adverse effect in the Cross Roads application for a Mitre 10 Mega.[3] Here though, Commissioner Fletcher completely dissented. That application was heard directly by the Environment Court.

[8] Both decisions are appealed and were heard by this Court together. The issues in both appeals centre upon whether and how the Environment Court should have considered PC19 providing for the development of Frankton, when considering whether or not the two applications would have adverse effects on the environment. For the purposes of s 104D analysis, there is no material difference between the Foodstuffs and Mitre 10 Mega proposals.

[9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the

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2 *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 *(Foodstuffs).*

3 *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177 *(Cross Roads).*

operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans.

[10] Within this basic scheme there is a sliding scale of analysis of the merits of applications, depending on the degree of conformity or departure from the operative and proposed plans. Those are ss 104 and 104A–D. This case concerns principally the application of s 104D.

[11] Section 104D provides:

> **104D. Particular restrictions for non-complying activities** — (1) Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority *may* grant a resource consent for a non-complying activity *only if it is satisfied that* either—
>
> (a) *the adverse effects of the activity on the environment* (other than any effect to which [s 104(3)(a)(ii)] applies) *will be minor*; or
>
> (b) the application is for an activity that *will not be contrary* to the *objectives and policies* of—
>
> (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
>
> (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
>
> (iii) *both the relevant plan and the relevant proposed plan*, if there is both a plan and a proposed plan in respect of the activity.
>
> (2) To avoid doubt, s 104(2) applies to the determination of an application for a non-complying activity.
>
> [Emphasis added.]

[12] In both cases, the Environment Court, by a majority, applying s 104D(1)(a), was satisfied that the adverse effects of the separate proposals on the environment will be "minor". The Court found the proposals will have only a "minor" effect in two different ways:

(i) By ignoring the proposed change PC19 completely, and effectively assuming as a fact that the Frankton Flats area was going to remain undeveloped;

(ii) In case (i) was wrong: By taking the proposed change into account and finding that "minor" could be any loss less than 20 per cent, arguing that using a number scale was "no more arbitrary" than the statutory standard "minor", and finding the loss of industrial land was less than 5 per cent, and so "minor".

[13] The assumption in (i) of a rural undeveloped environment is contrary to objective 6 and policies 6.1 and 6.2 of the operative district plan and to the current contest between property developers for the most valuable commercial development of Frankton Flats which is the remaining undeveloped flat land in Queenstown. There is no prospect of the land remaining undeveloped. While the Environment Court was right not to focus on the specifics of PC19(DV)'s content, it should have recognised:

- that the future environment of Frankton Flats was urban, consistent with objective 6 and its policies;

- the sites of the proposals were located within the last area of Frankton Flats to be rezoned urban;
- there was competition for development of that land and a pending plan change (PC19).

[14] As to (ii), it is not permissible to substitute a numeric test for the statutory test. The application of that test oversimplified the task set by law in subs (1)(a).

[15] These two errors undermine both judgments of the Environment Court, for they had the consequence that the gatekeeping section, s 104D(1)(a), was not applied correctly. Inasmuch as the Environment Court may have considered its s 104 analysis led to satisfaction of s 104D(1)(b), as an alternative to (1)(a), it was also in error of law.

[16] There is a real prospect that had s 104D been applied correctly, both these applications would have been dismissed at either of the two s 104D thresholds. Therefore the errors are material. It is not the task of the High Court on appeal to apply s 104D.

[17] Accordingly, both appeals have to be allowed. The applications remain on foot, and can be pursued, but will be examined now against the latest decision on the proposed change, which was released by another division of the Environment Court on 12 February 2013.[4]

[18] There were other arguments presented to the Court, contending other errors of law on the part of the Environment Court. Because of the Court's findings on the application of the gateway s 104D, these issues are of lesser importance to this Court. In case, however, this matter goes on to the Court of Appeal, the two judgments identify these other issues of law, and give summary reasons as to the Court's findings, both on error and on materiality.

[19] The first of these arguments is that the Environment Court should not have heard the appeal against the *Foodstuffs* decision or the original application in respect of *Cross Roads* until the decision of the other division of the Environment Court on PC19(DV). The second argument is that the Court wrongly classified Queenstown Central Ltd (QCL) as a trade competitor, with improper motives, with the result that it did not give QCL a fair hearing. The third argument is that the Court misinterpreted objective 10 of PC19(DV).

[20] This Court is releasing separate judgments on each appeal. However, there is significant cross-referencing. Effectively, both decisions have to be read, to collect the complete reasoning. The reason for separate judgments is to allow the parties to each appeal to make separate decisions to seek leave to appeal or not.

Section 104D issues

The context

[21] Queenstown is a resort town with an international appeal. The resort town proper is built right on the edge of the lake, at the head of

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4 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZEnvC 14 (*QAC v QLDC*).

Frankton Arm. Its centre is a bustling resort town, a mix of retail, restaurants, bars, backed by hotels, motels and apartments.

[22] The area suitable for industrial land is at the head of Frankton Arm, on flat land known as the Frankton Flats. The Frankton Flats are significantly developed. The airport is there. There is also industrially zoned land called Glenda Drive. There is also a large area of undeveloped land, not yet built upon, a good part of which is the subject of this litigation.

[23] The Council notified its district plan under the Act in 1995. It was declared partially operative in 2003 and fully operative in 2009. Frankton Flats was given a Rural General zoning; however, the district plan recognised that eventually it would become urbanised. Under the heading in the section of the operative district plan dealing with "District Wide Issues" "Urban Growth" the following appears:

> **Objective 6 — Frankton**
>
> *Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.*
>
> *Policies:*
>
> 6.1 To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.
>
> 6.2 To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.

[24] Part of Frankton Flats is developed; another part (FFA) remains undeveloped, but for a large excavation undertaken by a failed developer. The rezoning of the balance of Frankton Flats, known as FFB, is the purpose of plan change 19 (PC19). It was first notified back in July 2007. After hearing submissions, the Council released what is known as PC19 (Decision Version) (PC19(DV)).

[25] PC19(DV) has as its overall purpose the completion of the rezoning of Frankton Flats for urban activities, implementing objective 6 and policies 6.1 and 6.2 of the operative district plan. The mix of activities includes education, residential, visitor accommodation, commercial, industrial, business and recreation. It covers an area of approximately 69 ha; 38–42 ha, variously described, which provide for industrial uses.[5] It provides for a village centre, generally towards the west end of the area, being itself a mix of commercial, business, residential, visitor accommodation and retail. Generally to the south and near the airport, it provides for industrial and yard-based activities, with minimum lot sizes and more limited site coverage, with no residential or visitor accommodation and limits on retail. Generally, to the east it provides for industrial activities, with no residential or visitor accommodation and retail prohibited. This land to the east abuts existing industrial zoned land

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5 See *Foodstuffs* at [100]. See *QAC v QLDC*, at [28], (numbers are hectares) – D-7.95, E1-20.39, E2-9.37, E4-1.62.

known as Glenda Drive. This proposed plan reflects the usual urban separation of residential activities from unsuitable commercial and industrial activities, made to avoid nuisance, or, in current RMA language, to avoid reverse sensitivities.

[26] The Council's decision on the proposed change, PC19(DV), was the subject of a number of appeals. While these appeals were pending, Foodstuffs applied to the QLDC to construct a supermarket, to be a PAK'nSAVE, in the area of PC19(DV). Likewise in PC19's area, Cross Roads Properties Ltd applied for consent to erect a Mitre 10 Mega alongside the PAK'nSAVE, both businesses sharing a large car park.

[27] Because the operative zoning of the land for both the Foodstuffs and the Cross Roads applications is Rural General, the proposed uses were non complying against the operative district plan.

[28] Both the Foodstuffs and the Cross Roads proposals were inconsistent with PC19(DV). Section 87B(1)(c) of the RMA requires that as the rules proposed by PC19 are not yet operative, any application must be treated as an application for a discretionary activity. The PAK'nSAVE proposal was located mostly within the E2 activity area, where all activities are prohibited unless an outline development plan had been approved. Inasmuch as PAK'nSAVE was located in area E1, it was a prohibited activity.

[29] In the case of Cross Roads, it was located principally in the E1 industrial zone, and in that regard is a prohibited activity. But for the same reason, it is treated as a discretionary activity by application of s 87.

[30] To obtain consent therefore the two proposals needed to get past the gateway of s 104D and then survive analysis under s 104. The first way that both applications could get to s 104 was if the consent authority (here the Environment Court) would be satisfied that the effects on the environment of the PAK'nSAVE proposal, and separately, the Mitre 10 Mega proposal, would not be more than "minor".

Preliminary observations

[31] The Environment Court framed the application of s 104D(1)(a) in the following way, in [71] of its *Foodstuffs* decision:

> [71] Similarly, the resources or people against which or on whom possible effects are assessed to ascertain whether they are adverse (and, if so, more than minor) are identified either in principles in Part 2 of the RMA, or in operative objectives and policies, or in proposed objectives and policies in a proposed plan (change) that are beyond challenge. In our view they do not include the objectives and policies of a proposed but challenged plan (or plan change). Where the provisions of a proposed plan (change) are under challenge then they are not reasonably foreseeable as settled in that form for the purposes of section 104D(l)(a) of the RMA. It is worth noting that while permitted activities under a proposed district plan (or plan change) are not relevant to the first gateway test, proposed objectives and policies are still relevant under the second gateway test (and under section 104(1)(b) if we reach that far). In summary:
>
> (1) the first gateway (section 104D(l)(a)) is concerned with the adverse effects of a proposal on the existing and likely (reasonably foreseeable) future environment as explained in *Hawthorn*;

(2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;
(3) the second gateway (section 104D(l)(b)) is concerned principally with the adverse effects of a proposal on the future desired environment (even if, in the case of a proposed plan (change) that may be unlikely). [Footnotes omitted.]

[32] The issues on this appeal principally concern the legality of subparas (1) and (2). I observe, however, that this judgment should not be taken in any way as an endorsement of (3). Because both appeals turn on the application of the first gateway threshold, and because I have not had full argument on the framing of the second gateway test (3), this judgment does not discuss that framing. It is sufficient to say that I think (3) is inconsistent with s 104D(1)(b). The objectives and policies of plans are not confined to avoiding adverse effects.

[33] As a preliminary to more detailed analysis of the first gateway, I briefly introduce the issue by way of reference to the arguments that I heard. I do not intend, however, to attempt to summarise all the arguments from the five sets of counsel. That would unduly burden the judgment, without assisting the comprehension of it. It is, however, important to signal at the outset that this Court's judgment as to the application of the first gateway test does not coincide with any one of the five arguments received. It also does not wholly reject the approach of the Environment Court. The Environment Court rightly observed that PC19(DV) was under appeal in many respects, and so it was difficult to forecast what its ultimate shape and content would be.

[34] Mostly, counsel before me presumed that the task of applying the standard "will be minor" in the first gateway test involved examining the effects of each proposal on the future environment as provided for in PC19. In that regard, I heard a great deal of detailed argument as to the distinctions between the industrial E1 zone, the mixed industrial commercial and retail E2 zone, and the potential alignments of the Eastern Access Road.

[35] The Environment Court correctly identified, and all counsel agreed, that one of the ultimate issues was whether or not there was an adverse effect of the loss of industrial land. The first gateway test s 104D(1)(a), of being satisfied that the proposed activity's effects on the environment will be "minor", does not refer in any way to the operative or proposed plans. By contrast, the second gateway test s 104D(1)(b) does refer to operative and proposed plans, but only to their objectives and policies. For reasons which I detail hereafter, I am of the view that the first gateway test is a forward looking judgment as to whether or not the proposed activities may cause an adverse effect more than "minor" on the existing and future environment. That judgment can be made, and must be made, with regard to the provisions of the operative plan, existing resource consents, commercial activity competing for use of the subject and surrounding land, and associated regulatory initiatives by way of proposed change. But the judgment is not made in any static setting, for example, examining PC19(DV) as though it will remain unchanged.

[36] Secondly, I observe that the cornerstone material fact in the application of the first gateway test is that there is an operative district plan which contains objective 6, which provides for the urbanisation of this area to accommodate residential, commercial and industrial activity. I note that in [71] of the Environment Court's framing, it has correctly included in the consideration of whether effects are adverse and, if so, more than "minor", "operative objectives and policies".[6] However, I go on to reason that in fact it did not do this when applying the first gateway test. This is because, in my respectful view, it got sidetracked by the decision of the Court of Appeal in *Queenstown-Lakes District Council v Hawthorn Estate Ltd.*[7]

[37] Overall, the Environment Court was looking at these two applications, in the context of a plan change promulgated by the Council to give effect to the operative district plan objective 6, policies 6.1 and 6.2 and implementation methods, in accordance with the "Explanation and Principal Reasons for Adoption". It was a zone with multiple uses, endeavouring thereby to accommodate a residential village, shopping for the residents and to provide for additional commercial, industrial and yard-based activities.

[38] This is all in a setting where optimal growth of Queenstown makes it desirable to make provision for a low cost residential community and, secondly, for more industrial activity which, in the nature of things, is easier located on flat land. Flat land was scarce. This is the remaining flat land within the urban boundaries of Queenstown not yet developed. None of these facts are in dispute. All are common knowledge, and the stuff of regular debate in the local community.

[39] At the time that the Environment Court heard both applications for resource consent, in July and August 2012, PC19(DV) was under appeal. As already noted, there were numerous submissions for change, and the different zone boundaries and policies were very much under challenge. There was, however, no suggestion that the area of Frankton Flats B would remain undeveloped as rural general land. On the contrary, there is going to be intensive development, and the setting was one of making planning decisions to accommodate all the proposed activities, including a large area of industrial activity onto this area.

[40] There is very little land zoned industrial in the operative plan which remains undeveloped. It is all at Glenda Drive. In 2006, it amounted to 6.2 ha.[8] There were competing estimates by the experts as to how much industrial zoned land Queenstown needs. The estimates vary between a low of 60 ha and a high of 100 ha. It was common ground that Queenstown is short of industrial land.[9] The Frankton Flats B zone, under PC19(DV), is approximately 69 ha, of which 38–42 ha provided for industrial (not exclusively) activities. Hence the important conclusion by the Environment Court, at [100] of the *Foodstuffs* decision:

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6 See third and fourth lines.
7 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).
8 *Foodstuffs* at [107].
9 *Foodstuffs* at [63], [291], [298].

> [100] ... Indeed, providing a maximum of some 42 hectares within Frankton Flats B is not going to meet all the need identified [for industrial land], no matter which numbers are used.

[41] The next part of this decision summarises the reasoning in the *Foodstuffs* and the *Cross Roads* decisions, before returning to the issue as to whether or not that reasoning was in error of law. Both judgments of the Environment Court are detailed and very long. I am indebted to Mr Todd for his summary of the Environment Court's reasonings in both decisions, when applying s 104D(1)(a).

Foodstuffs decision

[42] The Court noted that a resource consent was required under both the operative plan and under the proposed plan.[10] It noted the extended definition of "effect" in s 3 of the RMA.[11] It set out the wide definition of "environment" in s 2 of the Act.[12] It is appropriate to set out both of those definitions now.

[43] Section 2 contains a broad definition of "environment"; it provides:

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

[44] Section 3(a) of the RMA provides:

> **3. Meaning of effect** —
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> ...

[45] The Court then went on to find that the meaning of "environment" was explained by the Court of Appeal in *Hawthorn*, setting out [42] of that decision:[13]

> [42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their

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10 At [23].
11 At [66].
12 At [67].
13 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

> constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the enquiry should be limited to a fixed point in time when considering "the economic conditions which affect people and communities", a matter referred to in paragraph (d) of the definition. The nature of the concepts involved would make that approach artificial.

[46] The Environment Court then went to apply what it considered the Court of Appeal's conclusion was:

> [84] In summary ... [i]n our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.

[47] Then in [69] of its judgment, the Environment Court recognises that the Frankton Flats was generally undergoing major changes, and these were all about changes "to one of the few as yet un-urbanised areas remaining on the flats". It then observed that just about everything about PC19(DV) had been challenged on appeal. It then moved on to [71], as we have seen.

[48] In the *Foodstuffs* decision, the Environment Court was satisfied that the adverse effects of the activity of a PAK'nSAVE supermarket on the environment would be "minor". It reached this decision by firstly finding that the landscape in the area had already been modified by the adjoining urbanisation of the Frankton Flats. That part of the decision is not under challenge. Second, and more pertinently, it found:

> [104] ... By analogy with *Hawthorn* where the Court of Appeal held that possible applications for resource consents were not part of the reasonably foreseeable environment, we hold that a possible exclusively industrial zoning for the site under the unresolved (and challenged) PC19(DV) is not part of the reasonably foreseeable environment.
>
> [105] ... Consequently the potential effect of removing possible exclusively industrial land from use as such within the potential Frankton Flats B zone is not an effect on the "environment" within the meaning of section 104D(1) of the RMA. [Footnote omitted.]

[49] By these two findings, the Environment Court removed from the future environment the possibility of industrial zoning. As will become apparent, the qualifier "exclusively" was not relevant; it is not used again in the Court's reasoning. The effect of these two findings is that it did not consider either the subject site or the receiving environment as a place where industrial activity might occur in the future. This is contrary to objective 6, which we have seen expressly provides for industrial activity on the Frankton Flats generally, and specifically in policy 6.2 for

expansion of the industrial zone at Frankton. Effectively, the Environment Court used [84] of *Hawthorn* to remove consideration of objective 6 of the operative district plan when examining the future environment of the Frankton Flats.

[50] In case that reasoning was wrong as a matter of law, the Court went on to examine the receiving environment in the context of the planned development of Frankton Flats B for urban activities, including industrial land. In this alternative analysis it substituted the test of "minor" for a test of a 20 per cent or less loss of potentially industrial land. It set "minor" alongside the complementary concept of "major" to arrive at the 20 per cent figure. It then found that the potential loss of industrial land was less than 5 per cent. It used this finding to find that quantitatively and qualitatively the effect would be "minor".

[51] Therefore, on two alternative bases the Court was satisfied that the adverse effects on the environment would be "minor", and so was satisfied that s 104D(1)(a) applied. That enabled the application for a non complying activity to proceed to s 104 analysis.

[52] I note that in the *Foodstuffs* analysis the Court also considered the question of an adverse effect on the amenities of the future Eastern Access Road and another road, Road 2, and adverse effects on the future of urban structure on the Frankton Flats. It came to the conclusion that both effects were "minor". These aspects of the decision were not the focus of the appeal.

[53] The appeal by QCL against the *Foodstuffs* decision did not contend that the Environment Court also cleared the Foodstuffs application under the second gateway test, subs (1)(b). However, it is arguable it did. At [119], the Court found:

> [119] Since we have found that any adverse effects of the proposal on the environment are not more than minor, the first gateway under section 104D(1)(a) of the RMA is passed and we do not have to consider the second, that is whether the proposal is contrary to the objectives and policies of either the outline development plan or of the PC19(DV). However, out of an abundance of caution and in the light of Mr Gardner-Hopkins' submission that consent cannot be granted because both gateway tests are failed, we will consider each of the objectives and policies to which the proposal by Foodstuffs is said to be contrary, after we have discussed them below under s 104(1)(b) of the Act. [Footnote omitted.]

[54] In its s 104 analysis, the Environment Court did find that the PAK'nSAVE proposal was consistent with objective 10 of the proposed change, when considered as a whole. In the companion *Cross Roads* decision of the Environment Court, it came to a similar position. The appeal point was taken principally in the *Cross Roads* appeal. In that decision, I find that there were several errors by the Environment Court in the construction of the objectives and policies. For the purposes of this judgment it is sufficient to say that my conclusion in that regard in *Cross Roads* is of equal application to *Foodstuffs*. So that if the Environment Court did clear the *Foodstuffs* application under the second gateway that was an error of law. I also observe that it is important in

regulatory statutes to ask the right question at the right time. If the second gateway test of s 104D(1)(b) was going to be examined in *Foodstuffs*, it should have been before considering the criteria under s 104(1)(b). As under s 104, the issue is not "will not be contrary" to the objectives and policies, for even if there is a conflict a proposal may be granted.

Cross Roads decision

[55] The *Cross Roads* decision was released after the *Foodstuffs* decision. It followed the analysis on the law in *Foodstuffs*, particularly as applying to the application of *Hawthorn* and as to the substitution of a numeric test for the statutory test of "minor". Like *Foodstuffs* it started with a landscape "minor" effect analysis, which does not concern us on this appeal.

[56] On the *Hawthorn* point, the Environment Court said, at [59]:[14]

> [59] The short answer is that, adopting the analysis in *Foodstuffs*, as a matter of law the supply of possible industrially zoned land under proposed PC19(DV) is not part of the (future) environment for the purposes of section 104D. We acknowledge that the *Foodstuffs* analysis was dealing with the E2 area, while this case is about E1. However, we were advised that in the PC19(DV) appeal hearings SPL is seeking that the site be part of a proposed "E3" area, in which a range of other activities including "trade and home improvement retail" would be enabled. Obviously, the future environment under PC19 is very unpredictable. Thus we consider the *Foodstuffs* analysis still applicable. [Footnote omitted.]

[57] Then it moved on to the alternative analysis:

> [60] In case we are wrong about that, we proceed to consider whether the removal of 1.8 hectares of industrial land would be only minor or not. ...

[58] The Environment Court then reached its conclusion:

> [65] ... taking all those matters into account, we are satisfied that to lose 5% (cumulatively up to 5.6%) of the only land that is proposed by PC19(DV) to be protected for "true" industrial uses would be an effect on the PC19(DV) environment that is only minor.

[59] It then dealt with adverse effects on the Eastern Access Road and Road 2.

[60] It then, again similarly to *Foodstuffs*, appeared to have deferred the second gateway test until after consideration of s 104, as in the last sentence of [71] it said:

> [71] We consider the extent to which the proposal implements (or fails to implement) the relevant objectives and policies of PC19(DV) in part 3 of this decision.

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14 *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177.

Does Hawthorn apply to the application of s 104D(1)(a), in the context of this case?

[61] The Court in *Foodstuffs* approached s 104D(1)(a) by identifying the range of alleged adverse effects. The alleged adverse effects identified by the evidence were:[15]

(i) effects on the landscape;
(ii) effects on industrial land supply;
(iii) effects on the amenity of the neighbourhood and in particular on the Eastern Access Road and Road 2;
(iv) effects on "urban structure".

[62] The practical consequence of applying [84] in *Hawthorn* literally, however, is that the Court is not allowed to examine the effects of the Foodstuffs and Cross Roads proposals on the future environment. Rather, applying [84] of *Hawthorn* to s 104D(1)(a), requires adopting the unreal prospect that the undeveloped land will continue to be the activity on the receiving environment. Likewise, housing, retail, etc, is excluded from consideration by the application of [84]. Or to use the drier phrasing of the Environment Court, in [71], cited above at [31]:

> [71] ...
>
> (2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;
>
> ...

[63] The Environment Court found effectively that *Hawthorn* prevented it from taking into account the reality that there was a demand for more industrial land for Queenstown, which had been recognised in the operative district plan as an objective to be provided in the future, and that the only available flat land will be used at least in part for that industrial activity.

[64] Paragraph [84] is a summary of [34]–[83]. In the core of its analysis, the Court of Appeal endorsed a future orientated assessment of the environment, in [53] and [54]:

> [53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the Council or the Environment Court on appeal makes its decision on the resource consent application.
>
> [54] ... It would be surprising if the Act, and in particular s 104(1)(a) were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[65] *Hawthorn* also recognised that these standards have to be applied in context:

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15 *Foodstuffs* at [65].

> [61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur.

That was not the context of *Hawthorn.*

[66] I think [84] of *Hawthorn* was read literally as applying to any context. I do not think the Court of Appeal intended it to be read this way. To read [84] as a rule applying to this context was an error of law. The context of this case is materially different from the context in *Hawthorn.* The Court of Appeal in *Hawthorn* did embrace a future environment as the consideration in s 104D (s 105(2A) previously) and s 104. For these combinations of reasons, it does not govern the application of these facts. It does, however, support relying upon objective 6 and policies 6.1 and 6.2 as reliably informing the assessment of "minor" effect on the future environment.

[67] In *Hawthorn* the applicant applied for consent to subdivide 33.9 ha into 32 separate lots, and for consent to erect a residential unit on each lot. The proposal required consent as a non-complying activity under the operative district plan and as a discretionary activity under the proposed district plan, so it did engage the predecessor to s 104D, s 105(2A).

[68] It is very material when comparing the context of *Hawthorn* to this case that the following relevant resource consents already existed in the *Hawthorn* baseline and receiving environment:

(a) An unimplemented consent to subdivide the subject site into 8 blocks of approximately 4 ha each; (baseline)
(b) Building consents in respect of a 166 ha triangle, which included the subject site, for 24 houses already erected and a further 28 consented to, but not yet built; (part baseline, part receiving) and
(c) Consents in respect of a further 35 building platforms outside the area of the triangle (receiving).

[69] This large number of existing consents meant that there was no issue, but that the environment would have a rural/residential quality. Furthermore, the applicant developer in *Hawthorn* had proffered as a condition of its application not to intensify the residential quality, by not making any further application for subdivision within the receiving environment. It is not surprising that consent was granted, and not disturbed on two appeals.

[70] None of the baseline or receiving environment cases has ever been deployed before to rule out consideration by a consent authority of the prospect that an application would impede an established objective in the operative plan. Given objective 6 and its policies 6.1 and 6.2, and recognising Queenstown's needs, it is inevitable that the Frankton Flats *will be* urbanised and used in part for industrial activities. "Will be" is the language used in s 104D(1)(a).

[71] The predecessor of s 104D was s 105(2A). It has been considered by the Court of Appeal in *Arrigato Investments Ltd v Auckland*

Regional Council[16] and in *Dye v Auckland Regional Council.*[17] They also are distinguished by context. Like *Hawthorn*, they were subdivision applications into relatively stable existing environments.

[72] There is no doubt that a PAK'nSAVE supermarket and/or a Mitre 10 Mega would have major effects on the future environment. They involve the erection of very large buildings, putting in place a large number of car parks, and will generate tens of thousands of vehicle movements each week. They would enhance the economic wellbeing of the community by delivering the benefits of competition in the marketplace.

[73] The question is not whether the Foodstuffs (or Cross Roads) proposal would affect the environment. But the question is whether it will be an *adverse* effect, and if so, can the consent authority be satisfied it will be less than minor.

[74] All counsel agreed that utilisation of scarce land for an inappropriate use can be an adverse effect. This is because Pt II of the Act, particularly s 5(2), includes consideration of meeting community needs, in the future.

[75] Section 5 provides:

> **5. Purpose** — (1) The purpose of this Act is to promote the **sustainable management** of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[76] The consent authority cannot consider any adverse effect on the community of using land for retail activities, which is suitable for industrial activities, if the s 104D(1)(a) analysis is done without the Court being able to have regard to the future needs of Queenstown for industrial land, and the objective in the operative district plan to provide more industrial land at Frankton Flats.

[77] The sort of issues that had to be confronted in *Foodstuffs* simply were not in play in *Hawthorn.* One cannot say with confidence how the Court of Appeal in *Hawthorn* would have analysed the material facts of this case. For these reasons, I do not consider that the Environment Court or this Court are bound by [84] in *Hawthorn.*

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16 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, [2001] NZRMA 481, (2001) 7 ELRNZ 193 (CA).

17 *Dye v Auckland Regional Council* [2002] 1 NZLR 337, [2001] NZRMA 513, (2001) 7 ELRNZ 209 (CA).

[78] Furthermore, the finding at [84] of *Hawthorn* was a non-binding observation that I erred, when I suggested, obiter, that the effects of resource consents that might in future be granted should be brought into account in considering the likely future state of the environment. The Court of Appeal endorsed the Environment Court's approach, which had taken a more restricted view. But the Court still answered the question in the negative, meaning that they did not think there was a material error in the High Court judgment, and no error in the Environment Court judgment.

[79] When the RMA had its genesis, it was intended by many of the promoters to introduce effects based decision making. Activities which did not generate adverse effects should not be regulated, was the attractive goal. That idea has never been completely lost. The Act did finally embrace the inevitability of plans, but not the inevitability of rules. Plans were to have objectives, policies to implement them, and those policies might or might not have rules: ss 30(1)(a) and 31(1)(a). But alongside that was the understanding that if an activity was innocuous (had no significant adverse effect on the environment), it did not need to be regulated or controlled by the RMA.

[80] That, in my view, is the natural context of s 104D(1)(a). If the activity is non-complying but has only "minor" (no need to be bothered about) adverse effects, then, even though it is non-complying, consent can be considered under s 104.

[81] There are a number of Environment Court decisions which examine the meaning of "minor" in s 104D(1)(a). They were not cited in argument.

[82] Section 104D(1)(a) is a section intended to impose a further restraint on consents being granted for non complying activities under either an operative plan or a proposed plan, and activities which are inconsistent with the proposed plans, unless they have only a "minor" effect. It is a very small eye in the needle. It can be contrasted with ss 104A–C. I develop this point later in this judgment, when considering the numeric substituted test for "minor".

[83] There was no dispute to the proposition of fact that each activity, the PAK'nSAVE and Mitre 10 Mega, considered separately would have the adverse effect of a loss of land for industrial use. There was evidence before the Environment Court of a shortage of industrial land – quite independent of PC19(DV).[18] That assessment can be made without regard to the operative plan. But, in fact, it is reinforced by objective 6, and its policies of the operative plan.

Conclusion

[84] The context of this case was materially different from *Hawthorn*. That decision recognised the importance of context. Read as a whole, it endorses having regard to objective 6 and its policies as a guide to the future environment. [84] was a summary only, and itself should not

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18 *Foodstuffs* at [63], [291] and [298].

be read out of context. It is an observation which does not bind this Court in this case.

[85] Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to objective 6 and its policies. The current development of the Frankton Flats, of which these applications are only part, was inconsistent with the plain statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase "will be". To read down s 104D(1)(a) so that the judgment is will be "minor" if established in an undeveloped environment, was contrary to the operative plan and the facts, and so thwarted the intention of Parliament. It was a significant error of law in the *Foodstuffs* decision, and likewise in *Cross Roads*.

Did the Environment Court err in its interpretation and application of "minor" when applying the alternative numeric analysis, which does take into account and recognise the presence of PC19(DV)? Did the Environment Court err in law when defining a 20 per cent threshold for "minor" effects?

[86] In the alternative to applying *Hawthorn*, the Environment Court, in case it was wrong, went on to consider whether the effect of granting consent to the retail use of a PAK'nSAVE would be more than "minor". The Court considered four possible areas against which the Foodstuffs area could be "measured":[19]

(1) the activity areas proposed to be zoned industrial under PC19(DV) (42 ha);
(2) all undeveloped industrial land in the Queenstown/Wakatipu area;
(3) the quantity of industrial land demanded in the district;
(4) the total area of industrial zones plus proposed industrial zones within the district.

[87] The Court opened its discussion of the alternative application of the standard "minor" in s 104D(1)(a), as follows:

> [72] Counsel did not refer to authorities on what "minor" means. The dictionary definitions suggest it means comparatively small or unimportant or lesser in number, size or [extent]. Based on normal usage "minor" seems to come between minimal on one side, and more than minor and then major on the other side of a scale of effects. Further, the concepts of size and importance seem to have both quantitative and qualitative dimensions. Accordingly, whether adverse effects are "minor" or "more than minor" depends on the circumstances and context. For example, where a significant habitat of a threatened indigenous species is at risk in a region where the species' population has already reduced to 20% of its former population, even a small (say 1%) reduction in its habitat or population may be more than minor. It depends on the species, the factors on which its population viability depend and the margins of error in the analysis.

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19 *Foodstuffs* at [106].

> [73] We are also acutely conscious of the "One Percent Problem" "... where small contributors account for so much of a ... problem that the social goal cannot be met without regulating many one percent sources".[20] Even very minor effects which may happen have the potential to lead to adverse accumulative effects ...
>
> [74] We return to the assessment of other adverse effects, including any strict cumulative effect — an effect that is at least reasonably likely to happen if a proposal gains consent and if it is implemented. The situation that most often arises with predicting such an effect is that the consent authority (or on appeal the Environment Court) is faced with making an unscientific qualitative prediction on evidence that gives no margin of error or confidence limits. A further complication is that in *Westfield*[21] Blanchard J approved an Environment Court decision in which the court placed "significant" somewhere in the scale, at least where there are possible trade effects (which must be disregarded under (now) section 104(3)(a)(i)). For the purposes of this decision we ignore any complexities introduced by *Westfield* and apply the first gateway test in the standard way. We hold that any adverse effect which changes the quantity or quality of a resource by under 20% may, depending on context, be seen as minor. [Footnotes omitted.]

[88] It may be noted that no authority is cited for the last sentence. The last sentence has to be read as justified by the preceding analysis. That analysis starts with reference to the "dictionary definitions" and "normal usage". It is not referenced to the function of s 104D in the scheme of the RMA.

[89] When it came to applying the standard against the key issue on appeal, whether the loss of potential industrial land is an effect on the environment, as we have seen, the Court identified a loss of about 5 per cent of the proposed supply of scarce industrial land. It recognised this as a distinct adverse effect, but concluded it was only minor:

> [110] ... However, in these particular circumstances we are satisfied that it is quantitatively and qualitatively only minor (and at the lower end of minor too).

[90] No counsel defended the proposition that any adverse effects which change the quantity or quality of a resource by under 20 per cent may, depending on context, be seen as "minor". Rather, counsel supporting the decision emphasised that the Court was relying on a much lower percentage of 5 per cent.

[91] The context is the unchallenged common assumption by the Environment Court under appeal and all counsel before me that land suitable for industrial activities is a resource and is necessarily limited within the urban area of Queenstown. Moreover, there is competition for land suitable for industrial activities, to be used for other, here retail, activities. In this context, loss of land for industrial activity can be an

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20 Citing an article by K M Stack and M P Vandenberg *"The One Percent Problem"* (2011) 111 Columbia Law Review 1385, p 1388.

21 *Discount Brands Ltd v Westfield (New Zealand) Ltd* (2005) NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337, (2005) 11 ELRNZ 346.

"adverse effect" on the environment. The definition of environment is engaged under s 2(a), (b) and (d), set out above in [43].

[92] I do not think it is possible to ignore the Court's approach to the application of "minor" by its substitution of a 20 per cent test. This is for two reasons. First, it is a substitution of one standard, a statutory one, by another. Secondly, by identifying 20 per cent as a demarcator between "minor" and "not minor", the Court is creating an anchoring effect on reasoning. Setting up the break line at 20 per cent facilitates and indeed encourages a judgment that a loss of 5 per cent will be "minor". This is even though there are qualifying passages in the Court's judgment saying that a significant 1 per cent loss could be "minor".

[93] The legal method deployed by the Environment Court in its analysis is a traditional legal method known as "literal" or "black letter". This is the method of reading a provision in isolation, as a businessman would, giving the words in the provision their usual meaning and then applying them to the facts.

[94] This legal method can apply quite satisfactorily when the provision is a rule. A rule can be applied without the need to understand why the rule is there, and without the need to understand the other body of rules surrounding it. So, for example, we are all familiar with driving to a strange city and immediately becoming familiar with the parking prohibitions around our hotel. It is not necessary to understand the policy or purpose behind why there is a no stopping sign and yellow lines painted in a particular part of a particular street. The signs and the yellow lines send a clear and unmistakeable communication.

[95] This black letter method cannot apply reliably, however, when the statutory provision is not a rule but a standard. When the statutory provision contains a term like "minor", that is a standard, application of which requires resolution of a question of degree. There is no bright line distinction between "minor" and "not minor". There is always room for two persons to honestly disagree in good faith on the application of a standard.

[96] It is not possible to apply standards in any way consistently without the persons who are applying them examining and agreeing on the policy or reason why the standard has been imposed, rather than a rule made. Standards are usually imposed when the task is of such complexity that it is simply not possible for it to be regulated by precise rules. In such situations it is necessary to apply the standard against the purpose for which it is applied. This is the classic situation where s 5 of the Interpretation Act 1999 applies. Section 5(1) provides:

> **5. Ascertaining meaning of legislation** — (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[97] The operative standard in s 104D(1)(a) is:

> A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that ... the adverse effects of the activity on the environment ... will be minor.

[98] It is not simply an application of a standard of "minor". It requires a positive *satisfaction* on the part of a consent authority that the adverse effects of the activity on the environment in the future *will be "minor"*. [Emphasis added.]

[99] Coming to this standard for the first time, the consent authority should ask: "Why is it here?" The reason is not hard to find. It is an amendment to the RMA, introduced to elaborate upon s 104. Section 104 is the cornerstone section which sets out the criteria that a consent authority must have regard to when considering any application for a resource consent. Sections 104A, B, C and D amplify s 104 by distinguishing separate criteria for applications for controlled activities s 104A (which "must" be granted), and discretionary or non-complying activities s 104B, restricted discretionary activities s 104C, and non-complying activities s 104D, (all of which "may" be granted).

[100] It also needs to be appreciated that s 104D(1)(a), treated as a threshold, is plainly intended to be applied without the obligation to have regard to either the operative district plan or proposed district plan. In context, it may be appropriate, and was here, to recognise that there was a plan change in process implementing objective 6 and policies 6.1 and 6.2. That exercise must be done when applying s 104D(1)(b) and, later, s 104(1)(b).

[101] In this context, it becomes clear that the purpose of s 104D(1)(a) is to allow applications for non complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is so "minor" that that is likely not to matter. It presents a picture where non complying activities are unlikely to get consent under an operative district plan, let alone under a proposed district plan, but they will be considered if the adverse effects will be "minor".

[102] In that context, it can be understood immediately that "minor" here is very much at the lower end of adverse effect. That it is quite wrong to approach "minor" as indicating something of the order of 20 per cent of loss. So that if something is lost by a proposal, one can tolerate it if it is merely 20 per cent.

[103] Secondly, by a different line of critique, the jurisprudence is full of cases which constantly warn against the dangers of substituting the statutory test with another. In the *Cross Roads* decision, the Environment Court said of the 20 per cent demarcator:

> [39] ... We accept that 20% is an arbitrary figure when compared with the range of figures from 15 to 25%, but it is not unreasonable. All we are trying to do is set an approximate upper limit beyond which we would, in most reasonably foreseeable circumstances, not be able to find that an adverse effect was only minor. Nor do we think such an approximate test is any more arbitrary than the words "minor" used in section 104D of the RMA or "significant", often used in this context.

[104] Embedded in that last sentence is the notion that the very deployment by Parliament of the "minor" standard in s 104D(1)(a) is "arbitrary". That is not intended as a complimentary term. The Courts

must take statutes as they are enacted. A test cannot be dropped because it is perceived as arbitrary, and replaced by a Judge made "better" test.

[105] However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved. It fits in as part of a statutory policy that otherwise non complying activities which are contrary to the policies and objectives of plans and proposed plans simply will not be approved, s 104D will stop the application even being considered under s 104. In that regard, non complying activities are close to but fall short of being prohibited activities. There is nothing "arbitrary" in this graduated scale of the classification of activities from permitted through to prohibited. To be sure, the application of the standard calls for judgment and it is always possible for decision makers to disagree on these questions of degree, but, when inculcated into the scheme of analysis and the values to be applied, such disagreement tends to be minimised.

[106] In [74] of the *Foodstuffs* judgment, cited above,[22] the Court distinguished approval by Blanchard J, in *Discount Brands Ltd v Westfield (New Zealand) Ltd*,[23]of the use of the synonym "significant" in the context of applying the test of "minor" as it appeared, a provision dealing with applications not requiring public notification. Section 94A provides:

> **94A. Forming opinion as to whether adverse effects are "minor" or more than "minor"** —
>
> When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—
>
> (a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and
>
> (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity[; and]
>
> (c) must disregard any effect on a person who has given written approval to the application.

[107] This provision has since been repealed. Blanchard J said:[24]

> [119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres – on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount

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22 At [99].

23 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, [2005] NZRMA 337, (2005) 11 ELRNZ 346 (SC).

24 At [119]–[120].

> Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.
>
> [120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected. [Footnotes omitted.]

[108] The standard of "minor" applies within a particular statutory provision when applied to a particular context. Just as it is wrong to go to the dictionary, so also it is wrong, as I have noted, to take the meaning given to a standard in a statutory provision dedicated to another purpose and assume it has the same reference in a different provision, with a different purpose.

[109] What I do take from the judgment of Blanchard J, approving the judgment of Randerson J in the High Court, is the standard "significant" used as a synonym to "minor" was used as part of a purposive explanation of the appropriate reach and application of s 94(2).

[110] I am satisfied that it was an error of law for the Environment Court to use the standard of 20 per cent, albeit with all its qualifications.

[111] There are additional reasons why it was an error of law, which have some pertinence to the judgments that have to be made. The first is that, as the Environment Court recognised, analysis of adverse effects is both a qualitative and quantitative exercise. It is impossible to use an arithmetical measure of quality. Land developers and planners are very aware, acutely aware, of the distinction between the quantity of land and the quality of land for particular activities. So are businessmen who understand the market. Take the position that pertains in Queenstown as an example. Most of the industrial land is located on *flat* land in the village of Frankton, which is at the end of Frankton Arm. The resort town proper, right on the edge of the lake, at the head of Frankton Arm, is built

on the slopes at the head of Frankton area. It is also now filled with a busy town centre, all the accoutrements of a village, and surrounded by hotels and apartment complexes. It is not an industrial area. It is also folded around hills. The northern exit from this village goes almost immediately into very high quality landscape, which is not suitable for an industrial sprawl.

[112] Reducing the adverse effects of the PAK'nSAVE proposal to 5 per cent or less does not give one the answer as to whether that will be a "minor" non complying activity. This is for two reasons. First, the Environment Court has already been anchored by the proposition that anything less than 20 per cent may well be "minor". Five per cent, of course, is much lower than 20 per cent. That was a mental distraction, a legally irrelevant consideration. Secondly, the percentage does not really tell the consent authority anything about the *quality* of the land for industrial uses. It might be not only land that is intended to be zoned industrial, but land which the marketplace will find is highly desirable as industrial land, rather than land for some other activity. It may also have other desirable qualities, namely for commercial use. That will pose a difficulty for the decision makers who will have to decide how tightly to define the range of activities on that piece of land, depending on what goal they are trying to achieve.

[113] The areas suitable for industrial land, within the bounds of the town, are the Frankton Flats, upon which are located the airport and a significant area of operatively industrially zoned land in Glenda Drive. But because of the high demand for flat land for commercial as well as industrial uses, a lot of the Glenda Drive industrial land is in fact occupied by non-industrial uses. As the Environment Court has had occasion to recognise in its *Foodstuffs* judgment, this is because of market forces which tend to place on land activities which obtain the highest value for the land. To be sure, you can categorise the land as "land zoned industrial", but, if the zoning also allows some commercial or retail activities, everybody knows that the land may be lost to industrial use. A substantial town like Queenstown requires industrial land to meet its needs. Industrial land has to be found. This is why a plan may have to secure land for industrial activity, in order to prevent market forces putting it to more remunerative activities.

[114] It follows that for the development of a town and its ongoing growth, the critical issue is what industrial land is available, or is potentially available, and what is its quality, rather than the total of land zoned industrial in the operative plan. The Court was told from the bar that Remarkables Park retail zone was considered as a site for Mitre 10 Mega, but it is not flat.

[115] For all these reasons, the Environment Court fell into error of law, when treating the statutory test as arbitrary, and when substituting a numerical percentage loss for the "satisfied will be minor" test.

Did the Environment Court err in law in considering all undeveloped industrial land in Queenstown/Wakatipu was the appropriate base against which to measure the loss of industrial land in relation to the Foodstuffs application?

[116] This is a subsidiary ground of appeal. The issue falls out of the four possible areas against which loss of industrial land could be measured, set out above in [98]. The Environment Court had selected option 2 (all undeveloped industrial land in the Queenstown/Wakatipu area). It was alleged by QCL that that was an error of law, that the focus should have been on the Frankton Flats area.

[117] As Mr Soper for Foodstuffs pointed out, however, the framing of the question: of "all undeveloped industrial land in the Queenstown/Wakatipu area" was not in fact widening the focus away from the Frankton Flats. For all undeveloped land suitable for industrial uses was located on the Frankton Flats and was a combination of the land to be developed under PC19(DV) and the undeveloped but currently zoned industrial land in Glenda Drive, which is nearby and on the Frankton Flats. Mr Soper argued the frame of reference of the inquiry by the Environment Court was correctly in the sensitive area, being the land proposed to be zoned industrial under PC19 and the adjacent industrially zoned land in Glenda Drive. This Court agrees.

[118] That frame of reference led to the following analysis in the *Foodstuffs* decision:

> [107] We know that it is proposed there be some 42 hectares on which industrial activities will be permitted under PC19(DV). As of 2006 when the CLNA was prepared, there were 6.2 hectares of land undeveloped in Glenda Drive. We do not know how much remains undeveloped at Glenda Drive, but it must be a maximum of 6.2 hectares. Thus the proposed Pak 'N Save will use for retail purposes between 4.5% and 5.2% of the proposed future supply of industrial/business land under PC19(DV).
>
> [108] We can also test the qualitative (or policy) importance of losing industrial land. Since, on the hypothesis, we are looking at the possible outcomes of PC19 (even though we believe that to be incorrect under *Hawthorn*), we can look at how PC19(DV) rates the importance of losing industrial land. The answer appears to be that it is important but compromise is possible – without needing to have regard to the importance of industrial land supply. That is because PC19(DV) contemplates that within Activity Area E2 as shown on the structure plan, "Showroom Retail with a gross floor area more than 500 m^2 per retail outlet" is a limited discretionary activity and all other retail is discretionary. So PC19(DV) seems to consider that all retail and even large retail will not be an adverse effect on the supply of industrial land anywhere in E2. No reason is put forward either in PC19(DV) or in the evidence in this proceeding as to why other proposed retail (such as the Pak 'N Save) would have an adverse effect on industrial land supply when PC19(DV) implies that showroom retail would not. In fact, the scheme of PC19(DV) shows that the effects on industrial land supply of using it for retail are irrelevant: "Showroom retail" in an area identified as E2 on a structure plan – because it is a limited discretionary activity – goes with a list of matters to which the council has restricted its discretion. None of those

matters relates to the effect of the proposal on the supply of industrial land – see proposed rule 12.20.3.3i and iv.

[109] Potentially it is possible for the whole of the E2 subzone under PC19(DV)'s structure plan to be developed for Showroom retail as a series of limited discretionary applications. That is, an area of 10.62 hectares could be removed from the industrial land supply. That can only be justified on the basis that either the adverse effect on industrial land supply is minor, or that the land is more valuable for (showroom) retail. Either way, the same justification applies (absent reference to the proposed policies) to other retail such as a supermarket. [Footnotes omitted.]

[119] I remind myself the issue here is not whether this is a meritorious evaluation, but whether there is any error of law embedded in this evaluation. I have already found that it is an error of law to depart from the "satisfied will be minor test" and going to the 20 per cent loss threshold, and pursuing a numeric evaluation for both quantitative and qualitative analysis. The question now becomes whether there is any additional error of law in the analysis in [107] through to [109]

[120] The appellant, QCL, submitted that the appropriate basis upon which to measure the loss of industrial land supply is the type of industrial land that PC19 intended for the PAK'nSAVE site. QCL submitted that Area E2 was intended for "light industry" and, as the AAE2 borders the Eastern Access Road, development is to be higher amenity, good quality urban design with activities including higher quality showroom-type uses and other premier businesses who can exploit the passing trade the Eastern Access Road will provide.

[121] One can immediately see that QCL's argument tries to narrow the area of loss to equate in fact the total area of loss. Assessed against the area of land for E2 as it was under PC19(DV), the level of loss for industrial land is in fact a loss of nearly 21 per cent. Secondly, in evaluating the issue of "minor" or not, in [108] we can see that the Environment Court replied on the retail aspects as to uses available in the E2 zone. This is developed in [109].

[122] Mr Soper for Foodstuffs submitted the Environment Court was entitled to find it was unlikely that the Foodstuffs site would be used for industrial purposes in the near future. Secondly, the decision to adopt all undeveloped industrial land as an appropriate base was a judgment issue, a matter of fact, and not a question of law.

[123] I consider that the QCL argument is too specific for an inquiry under s 104D(1)(a), as to potential loss of industrial land. I heard a lot of argument, getting into the niceties of the distinctions between E1 and E2 industrially zoned land in PC19(DV). But the Environment Court was right not to get bogged down in the detail of these zones, which could change as a result of the appeals, and did. Section 104D(1)(a) analysis is not against the specific content of proposed plans. That is subs (1)(b), (where it is confined to objectives and policies). The subs (1)(a) analysis is properly considered in terms of the very preceding words of s 104D, as an inquiry into whether or not the Court can be satisfied that there will be no more than a "minor" effect on the environment in the future. That

involves envisaging what the future environment may be. That is a broader lens than focusing on the specifics of the current proposed change, which is under appeal.

[124] I do not agree with Mr Soper's submission that the Environment Court was entitled to find it unlikely that the Foodstuffs site would be used for industrial purposes. That is not the s 104D(1)(a) test. Secondly, the final content of PC19 could not be predicted at that time.

[125] In the *Cross Roads* decision, I have addressed the arguments that the Environment Court was in error of law when interpreting objective 10 of PCI9(DV). That reasoning is to be read as adopted in this judgment.

[126] Applying s 104D(1)(b), a consent authority could not be satisfied that the PAK'nSAVE supermarket in the El and E2 zones will not be contrary to objective 10 of PCI9(DV).

[127] If the Environment Court did so find, this was a material error of law. For, had the decision gone the other way, these applications would not have got past s 104D.

General conclusion on error of law in the Foodstuffs application on the evaluation that the Foodstuffs application could be no more than a "minor" adverse effect, and was not contrary to objective 10 of PC19(DV)

[128] For these reasons, I am of the view that it is clear that the *Foodstuffs* analysis was in error of law on the gateway issues. The principal error of law was to ignore the facts: that the Frankton Flats was suitable for industrial activities, was inevitably going to be urbanised, and was intended to be for activities including industrial, by objective 6 of the operative plan. Secondly, it was to depart from the "minor" test, both in turning to the dictionary meaning and implicitly contrasting it with major; and using a numeric standard as a substitute when it is not. Thirdly, it erred when interpreting objective 10 of PC19(DV). The resultant consequence was that the Environment Court lowered the threshold enabling applicants for non complying activities to get past the gate, set up to prevent non complying activities from even being considered for consent unless the effects will be "minor". If it did make a decision on s 104D(1)(b), it was in error to find that it was satisfied that the application would not be contrary to objective 10.

Materiality of error of law

[129] This Court only intervenes where there are material errors of law. In this case, the question divides into two parts.

[130] The first question is whether the judgment on the first gateway might have been different had the Environment Court not applied *Hawthorn* and had not substituted the numeric standard for the "minor" standard. For a number of reasons, I think that it is likely that the judgment would have been different.

[131] On the gateway issues, Commissioner Fletcher dissented in both the *Foodstuffs* and the *Cross Roads* decisions. His reasons can be

summed up in *Foodstuffs*, by his two paras [291], [292] and the opening sentence of [293].

> [291] Further, I consider there is evidence of a scarcity of industrial land. The evidence of scarcity in the CLNA is that "the supply of commercial land is likely to be exhausted in the near future" (p 1) and table 4 showing that as of 2006 out of 120 hectares of commercial land there is only 30 (25%) hectares vacant, and that within this there is 54 hectares of industrial land, of which only seven hectares (13%) is vacant. As well, we have the parties' acceptance of the "fact that there is a shortage of land for these types of activities". The impending shortage is due to the lack of land zoned industrial (and perhaps that that which is so zoned is not exclusively so). Scarcity would normally push up prices (which it has) which would bring more supply into the market, which can only happen if there is land available and it is zoned accordingly. The parties agree that:
>
> > The Frankton Flats is the last remaining greenfields site within the Urban Growth boundary of Queenstown south of the State Highway.
> >
> > There is no more land available in Queenstown suitable to be zoned industrial.
>
> [292] I consider the loss of around 5% of the future supply of industrially zoned land to a supermarket to be [an] adverse effect that is more than minor.
>
> *Qualitatively*
>
> [293] I disagree with my colleagues about the policy importance of losing industrial land. ...

[132] I do not set out the rest of the qualitative analysis. It is closely related to a proposed rule in PC19(DV) and an objective. We then come to his conclusion:

> [294] Both quantitatively and qualitatively the effect of losing 2.2 hectares of future industrial land to a supermarket would be more than minor in my judgment.

[133] In the *Cross Roads* decision, Commissioner Fletcher's reasoning was similar:

> [196] As to the first, I consider that the 5.6% loss in proposed industrial land would be a more than minor adverse effect. This would be relevant under section 104D if the industrial protection of area E1 under PC19(DV) was part of the (future) environment, and will be relevant under section 104(1)(a) of the Act.
>
> ...
>
> [201] I agree with the majority that resource consent(s) should be granted to CRPL under the operative district plan. However, in relation to PC19(DV) I disagree with my colleagues on this point. In my view not only is the loss of future industrial land an effect in terms of section 104(1)(a) that is more than minor, but there is more to the issue. The proposal not only does not give effect to, but is contrary to objective 10, and specifically policies 10.1 and 10.11 of PC19(DV). I would refuse consent under PC19(DV).

[134] The reasoning of Commissioner Fletcher is close to the reasoning in this judgment.

[135] The second part of the materiality reasoning is the decision of Judge Borthwick's division on the PC19 higher order issues, released on 12 February.[25] This decision was released at the beginning of the oral hearing of this case. But, at my request, it was not examined until the last day, after the appeal had been argued on the facts as they presented to the Environment Court of Judge Jackson. This decision of the Environment Court was written after having a resumed hearing on 7 November 2012, which was after the release of the *Foodstuffs* and *Cross Roads* decision by Judge Jackson's division.

[136] Judge Borthwick's division's decision did not amend PC19 to accommodate the PAK'nSAVE and Mitre 10 Mega proposals. The zone plan is now little different from PC 19(DV), as it was before the Environment Court on these consent applications. The PAK'nSAVE site is affected, however, in a significant way, in that the E2 zone on the eastern side of the Eastern Access Rd is reduced in width, so that the PAK'nSAVE site is now located as to one-third in E2 and two-thirds in E1. As to the Mitre 10 Mega site, there is no change; it remains squarely within E1. Judge Borthwick's division endorsed the E1 zone as an area for industrial activities.[26] The Court granted leave to the parties "*to review and propose a revised version of the objectives and policies, but subject to their overall direction being maintained*".[27]

[137] I have not lost sight also of the fact that the Commissioners' decision rejected the Foodstuffs application. The Commissioners decided that the proposal failed both gateways under s 104D.[28] They held that the adverse effects on the rural environment would be significant,[29] that the adverse effects in terms of urban design would be significant,[30] and made more general findings that the proposal would have significant adverse effects on the environment.[31] They also found that the PAK'nSAVE proposal would be contrary to the objectives of PC19(DV) and undermine the integrity of the plan change.

[138] Accordingly, I come to the general conclusion that the errors, when applying s 104D(1)(a), are material.

[139] Inasmuch as there might have been findings in respect of the second gateway issue (1)(b) of lack of material conflict with objective 10, those errors also are material, in both applications. My reasoning in this regard is to be found in the *Cross Roads* decision.

[140] It follows that the two consents must be set aside.

Other issues

Should the Environment Court have adjourned the hearings?

[141] Counsel for QCL argued that, because there was an imminent decision by another division of the Environment Court on PC19(DV), this

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25 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZEnvC 14.
26 At [656].
27 At [662].
28 *Foodstuffs* at [260].
29 At [258].
30 At [259].
31 At [260].

division of the Environment Court should have deferred its decision on the consent application. The submission was that it was an error of law, because the circumstance meant that Judge Jackson's division could not reasonably have proceeded with either of its decisions, and/or, in doing so, the Environment Court did not appreciate the consequence of doing so, and have regard to relevant considerations.

[142] The argument did not rely on provisions of the RMA. Nor could it, because they are the other way. Both appeals had to be heard; ss 87I(1)(c), 101(2), 272.

[143] Rather, the argument went to the inherent power of the Environment Court to schedule its hearings. It is long established that the High Court is loathe to interfere with scheduling decisions of any statutory Court. The decision to proceed with these hearing applications did disrupt the decision-making processes of the other division. It had an additional hearing on 7 November 2012 to consider the consequences of the grants of consents for the PAK'nSAVE and the Mitre 10 Mega. However, in my view, given the clear scheme of the statute which allows for applications to proceed in the face of plan changes, and indeed requires applications to be dealt with promptly, I do not consider that the decision of Judge Jackson's division to continue was an error of law. Whether or not it was meritorious is a different question. But it is not one within the jurisdiction of this Court limited on appeal to errors of law.

Was the Court prejudiced by an error of law classifying QCL as a trade competitor? Did this materially affect the decision?

[144] I address this issue less summarily, as it may have ongoing relevance to these parties. The RMA is the fourth planning statute in our legislative history. As part of the reforms it allows any person to make submissions or applications, whether or not they own land, and whether or not they are adversely affected by other activities nearby, s 96(2). So a concerned environmental activist in Kaitaia can make a submission against the development of opencast coalmining in Southland. A person can apply for consent for an activity on another person's land, even though the applicant does not even have a conditional agreement to purchase that land. A concerned activist in Kaitaia can take an interest in the amenity values of the suburb of Sydenham in Christchurch, and file a submission in opposition to an application for consent for a retail activity in the Sydenham shopping centre.

[145] Businesses competing in trade, unrelated to competition to purchase land and develop it, began to take an interest in RMA disputes. It became the practice for many years for supermarket operators to take a very keen interest in attempts by rivals to locate in their customer catchment. Typically, the competing supermarket retained lawyers, planners and other experts to run sophisticated planning arguments as to why consent should not be granted for another supermarket within their customer catchment. Of course, the arguments did not say they were worried about trade competition. But it was commonly thought by participants in the process and obviously in the end by Parliament that this participation was motivated by the fact they were in competition in trade.

[146] As a result of amendments to the RMA in 2003, trade competitors are now the only class of person who must have a legitimate RMA reason for participating in an RMA process.

[147] The relevant provisions now are:

> **96. Making submissions** — (1) If an application for a resource consent is publicly notified, a person described in subsection (2) may make a submission about it to the consent authority.
>
> (2) Any person may make a submission, but the person's right to make a submission is limited by section 308B if the person is a person A as defined in section 308A and the applicant is a person B as defined in section 308A.

In Part 11A, ss 308A and 308B provide:

> **308A. Identification of trade competitors and surrogates** — In this Part,
>
> (a) **person A** means a person who is a trade competitor of person B:
>
> (b) **person B** means the person of whom person A is a trade competitor:
>
> (c) **person C** means a person who has knowingly received, is knowingly receiving, or may knowingly receive direct or indirect help from person A to bring an appeal or be a party to an appeal against a decision under this Act in favour of person B.
>
> **308B. Limit on making submissions** — (1) Subsection (2) applies when person A wants to make a submission under section 96 about an application by person B.
>
> (2) Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that —
>
> (a) adversely affects the environment; and
>
> (b) does not relate to trade competition or the effects of trade competition.
>
> (3) Failure to comply with the limits on submissions set in section 149E or 149O or clause 6(4) or 29(1B) of Schedule 1 is a contravention of this Part.

[148] Foodstuffs South Island Ltd was the applicant for the PAK'nSAVE supermarket. Queenstown Central Ltd owns part of the land in PC19. It does not own land over which the PAK'nSAVE supermarket would be operated. Shotover Park Ltd (SPL) is another property owner, over whose land Foodstuffs' PAK'nSAVE would operate. Cross Roads Properties Ltd is a subsidiary of the leading South Island retailer, H W Smith Ltd, who operate Mitre 10s in the South Island. Queenstown Gateway Ltd (QGL) owns land adjacent to PC19, which has a consent for the establishment of a Countdown supermarket. QGL and QCL are managed by the same company. But there is no common shareholding.

[149] At [37] of the *Foodstuffs* decision, the Court made five points on what it saw as the trade competition complexities of the case:

> [37] The proceeding is fraught with trade competition complexities:
>
> - Foodstuffs owns the Pak 'N Save and New World supermarket brands. There is a New World at the Remarkables Park shopping centre on the south side of the airport. It is easy to see that Foodstuffs would not want to have their Pak 'N Save in close proximity to its sister brand;
> - conversely, Foodstuffs may like to place the Pak 'N Save in close proximity to the Countdown supermarket proposed to be built on land

in Frankton Flats A, immediately to the west of the PC19 land. The Countdown brand is owned by Progressive Enterprises, Foodstuffs' main rival in the supermarket trade in New Zealand;

- the Countdown supermarket is proposed to be built on land owned by Queenstown Gateway Ltd ("QGL"). It is obvious that QGL may not want a Pak 'N Save in close proximity to the proposed Countdown supermarket. We understand QGL is a sister company of QCL, with related ownership. The management of the QGL land and the QCL land in the C1 area of PC19(DV) is done by the same company, the Redwood Group Ltd ("RGL");
- the Remarkables Park shopping centre is on land owned by Remarkables Park Ltd ("RPL"), which we understand is a related company to Shotover Park Ltd, sharing common ownership.
- RPL and SPL on one side are trade competitors with QCL and QGL on the other side. [Footnotes omitted.]

[150] The appellant argues that the Environment Court found that QCL was a sister company of Queenstown Gateway Ltd (QGL) and a trade competitor, without giving QCL the opportunity to address the issue further, in breach of natural justice. Secondly, having found QCL to be a trade competitor, the Environment Court took that into account when making its substantive assessment. This finding altered the weight it gave to evidence from witnesses from QCL, and its refusal to stay its consideration of the applications and await the higher order decision on PC19 from Judge Borthwick's division.

[151] For Foodstuffs, Mr Soper submitted that the appellant's arguments were misconceived, and misinterpreted the Environment Court's reasoning. That the Court did not find, for the purposes of the PAK'nSAVE application, that QCL was a trade competitor. Mr Soper argued that QCL has overstated the position when saying that there was prejudice occasioned by error of law as to whether or not QCL was a trade competitor.

[152] As to the Environment Court taking the perception that QCL was a trade competitor, there are two dimensions to the analysis which need to be separated. One is the meaning of trade competitor, and the second is the Court's evaluation of the relationship between QCL and QGL.

[153] Mr Soper, supported by Mr Todd for Cross Roads, denied vigorously that the Court had made a finding that QCL was a trade competitor.

[154] I am quite satisfied that the Court did regard QCL as a trade competitor with QGL, as it states so simply in the last bullet point at [37]. Mr Soper submits that that last phrase is confined to the PC19 proceedings. I agree. As a matter of fact there is no doubt that QCL and SPL are in competition for the best uses of appropriately zoned land in the Frankton area. QCL is the owner of around about 23 ha of land.

[155] QCL and SPL are disagreeing on the appropriate zoning of their respective parcels of land. Let us allow that to be described as a form of competition or competing with each other. It does not follow they are in trade competition.

[156] In the absence of a statutory definition of "trade competitor", the qualifier "trade" can be understood by taking into account the mischief which was perceived to be afoot, as outlined above.

[157] There is no doubt that the Environment Court was perfectly aware that neither SPL nor QCL were directly active as retailers. It dubbed them as trade competitors by their association with Foodstuffs and with Progressive. SPL and QCL are property developers. Property developers develop property with an eye to the market for that property. That does not make them participants in the trade of the use to which the property is likely to be put. There is nothing in Pt 11A of the RMA to suggest such an extended definition.

[158] Keeping in mind the overall policy of the RMA to allow all-comers to participate, there is no justification for extending the phrase "trade competitors" to property developers competing for the best use of land. I am satisfied that the Environment Court was in error of law in categorising SPL and QCL as trade competitors.

[159] Competition between land developers is an inevitable ongoing phenomenon. As the Environment Court had occasion itself to observe, if the market is left unregulated, land will trend towards its most valuable use.[32] It is the purpose of regulation of use of the land to prevent that. This is discussed very clearly in the dissent of Commissioner Fletcher, in *Foodstuffs*. The RMA is a mixture of statutory reform of the common law of nuisance, and providing for national, regional and local regulations of use of natural resources.

[160] Where the total amount of land is a limited resource, choices have to be made. The situation in Queenstown is a classic example of that. There is a very limited amount of flat land available in the Queenstown urban environment. There is a contest for the use of that land. There is a community interest to build a significant amount of low cost housing to enable workers to live in Queenstown and not have to commute all the way from Cromwell. There is a need for retail and commercial activities to support that residential population. But on top of this, there is a recognised and overall shortage in Queenstown of industrial land. If it was entirely left to market forces the local authority could not be sure that all those needs would be catered for on the Frankton Flats. In the long run, that would be to the overall detriment of the economic welfare and growth of the town. Hence, the Council, in its plan, has endeavoured to meet needs for all of those activities. It is in this context that owners of land located in Frankton Flats compete to get their land zoned for the highest valued use. That is not trade competition, as that word is used in the RMA. If it were, numerous planning disputes would be wrongly categorised as trade competition.

[161] Rather, trade competition presents as the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and

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32 *Foodstuffs* at [102].

uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land.

[162] In [263] of the *Foodstuffs* decision, the Court said:

> [263] ... Quite apart from our duty to issue a decision as soon as practicable, the strong flavour of anti-competitive behaviour by QCL suggests a decision should be issued sooner not later.

[163] While it was unfortunate that the Environment Court labelled QCL as a trade competitor, and criticised its behaviour, I do not think it was an error of law which had material consequences. There is no evidence, beyond QCL's genuinely held perception, however, that the characterisation of QCL as a trade competitor influenced the decision, except possibly the decision to hear these applications, notwithstanding the commencement of the proceedings before the other division of the Environment Court in respect of PC19.

Result

[164] The appeal is allowed, for the reason that the decision has material errors of law, summarised at the beginning of this judgment. The case is remitted back to the Environment Court. In case there be any doubt, the application now requires re-evaluation against the current terms of PC19, as they have been amended by the February 2013 decision.

[165] Costs are reserved. If the parties cannot agree on costs, I require counsel to circulate draft submissions on costs, not extending beyond five pages each. After that process, file the submissions. I will deal with these submissions on the papers unless there is a request for an oral hearing. Leave to apply in that regard is reserved.

Reported by: Kerry Puddle, *Barrister and Solicitor*

Queenstown Lakes District Council v Hawthorn Estate Ltd

Court of Appeal CA 45/05
14 March; 12 June 2006
William Young P, Robertson and Cooper JJ

Resource consent — Non-complying activity — Appeal on a question of law — Further appeal to Court of Appeal — Land use activity consent — Subdivision consent — Permitted baseline — Assessment of effects of proposed activity on the environment — Relevance of future environment on determination of resource consent application — Resource Management Act 1991, ss 2, 5, 6, 7, 8, 30(1), 31, 45, 56, 61, 66, 94, 104, 105, 123(b), 125, 271A, 308.

Hawthorne Estate Ltd applied to the Queenstown Lakes District Council for both subdivision and land use activity consent to subdivide and develop 33.9 ha of land in the Wakatipu Basin, near Queenstown. The council declined to grant resource consent for the non-complying activity. A key question which arose in relation to the assessment of the effects of the proposed activity on the environment was whether a consent authority should take account of the environment as it might be in the future, assuming that unimplemented resource consents would be given effect to in the future. The council argued that the assessment of effects should be limited to the environment as it existed at the time when the application was considered. On appeal the Environment Court set aside the council's decision and granted consent for the proposed activity. The decision of the Environment Court was upheld on further appeal to the High Court on a question of law. The council then obtained leave to pursue a further appeal to the Court of Appeal.

Held (dismissing the appeal)

1 The "permitted baseline" analysis was designed to isolate activities permitted by a district plan or activities which had been approved by the grant of resource consent, with the result that the effects of such activities should not be taken into account when assessing the effects of a proposed activity on the environment. The "permitted baseline" analysis was conceptually different from the question of whether the future environment should be considered when carrying out the assessment of effects on determination of a resource consent application (see paras [65], [66]).

2 There was no justification for borrowing the term "fanciful" from the "permitted baseline" cases to determine whether the future environment was relevant to determination of the resource consent application. That question could be determined in a practical way by receiving evidence about any resource consents granted by the consent authority in the past in relation to the surrounding area, and whether those consents were likely to be implemented. The possibility of "environmental creep", where successive consents were obtained in respect of the same site, did not result in such consents being disregarded from any assessment of the future environment notwithstanding the fact that later consents may have replaced earlier consents (see paras [74], [75], [77], [79]).

3 Having regard to consented activities as part of the future environment did not create a precedent for the approval of other activities, and cumulative effects arose in the context of a proposed activity not from other activities which might take place in the vicinity (see paras [80], [81], [82], [83], [84]).

Cases mentioned in judgment

Aley v North Shore City Council [1998] NZRMA 361.

Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481; [2002] 1 NZLR 323 (CA).

Bayley v Manukau City Council [1999] NZLR 568 (CA).

Dye v Auckland Regional Council [2001] NZRMA 513; [2002] 1 NZLR 337 (CA).

Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257.

Geotherm Group Ltd v Waikato Regional Council [2004] NZRMA 1.

O'Connell Construction Ltd v Christchurch City Council [2003] NZRMA 216.

Rodney District Council v Gould [2006] NZRMA 217.

Smith Chilcott Ltd v Auckland City Council [2001] NZRMA 503; [2001] 3 NZLR 473 (CA).

Wilson v Selwyn District Council [2005] NZRMA 76.

Appeal

This was an appeal by the Queenstown Lakes District Council from the judgment of the Environment Court setting aside a decision of the council declining a resource consent application made by Hawthorn Estate Ltd, the first respondent. The Court of Appeal gave leave to appeal on a question of law.

E D Wylie QC and *N S Marquet* for Queenstown Lakes District Council.

N H Soper and *J R Castiglione* for Hawthorn Estate Ltd.

The judgment of the Court was delivered by

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

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

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

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

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

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

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

Background

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

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 ha, together with access

lots, and a central communal lot containing 12.36 ha. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately 4 ha in each case. Those approved allotments contained identified building platforms.

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

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

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

The Environment Court decision

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

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

three other subdivisions in the triangle, for which the council had recently granted consent. Those subdivisions had an average area of 2 ha per allotment. Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.

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

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

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

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

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

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

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

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

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

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

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

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

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving

environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.

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

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

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

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

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "other rural landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at para [76]:

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

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

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

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

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

> Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

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

> Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well

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

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

Question 1(a) – the environment

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

[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "Maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.

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

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

[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities

dealing with issues of precedent and cumulative effect as well as the authorities already mentioned on the "permitted baseline".

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

[40] The definition reads as follows:

> "Environment" includes —
>
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

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

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

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

> **5. Purpose** — (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while —
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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

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

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

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

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

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that

those bodies are in fact planning for the future. The same forward-looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

> **104. Matters to be considerd** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to . . .

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

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

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

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of

account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

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

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in 20 years' time.

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

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

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

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

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all

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

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

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

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

[63] The Judge referred to *Bayley v Manukau City Council*, *Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of "permitted baseline" analysis is one that is restricted to the

site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council* at paras [30] and [34] - [35].

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

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

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

[66] Where it applies, therefore, the "permitted baseline" analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

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

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

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

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

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

[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the district council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were, however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in para [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.

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

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

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

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

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

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

[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the "permitted baseline" cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at para [26], where it was used to rule out of consideration, for the purposes of the "permitted baseline" test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

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

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

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

notionally degraded by its potential development under the unimplemented consents.

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

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

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

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it

had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from para [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye.*

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

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v Auckland Regional Council* — that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

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

Question 1(b) – speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be

built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

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

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

Question 1(c) – consideration of the permitted baseline

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

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

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly

arise. We simply answer the question by saying that the issues raised by the council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – landscape category

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

[93] The district plan defines and classifies landscapes into three broad categories, "outstanding natural landscapes and features", "visual amenity landscapes" and "other rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

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

> They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

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

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

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

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any

"Arcadian" qualities of the wider setting. It concluded that the landscape category was other rural.

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

[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "other rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area (para [79] of his decision, set out in para [29] above).

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

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

> 5.4.2.1 **Landscape Assessment Criteria – Process**
>
> **There are three steps in applying these assessment criteria.** First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.
>
> **Step 1 – Analysis of the Site and Surrounding Landscape**
>
> An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination

of a landscape category – ie whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.
An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.
An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.
Step 2 – Determination of Landscape Category
This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.
The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.
In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and
(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters
Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:
First, with respect to the prescribed assessment criteria set out in r 5.4.2.2 of this section;
Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p 1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

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

[102] Mr Castiglione argued to the contrary, suggesting that the words used in step 1, ". . . the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape", were apt to refer to proposed development generally within the landscape. We reject that submission. In context, the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.

[103] But the wording of steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation

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

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

Question 3 – reliance on minimum subdivision standards in the Rural Residential zone

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

[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the Rural Residential provisions of the plan. In para [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the council expressed the opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4000 m^2 and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 ha. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of Rural Residential amenity.

[107] The next reference to the Rural Residential rules was in para [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could coexist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of overdomestication. That was so, because the site was in an "other rural landscape", and the district plan considered that Rural Residential allotments down to 4000 m^2 retained an appropriate amenity for rural living.

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

[109] Having reviewed the various references to the Rural Residential zone in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the Rural Residential zone. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "Arcadian" character of the landscape had gone. He then repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

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

Result

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

[112] The respondent is entitled to costs in this Court of $6000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary, by the Registrar.

Body Corporate 97010 v Auckland City Council

Court of Appeal Wellington
25 July; 17 August 2000
Richardson P, Keith and Blanchard JJ

Resource management – Notification – Whether application for variation notifiable – Distinction between activity and conditions – Whether application for extension notifiable – Whether effects of variation and of extension to be compared with original consent or effect of proposed development to be reconsidered – Whether effect of extension to be considered in light of proposed plan – Whether marketing and finance constitute progress towards implementing consent – Resource Management Act 1991, ss 125 and 127.

Southern Trading Co Ltd (STC), the second respondent, purchased land without notice of an agreement between the previous owner and the appellant body corporate to limit building heights. STC then obtained resource consent to construct a tower block of apartments. The height of the building was within the limits set by the district plan but outside the limits set by the agreement between the previous landowner and the body corporate. Under the operative plan two aspects of the proposal required consent: the dwelling units as a controlled activity and the car parking which required a discretionary consent. The application was granted on a non-notified basis. The consent was issued shortly before the proposed plan was notified. Meanwhile, another neighbour was concerned that those living in the tower block would object to noise from its activities. Agreement was reached that the tower block would be double glazed and noise-insulated. This necessitated air conditioning, which in turn necessitated design changes. In the meantime, the market had flattened and efforts to sell the apartments had not been as successful as expected. STC therefore applied for a variation under s 127 to allow the construction of two towers within the same building envelope with a reduction in the number of apartments, a reduction of parking spaces and an improvement in the view from the point of view of the body corporate. The variation application was not notified, on the ground that it was an application for variation to conditions only, and consent was granted. Six months before the expiry of the three-year consent, STC applied for an extension for another two and a half years. Consent was not sought from any affected party and the extension was granted despite apparent conflict with the proposed plan which had by then been notified. The body corporate sought judicial review of all three decisions.

Held: 1 The activity which was to occur within the building was the use that was to be made of it and was to be distinguished from the structure or fabric of the building itself. The building defined the space within which the activity was to take place and the manner in which it was to occur. The approved activity in this case consisted of the use of the defined space, the original building

envelope, for residential apartments. The details of the apartments, including their number, were conditions attached to the approval of the activity. A change to the number of apartments was therefore a change to a condition as long as the apartments were to be constructed within the original building envelope. Accordingly, the variation applied for was a variation to conditions and not to an activity in terms of s 127 (see paras [46], [47], [48], [49]).

2 The proper comparison required by s 127(3) in deciding that the effect of the variation was minor, was between the effects of the variation applied for and the effects which might occur if the proposed original development went ahead. The effects of the variation were to be considered only to the extent that they differed from those taken into account on the initial application. Regard was only required to a proposed plan, therefore, to the extent that the variation would have an adverse impact upon its objectives (see para [53]).

3 The change in market conditions which occurred during the process was capable of being a "change in circumstances". "Circumstances" encompassed all relevant matters and causes making a condition inappropriate or unnecessary. There was nothing in s 127 which required the "circumstances" to be limited to the amenities, the environment or the planning reasons for which the condition was originally imposed (see paras [55], [56]).

4 In considering whether there had been substantial effort made towards implementing the consent for the purposes of s 125(1)(b)(i), the council was entitled to take into account the negotiations with the other neighbours and the effort to market and sell the apartments and to raise finance (see paras [69], [70]).

Goldfinch v Auckland City Council [1997] NZRMA 117 at p 125 approved.

5 The adverse effects required to be considered under s 125(1)(b)(ii) were not any adverse effects of the activity itself, but of the proposed extension of time. These effects were not confined to the effects of the building itself, but could include, for example, prolonged uncertainty for those living and working in the vicinity. But an application for an extension was not an opportunity to reconsider the adverse effects of the activity for which the original consent was granted and the council had been entitled to conclude that no person was adversely effected by the extension of the period for implementation of the consent (see paras [72], [73], [74]).

6 Subsection 125(1)(b)(iii) which required that the effect of an extension on any plan be minor was concerned primarily with whether the grant of the extension would compromise the policies and objectives of a plan which had been amended or of a new plan which had been notified. It was important to ensure that while a proposed plan was under consideration its objectives were not undermined before it became operative. When an extension was sought in such circumstances therefore, there was no weighing exercise between the incoming and outgoing plans, the consent authority was required to assess the effects against the new plan independently, although some allowance had to be made for uncertainties still surrounding it. The council had erred in not considering the effects against the proposed plan independently as opposed to comparing the two plans. The decision to grant the extension would be set aside on that ground (see paras [77], [78], [79], [84], [85]).

Appeal allowed in part: cross-appeal dismissed.

Other cases mentioned in judgment

Bayley v Manukau City Council [1999] 1 NZLR 568 (CA).

Berkeley v Secretary of State for the Environment [2000] 3 WLR 420; [2000] 3 All ER 897 (HL).

GUS Properties Ltd v Blenheim Borough Council (Supreme Court, Christchurch, M 394/75, 24 May 1976, Casey J).

Katz v Auckland City Council (1987) 12 NZTPA 211.

Sutton v Moule (1992) 2 NZRMA 41 (CA).

Warbrick v Whakatane District Council [1995] NZRMA 303.

Appeal

This was an appeal by Body Corporate 97010 from the judgment of Randerson J reported at [2000] NZRMA 202 dismissing its application for judicial review of three decisions of the Auckland City Council taken under ss 125 and 127 of the Resource Management Act 1991 to allow variation and extension of resource consents granted to STC, the second respondent.

James Farmer QC, *David Chisholm* and *Robert Enright* for the body corporate.

William Loutit and *Padraig McNamara* for the Auckland City Council.

Richard Brabant and *Kitt LittleJohn* for STC.

Cur adv vult

The judgment of the Court was delivered by

BLANCHARD J. [1] Body Corporate 97010 appeals against a decision of Randerson J in the High Court at Auckland on 9 March 2000 [reported at [2000] NZRMA 202] refusing an application for judicial review of three decisions by the Auckland City Council under the Resource Management Act 1991 (the RMA). The decisions relate to a proposed high-rise residential development located on reclaimed land formerly occupied for railway purposes at The Strand, Parnell (the site). The appellant represents the owners of the Dilworth Terrace town houses which are situated on a nearby clifftop overlooking the site. The council is named as first respondent. The second respondent is the developer, Southern Trading Co Ltd (STC).

[2] In the first decision of which review was sought, dated 1 October 1997, the council granted STC a resource consent to erect a single 30 m high apartment block in a particular position on the site. In accordance with s 125 of the RMA, the consent was to expire unless given effect within two years. The expiry date was thus 1 October 1999. The consent was granted in relation to the council's operative transitional district plan (the operative plan).

[3] Eight days later, on 9 October 1997, the council gave public notice of a proposed district plan (the proposed plan). Under a rule in the proposed plan a height restriction of 15 m, instead of 30 m, would apply to the site.

[4] By the second decision, dated 26 January 1999, the council granted STC a variation of the original consent pursuant to s 127 of the RMA. The effect of the variation was to permit the erection of two 30 m high apartment blocks (the twin towers) on the one foundation but separated by a narrow gap. Both blocks would be entirely situated within the location (the building envelope) previously approved for the single apartment block. In total there would be considerably fewer apartments in the twin towers than had been proposed for the single tower block, with a consequential reduction in parking spaces.

[5] In the third decision, dated 12 May 1999, pursuant to an application made after the variation consent was given, the council granted STC a time extension under s 125 of the RMA until April 2002 for the implementation of its development, ie an extension of about two and a half years beyond the previous expiry date.

[6] The appellant says that the first two consents were invalid because they were not publicly notified. It further says that the variation consent should not have been granted. Lastly, it is contended that the decision extending the period for implementing the consent (as varied) is invalid because the council erred in law or could not reasonably have come to its decision. A focus of the appellant's arguments relating to the variation and the extension is the height limitation in the proposed plan, which has not yet become operative. STC cross-appeals, arguing that because of delay by the body corporate in commencing its proceeding it has been prejudiced and therefore relief should not be granted.

Background

[7] There was previous litigation between the body corporate and the New Zealand Railways Corporation as the then owner of the site. They entered into a compromise agreement in 1993 which provided for a graduated view shaft limiting the height of buildings on the site so as to preserve views from Quay Street *towards* the town houses. Of course the views from the town houses were also benefited, but that was not the purpose of the view shaft. The town houses are of some historical and architectural significance and it was thought undesirable that they be hidden from view by surrounding buildings. The height limits agreed were between 6 m and 15 m, with development being permitted up to a height of 30 m on a part of the site immediately adjoining The Strand. In addition, a triangular-shaped piece of land at the northern end of the site was to be subject to a height restriction of 9 m. The proposed development is partly on land subject to the 30 m height limit and partly on the triangular piece. This has been possible because, unfortunately, when the railways corporation sold the site to the Ngati Whatua Orakei Trust Board it omitted to ensure that a restrictive covenant protecting the arrangements which had been agreed was registered against the title. The trust board and those who have subsequently obtained interests in the land, including STC, purchased without being aware of the restrictive covenant and therefore are not bound by the provisions agreed to by the railways corporation. Hence the only controls over height are now those to be found in a district plan.

The original consent

[8] In its application dated 29 August 1997 STC applied for a land use consent for the construction of "an apartment building with 340 car parking spaces" and other facilities in accordance with specified architects' plans. Consent was sought for two options, one involving 224 apartments and 340 car parks, the other 242 apartments and 340 car parks. One hundred and ninety of the car parks were to be provided in the form of "95 stacked pairs" (meaning, we understand, one behind the other).

[9] The assessment accompanying the application noted that the building would be 30 m in height. A basement car park would be excavated to a depth of approximately 3 m over most of the site. Over a smaller area there would be a ground level car parking structure which would create a podium from which the tower apartment building would rise close to The Strand road frontage.

[10] Under the operative plan two kinds of resource consent were required: a controlled activity consent for dwelling units in the residential 9C zone and a discretionary activity consent, which was needed because 190 of the car parking spaces were to be stacked.

[11] The operative plan provided for a controlled activity consent application to be made without notice unless the council decided otherwise. The plan did not however dispense with the need to obtain approval from affected persons in accordance with s 94(1) of the RMA. The parking arrangements required a discretionary activity consent because there was a prohibition against stacked parking, but a rule permitted the council to grant exceptions to normal parking requirements where the safety and flow of vehicular and pedestrian traffic would not be unduly affected. The dispensation could be given for up to 80 per cent of the required car parking spaces.

[12] The appellant argues that the application for the original consent should have been publicly notified. Section 94 of the RMA states when notification of a resource consent application is not required. The provisions relevant to the arguments made in this Court are:

> **94. Applications not requiring notification** – (1) An application for –
>
> . . .
>
> (b) A resource consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:
>
> (c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if –
>
> (i) The activity to which the application relates is a controlled activity; and
>
> (ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.
>
> . . .
>
> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and –
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[13] This Court has observed in *Bayley v Manukau City Council* [1999] 1 NZLR 568 at p 575:

> "There is a policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, that the process is to be public

and participatory. Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power and in the interpretation of the section, however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular."

[14] In argument before us Mr Farmer QC, for the appellant, drew attention to the very recent decision of the House of Lords in *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420 at p 430 which, in a rather different legislative setting, takes a broadly similar approach to the participation rights of the public, "however misguided or wrongheaded its views may be".

[15] A report dated 25 September 1997 from Mr Appleyard, an assistant planner, to Ms Janine Bell, the council's manager, central area planning, who had delegated authority to make decisions under s 94, recommended that the application be dealt with on a non-notified basis. Mr Appleyard referred to s 94(1)(c) but, in making an assessment of the proposal, spoke in an apparently more general way of the purposes of s 94 and expressed the view, which is obviously referable to the words of subs (2), that "the adverse effect on the environment of the proposal will be not more than minor". His assessment included the car parking situation. He concluded that no person would be adversely affected and that no written approvals were necessary.

[16] Ms Bell endorsed on this report her decision that the application was to be dealt with on a non-notified basis "for the reasons given".

[17] The application was considered at a meeting of the planning fixtures subcommittee on 1 October and it was resolved:

> "THAT THE APPLICATION TO ERECT EITHER OPTION 1, 224 APARTMENTS OR OPTION 2, 242 APARTMENTS AT 86-100 THE STRAND BE CONSENTED TO UNDER SECTIONS 104 AND 105 OF THE RESOURCE MANAGEMENT ACT 1991 ON THE GROUNDS THAT THE ACTIVITY WITH APPROPRIATE CONDITIONS OF CONSENT WILL HAVE NO ADVERSE EFFECT ON THE AMENITIES OF THE NEIGHBOURHOOD.
>
> THIS CONSENT SHALL BE SUBJECT TO THE FOLLOWING CONDITIONS PURSUANT TO S 108 OF THE RESOURCE MANAGEMENT ACT 1991:
>
> (A) THE DEVELOPMENT SHALL BE IN ACCORDANCE WITH THE INFORMATION AND PLANS SUBMITTED BY PLANNING NETWORK SERVICES, DRAWN BY PATTERSON, REGISTERED ARCHITECTS, AUGUST 1997, EXCEPT WHERE AMENDED BY CONDITIONS OF CONSENT."

There followed reference to plan numbers and several pages of further conditions, including some relating to car parking, and advice notes.

[18] It was submitted in the High Court that, in accordance with what was said in *Bayley*, the council had erred in failing to treat the whole application as a discretionary activity. Randerson J rejected that argument. He said that there were no grounds for interfering with the view of the council's officer that the stacked parking proposal would comply with the criteria in the relevant rule

and that no person would be adversely affected by the granting of the resource consent in that respect. The parking arrangements would have "no off-site effects". Even if the discretionary activity application were refused, the Judge said at para [29]:

> ". . . the evidence is that, at worst, one of the residential apartment levels would have been converted to provide additional complying parking. There would be no effect on the size, shape, or location of the building on the site and it could not be said that consideration of the parking issue would affect the outcome of the controlled activity consent for the building as a whole."

[19] Secondly, the Judge said, the plan did not permit the council to require material changes to the form of the building, which complied with development controls for the site, and that it could not in this case require alteration of the shape or height of the building or dictate a materially different location on the site. He noted that the appellant's concern was with the height and bulk of the building, not its location on the site: "The Council had no power to prevent STC taking advantage of the development rights afforded for the site by the [Operative] Plan" (para [31]). Therefore, the Judge concluded, the council was entitled to consider separately each of the two resource consents. Because the council had no power to impose a condition about the height or bulk of the building or materially affecting its location, any adverse effects on the persons represented by the appellant could not have been addressed if the application had been notified. No purpose would have been served by requiring notification. Although the report did not refer explicitly to s 94(2), the Judge said that it in fact addressed the matters which the council was required to address under that provision.

[20] The appellant made essentially the same arguments in this Court. We agree with the Judge that in substance the council's officer did address s 94(2). We are not persuaded that Ms Bell failed to give consideration to the possibility of adverse effects on the environment. The report she endorsed did so, and said that they would not be more than minor, which was a clear reference to s 94(2)(a). There was ample basis for the council to reach the view that the car parking arrangements would not give rise to any adverse effects beyond the site.

[21] Mr Farmer also repeated the argument made to Randerson J that, in accordance with *Bayley*, the whole proposal should have been assessed for notification purposes as a discretionary activity. In *Bayley* it was said at p 580:

> "Section 94(1)(b) and the provisions of the council's proposed plan permit non-notification of such an application without written approval of affected persons but do not require the council to dispense with notification. (It 'need not be notified'.) Such a course may be inappropriate where another form of consent is also being sought or is necessary. *The effects to be considered in relation to each application may be quite distinct.* But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, *where there is an overlap*, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the

round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces." (Emphasis added.)

[22] The answer to Mr Farmer's submission lies in the words which have been emphasised. The effects of the car parking in this case were distinct in the sense that, unlike the staircases and decks in *Bayley*, the arrangements proposed for it had no consequential or flow-on effects on the matters being considered under the controlled activity application, as Randerson J noted in the passage from his judgment quoted above (in para [18]). There was in this case no overlap and therefore no need for a holistic approach.

[23] The appeal relating to the council's decision not to require notification of the original resource consent application must therefore be unsuccessful. In this Court there has been no challenge to its substantive decision to grant that consent.

The variation application

[24] STC began marketing apartments in its single tower block. But from early December 1997 it was facing a potential challenge to the granting of the resource consent from Ports of Auckland Ltd (POAL) which was worried that future residents in the apartments might be affected by activities at its nearby port (particularly, the noise those activities might make) and could seek legal restraint of those activities. STC gave POAL certain temporary undertakings, extending to February 1998, and thereafter seems to have put its development on hold pending resolution of the dispute. It also pursued the possibility of selling or leasing the site or using its building for a hotel. Lengthy negotiations were unsuccessful until POAL issued proceedings in June 1998. That brought matters to a head and the next month a settlement agreement was entered into. This required STC to change its plans to include non-opening acoustic glazing on the exterior of the building, which in turn necessitated installation of air conditioning for all areas which would be inhabited. It was agreed that a Land Information Memorandum would be registered on titles to the apartments so as to preclude purchasers from objecting to POAL's port activities.

[25] By October 1998 the twin tower building design was in contemplation. STC told its architects that it had been unable to achieve "the agreed sales threshold of 75% of apartments in the original scheme", and therefore it had decided not to proceed with the development as a whole. On 27 November 1998 the application to vary the resource consent was lodged in reliance on s 127 of the RMA:

> **127. Change or cancellation of consent condition on application by consent holder** – (1) The holder of a resource consent may apply to the consent authority for the change or cancellation of any condition of that consent (other than any condition as to the duration of the consent) –
>
> (a) At any time specified for that purpose in the consent; or
>
> (b) Whether or not the consent allows the holder to do so, at any time on the grounds that a change in circumstances has caused the condition to become inappropriate or unnecessary.
>
> . . .
>
> (3) Sections 88 to 121 shall apply, with all necessary modifications, to any application under subsection (1) as if the application were for a resource consent, except that section 93 (notification of applications) shall not apply if the consent authority is satisfied –

(a) That either –

(i) The adverse effect (other than any effect on any person whose written approval has been obtained in accordance with paragraph (b)) of the activity after any change or cancellation of the condition will continue to be minor; or

(ii) The degree of adverse effect (other than any effect on any person whose written approval has been obtained in accordance with paragraph (b)) of the activity is likely to be unchanged or decreased as a result of any such change or cancellation; and

. . .

(4) The exception in subsection (3) applies whether or not –

(a) Notification is required by a plan or proposed plan; or

(b) The application relates to a resource consent in respect of a . . . controlled, discretionary, or non-complying activity.

[26] The s 127 application sought to:

". . . change Consent Condition A stipulating that the development proceed in accordance with the information and plans submitted by Planning Network Services Limited and Patterson Partners Architects Limited. The amended plans involve the construction of two apartment towers on a common podium within the building profile of the approved development on the same site. The amended plans incorporate a total of 112 residential units and an associated 182 car parking spaces, tennis court and swimming pool, health gymnasium centre and extensive landscaping."

[27] The application stated:

". . . the current proposal is not materially different in character from the original development and requiring the development to proceed generally in accordance with the original plans is inappropriate given the changed circumstances."

[28] It was proposed that:

". . . Consent Condition A of the existing consent be amended to read as follows:

(A) The development shall be in accordance with the information and plans submitted by Planning Network Services, drawn by Patterson, Registered Architects, November 1998, except where amended by conditions of consent.

The relevant plans are dated November 1998 and referenced by Council as: PO/97/00131-2, November 1998, Sheets D.00 to D.07."

[29] The application was the subject of a report by the council's consultant, Mr Wren, dated 18 January 1999. The report noted that the proposal was "contained entirely within the envelope of the previous building apart from the fact that there will be now two lift wells and two spires which the applicant advises are optional." (No point was pursued on appeal about these features.) The assessment concentrated on the car parking arrangements, noting that the operative plan required 229 spaces, but only 182 were proposed to be provided. However, the proposed plan allowed a maximum of one car park per residential unit. (Obviously there was here a situation of unavoidable tension between the two plans, which the council would have to resolve.)

[30] The council's manager, transportation services, had advised that 80 spaces, including all stacked spaces, should be removed so as to comply with the proposed plan. Mr Wren was of the view, however, that the provisions of the proposed plan "do not effectively apply to this application which relates to a consent granted under the [Operative] Plan." The conclusions of the manager, transportation services, were however "useful for making a judgement about whether allowing a lessor [sic] number of car parks than required by the [Operative] Plan is appropriate in this case".

[31] Addressing the statutory need for a change of circumstances (s 127(1)(b)), the report said:

> "The applicant states in the application that the change of circumstances requiring the change of condition relates to the litigation that has taken place between the applicant and the Ports of Auckland Ltd (POAL) concerning noise mitigation measures on the proposed building. The applicant states that the settlement reached with the POAL has meant a design review has had to take place.
>
> The applicant has also stated that the design delays experienced as a result of the litigation have delayed the project and the market has shifted to a different type of apartment.
>
> It is considered that the litigation and subsequent re-design of the building to cater for the requirements of the POAL have resulted in a legitimate change of circumstance. This change has meant that a smaller building is now appropriate in the eyes of the applicant and a condition requiring a larger building is no longer appropriate."

[32] Mr Wren considered that, as the building was now significantly smaller, the effects would also be reduced. He referred to the lesser amount of traffic and the reduction in the "visual extent of the buildings . . . from some view points, especially from The Strand."

[33] POAL had consented to the variation. In view of this, and because the proposed building was smaller and no one would be adversely affected by the change of condition, it was considered that the application could be dealt with on a non-notified basis. Ms Bell endorsed her approval on the report.

[34] On 26 January 1999, the planning fixtures subcommittee approved the change of condition subject to the removal of two car parks. All other conditions (which included the expiry date of 1 October 1999) were to continue to apply.

[35] The appellant submitted, both in the High Court and in this Court, that the twin tower proposal should not have been dealt with under s 127, saying that:

(a) the new plans were for an entirely different building or buildings and represented a new development which required a fresh application under s 88, notified under s 93;

(b) there had been no "change of circumstances" and the building originally proposed had not become "inappropriate or unnecessary" in terms of s 127; and

(c) the council had failed to have regard to the proposed plan as required by the importation into s 127(3) of s 104, and particularly s 104(1)(e), which requires that in considering an application the consent authority must have regard to any relevant objectives, policies, rules, or other provisions of a plan *or proposed plan*.

[36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks consent to an activity which is materially different in nature is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent: "The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow" (para [73]). From none of this did we understand counsel for the appellant to dissent.

[37] Randerson J said that the consent authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was a fundamentally different activity or one having materially different adverse effects a consent authority "may decide the better course is to treat the application as a new application" (para [74]), particularly where it is sought to expand or extend an activity with consequential increase in adverse effects. Here the number of apartments was reducing and they would be located entirely within the profile of the original building. Adverse effects would remain but would be less. The Judge could see no grounds for review of the council's decision to proceed under s 127.

[38] Randerson J said that s 127(3) creates a separate regime for dispensing with notification of variation applications which excludes s 94. It was, he said, the effects of the change, not of the activity itself, which are relevant:

> "The appropriate comparison is between any adverse effects which there may have been from the activity in its original form and any adverse effects which would arise from the proposal in its varied form. If the effects after variation would be no greater than before, then there is no requirement for written approvals to be obtained from persons who may be affected by the activity but not by the change to it" (para [83]).

[39] As it was accepted by the appellant that the adverse effects were less, STC was entitled to have the application treated as one not requiring public notification.

[40] The next argument addressed by the Judge was that the council should have considered the proposed plan and its maximum height limit. However, he accepted the present respondents' argument that STC was already authorised to construct the apartment building in the form originally approved and that s 9 permitted it to use the land in that way notwithstanding that it contravened any operative or proposed plan. Section 9(1) reads:

> **9. Restrictions on use of land** – (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is –
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by section 10 or section 10A.

[41] The Judge observed that a land use consent is of unlimited duration unless a specific term is specified in the consent (s 123(b)). Section 9(1) protects the consent holder, who is permitted to continue to exercise the rights

expressly allowed by the resource consent notwithstanding any subsequent plan changes. Therefore on a s 127 application the starting point is the existence of the present right defined by the resource consent which it is sought to vary. In the Judge's view:

> " . . . the legislature could not have intended that a subsequent plan provision could be used to cut down the right preserved by s 9 to continue to use the land in the manner authorised by the original consent. Where the variation sought may, properly be considered as falling within the scope of the original grant, the consent authority has no power to apply the proposed plan in a way which would limit the consent holder's ability to exercise the right in the terms originally granted" (para [90]).

[42] Randerson J was satisfied that the variation application did not take the proposal beyond the scope of the activity for which the consent was originally granted and that the council was not entitled to apply the provisions of the proposed plan in a way which would restrict the exercise of the rights originally granted.

[43] The Judge was also of the view that the council was entitled to consider that there had been a change in circumstances making the condition inappropriate or unnecessary. The dispute with POAL had led to a delay during which time changes in the market led to STC's conclusion that the proposal in its original form was not viable. The larger building was therefore no longer appropriate. It followed that a condition which required conformity with the plans for the larger building was no longer necessary or appropriate.

[44] We are not persuaded by the appellant's arguments that the council could not approve a variation under s 127 in this case. A resource consent is granted in respect of an "activity". This term is not defined in the RMA but in *Bayley* (at p 570) this Court said that in general it appears to have the same meaning as "use". A condition in relation to a resource consent includes a term, standard, restriction and prohibition (s 2). A condition is thus a qualification to a consent to a particular use.

[45] Section 127 permits an alteration to a condition but not an alteration to an activity. The question of what is an activity and what is a condition may not be clear-cut and will often, as the Judge recognised, be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent. Mr Brabant pointed out to the Court that the exact wording may, as in this case, have been supplied by a planner who is not a lawyer and who has not really addressed the distinction.

[46] It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in different ways. Take, for example, the restaurant in *Warbrick v Whakatane District Council* [1995] NZRMA 303. It seems to us that the activity was the carrying on of a restaurant. The restriction on the hours of opening was simply a condition imposed by the terms of the consent upon the conduct of the activity. Thus the approach taken in *Warbrick* was, it seems to us, in error, although it may well have been that the result was justified because of the adverse effects of varying the opening hours.

[47] To return to the present case, an activity to occur within a building is the use which is to be made of it and should be distinguished from the structure or fabric of the building itself. The building does, however, define the place where the activity will occur and the manner in which it may occur (in the present instance in separate apartments).

[48] The approved activity in this case consisted of the use of a defined space (the original building envelope) for residential occupation in separate units or apartments. The exact shape and dimension of the units in which that activity could be carried on, including their number, was delimited by the conditions attaching to the approval of the activity. A change, for example, in the number of apartments is therefore merely a change to the conditions, so long as those apartments are to be constructed within the same overall space or envelope as was delineated by the original building plans. Accordingly the changes proposed in this case were changes to conditions within s 127 notwithstanding that a different (twin tower) building emerged. This did not of course mean that the applicant was free to seek under that section any necessary approval to reposition the building on the site or to change its use to something other than residential apartments. That would have involved a change in the activity, in the former example, as to such part of the site as was not approved by the original consent for the locating of the single tower building. But within the building envelope changes could be made to the features and dimensions of the building and its component parts – apartments, parking spaces and common areas – including the creation of separate structures (if indeed the twin towers are to be viewed as such).

[49] Mr Farmer submitted that this could not be a mere variation because further discretionary consents were incidentally required under the operative plan relating to vehicular use and car parking – Randerson J had held that the application for the variation had to be taken to have embraced all necessary consents, which could be taken to have been implicitly granted. Counsel argued that this was contrary to s 9(1)(a) which protects only such activities as are *expressly* allowed by a resource consent.

[50] We reject this argument. The exact form of an application is not determinative although it must suffice to put before the consent authority the matters which it is required to consider and decisions must be made on them. An application can include incidental matters which may technically require separate consents. The consents given will be valid notwithstanding deficiencies in the form of the application, provided that appropriate procedures are followed, including notification where necessary, and the substance of the matter is properly considered. It is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. Substance is to be preferred to form (*Sutton v Moule* (1992) 2 NZRMA 41 at p 47).

[51] It is plain that the council officer had regard to the parking situation which had already been considered when the original consent was given. The reality was that what was sought in this respect was a variation of the car parking conditions. There was seen to be a need to strike a balance between the operative and proposed plans, and obviously, as there had been no off-site adverse effects detected in relation to the original proposal's car parking arrangements, there was going to be none from the overall reduction in apartments and car parks. The council rightly saw no need for notification of the application so far as it related to car parking and appreciated the need to

strike a balance between the conflicting requirements of the two plans. Other things being equal, it would be ridiculous to set aside the variation consent on the basis of the technicality that there should have been separate applications. Where the subject-matter was dealt with when the original application was considered and is incidental to the subject of the variation, the council can properly deal with it under s 127.

[52] In his submissions in this Court, Mr Farmer did not appear to dispute the council's assessment that, as against the operative plan, the adverse effect of the activity after the proposed change of condition (ie to the dimensions of the building) would continue to be minor and that the degree of adverse effect was likely to be unchanged or, as the council found, reduced. What was contended was that a comparison had also to be made, as required by s 104(1)(d), with the proposed plan. It was said that the original consent does not protect the consent holder if it elects to seek a variation of a condition, no matter how minor it may be. Counsel went so far as to suggest that the protection is not available even in circumstances where the adverse effect of the original (consented) proposal is diminished. Mr Farmer said that even if the height of the building had been reduced to something less than 30 m but more than 15 m, the original consent would provide no protection in terms of s 9(1). It is wrong, said counsel, to compare the adverse effects which would be present if a variation were to be granted and implemented against those which would exist if the unexercised original consent were to be exercised; the proper comparison being said to be with those effects which would occur from activities which can be carried on as of right.

[53] Again, we do not agree. Sections 88 to 121 apply to applications under s 127(1), but "with all necessary modifications" (subs (3)). Without such modifications there would be little utility in s 127 where, during the period allowed by a resource consent for its implementation, the planning context had changed. The section itself does not indicate any such limitation. A consent holder whose plans had changed might as well begin again and make a fresh application under s 88 if the existence of the original consent provided no protection against a more restrictive approach taken or foreshadowed by a new plan or proposed plan. We are satisfied that the protection afforded by s 9(1)(a) to a resource consent is intended to extend to an applicant under s 127 and that, unless there is also an extension sought for the period of implementation, effects of a variation of condition are to be considered only to the extent that they differ from those which have been taken into account in the granting of the original consent. Regard to a proposed plan is therefore required only to the extent that the variation would have an adverse impact upon its objectives etc. The proper comparison under subs (3) of adverse effects is between those which might occur if development proceeded pursuant to the original consent and those which may occur as a result of the variation. In the present case the council was properly able to consider that there would be no greater impact on the proposed plan. Indeed, there would be a reduction in the effect upon that plan of an implementation occurring during the original two-year period.

[54] The remaining matter relating to the s 127 application is the appellant's argument that there had not been any "change in circumstances" causing a condition (compliance with the original building plans) to become "inappropriate or unnecessary." Mr Farmer submitted that the POAL litigation did not cause the building plans to become inappropriate or unnecessary. That is certainly correct, but the circumstance in question was not the litigation or

the settlement which brought it to an end, but the change in market conditions which occurred during the period of delay caused by the litigation. That, it seems to us, is the justification which STC, a little clumsily, put to the council and which the council accepted. Mr Farmer recognised this, but said that the council was wrong to rely upon STC's subjective belief that market conditions had changed; and that a change in market conditions is, in any event, not a "circumstance" for the purposes of s 127 because it has nothing to do with the amenities or the environment, to which s 104(1)(a) directs attention – there must be a nexus, counsel said, between the *planning* reasons for which the condition was originally imposed and the change in circumstances.

[55] We can, like the Judge, find nothing in s 127 which compels such a restrictive interpretation of relevant circumstances. The requirement that the council must have regard to the matters listed in s 104 does not limit the matters which may be taken into account, as s 104(1)(i) itself demonstrates ("Any other matters the consent authority considers relevant and reasonably necessary to determine the application.") If such a restriction had been intended one would have expected s 124 to say so directly. "Circumstances" is a word which encompasses all relevant matters and causes making a condition inappropriate or unnecessary. If the market for a particular kind of apartment has diminished, that is capable of being a "change of circumstances". "Inappropriate" does not mean merely "inappropriate in planning terms".

[56] STC asserted to the council that there had been a change in market conditions. It has not, even now, been suggested for the body corporate that STC was wrong in that assessment. Therefore no basis has been provided for the argument that there was in fact no change in circumstances. Whilst it might have been preferable for the council to require further evidence concerning the market, there is no reason to consider that its failure to do so led it to grant a variation consent without the requisite factual basis for the operation of the section being present.

[57] The appeal in relation to the variation consent also fails.

Extension

[58] Section 125(1) provides:

> **125. Lapsing of consent** – (1) Subject to sections 357 and 358, a resource consent lapses on the expiry of 2 years after the date of commencement of the consent, or after the expiry of such shorter or longer period as is expressly provided for in the consent, unless –
>
> (a) The consent is given effect to before the end of that period; or
>
> (b) Upon an application made up to 3 months after the expiry of that period (or such longer period as the consent authority may fix in accordance with section 37), the consent authority fixes a longer period upon being satisfied that –
>
> (i) Substantial progress or effort has been made towards giving effect to the consent and is continuing to be made; and
>
> (ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval; and
>
> (iii) The effect of the extension on the policies and objectives of any plan is minor.

[59] It will be observed that the section does not provide for any notification of an application for an extension.

[60] Some two weeks after receiving the variation consent STC's planning consultant, Planning Network Services Ltd, wrote to the council reminding it of the duration of the resource consent and saying that it had been an oversight that an extension had not been sought along with the variation. It asked for a three-year extension. The council replied requiring a more formal application which was made on 11 February 1999. That application referred to the delay resulting from the POAL dispute and to the change in market conditions. It said that since the variation consent had been received STC had been actively marketing the development and had begun to mark out the site and buildings. The 1 October expiry date was clearly "insufficient time within which to make substantial progress towards giving effect to the consent". A two and a half-year extension was sought:

> "The settlement with the PoAL and the fact that the applicant began extensively marketing the development the day after the variation was approved demonstrates that there has been continuous and substantial effort on the part of the applicant to progress this project. It is unfortunate that an extension to the timeframe was not sought at the same time the application for the variation was lodged and also that the expiry date was not highlighted at the time of Council processing that application. Despite this, the circumstances do not reflect any lack of effort or integrity on the part of the applicant and it would seem reasonable for Council to exercise its discretion in favour of the applicant in this matter."

[61] Later in the application, after a submission that the effect of the extension on the policies and objectives of the operative plan was no more than minor, it was said that STC's development plans had not been assessed under the proposed plan because it "had not been publicly notified when the original consent was lodged/approved" and it was "therefore not relevant to this proposal." But the council nevertheless sought an assessment against the proposed plan, which STC provided.

[62] A report on the application was made by Ms Borich, a senior planner. On the question of whether there had been substantial progress or effort towards giving effect to the consent she commented that it was "generally accepted that while little or no construction may have been carried out on the site, as long as the consent holder has been doing their best efforts to get the work completed this can be taken into account." The settlement with POAL demonstrated that best efforts had been made. The "extensive marketing" of the project following that settlement made it evident that substantial effort or progress was continuing to be made. Ms Borich noted that the extension would not lengthen the period of construction, only delaying its timing. The additional two and a half years seemed to her a reasonable period of time within which to undertake the project and to give the neighbours some certainty about time frames. She expressed the view that there were no "other persons" who would be affected by the granting of the time extension. As she had earlier referred to POAL and to parties involved in other construction projects in the vicinity of the site, as well as to neighbours, she seems to have been saying that no one would be adversely affected.

[63] Ms Borich then turned to the question of the effect of the time extension on the policies and objectives in any plan (subs (1)(b)(iii)). She said that the proposal was not contrary to those of the operative plan. She then examined it

in relation to the proposed plan, referring to several of its objectives and policies. With apparent awareness that s 125 does not directly require measurement of the effect of the extension on any rule of a plan and that the height restriction is to be imposed by a rule of the proposed plan, Ms Borich observed that the method for achieving the policies in that plan is generally by applying building height and floor area ratio restrictions and requiring resource consent applications to be assessed against design guidelines. She then assessed the effect on the proposed plan in the following way:

> "The applicant states in the application that the development includes extensive areas of landscaping and amenity within the site and a high standard of architectural design of the buildings themselves. The proposal is located some distance from the railway station building. The building complies with the special height control for the Museum and is located outside the control for the Dilworth Terrace houses. A comparison between the provisions of the Operative District Plan shows that it allowed buildings up to 30 metres in height which were also subject to a height in relation to boundary control, and a floor area ratio control. The proposal achieves a height of 30 m. The Proposed District Plan has a 15 m height limit and a maximum floor area ratio of 2.5:1. The Proposed District Plan parking provisions differ from the Operative District Plan for this area. The Proposed plan provides for a maximum of one carpark per residential unit. The proposal incorporates 182 carparking spaces for 112 units. The proposal does not comply with the height and parking provisions of the Proposed District Plan. As these provisions are subject to submissions which have yet to be heard, greater weight should be given at this stage to the provisions of the Operative District Plan which the original proposal was assessed against. Given this I consider that the effect of the time extension would be no more than minor on the policies and objectives of the Transitional and the Proposed District Plans."

[64] Ms Bell endorsed her approval on the report. There was a hearing on 12 May 1999 before three councillors appointed as Planning Commissioners. STC's consultant planner, Mr Warren, made submissions in which he said that work towards construction was progressing at pace but that it had been thought prudent to seek an extension at that time rather than wait until the consent expired.

[65] The same day the Commissioners resolved to approve the application, repeating as one of the grounds for doing so one of the recommendations in the report prepared by Ms Borich:

> "Given the statutory infancy of the Proposed Plan whose parking and height provisions for this site are subject to submissions which have yet to be heard greater weight should be given at this stage to the provisions of the Operative District Plan for which the effect of the time extension would be no more than minor and does not cast doubt over the policies and objectives of the Proposed District Plan."

[66] In the High Court Randerson J heard a submission that STC had misrepresented its position to the council but he concluded that the council was in fact aware of all the factors, any misinformation having been corrected in Mr Warren's evidence to the Commissioners. He accepted STC's submission that the Commissioners were not misled either about the proportion of the apartments in the development that had been sold to that time or about the

position relating to construction. The Judge said that Mr Warren's evidence had been supported by affidavit evidence before him demonstrating that at 12 May 1999 the company had sold 64 per cent of stage one of the development based on value or 73 per cent of the total number of units available in that stage (one of the twin towers). By that date, the Judge said, STC had sold 41 units for a total value of over $12.5m. Mr Warren's evidence had made it clear that construction contracts had still to be let.

[67] In our view Randerson J was correct in addressing the issue of alleged misrepresentation by STC to the council as a factual matter. Having considered the evidence and the appellant's submissions on this point, we agree with the Judge that the council does not appear to have been misled as to the facts in any material respect.

[68] The Judge held that under s 125 it is not necessary to show that there has been continuous progress or effort. While continuity is required, there may be reasonable interruptions which do not break the overall picture of continuing towards the end in view. While no physical progress on site had been made, the council was entitled to take into account the threat of proceedings which had effectively prevented STC from continuing with the development until the risk of litigation with the port company was removed. The evidence showed that there had been a change in market demand which caused STC to review the position and explore other possible uses of the site until it had concluded by the end of September 1998 that the apartment building in its original form could not realistically proceed due to lack of demand. Shortly afterwards, said the Judge, the plans were redrawn and the variation application was lodged.

[69] Randerson J said that the council was entitled to take into account the practical and economic realities of constructing and completing a major development of this type, including fluctuations in market demand and the need to raise finance. A minimum level of sales was required before finance could be obtained and construction contracts could be let. In these circumstances the council was entitled to treat the preparation of plans and the marketing of the apartments as progress or effort towards giving effect to the consent. It was significant that at the date the application for extension was considered STC had spent over $600,000 on the project (other than land cost) and had achieved the level of sales mentioned. The Judge also referred to the new marketing campaign after the variation was approved, which had achieved an average of $1m in sales per month. He considered too that the council was entitled to treat the variation application as a step towards the implementation of the consent originally granted. Bearing in mind the scale of the project, the funding method adopted, the progress actually made and all the relevant circumstances, Randerson J was satisfied that the council could reasonably have concluded that substantial progress or effort had been made towards implementing the consent and was continuing to be made.

[70] Again, we agree with Randerson J that, for the reasons he gave, it was open to the council to conclude that there had been substantial effort, and, more than that, arguably some substantial progress – in achieving sales off the plans – directed towards giving effect to the consent (as varied). We adopt the approach to s 125(1)(b)(i) of Morris J in *Goldfinch v Auckland City Council* [1997] NZRMA 117 at p 125. The council could properly take the view that there was not the kind of break in continuity which was one of the fatal problems for the developer in *GUS Properties Ltd v Blenheim Borough Council*

(Supreme Court, Christchurch, M 394/75, 24 May 1976, Casey J). A lack of substantial "progress" is also no longer of the same significance now that substantial "effort" can be enough, provided it is directed to the end of giving effect to the consent.

[71] The council's view on the matters to be considered under s 125(1)(b)(i) was one which it could rationally take. STC's effort to avert litigation with POAL was an endeavour to advance the implementation of the resource consent it held. So was the application to vary the condition of that consent in light of market changes. So too were the marketing endeavours which had begun once the twin tower design had been decided upon. The sales levels in terms of percentage of apartments and prices were significant, even if confined to one tower.

[72] Turning to s 125(1)(b)(ii), the Judge said that it is not concerned with the adverse effects of the activity itself but with the adverse effects of the extension of time to give effect to the activity authorised by the resource consent. The focus of the inquiry under s 125 is, he said, upon the effects of the grant of the extension which include, in the case of a construction project, the effects of that construction taking place at a later time than originally envisaged. It was not submitted to him that the delay in the time of construction would have any adverse effect. The Judge accepted, however, that the effects of the extension are not confined to construction effects:

> "For example, the extension sought may be such as to give rise to unacceptable uncertainty for those living or working in the vicinity or there may be changes to the physical environment or to activities in the vicinity since the grant of the original consent which require consideration when application is made under s 125. Where such changes have occurred, a consent authority may be justified in concluding that the grant of the extension would adversely affect other persons. However, the focus of the inquiry still remains on the grant of the extension. Effects which would have occurred had the consent been given effect to within the statutory period of two years (or such other period as may be specified in the consent) are to be disregarded. An application for extension is not an opportunity to revisit the effects associated with the original grant except to the extent that they be necessary background to the effects of granting the extension" (para [141]).

[73] It had not been suggested that there had been any changes to the physical environment or the nature of activities in the area, nor did the length of the extension create unacceptable uncertainty. It had been submitted to the Judge that the body corporate would be adversely affected by the grant of the extension because, if it were not granted, then STC would either have to apply for a fresh consent (which would likely be notified) or not proceed with the activity. However, he said that while it was true that strategic advantage would accrue to the body corporate if the application were declined, the RMA was not concerned with that type of effect. It had not been shown to him that the council erred in concluding that no persons would be adversely affected by the extension of time.

[74] We agree so completely with the Judge's views about what effects are to be taken into account under s 125(1)(ii) that we do not find it necessary to prolong a lengthy judgment by restating them. An extension application is not an opportunity for the council to consider again the adverse effects on neighbours and other persons of the activity for which it granted the resource

consent. In relation to such persons it is confined to the adverse effects of the extension of the period for implementation of the consent. Here the council could properly conclude that no person was adversely affected by that. Any strategic advantage to the body corporate was something the council was not able to take into account.

[75] The final matter is the very important issue of the council's approach to s 125(1)(b)(iii), which requires the consent authority to be satisfied that the effect of the extension on the policies and objectives of any plan is minor.

[76] Subsection (1)(b)(iii) appears to have been enacted to give statutory confirmation of the philosophy found in the following passage from the Planning Tribunal's decision in *Katz v Auckland City Council* (1987) 12 NZTPA 211 at p 213:

> "There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in the light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary. Sections 70 and 71 [now ss 125 and 127] of the Act give legislative recognition and form to these matters of policy, which in the end do but recognise that planning looks to the future from an ever-changing present."

[77] Thus, if permission is sought to extend the time limit for implementing a consent, s 125 requires the council to consider whether the planning situation has altered since the resource consent and, if so, whether, in the light of that changed situation, allowing the consent to be implemented after the expiry of the time limit will affect the policies and objectives of any plan. *Any* plan includes the plan in relation to which a consent was originally granted (unless it has already been replaced by a new operative plan). But the original plan is highly unlikely to be affected to any greater extent unless it has subsequently been amended. Therefore it must be the case that the concern of s 125(1)(b)(iii) is with whether the grant of an extension will compromise the policies and objectives of a plan which has been so amended, or, as in the present case, those of a new plan which has been notified since the original consent.

[78] The new plan or amendment may necessitate an entirely new appraisal of the development, because what was considered appropriate in the former planning context may have thereby been rendered inappropriate. It is important for the council to ensure that the granting of an extension while a proposed plan is under consideration does not preempt what the plan is proposed to achieve by undermining its objectives and policies before it has become operative. Although as a result of the necessary process of public consultation those objectives and policies may be amended or even discarded altogether, it is meanwhile not to be assumed that this will occur.

[79] It follows therefore that when a consent authority comes to consider an extension application in circumstances where, since the original consent, a proposed plan or an amendment to an operative plan has been announced, it is

not engaged in a weighting exercise as between outgoing and incoming plans (as it is under s 104(1) where it may be appropriate to give decreasing weight to the outgoing plan as the process advances towards the moment when the proposed plan will become operative, or when s 19 has operation in respect of a particular feature). In such circumstances, when an extension is sought the consent authority is required to assess all the features of a resource consent application against both operative and proposed plans.

[80] When the consent authority considers a variation application under s 127 it does so on the basis that the decision made under s 105 has already assessed the s 104 considerations and has contemplated implementation within a period which has not expired. Therefore, as this judgment has already indicated, the assumptions underlying the original consent have not altered: it was intended that the consent could be implemented within the period despite the possibility of the arrival of a new plan. But, if consent is sought under s 125 for implementation *after* the period contemplated by the consent, the position is quite different. It was not originally assumed that the developer would be able to proceed after that relatively limited period notwithstanding any change to the planning context. If the developer later seeks an extension it accordingly faces a renewed overall assessment of the effects of its proposal against a new plan (or an amendment to the plan in respect of which the consent was granted). That is not appropriately an exercise of weighing the proposed plan against the operative plan. The effect on the new plan must be considered independently, although some allowance can be made for uncertainties still surrounding it.

[81] Randerson J appeared to recognise this. He said at para [146]:

> "**[146]** It is common ground that the Council was obliged to consider what impact the grant of the extension would have on the objectives and policies of the Proposed District Plan. This is a slightly different exercise from 'having regard to' the provisions of a plan or proposed plan under s 104(1)(d). The consent authority retains a discretion under that section as to the weight it will accord to a proposed plan in the circumstances of the case. However, under s 125(1)(b)(ii), the consent authority must be 'satisfied' that the effect of the grant of the extension on the policies and objectives of any plan (operative or proposed) is minor."

(The reference to (b)(ii) is an obvious error for (b)(iii)).

[82] He then rejected the argument that the council was not obliged to consider the effect on the 15 m height limit in the proposed plan, rightly saying that this was to take an unduly narrow view of s 125(1)(b)(iii) because the rules in that plan are the means by which its objectives and policies are implemented and that, to the extent that the rules give substance to and define the objectives and policies, they ought to be considered.

[83] But where we respectfully part company from the Judge is in his conclusion that the council properly considered this question. Having, as noted, distinguished the position from that under s 104(1)(d) where account can legitimately be taken of the imminent disappearance of an operative plan, the Judge referred to Ms Borich's assessment that greater weight should be given to the operative plan. But he does not seem to have appreciated that in this respect Ms Borich was misdirecting herself, and therefore the council when it relied upon her report, by according "greater weight" to the operative plan because of the "statutory infancy" of the proposed plan.

[84] For the reasons already given, we consider that in approaching s 125(1)(b)(iii) in this way the council erred in law. It should have addressed the

effect of the extension on the policies and objectives of the proposed plan without comparing that plan with the operative plan. The developer was seeking to proceed with its development at a time beyond that originally fixed for implementation. In that situation the council had to consider how the development might compromise the new plan. It was entitled to take into account the possibility that the policies and objectives, and the height limit by which they were intended to be achieved, might not survive intact when the plan became operative, but it was not appropriate to give the operative plan greater weight and on that basis to say that the effect on the new plan was no more than minor. We agree with the submission of Mr Chisholm, who argued this part of the case for the appellant, that the assessment needed to be made independently of the operative plan, not by a process of weighting. Ms Borich's report reveals no identified basis on which any real weight was given to the proposed plan.

[85] We have therefore concluded that the council's decision to extend the period for giving effect to the consent was not properly made. Mr Brabant accepted that, if this were the view of the Court, he could not say that relief should be withheld because of any delay by the body corporate after the extension was granted. It was unaware of the extension application and of the council's decision under s 125 until about two weeks before this proceeding was commenced. STC's cross-appeal therefore fails.

Result

[86] We allow the appeal in relation to the council's decision to grant the s 125 extension, grant judicial review of that decision and set it aside. It will be for STC to consider whether it will ask the council to revisit the application. In all other respects we dismiss the appeal. We also dismiss the cross-appeal.

[87] In circumstances in which the appellant has succeeded in part only, it is awarded costs of $2000 against each respondent ($4000 in total) together with its reasonable disbursements, including travel and accommodation costs of counsel, as fixed by the Registrar of this Court. The disbursements are to be borne equally by the respondents. Costs in the High Court are to be fixed in that Court in light of this judgment.

Appeal allowed in part: cross-appeal dismissed.

Solicitors for the body corporate: *Kensington Swan* (Auckland).
Solicitors for the Auckland City Council: *Simpson Grierson* (Auckland).
Solicitors for STC: *Martelli McKegg Wells & Cormack* (Auckland).

Reported by: Bernard Robertson, *Barrister*

Tauranga Environmental Protection Society Inc v Tauranga City Council

High Court Tauranga CIV-2020-470-31; [2021] NZHC 1201
3, 4 September 2020; 27 May 2021
Palmer J

Land use consents — Independent hearing commissioners decided to grant consents subject to conditions to re-align electricity transmission line to Transpower — Ngāti Hē and Marae opposed Transpower's proposal based on significant adverse effects to areas of cultural value — Environment Court affirmed commissioners' decision because proposal was more appropriate than continuation of status quo — Appeal to High Court — Ngāti Hē's opposition determinative of question of significant adverse impacts — Environment Court erroneously adopted "overall judgment" approach — Proposal and status quo were among available alternatives, but were not exhaustive thereof — Environment Court erred in failing to carefully analyse and apply hierarchy of planning instruments to proposal — Māori Values of Outstanding Natural Features and Landscapes (ONFL) — Bay of Plenty Regional Coastal Environment Plan (RCEP) — New Zealand Coastal Policy Statement (NZCPS) — National Policy Statement on Electricity Transmission (NPSET) — Resource Management Act 1991, part 2.

Ngāti Hē is a hapū of Ngāi Te Rangi. Much of Ngāi Te Rangi's land was confiscated for settlement, but some of it was later returned. The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. The Maungatapu Marae (the Marae) of Ngāti Hē, also called Opopoti, is on the northern tip of the Maungatapu peninsula. Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland. In 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition. In 1993, Transpower (the state-owned enterprise that succeeded to the Ministry of Works) undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of the state highway, which enabled the A-line to be removed. That "B-line" was constructed in 1995, but the A-line has not yet been removed.

The condition of poles 116 and 117, located in Te Ariki Park, were deteriorating and the poles needed to be replaced. Tower 118, situated in Rangataua Bay, was due for major refurbishment in the next 10 years. Transpower developed a realignment proposal that would remove poles 116 and 117 and tower 118 from Rangataua Bay. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. The proposal was initially supported by Ngāti Hē and the Marae, but once they realised the size, nature and location of the new pole 33C, directly adjacent to the entrance to the Marae, they opposed it. In 2017, Transpower applied for the required resource consents for the proposal from the

Tauranga City Council and the Bay of Plenty Regional Council (the Councils). In 2018, the Councils' independent hearing commissioners jointly decided to grant land use consents to realign the A-line, subject to various conditions.

The Tauranga Environmental Protection Society Inc appealed to the Environment Court. The Environment Court refused the appeal and amended the conditions of consent. The Environment Court concluded that neither it nor the Councils had the power to substantially alter Transpower's proposal, or to require any third party to participate in the proposal. It found that the proposal was a single one and its elements should be considered together, and that the positive effects of removing the existing A-line were significantly greater than the adverse effects in intensity and scale arising from the proposal. In such circumstances, the Court concluded that, in so far as no possible outcome would be wholly without adverse effects, the proposal was more appropriate overall than the continuation of the status quo. TEPS, supported by the Maungatapu Marae Trustees from Ngati Hē, appealed from the decision of the Environment Court to the High Court. At issue was whether the appeal should be allowed.

Held: (allowing the appeal)

(1) The Environment Court did not commit an error of law when it considered the effects of removing the A-line and construction of the new line in a "bundled" way because the two elements of the proposal were integrally related (see [35]).

(2) The Environment Court erred in law because, although it accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL, it incorrectly refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis", which later conclusion was not supported by the evidence (see [59], [60], [61], [62]).

(3) The Environment Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē, but when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not, because Ngāti Hē's view is determinative of those findings (see [65]).

(4) A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed and, where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to part 2 of the Resource Management Act 1991 (RMA) is required (see [79]).

(5) The Environment Court erred because it did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal, but rather merely stated that the planning instruments contain "relevant objectives and policies to which we must have regard", which was effectively the application of an erroneous "overall judgment" approach (see [87]).

(6) The RMA envisages that planning documents may (or may not) contain "environmental bottom lines" and "cultural bottom lines" that may determine the outcome of an application, which is why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment" (see [93], [94]).

(7) Consistent with its overall judgment approach, the Environment Court did not sufficiently analyse or engage with the meaning of the provisions of the planning instruments or apply them to the proposal (see [118]).

(8) It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue (see [125]).

(9) Having regard to the conclusion that, as a matter of fact and law, the proposal would have a significant adverse effect, the "bottom lines" in Policies IW 2 and NH 4

of the RCEP respectively may be invoked, such that whether the "cultural bottom lines" in the RCEP were engaged depends on whether the "practicable", "possible" and "practical" thresholds (set out in IW 2 and NH 4 Policies of the RCEP) are met (see [129], [130]).

(10) The practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application, such that the Environment Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP (see [143]).

(11) The Environment Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal, such that it erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all (see [146]).

(12) The status quo was one of the alternatives that Transpower, and the Court, considered, but it was not a matter of preferring the proposal to the status quo; rather, it law, it was a matter of whether the proposal was lawfully available, given the alternatives (see [152]).

(13) It would be desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the identified questions about the alternatives, such that the application should be remitted to it (see [163], [164], [165], [166]).

Cases mentioned in judgment

Auckland City Council v Minister for the Environment [1999] NZRMA 49 (EnvC).

Bayley v Manukau City Council [1999] 1 NZLR 568 (CA).

Body Corporate 97010 v Auckland City Council [2000] 3 NZLR 513, [2000] NZRMA 529 (CA).

Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721.

Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau [2003] 2 NZLR 349 (HC).

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.

Dye v Auckland Regional Council [2002] 1 NZLR 337, [2001] NZRMA 513 (CA).

Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, [1955] 3 All ER 48 (HL).

Elderslie Park Ltd v Timaru District Council [1995] NZRMA 433 (HC).

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

Estate Homes Ltd v Waitakere City Council [2006] 2 NZLR 619, [2006] NZRMA 308 (CA).

Gertrude's Saddlery Ltd v Queenstown Lakes District Council [2020] NZHC 3387.

Hu v Immigration and Protection Tribunal [2017] NZHC 41, [2017] NZAR 508.

Infinity Investment Group Holdings Ltd v Canterbury Regional Council [2017] NZEnvC 35, [2017] NZRMA 479.

John Collingwood King v Auckland City Council [2000] NZRMA 145 (HC).

Marlborough District Council v New Zealand Rail Ltd [1995] NZRMA 357 (PT).

McGuire v Hastings District Council [2000] UKPC 43, [2002] 2 NZLR 577, [2001] NZRMA 557.

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

Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd [2020] NZHC 2768, [2021] NZRMA 179.

RJ Davidson Family Trust v Marlborough District Council [2018] NZCA 316, [2018] 3 NZLR 283, [2019] NZRMA 289.

Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council [2017] NZHC 3080, [2019] NZRMA 1.

SKP Inc v Auckland Council [2018] NZEnvC 81.

SKP Inc v Auckland Council [2020] NZHC 1390, [2021] 2 NZLR 94, (2020) 21 ELRNZ 879.
Tauranga Environmental Protection Society Inc v Tauranga City Council [2020] NZEnvC 43.
Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council [2020] NZHC 3388, [2021] NZRMA 76.
Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2020] NZCA 86, [2020] NZRMA 248.
Transpower New Zealand Ltd v Auckland Council [2017] NZHC 281.
Vodafone New Zealand Ltd v Telecom New Zealand Ltd [2011] NZSC 138, [2012] 3 NZLR 153.
Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Inc Industrial Union of Workers [2017] NZSC 199, [2018] 1 NZLR 780.

Appeal

This was an appeal from a decision of the Environment Court to the High Court.

JDK Gardner-Hopkins for the appellant and the Maungatapu Marae Trustees, an interested party.

MH Hill and *RM Boyte* for the respondents.

AJL Beatson, JP Mooar and *EM Taffs* for the applicant for consent.

JDK Gardner-Hopkins for the interested party (Maungatapu Marae Trustees).

Appearance excused for Ngāi Tūkairangi Trust, an interested party.

Palmer J.

Contents

Summary

[1] Ngati Hē was dispossessed of most of its ancestral lands but retains the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranga (Tauranga Harbour). Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will require replacement soon. In 2016, to address Ngāti Hē's grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported removal of the existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal. Consents were granted for the proposal realignment which the Environment Court upheld.[1]

1 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2020] NZEnvC 43 [Environment Court] at [218].

The Tauranga Environmental Protection Society Inc appeals the decision of the Environment Court, supported by the Maungatapu Marae Trustees from Ngati Hē.

[2] I uphold the appeal. I find:

(a) The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law.

(b) Proper application of the law requires a different answer from that reached by the Environment Court. When the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the Outstanding Natural Features and Landscapes (ONFL), it is not open to the Court to decide it would not.

(c) The Court erred in law in applying an "overall judgment" approach to the proposal and in its approach to part 2 of the Resource Management Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified (the Bay of Plenty Regional Coastal Environment Plan (RCEP) in particular) and apply them to the proposal.

(d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement on Electricity Transmission (NPSET). There are cultural bottom lines in the RCEP:

  (i) Policy IW 2 requires adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable".

  (ii) Policy NH 4, NH 5(a)(ia) and NH 11(1) require the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

(e) Determining whether the exceptions to the cultural bottom lines apply requires interpretation and application of the "practicable", "practical" and "possible" thresholds. The Court erred in failing to recognise that this determines whether the proposal could proceed at all. The technical feasibility of alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. On the basis of the Court's existing findings, Policy NH 11(1)(b) is therefore not satisfied and consideration providing for the proposal under Policy NH 5 is not available.

[3] These are material errors. I quash the Environment Court's decision. But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. I remit the application to the Environment Court for further consideration consistent with this judgment.

The application for consents in context

Ngāti Hē and te Maungatapu Marae

[4] Ngāti Hē is a hapū of Ngāi Te Rangi. After the battles of Pukehinahina (Gate Pā) and Te Ranga in 1864, much of Ngāi Te Rangi's land was confiscated for settlement under the New Zealand Settlements Act 1863 and Tauranga District Lands Act 1868.[2] The confiscations were then reviewed by Commissioners and land was returned.[3]

[5] The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. In 1884, the Crown "awarded" back to Ngāti Hē two blocks of land on Maungatapu peninsula, some three kilometres east of central Tauranga.[4] Block 2 was part of the tip of the Maungatapu peninsula. Ngāti Hē has since lost part of that land too. Some was taken for the public purposes of putting in a motorway and electricity transmission lines. Some was subject to forced sale, because Ngāti Hē was unable to pay rates, and then sub-divided.[5] As stated in the agreed Historical Account in the Deed of Settlement between Ngāi Te Rangi and the Crown, upon which the Crown's acknowledgement and apology to Ngāi Te Rangi was based:[6]

> The Maungatapu subdivision contributed to the reduction of Ngāti He landholdings on the peninsula to 11 hectares by the end of the twentieth century. Maungatapu was once the centre of a Ngāti He community who used their lands for gardens, but now the hapū only maintains the marae and headland domain, along with a small urupā.

[6] Among the Crown's many acknowledgments in the Deed, it acknowledged:

(a) public works, including "the motorway and infrastructure networks on the Maungatapu and Matapihi Peninsulas", have had "enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi";[7]

(b) "the significant contribution that Ngāi Te Rangi … [has] made to the wealth and infrastructure of Tauranga on account of the lands taken for public works";[8] and

(c) "the significance of the land, forests, harbours, and waterways of Tauranga Moana to Ngāi Te Rangi … as a physical and spiritual resource".[9]

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2 *Ngāi Te Rangi and Ngā Pōtiki Deed of Settlement of Historical Claims* (14 December 2013) [Deed of settlement], cl 2 (CBD 303.0702 and 303.0703). The Deed is conditional upon settlement legislation coming to force, which has not yet occurred.

3 See generally Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at chs 4 and 10.

4 Maungatapu 1 and 2 Blocks. Commissioner Brabant "Land Returned to Ngaiterangi Tribe Under Tauranga District Land Acts" [1886] AJHR G10; Heather Bassett *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga* (July 1996) at 6 (CBD 301.0024); and Des Heke *Transpower Rangataua Realignment Project: Ngāti Hē Cultural Impact Assessment* (September 2017) at 6 (CBD 304.0966).

5 Deed of settlement, above n 2, cl 2.71.

6 Clause 2.72.

7 Clauses 3.15 and 3.14.5.

8 Clause 3.16.1.

9 Clause 3.18.1.

[7] As stated in evidence in this proceeding:[10]

> The result of all these forms of alienation has been that very little land in Maungatapu and Hairini is still owned by Māori. There are a handful of reserve areas, such as marae and urupā, and some families live in the area on their individual sections. The traditional rohe of Ngāti Hē and Ngāi Te Ahi now has the overwhelming characteristics of a well populated residential suburb, in which there is less scope for Māori interests and activities to be promoted than there was in the past.

[8] The Maungatapu Marae (the Marae) of Ngāti Hē, also called Opopoti, is on the northern tip of the Maungatapu peninsula.[11] The wharenui, Wairakewa, and wharekai, Te Ao Takawhaaki, look to the northeast, towards the bridge and Matapihi peninsula. Te Kōhanga Reo o Opopoti is established on the eastern side of the Marae, between the Marae and a health facility next to State Highway 29A. To the west of the Marae is a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park, home to the rugby field, tennis/netball courts and clubrooms of Rangataua Sports and Cultural Club. The land on which the Club is situated is a Maori reservation managed by Ngāti Hē.[12]

Ngāi Tūkairangi

[9] Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland.[13] Te Ngāio Pā, near the southern tip of the Matapihi Peninsula, is associated with Ngāi Tūkairangi, Ngāti Hē, Ngāti Tapu, and Waitaha.[14] Approximately 60 hectares in Matapihi is owned by over 1,470 Ngāi Tūkairangi or Ngāti Tapu landowners.[15] The Ngāi Tūkairangi No 2 Orchard Trust has managed orchard land in the area since 1992.[16]

The A-line

[10] In the 1950s, the Maungatapu 2 block was implicated in plans for a motorway and a new electricity transmission line.[17] In 1958, the Maungatapu 2 block, including the beach in front of it, was reserved as a marae and recreation area under s 439 of the Māori Affairs Act 1953.

[11] Also in 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. It is supported by poles in Rangataua Bay and passes over some 40 private residences and above the playing fields of Te Ariki Park. Ngāti Hē complained but the Ministry took the position that there was no alternative route for the power lines.[18] The Crown Law Office has acknowledged that the electricity department did not properly inform those affected.[19] The Crown acknowledged in the Treaty settlement that it did not send notices to all the owners of land taken, which may have been why Ngāti

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10 Bassett, above n 4, at 6 (CBD 301.0024).
11 Environment Court, above n 1, at [10].
12 Heke, above n 4, at 15 (CBD 304.0975).
13 Environment Court, above n 1, at [28].
14 At [29].
15 Brief of Evidence of Peter Te Ratahi Cross (25 March 2019) [Cross brief] at [7] (CBD 202.0388).
16 Environment Court, above n 1, at [188].
17 Bassett, above n 4, at 10 (CBD 301.0030).
18 At 11 (CBD 301.0032).
19 Rachael Willan *From Country to Town: A Study of Public Works and Urban Encroachment in Matapahi, Whareroa and Mount Maunganui* (December 1999) at 85 (CBD 301.0081).

Hē owners did not apply for compensation within the required timeframe.[20] Ngāti Hē's concerns about the location of the A-Line infrastructure were included in their claim to the Waitangi Tribunal in 2006.[21] The claim referred to the absence of compensation for, or adequate notification of, the construction of the power lines.

[12] The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition.[22] The A-Line went directly over Te Ngāio Pā on the southern tip of the Matapihi peninsula. The effect of the A-line on the use and development of horticultural lands at Matapihi was also the subject of Treaty of Waitangi claims to the Waitangi Tribunal by Ngāi Tūkairangi in 1988 and 1997.[23] These claims also concerned the construction of the power lines without compensation nor adequate consultation.[24]

[13] In 1959, a bridge was constructed from the northern end of the Maungatapu peninsula to the southern end of the Matapihi peninsula. This is now State Highway 29A, to Mt Maunganui. Construction substantially altered the site of Te Pā o Te Ariki of Ngāti Hē, disturbing an ancient urupā and exposing bones.[25]

The B-line

[14] Under the State-Owned Enterprises Act 1986, the electricity assets of the Ministry of Works were transferred to the Electricity Corporation of New Zealand. In 1991, the electricity transmission assets were further transferred to Transpower, the SOE which still manages the national grid. In mid-1991, work began on a second transmission line to Mt Maunganui and Papamoa. In 1993, Transpower undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of the state highway.[26] That would enable the A-line to be removed. The B-line was constructed in 1995. It crosses Rangataua Bay through a duct underneath the Maungatapu-Matapihi bridge and underground on the approaches at each end of the bridge.[27] Ms Raewyn Moss from Transpower confirms the resulting expectation:[28]

> ... When the B-line was constructed in 1995, there was an expectation at the time that the A-line would eventually be re-aligned onto the B-line. I understand that Ngāti Hē, Ngāi Tūkairangi, Māori trustee land owners also share this expectation. This has been the subject of discussion between the parties and Transpower over many years.

The realignment proposal

[15] The A-Line has not yet been moved. Now, the condition of Poles 116 and 117, located in Te Ariki Park, is deteriorating and the poles need to be replaced. In particular, Pole 117 is close to the edge of the cliff above the

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20 Deed of settlement, above n 2, cl 2.54.

21 Environment Court, above n 2, at [44]; and Waitangi Tribunal *Tauranga Moana: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2006).

22 Cross brief, above n 15, at [10].

23 Environment Court, above n 1, at [44]; and Hikitapua Ngata *Transpower Line Realignment Project: Ngai Tūkairangi Hapu Cultural Impact Assessment* at 10 (CBD 304.1008). Wai 211 was heard as part of the foreshore and seabed inquiry. Wai 688 was heard as part of the Kaipara inquiry.

24 Ngata, above n 23, at 10 (CBD 304.1008).

25 Bassett, above n 4, at 13 (CBD 301.0034); and Deed of settlement, above n 2, cl 2.56.

26 Willan, above n 19, at 79 (CBD 301.75).

27 Environment Court, above n 1, at [42].

28 Notes of Evidence of Environment Court [NOE] 15/9–14 (CBD 201.0015).

harbour and recently required temporary support to protect it from coastal erosion.[29] Tower 118, situated in Rangataua Bay, is due for major refurbishment in the next 10 years.[30]

[16] Recently, Transpower developed a realignment proposal that would remove Poles 116 and 117 and Tower 118 from Rangataua Bay. Instead, aerial lines would extend between two new steel monopoles, Pole 33C on Maungatapu, at a height of approximately 34.7 metres, and Pole 33D at Matapihi, at a height of approximately 46.8 metres. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. This is depicted in the illustration below, with the red lines and poles to be removed, the green lines and poles to be added and the blue lines and poles to be retained.[31]

[17] Transpower's objectives for this project, set out in its Assessment of Effects on the Environment, are to:[32]

a) enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;

b) remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and

c) honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

29 Environment Court, above n 1, at [40].

30 At [42].

31 Transpower *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at sch A.1 (CBD 304.1103).

32 Transpower *Assessment of Effects on the Environment: Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga* (24 October 2017) at 8 (CBD 304.0784).

[18] From March 2013, Transpower discussed the project with Ngāti Hē and Ngāi Tūkairangi, among others.[33] The proposal was a "welcome surprise" to Ngāi Tūkairangi, which supports it.[34] Removal of the lines will allow more flexible farming practices, use of shelter planting and reconfiguration of the orchard.[35]

[19] Ngāti Hē and the Marae also initially supported the proposal. But once the applications were notified, and Ngāti Hē and the Marae realised the size, nature and location of the new Pole 33C, directly adjacent to the entrance to the Marae, they opposed it. A mock-up of the view of Pole 33C from the Marae is depicted below.[36]

The application and Council decisions

[20] In 2017, Transpower applied for the required resource consents for the proposal from the Tauranga City Council and the Bay of Plenty Regional Council (the Councils):[37]

(a) From the Tauranga City Council under the National Environmental Standards for Electricity Transmission Activities (NESETA) regulations for relocation of support structures, removal of willow and other vegetation and construction of the additional poles.

(b) From the Bay of Plenty Regional Council for earthworks, disturbance of contaminated land, drilling of foundations below ground water, modification of wetland, disturbance of the seabed and occupation of the coastal marine area airspace.

[21] Section 2 of the RMA defines the "coastal marine area" to mean "the foreshore, seabed, and coastal water, and the air space above the water", up to the line of mean high water springs.

[22] The Councils each appointed an independent hearing commissioner to consider and decide the consent applications. On 23 August 2018, the commissioners jointly decided to grant land use consents to realign the A-Line, subject to various conditions.

Appeal to the Environment Court

[23] The Tauranga Environmental Protection Society (TEPS) is an association of 14 people whose views of the harbour after realignment would be impacted by the new powerlines or poles and who made submissions opposing the application. TEPS appealed to the Environment Court. The

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33 Environment Court, above n 1, at [47].

34 At [12].

35 At [14].

36 *Transpower Hairini to Mount Maunganui Re-Alignment: Landscape and Visual Graphics, Attachments to the Environment Court Evidence of Brad Coombs* (30 January 2018) at 39 (CBD 202.0514).

37 Environment Court, above n 1, at [50], table 1.

trustees of the Maungatapu Marae, Ngāi Tūkairangi Hapū Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys joined the appeal as parties under s 274 of the RMA:

(a) The Marae supported removal of the A-Line, as the subject of their long-held grievance and a danger to users of the Sports Club. But the Marae opposed the new poles and lines. Ngāti Hē would rather wait longer to get the right result.

(b) Similarly, Ngāi Te Rangi supported removal of the A-Line and its relocation. It opposed the method by which the realignment would cross Rangataua Bay.

(c) Ngāi Tūkairangi conditionally opposed the appeal on the basis it would delay the removal of transmission infrastructure on Matapihi land, which would have positive cultural and other effects for them.[38] However, if the appellants' concerns could be met through changes within the scope of the application, Ngāi Tūkairangi would wish to consider that.

(d) Mr Meys, whose property is under the existing A-Line, supported the proposal, with urgency, and opposed the appeal.

The Environment Court decision

[24] The Court refused the appeal and amended the conditions of consent.[39] The structure of its decision was to:

(a) identify the background to, and nature of, the proposal and consent application;

(b) outline the legal framework and the relevant policies and plans;

(c) identify three preliminary consenting issues: bundling; alternatives; and maintenance or upgrade;

(d) consider the cultural effects of the proposal;

(e) consider the effects on the natural and physical environment; and

(f) consider and amend the conditions of the consents.

[25] In its conclusion, the Court observed that neither the Councils nor the Court on appeal "have the power to substantially alter Transpower's proposal or to require any third party, such as the New Zealand Transport Authority, to participate in the proposal".[40] It said "[i]f we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent".[41] In summary, the Court in its concluding reasoning:

(a) Found the removal of the A-Line will result in positive effects for all people, land and water and for Ngāti Hē and Ngāi Tūkairangi.[42]

(b) Noted it had found the proposal is a single one and its elements should be considered together.[43]

(c) Held that the proposed relocation "does not result in wholly positive effects" and it must have regard to Policy 15 of the NZCPS because the "location is not ideal". In particular, placing the line above the bridge with the associated tall poles "creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly

38 At [16]–[17].
39 At [271]–[272].
40 At [260].
41 At [260].
42 At [261].
43 At [262]–[263].

when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A".[44]

(d) Found the alternatives of laying the A-Line on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", though they are technically feasible, because of the cost.[45] The Court does not have the power to require Transpower to amend the proposal.

(e) Found "[t]he character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori."[46] The positive effects of removal of the existing A-Line are "significantly greater than the adverse effects in intensity and scale" in terms of land use, visual impact and effects on sites of significance to Māori, "even while taking account of the impact of the relocated line on views from the marae and proximity to the kōhanga reo".

(f) Considered it "must undertake a fair appraisal of the objectives and policies read as a whole".[47] The Court did not accept Policy 15 of the NZCPS requires consent to be declined or the proposal amended on the basis it has adverse effects on the ONFL. The NZCPS "does not have that kind of regulatory effect" and its terms do not provide that "any use or development in an ONFL would be inappropriate". What is inappropriate "requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected".

(g) Noted it is important that the existing environment of the ONFL includes the existing bridge and national grid infrastructure.[48]

(h) Considered it must also "have regard under s 104(1)(b)" to the relevant objectives and policies of the NPSET, RCEP and District Plan.[49] Those instruments "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved". Policy 6 of the NPSET guides the Court, consistently with the proposal, but "there is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved".

(i) Said finally:

> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH

44 At [264].
45 At [265].
46 At [266].
47 At [267].
48 At [268].
49 At [269].

> 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

The appeal

[26] Under s 299 of the RMA, a party to a proceeding before the Environment Court "may appeal on a question of law to the High Court" against a decision, report or recommendation of the Environment Court. Under r 20.18 of the High Court Rules 2016, the appeal is "by way of rehearing".

[27] TEPS appeals the Environment Court's decision. The Marae Trustees support the appeal as an interested party. Transpower, as the applicant for consent, supports the Environment Court's analysis. Ngāi Tūkairangi Trust supports the submissions of Transpower and does not make any additional submissions. The Councils, as the consent authorities, separately support the Court's decision.

[28] Counsel argued six or seven grounds of appeal. There was quite a lot of overlap in all parties' submissions from one ground to another. I group the grounds of appeal in terms of five issues and treat them in a different order. I treat submissions made by counsel in relation to the issue to which they are most relevant. The issues are:

(a) Was the Environment Court wrong to "bundle" the effects together?
(b) Was the Court wrong in its findings about adverse effects?
(c) Did the Court err in its approach to part 2 of the RMA?
(d) Did the Court err in interpreting and applying the planning instruments?
(e) Was the Court wrong in its assessment of alternatives, including the status quo?

Issue 1: Was the Environment Court wrong to bundle the effects together?

The Environment Court's decision

[29] The Environment Court addressed the issue of "bundling" as the first preliminary issue. It stated:

> [96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[50] Where, however, the effects to be considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[51]

[30] The Court recorded but rejected the appellant's argument that the proposal was in two parts that should be assessed separately using a structured approach.[52] It considered the term "effect" is defined broadly and inclusively in s 3 of the Resource Management Act 1991 (RMA) and is subject to the

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50 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580; and *John Collingwood King v Auckland City Council* [2000] NZRMA 145 (HC) at [47]–[50].

51 *Bayley v Manukau City Council*, above n 50, at 580; and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513, [2000] NZRMA 529 (CA) at [21]–[22].

52 Environment Court, above n 1, at [100].

requirements of context.[53] The Court considered case law has generally interpreted and applied the statutory definition of "effect" in a realistic and holistic way.[54] It concluded:

> [110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.
>
> [111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units which can assist in such integration.
>
> [112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

[31] In its overall conclusion, the Environment Court said that, even though it was "treating the proposal as a single one", the effects of the elements of the proposal "must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate … must be done in terms of all the effects".[55]

Submissions

[32] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Environment Court erred in rejecting a structured approach. He submits the Court should have considered the two distinct elements of the removal of the A-Line and construction of the new infrastructure separately. He submits doing so is particularly important given the "avoid" policies which require a proposal with adverse effects to be squarely confronted. He submits the Court netted off the adverse effects on the Marae with the benefits of removing Poles 116 and 117. The effect of that approach was to subsume the adverse effects

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53 At [104].

54 At [106]–[108], citing *Elderslie Park Ltd v Tīmaru District Council* [1995] NZRMA 433 (HC); *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357 (PT); and *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

55 Environment Court, above n 1, at [263].

into an overall net-effect analysis. This masked the effects on cultural values and circumvented the requirement to confront the terms of the planning documents.

[33] Mr Beatson, for Transpower, submits the Court properly accepted that relocation of the A-Line depended on consents being granted, which determined whether or not to consider the effects in a holistic way. He submits the Court was correct, given that the removal and placement are integrally related, and was consistent with the assessment of all expert witnesses and the authorities.

[34] Ms Hill, for the Councils, submits there is no material error of law. Separate assessment of each part of the proposal against the avoid policies would not necessarily prohibit a proposal with adverse effects. It would just require the effects to be squarely confronted. The Environment Court was clear that the effects of the separate parts of the proposal must be identified and analysed separately and it squarely confronted the effects of the proposal. The structured approach is not supported by the policy framework. The Court's "realistic and holistic" approach was appropriate and consistent with sound resource management practice, whereas the structured approach has no supporting authority.

Did the Court err in applying a bundling approach?

[35] The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, are integrally related. One would not occur independently of the other, as Mr Gardner-Hopkins acknowledged. The effects on cultural values were incorrectly determined, as I discuss in Issue 2. But they were not masked by the Court's approach. The Environment Court was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way. The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here. The problems with the Court's reasoning were not caused by its approach to bundling.

Issue 2: Was the Court wrong in its findings about adverse effects?

[36] The Court was required to consider whether the proposal had certain adverse effects. This issue concerns whether the Court's findings regarding adverse effects constituted an error of law.

Relevant provisions

[37] The Court was required to interpret and apply two policies of the Bay of Plenty Regional Coastal Environment Plan (RCEP).[56]

[38] First, Iwi Management Policy IW 1(d) requires proposals "which may affect the relationship of Māori and their culture, traditions and taonga" to "recognise and provide for""[a]reas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumātua".

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56 Relevant extracts from the RCEP and other planning instruments are provided in full in the Annex to this judgment.

[39] Schedule 6 identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

> Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi—known as *"Mai i ng ā Kurī a Whārei ki Wairakei."* Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi—Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> ...
>
> Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.
>
> Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

[40] IW 2 of the RCEP applies to "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS [Regional Policy Statement]". Advice Note 2 to the Policy states that "[t]he Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS".

[41] Second, Natural Heritage Policy NH 4 applies to "adverse effects""on the values and attributes of""[ONFL] (as identified in Schedule 3)". Te Awanui (Tauranga Harbour) is identified as ONFL 3, including the harbour around Maungatapu and Matapihi. Schedule 3 states "[t]he key attributes which drive the requirement for classification of ONFL, and require protection, relate to the high natural science values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns".

[42] Schedule 3 of the RCEP provides assessment criteria for "Māori values" as "Natural features and landscapes that are clearly special or widely known and influenced by their connection to the Māori values inherent in the place". "Māori values" of ONFL 3 are rated as "medium to high" and evaluated as follows:

> Ancient pā, mahinga kai, wāhi tapu, kāinga, taunga ika.
>
> Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi—Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.
>
> Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

[43] Policy NH 4A provides:

> When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedule ... 3 to this Plan ...:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape ...
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor;
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values, and
>
> (e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

[44] The Tauranga City Plan, which has the legal status of a District Plan, should also be interpreted and applied. It identifies Te Ariki Pā/Maungatapu as a significant Māori area (No M 41) of Ngāti Hē.[57] Its values are recorded as:

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[45] The iwi management plans, included in the Annex to this judgment, and invoked in other planning instruments, relevantly provide:

(a) Policy 10 of Te Awanui Tauranga Harbour Iwi Management Plan 2008 specifically records that "[i]wi object to the development of power pylons in Te Awanui".

(b) Policy 15.1 and 15.2 of the Tauranga Moana Iwi Management Plan is to "[o]ppose further placement of power pylons on the bed of Te Awanui" and "[p]ylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge".

(c) The Ngāi Te Rangi Resource Management Plan states:

> Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities—Maori and non Maori—shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.
>
> ...
>
> Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

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57 Environment Court, above n 1, at [26].

[46] Te Tāhuna o Rangataua (Rangataua Bay) is also listed in the New Zealand Heritage List/Rārangi Kōrero as a wāhi tapu historically associated with several iwi and hapū, including Ngāti Hē.[58]

Environment Court's decision on adverse effects

[47] In its lengthy discussion of cultural effects, the Environment Court outlined the consultation process, the iwi management plans, and the cultural impact assessments of the proposal.[59] It summarised the evidence of each witness from the Marae, Ngāi Te Rangi and Ngāi Tūkairangi.[60] In particular:

(a) The late Mr Taikato Taikato, chairperson of the Maungatapu Marae Trust and kaumātua, supported the removal of the A-Line from Te Ariki Park but did not support its replacement as an aerial line. This was because the cable would be directly in front of the marae and would "move the lines from our backs and put them back in front of our faces".[61] He had concerns about the noise from the lines. He believed Ngāti Hē could wait another year or two to get the right result. Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with electricity, and that, should consent be refused, negotiations about replacing Poles 116 and 117 would have to start all over again.

(b) Dr Kihi Ngatai focused on the significance of Te Pā o Te Ariki, the pā site of Ngāti Hē. He told the Court his main purpose as a member of the Te Pā o Te Ariki Trust is to get the line shifted away from this significant site because it is wāhi tapu and should be left as it was when it became tapu; without powerlines.

(c) Ms Hinerongo Walker, a kuia and a Trustee of both the Maungatapu Marae and the kōhanga reo, and Ms Parengamihi Gardiner, a kuia who lives in the Kaumātua Flats on Te Ariki, gave evidence together. Ms Walker was concerned about the visual aesthetics and constant humming of the realignment and the impact on the marae and kōhanga reo. Ms Gardiner said they had been trying to have the lines removed, and confirmed she had submitted in favour of the proposal to remove the lines from Te Ariki Park. However, she said she did not want them removed if it meant an impact on the marae, the kōhanga reo or other people. When asked whether they supported the removal of Tower 118 from the middle of Te Awanui, they said that depended "on the removal of lines from here" and they looked it as a whole package.[62]

(d) Ms Matemoana McDonald, of Ngāti Hē and a councillor on the Bay of Plenty Regional Council, gave evidence on the changes to the cultural landscape of Ngāti Hē over her lifetime.[63] She said the Transpower proposal adds insult to injury in terms of what Ngāti Hē have lost in providing for the needs of the city, and said they do not want two new poles in close proximity to their sacred marae. She

58 Heritage New Zealand *New Zealand Heritage List/Rārangi Kōrero—Report for a Wāhi Tapu Area: Te Tāhuna o Rangataua* at 5 and 22 (CBD 303.0663 and 303.0680).

59 Environment Court, above n 1, at [153]–[169].

60 At [170]–[193].

61 At [170]; and Statement of Evidence of Taikato Taikato on behalf of the Maungatapu Marae Trust (25 March 2019) at 3 (CBD 202.0370).

62 NOE 260/3.

63 Statement of Evidence of Matemoana McDonald (8 April 2019) (CBD 202.0378).

wanted to see alternative options considered and discussed to find a better solution to the proposal. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the A-Line issue. She questioned why Pole 33C could not go to the other side of SH 29A, because although it could have effects on other parties on that side of the road, those houses would change hands over time, whereas Ngāti Hē would always be present at their marae. She confirmed that "Te Awanui and Te Tahuna has much significance as what the marae does".[64]

(e) Ms Ngawaiti Hera Ririnui, chairperson of Te Kōhanga Reo o Opopoti, said the potential effect of Pole 33C on tamariki that live on the marae or attend the kōhanga reo was seen as negative, as there is no research that proves or disproves whether there is an impact on health from such powerlines.[65] She gave evidence of tamariki having full access to the area around the Marae and "tamariki out on the beach at Rangataua being taught by our kaimahi about what it means to be part of our community and be a member of Ngāti Hē".[66] She saw the pole as a "monstrous dark structure that's going to be hanging over our marae on a daily basis, lines that are going to be slung across our marae swinging in the wind for our tamariki to see".[67] She said generations have tried to fight the changes in the surrounding environment, but have never won. She agreed removal of the poles and wires from Te Ariki Park would be a benefit, but not if the poles were relocated to beside the kōhanga reo.

(f) Ms Yvonne Lesley Te Wakata Kingi, secretary of the Maungatapu Marae committee for 25 years, said she felt they were having to continue a battle to maintain the mana on their land. She talked about their use of the beach.[68] She stated they are being treated in the way Māori were when new people first began to settle there. She described wanting the marae to be a happy place, not only for Māori but for the visitors who come there.

(g) Mr Mita Michael Ririnui, a kaumātua, the chair of the Ngāti Hē Hapū Trust, and the Ngāti Hē representative on the Ngāi Te Rangi Settlement Trust and Te Rūnanga O Ngāi Te Rangi Iwi Trust, clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park. However, the Trust had not given any support to the proposed structures including Pole 33C. He said the proposed structures are considered "a blight on the [Ngāti Hē] estate" and marae.[69]

64 NOE 276/6–9.
65 Environment Court, above n 1, at [179].
66 NOE 281/12–25.
67 NOE 281/27–30.
68 NOE 286/4–15.
69 NOE 291/5–6.

(h) Mr Paul Joseph Stanley, Chief Executive of Te Runanga o Ngāi Te Rangi Iwi Trust, submitted "[i]t will be much better … if those lines were put across with the bridge or underneath the harbour".[70]

[48] In relation to cultural effects, the Court:

(a) said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui";[71]

(b) identified "the key cultural issues" to be "the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kōhanga reo there";[72]

(c) traversed the process of consultation in preparing the application;[73]

(d) summarised the submissions on the notified consent application, focussing on Ngāti Hē's position, including in this (implicitly critical) paragraph:[74]

> [205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tūkairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

(e) found that Transpower had carried out a full and detailed consultation, and that Ngāti Hē changed its mind, as it was entitled to do;[75]

(f) noted Ngāti Hē's frustration and anger about the original construction of the A-Line and accepted the cultural effects of that had adversely affected them for the last half-century;[76]

(g) found the removal of the A-Line and poles from Ngāti Hē's land at Te Ariki Park and of Tower 118 in Rangataua Bay would have positive effects;[77]

(h) "deeply regretted" the "adverse effects from their point of view" of Pole 33C, but found there was no opportunity to move the pole without adversely affecting other persons not before the Court;[78]

(i) found Ngāti Hē's preferred alternatives of a strengthened or new bridge or under-sea-bed crossing would reduce the effects on the marae and kōhanga reo but "may also, from our understanding of the

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70 NOE 265/19–20.
71 Environment Court, above n 1, at [194].
72 At [195].
73 At [196]–[197].
74 At [198]–[206].
75 At [207]–[208].
76 At [209].
77 At [211].
78 At [212].

evidence" have greater effects within the [Coastal Marine Area] and on the ONFL than those that will result from the aerial transmission line";[79]

(j) observed that Ngāi Tūkairangi consider the effects of the proposal on their land would be highly beneficial;[80]

(k) observed there is no certainty that a proposal Ngāti Hē can support will come forward or achieve their desired outcomes;[81]

(l) suggested changes to activities or to the environment may result in the cumulative effect being less than before and doubted the only proper starting point for assessing cumulative effects was prior to any development;[82]

(m) held that the question was whether Ngāti Hē is better or worse off in terms of the assessment of cumulative effects, deducting the removal of adverse effects from the creation of adverse effects, and noted Ngāti Hē "are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects";[83]

(n) considered no other group would be worse off by the proposal and some, "particularly Ngāi Tūkairangi and the residents along Maungatapu Road" would be better off and refusing consent would leave them worse off;[84]

(o) noted Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent;[85] and

(p) concluded:[86]

> [220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. **From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē.** Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kōhanga reo. We are conscious that the benefits to Ngāi Tūkairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tūkairangi, are greater than the adverse effects of Pole 33C's placement near the marae and the kōhanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

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79 At [213].
80 At [214].
81 At [214]–[215].
82 At [216].
83 At [217].
84 At [218].
85 At [219].
86 Emphasis added.

[49] In relation to the effects on the ONFL, the Environment Court compared and assessed the evidence of expert witnesses, in particular that of Ms Ryder for the Councils and Mr Brown for TEPS.[87] The Court was "unable to confirm Mr Brown's opinions in relation to what he considered [were] the significant effects on Māori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses".[88]

[50] The Court further concluded:

> [246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui—and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.
>
> [247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kōhanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.
>
> [248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

Submissions on adverse effects

[51] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in light of the evidence before it, because the true and only reasonable conclusion is that there would be:
   (i) at least some adverse effects in terms of ASCV 4 or otherwise on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment, contrary to Policy IW 2; and/or
   (ii) significant, or at least some, adverse effects on Ngāti Hē's association with the cultural values of ONFL 3, contrary to Policy NH 4(b).

(b) It is for Ngāti Hē to identify the cultural impacts on them and they have done so. All the Ngāti Hē witnesses promoted the same overall outcome and gave a consistent message. They did not support the proposal because the benefits of the removal of the A-Line did not

87 Summarised at [243], table 3.
88 At [244].

outweigh the adverse effects. Not one witness said the proposal should proceed if the cost was the poles being in front of the Marae. The evidence focussed on the visual dominance of the poles but kaumātua and kuia also raised wider issues of the connectedness of the Marae and the reserve with Rangataua Bay. The visual effects can clearly affect the aesthetic and experience of the ONFL. The moderate to high rating of Māori values in ONFL 3 answers the submission that Māori values are not a key component of the ONFL at the Bay.

(c) The Environment Court navigated around all that, finding the effects were de minimis. It was focussed on the effects of aerial lines crossing the harbour on the ONFL, not the effects of the large structures on either side that will impact on Ngāti Hē's cultural association with the harbour. If the Court had applied the right framework and focussed on the poles as well as the lines, it could not have found the effects to be *de minimis*.

(d) It cannot be right that any adverse effect needs to be assessed against the Tauranga harbour as a whole, because that would require a proposal of a massive scale. In the context of this proposal, the appropriate scale must be Rangataua Bay. If the project proceeds and Poles 33C and 33D are constructed, the effects on Ngāti Hē and the Marae will continue for another two to three generations. They do not want an additional visual intrusion into their connectedness with Rangataua Bay from their marae or beach. If that is not available now, they are prepared to wait.

[52] Mr Beatson, for Transpower, submits:

(a) It could not be further from the truth to suggest the Court found there were no effects on cultural values at all or it imposed its own assessment of the cultural effects. The Court spent some 20 pages summarising the consultation and evidence on cultural effects. It weighed the evidence before concluding there was an overall positive cultural effect. The benefits of the realignment to Ngāti Hē and Ngāi Tūkairangi would be greater than the adverse effects of Pole 33C on the Marae and kōhanga reo. Its approach is consistent with *SKP Inc v Auckland Council* and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[89]

(b) The Court focussed its enquiry on the effects of ONFL. It noted the main adverse cultural effects related to visual effects on the Marae and kōhanga reo enjoyment of the ONFL, rather than on the values and attributes of ONFL 3. The description of the values and attributes is a guide to the key focus of the ONFL. Adverse effects on Māori values would not necessarily lead to the conclusion there is an adverse effect on the ONFL as a whole, in terms of the description. The Court found the conclusion that the effects on the Māori values would be significant was not supported by the evidence of the cultural witnesses.[90]

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89 *SKP Inc v Auckland Council* [2018] NZEnvC 81; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

90 Environment Court, above n 1, at [228].

(c) The Environment Court's findings were well supported by the landscape and cultural evidence. As the primary finder of fact, it should be given latitude to do so. The appellant has not cleared the high bar of an "only true and reasonable conclusion". An assessment of the effects should take an overall approach, allowing the significant positive effects of the relocation to be taken into account. The relocation is more desirable than retaining the status quo.

[53] Ms Hill, for the Councils, submits:

(a) The weight given to particular considerations by the Environment Court is not able to be revisited as a question of law. It should be given some latitude in reaching findings of fact within its area of expertise, with which the High Court should not readily intervene.

(b) The Environment Court thoroughly set out and carefully evaluated the cultural evidence. It observed the evidence given by the cultural witnesses focussed on the visual effects of the pole in front of their marae rather than the effects on the cultural values of ONFL 3. The values and attributes of the ONFL include the national grid infrastructure so that is why the effect of the proposal is *de minimis*.

(c) Policy IW 2 is not a directive policy. The Court clearly explained its approach to the cumulative effects on Ngāti Hē arising from historical matters. The effects on Ngāti Hē are only part of the wider cultural equation. Cultural values are often intangible and it is difficult to avoid something that cannot be seen.

Did the Court err in its findings about adverse effects?

[54] It is clear from the evidence before the Court, as summarised above, that Ngāti Hē considers the re-alignment proposal would have an overall adverse effect compared with the status quo. In particular, they are concerned about the implications of the location of Pole 33C on their use and enjoyment of their marae and kōhanga reo, and the effects on the ONFL. The Environment Court summarised the submissions this way:

> [198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kōhanga reo children, effects on the mana of the marae, ongoing cumulative effects on the Hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[55] That view is understandable given the history and cultural values of Ngāti Hē that are recognised in ASCV 4 and ONFL 3 of the RCEP and substantiated by the evidence of kuia and kaumātua of Ngāti Hē. It is consistent with the identification in the Tauranga City Plan of Te Ariki Pā and Maungatapu as a significant area for Ngāti Hē with special values and significance in terms of mauri, wāhi tapu, korero tuturu and whakaaronui o te Wa. It is consistent with the significance of Tauranga Moana to Ngāi Te Rangi as a physical and spiritual resource, recognised by the Crown in the Deed of Settlement. It is consistent with the objections in the Iwi Management Plans to power pylons and the emphasis of Ngāi Te Rangi's Resource Management

Plan on the importance of marae. It is consistent with the Marae Sightlines Report, which was in evidence before the Environment Court and referred to by several witnesses. That report was prepared for SmartGrowth and the Combined Tāngata Whenua Forum in 2003 to review the visual setting, values and landscape context of 36 marae in the Western Bay of Plenty.[91] Its conclusions stated:[92]

> Protecting visual access and linkages to the ancestral landscape is critical to the personal and cultural wellbeing of the tāngata whenua of the rohe.
>
> Discrete taonga identifiable as landscape markers or pou whenua cue the oral traditions, poetry and waiata, traces events leaders and traditions, catalyses and facilitates the education of generation to generation and serves as personal mentor.
>
> ...
>
> The sense of belonging and turangawaewae is dependent on the quality of the visual of the surrounding landscape. The challenge then is to promulgate a landscape management principle dedicated to tāngata whenua interest to protect the mnemonic—iconic values associated with their rohe and turangawaewae. Particular regard for their relationship with the landscape as a component of landscape quality and diversity is required.

[56] In its decision, the Court explicitly noted that Ngāti Hē "were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing".[93] It recorded that "[t]hey are clear in their view that they [will be] worse off, not least because they see the proposed change as continuing to subject them to adverse effects".[94] The Court recorded that "the evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view".[95] In its conclusion, the Court said:

> [264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A.

[57] The depth of Ngāti Hē's opposition to the proposal is reflected in their preference for the status quo over the proposal. In its Deed of Settlement with Ngāi Te Rangi, the Crown acknowledged the infrastructure networks on the Maungatapu peninsula "have had enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi" while making a "significant contribution ... to the wealth and infrastructure of Tauranga".[96] The Court said:

> [209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pā and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions

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91 Kaahuia Policy Resource Planning & Management *Marae Sightlines Report* (December 2003) (CBD 301.0143).

92 At 34–35 (CBD 301.0163–301.0164).

93 Environment Court, above n 1, at [200].

94 At [217].

95 At [205].

96 Deed of settlement, above n 2, cls 3.15.5 and 3.16.1.

provided about the history of development activities in the Ngāti Hē rohe and accept that these cultural effects have adversely affected the hapū for the last half century.

[58] Yet Ngāti Hē preferred that status quo to the proposal.

[59] The Environment Court's conclusion in relation to the cultural effects of the proposal, relevant to IW 2, or the effects on the values of the ONFL relevant to NH 4, did not reflect the evidence before it:

(a) Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects.[97] That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē,[98] even though it had found Ngāti Hē clearly considers it would.[99]

(b) In relation to the ONFL, the Court said it had no doubt about the importance of Rangataua Bay to the marae and Ngāti Hē.[100] That is clearly demonstrated by the evidence before it. But the Court concluded the long-term visual effects of the works from the marae and vicinity to be "de minimis".[101]

[60] The Supreme Court's judgment in *Bryson v Three Foot Six Ltd* is the most authoritative current exploration of the parameters of questions of law.[102] In summary:

(a) Misinterpretation of a statutory provision obviously constitutes an error of law.[103]

(b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[104]

(c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable—so clearly untenable—as to amount to an error of law, because proper application of the law requires a different answer".[105] The three rare circumstances in which that "very high hurdle"[106] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and

97 Environment Court, above n 1, at [220].
98 At [220].
99 At [217].
100 At [246].
101 At [248].
102 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. Applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619, [2006] NZRMA 308 (CA) at [198].
103 At [24].
104 At [25].
105 At [26]. The sentence quoted in Bryson contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52].
106 *Bryson v Three Foot Six Ltd*, above n 102, at [27].

> contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[107]

[61] I consider the Court's conclusions about the evidence were insupportable in terms of *Bryson v Three Foot Six Ltd.* The Court accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL. But it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis".

[62] The evidence of Ngāti Hē, as summarised above, is contradictory of those findings. The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

[63] The Court's approach is not saved by a distinction between the "values and attributes" of the ONFL and the ONFL itself. The Māori values of ONFL 3 are rated as medium to high and clearly encompass connections to ancestral and cultural heritage sites. The evidence is that Pole 33C would interfere with those connections with Rangataua Bay, including on the beach.

[64] As Mr Gardner-Hopkins submits, an effect of a proposal at Rangataua Bay does not have to be assessed for its impact on the whole Tauranga Harbour, just Rangataua Bay. And neither is the Court's approach saved by it being an overall assessment of cultural effects, including the effects on Ngāi Tukairangi. The Court clearly rested its conclusions on its findings that the effects on Ngāti Hē alone would be, on balance, positive for Ngāti Hē. It relied on evidence from an expert landscape architect for the councils, Ms Ryder, to that effect.[108] But that was not Ngāti Hē's view. As the Court recorded Mr Gardner-Hopkins submitted:[109]

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

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107 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, [1955] 3 All ER 48 at 57 (HL). These can also be seen as circumstances of unreasonableness: *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and fn 27.

108 Environment Court, above n 1, at [228]–[229].

109 At [245].

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for""the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Inc v Auckland Council*, approved by the High Court in 2018 that:[110]

> ... persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

[67] Deciding otherwise is also inconsistent with the requirement of Policy IW 5 of the RCEP, and similar statements in Policies IW 2B(b) and IW 3B(e) of the RPS. Contrary to the Court's finding, the RCEP is specific enough about the cultural values and attributes of Rangataua Bay and Te Awanui. Policy IW 5 states:[111]

> Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

[68] Mr Taikato and Mr Ririnui are kaumātua. Ms Walker and Ms Gardiner are kuia. The evidence of Ngāti Hē is clear.

[69] I do not readily reach a different view of the facts to that of the Environment Court. But I consider proper application of the law requires a different answer from that reached by the Court regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of the ONFL. Accordingly, the Court's findings about those matters constitute an error of law. Whether that matters to the outcome of the appeal depends on how material the error was, which I consider in the context of the remaining issues.

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110 *SKP Inc v Auckland Council*, above n 89, at [157]. On appeal, Gault J considered the general statement of position in support of the proposal by the party taken to represent mana whenua "resolved any cultural effects issue". (He accepted that finer grained evidence would be required in an application for re-hearing where two entities were claiming mana whenua with competing evidence on cultural effects): *SKP Inc v Auckland Council* [2020] NZHC 1390, [2021] 2 NZLR 94, (2020) 21 ELRNZ 879 at [57].

111 Bay of Plenty Regional Council *Proposed Bay of Plenty Regional Coastal Environment Plan (RCEP)* at 38 (CBD 302.0302).

Issue 3: Did the Court err in its approach to part 2 of the RMA?

[70] This ground of appeal is whether the Court erred in not applying part 2 of the RMA. It is integrally related to the submissions of counsel about whether the Court should have, and did, apply an "overall judgment" approach.

Part 2 of the RMA and the former overall judgment approach

[71] Part 2 of the RMA provides the overall sustainable management purpose and principles of the Act. Section 5(1) in part 2 states that the purpose of the Act "is to promote the sustainable management of natural and physical resources". Section 5(2) explains that "sustainable management" means "managing the use, development, and protection of natural and physical resources in a way ... which enables people and communities to provide for their "social, economic, and cultural well-being" while:

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[72] The Act then provides for a cascading hierarchy of legal instruments in "a three-tiered management system" which give effect to part 2.[112] A document in a tier must give effect to, or not be inconsistent with, those in the tiers above. The highest tier is national policy statements, which set out objectives and identify policies to achieve them. The next tier are regional policy instruments, which identify objectives, policies and methods of achieving them including rules, that are increasingly detailed as to content and location.

[73] The tiers of planning instruments are the legal instruments which "flesh out" how the purpose and principles in part 2 apply in a particular case in increasing detail and specificity.[113] The Supreme Court explained in *EDS v King Salmon* the importance of attending to the wording of the planning instruments, as with any law:

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of '. That said however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
>
> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy

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112 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 [*EDS v King Salmon*] at [10] and [30].

113 At [151].

> prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.
>
> [131] A danger of the 'overall judgment' approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them...

[74] So, although part 2 is relevant to decision-making, because it sets out the RMA's overall purpose and principles, the basis for decision-making is the hierarchy of planning documents.[114] The Supreme Court noted in *EDS v King Salmon* that part 2 of the RMA may be relevant if a planning document, there the NZCPS, does not "cover the field" or to assist in a purposive interpretation if there is uncertainty as to the meaning of particular policies in the NZCPS.[115]

[75] There has been some debate as to the implications for this approach of following the subsequent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council*.[116] There, the Court of Appeal accepted that, in considering a resource consent application compared with a plan change proposal, a decision-maker must have regard to the provisions of part 2 when appropriate.[117] The Court said that applications for resource consent "cannot be assumed" to "reflect the outcomes envisaged by pt 2" and "the planning documents may not furnish a clear answer to whether the consent should be granted or declined".[118] It did not consider that the Supreme Court's rejection of the "overall judgment" approach prohibited consideration of part 2 in the context of resource consent applications.[119]

[76] There are obiter comments by the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* that appear to suggest the Supreme Court's proscription of the "overall judgment" approach in *EDS v King Salmon* might not apply outside a context that engages the NZCPS.[120] However, this case does engage the NZCPS. It is clear that, where the NZCPS is engaged, any consent application will necessarily be assessed applying the provisions of the NZCPS and other relevant plans, and also part 2 if it is otherwise unclear whether the consent should be granted or not.[121] Part 2 cannot be used "for the purpose of subverting a clearly relevant restriction in the NZCPS".[122] Where there is "doubt" as to the outcome of the consent application on the basis of the NZCPS, recourse to part 2 is necessary.[123] Recourse to part 2 may or may not assist, depending on the provisions of the relevant plan.[124]

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114 At [151].
115 At [88].
116 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283, [2019] NZRMA 289.
117 At [47].
118 At [51].
119 At [66].
120 At [67]–[69] and [71].
121 At [71] and [73].
122 At [71].
123 At [75].
124 At [75].

[77] In any case, I read the Court of Appeal's comments as being focussed on permitting reference to part 2 of the RMA. I do not read the Court of Appeal to be endorsing the previous approach of courts simply listing relevant considerations, including provisions of planning documents, and stating a conclusion under the rubric of an "overall judgment" in relation to consent applications that do not engage the NZCPS. The Supreme Court was clear about the obvious defects of that approach.[125] It is inconsistent with the text and purpose of the RMA, inconsistent with the need to give meaning to the text of the plans as the legal instruments made under the RMA, and inconsistent with the rule of law. The Court of Appeal's statement, that in all cases not involving the NZCPS "the relevant plan provisions should be considered and brought to bear on the application" makes it clear it does not advocate for that.[126] Rather, the Court considered there must be "a fair appraisal of the objectives and policies [of a plan] read as a whole".[127] While the Court of Appeal expanded on the use of part 2 of the RMA, I do not consider its judgment contradicted the reasoning of the Supreme Court in warning about the defects of the overall judgment approach in relation to particular consent applications.

[78] This was illustrated in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[128] That case involved a challenge to the formulation of natural heritage policies for the Regional Coastal Environment Plan (RCEP) on the basis of inconsistency with the NZCPS. Wylie J held:

(a) The Environment Court was not entitled to focus on the unchallenged provisions of the planning document at issue, or the one immediately above it and ignore or gloss over higher order planning documents.[129]

(b) The Court erred in resolving tensions in RCEP policies primarily by reference to the RCEP's objectives, with only limited reference to the RPS and NZCPS.[130] The Court "failed to make 'a thoroughgoing attempt to find a way to reconcile' the provisions it considered to be in tension".[131]

(c) The "proportionate" approach adopted by the Environment Court was an overall judgment approach, "albeit by a different name", of the sort that had been "roundly rejected" by the majority of the Supreme Court in *EDS v King Salmon*.[132] It was not available to the Court to suggest that the benefits and costs of regionally significant infrastructure that could have adverse effects on areas of Indigenous Biological Diversity, which are areas with outstanding natural

125 *EDS v King Salmon*, above n 112, at [131]–[140].
126 *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].
127 At [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337, [2001] NZRMA 513 (CA) at [25].
128 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.
129 At [84].
130 At [89].
131 At [98], citing *EDS v KIng Salmon*, above n 112, at [131].
132 At [103].

character in the coastal environment, should be assessed on a case-by-case basis having regard to all relevant factors.[133]

(d) Accordingly, the Environment Court erred in:

(i) approving policies and a rule that did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS;[134]

(ii) by failing to consider the directive nature of Policies CB 2B and CE 6B of the RPS;[135] and

(iii) by failing to recognise that the objectives in the RCEP recognise that "provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area".[136]

[79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson Family Trust v Marlborough District Council*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed.[137] As with any legal instrument, the text of the instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to part 2 is required.[138] The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. That is consistent with the standard purposive interpretation of enactments, as summarised by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[139]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The Environment Court's treatment of part 2

[80] Here, the Environment Court held, with reference to *RJ Davidson Family Trust v Marlborough District Council*, that it is "necessary to have regard to part 2, when it is appropriate to do so", but reference to part 2 is "unlikely to add anything" where it is clear a plan has been competently prepared having regard to part 2.[140]"[A]bsent such assurance, or if in doubt,

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133 At [106].
134 At [123].
135 At [129].
136 At [135].
137 At [128]–[129].
138 At [75].
139 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
140 Environment Court, above n 1, at [59].

it will be appropriate and necessary to do so".[141] The Court considered submissions about whether reference to part 2 was required here, in particular regarding the relationship between the NPSET and NZCPS, or whether those instruments were clear and had been reconciled in the formulation of the RCEP.[142] The Court considered evidence of expert planning witnesses about whether to refer to part 2,[143] which is irrelevant and an error given that the necessity or otherwise of reference to part 2 is an issue of law. The Court said:

> [68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

[81] The Court acknowledged the need to give effect to national policy statements according to their particular terms, rather than on the basis of a broad overall judgment.[144]

[82] In the final two paragraphs of its concluding reasoning, after rejecting the argument that the NZCPS required consent to be declined, the Court said:

> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on part 2 and the overall judgment approach

[83] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Court erred by failing to assess the proposal against part 2, including ss 6(3), 7(a) and 8, directly. The nature of the issues, the meaning of the policies and the relationship between the NZCPS and NPSET made it "appropriate and necessary" for it to do so. He submits the Court erred in applying an overall judgment of the proposal against s 5 selectively, without analysis, and without consideration of the balance of part 2. *RJ Davidson Family Trust v Marlborough District Council* does not mean that reference to part 2 only

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141 At [59].

142 At [60]–[67], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 128, and related Environment Court judgments.

143 At [66].

144 At [92].

occurs if there is a problem. Rather, part 2 and superior planning instruments must be taken into account in a difficult case, as it was here. He submits that part 2 should be used in a purposive interpretation of the terms in the RCEP.

[84] Mr Beatson, for Transpower, submits:

(a) *EDS v King Salmon* rejected the previous "overall broad judgment approach". *RJ Davidson Family Trust v Marlborough District Council* confirms recourse to part 2 is only necessary where there is a question as to whether a plan has been competently prepared having regard to part 2. The Court was correct that it is up to a decision-maker to give competing policies such weight as it thinks necessary in the context.

(b) The Court found there is no need for an overall evaluation under part 2 at the consenting stage where plans have been prepared having regard to part 2. Here, the Court found the RCEP is comprehensive and provides a clear policy and consenting pathway for the project, so it focussed on the RCEP policies. The relevance to a proposal of higher order documents, which have been reconciled and prepared in accordance with part 2, does not justify concluding it is unclear as to whether consent should have been granted. No defect within the RCEP has been identified that makes recourse to part 2 necessary. The Court's concluding paragraphs were not attempting to undertake a part 2 analysis.

(c) Regardless of its decision that recourse to part 2 was not necessary, the Court carefully set out the cultural evidence provided by witnesses, the consultation undertaken by Transpower, the potential cumulative cultural effects and how the cultural effects on both hapū would be impacted by the proposal. That is the same analysis that would be undertaken under ss 6(e), 7(a) and 8. Addressing those sections directly would have added nothing. Section 7(b), (c) and (f) of part 2 of the RMA would also be relevant. The conclusions reached would inevitably have been the same.

[85] Ms Hill, for the Councils, submits the Environment Court exercised a discretionary judgment not to consider the proposal against part 2.[145] As the Court of Appeal held in *RJ Davidson Family Trust v Marlborough District Council*, assessment against part 2 is only necessary where a plan has not been competently prepared in accordance with part 2. The Court correctly observed that, in applying the policies, no specific outcomes are particularised and no outcome that would wholly avoid adverse effects was possible.[146] Its consideration of s 5 did not purport to be an assessment against part 2.

Did the Court err in its approach to part 2?

[86] I outlined above the proper approach to part 2 of the RMA and the legal defects of the overall judgment approach. Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust v Marlborough District Council*, a Court will refer to part 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to part 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions

145 Environment Court, above n 1, at [59]–[68].
146 At [269].

attempt to confine reference to part 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

[87] Mr Beatson is correct that the Court here considered that the RCEP is comprehensive and provides a clear policy framework and consenting pathway for the proposal.[147] The Court also correctly acknowledged the need to give effect to the National Policy Statement according to their particular terms "rather than on the basis of a broad overall judgment".[148] But the Court did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal. It stated that the planning instruments contain "relevant objectives and policies to which we must have regard".[149] That generic characterisation recalls the overall judgment approach that the Supreme Court ruled out in *EDS v King Salmon*. The planning instruments are more than "relevant" and the Court must do more than "have regard" to them.

[88] In the last two paragraphs of its reasoning, the Court characterised the regional and district plans as generally treating as desirable both the protection of ONFL and provision of network infrastructure. It characterised Policy 6 of the NPSET as guiding it to reduce existing adverse effects of transmission. But the Court said the NPSET and NZCPS do not provide guidance as to how potential conflict between them should be resolved. So it fell back on reaching "a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA".[150] In only two further sentences, the Court made a "judgment" that the proposal was "more appropriate overall" than the status quo.[151] This is effectively, and almost explicitly, the application of an overall judgment approach. As such, it was an error of law.

[89] Instead, what the Court was required to do was to carefully interpret the meaning of the planning instruments it had identified, the RCEP in particular, and apply them to the proposal. If the text of the RCEP was not sufficient to do that, as the Court considered they were not, it was required to have recourse to the higher-level instruments such as the NZCPS and NPSET, and to part 2 of the Act. The Court did consider the NZCPS and NPSET and found them insufficient. Yet all parties agreed the Court did not have recourse to part 2.

[90] The Court's approach to part 2, and its use of an overall judgment approach, was a legal error. Whether that makes sufficient difference to the outcome to sustain the appeal depends on the outcome of that exercise, which I examine next.

Issue 4: Did the Court err in interpreting and applying the planning instruments?

[91] The submissions on this ground of appeal centred on whether one national policy statement, the NZCPS, is inconsistent or takes priority over another, the NPSET. Lying behind that were submissions as to whether the NZCPS or the RCEP contains directive provisions determining the result of the application.

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147 At [68].
148 At [92].
149 At [269].
150 At [270].
151 At [270].

The RMA and bottom lines

[92] The Supreme Court in *EDS v King Salmon* clarified that a policy of preventing adverse effects of development on particular areas is consistent with the sustainable management purpose of the RMA.[152] It held that "avoid", in s 5 and the NZCPS, is a strong word that has its ordinary meaning of "not allowing" or "preventing the occurrence of".[153] The use in s 5 of "remedying and mitigating" indicates that developments with adverse effects could be permitted if they were mitigated or remedied, assuming they were not avoided.[154]

[93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application.[155] This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".[156]

[94] The RMA also envisages that there may be cultural bottom lines. As Whata J stated recently in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, "... there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively".[157] The cascading hierarchy of the RMA, and the legal instruments under it, accord an important place to the cultural values of Māori. That is reflected in part 2 of the Act:

(a) The core purpose of the Act, stated in s 5, is to promote sustainable management by managing the "use, development and protection of resources in a way which enables people and communities" to provide for their "social, economic, and cultural well-being" at the same time as sustaining the potential of resources to meet the reasonably foreseeable needs of future generations.

(b) The requirements on all persons exercising functions and powers under the Act in relation to "managing the use, development, and protection of natural and physical resources":

(i) to "recognise and provide for""the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one matter of national importance in s 6(e);

(ii) to "have particular regard to" kaitiakitanga in s 7(a); and

(iii) to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in s 8.

Māori values in the RMA recognised in case law

[95] The implications of those part 2 provisions have been recognised in case law. In 2000, in his last sitting in the Judicial Committee of the Privy Council in *McGuire v Hastings District Council*, Lord Cooke described part 2 of the RMA as "strong directions, to be borne in mind at every stage of the

152 *EDS v King Salmon*, above n 112, at [24](d).
153 At [24](b), [96] and [126].
154 At [24](b).
155 At [47].
156 At [39]–[41].
157 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] NZRMA 179 at [29].

planning process".[158] They mean "that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads".[159] In that case, which involved a challenge to the designation of a road through Māori land, the Privy Council held "if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route".[160] This principle would extend to not constructing the new route at all in that case if "other access was reasonably available".[161] All authorities making decisions are therefore "bound by certain requirements, and these include particular sensitivity to Maori issues".[162] The Judicial Committee was satisfied that Māori land rights are adequately protected by the RMA.[163]

[96] Similarly in 2014, the Supreme Court in *EDS v King Salmon* affirmed that "the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind".[164] In its reasoning rejecting the "overall judgment approach", the Supreme Court held that s 58 of the RMA was inconsistent with the NZCPS being no more than a statement of relevant considerations.[165] Section 58 contemplates the possibility, depending on the meaning of the planning instruments, that there might be absolute protection from the adverse effects of development—a potential environmental bottom line.

[97] The Supreme Court's emphasis on s 58 is also relevant to this case. Section 58(1)(b) empowers a NZCPS to state objectives and policies about "the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga" and, in s 58(1)(gb), "the protection of protected customary rights". This indicates that cultural bottom lines, as well as environmental bottom lines, can be provided for under the NZCPS. Whether there are particular cultural bottom lines depends on the text and interpretation of the relevant planning instruments.

[98] In 2020, the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (currently under appeal to the Supreme Court), the Court of Appeal considered an appeal of decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[166] The Court held the decision-maker erred by "failing to give separate and explicit consideration" to environmental bottom lines; failing to address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga; and in failing to identify relevant

158 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577, [2001] NZRMA 557 at [21].
159 At [21].
160 At [21].
161 At [21].
162 At [21].
163 At [29].
164 *EDS v King Salmon*, above n 112, at [88].
165 At [117].
166 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 89.

environmental bottom lines under the NZCPS and consider whether the proposal would be consistent with them.[167]

[99] The Court held the interests of Māori in relation to all taonga, referred to in the Treaty of Waitangi and regulated by tikanga, were included in a statutory requirement to take into account the effects of activities on "existing interests".[168] It held it was necessary for the decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[169] The Court stated:

> [174] In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right—as ancestors, gods, whānua—that iwi have an obligation to care for and protect.

[100] Also in 2020, in *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, after comprehensively traversing the ways in which the RMA recognises Māori cultural values, Whata J observed that:[170]

> [73] ... the obligation 'to recognise and provide for' the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. ...
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> ...
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> [102] ... where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. ...

The NZCPS and NPSET

[101] The NZCPS and NPSET are national policy statements which bear on the interpretation of lower order planning instruments. The NZCPS of 1994 was the first national policy statement formulated. It was substantially revised in 2010, under s 58 of the RMA. Under s 56, the purpose of a NZCPS is "to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand". Under ss 62(3), 67(3) and 75(3), regional policy statements, regional plans and district plans must "give effect" to the NZCPS. Its 29 policies support seven stated objectives. The relevant Objectives and Policies are set out in the Annex to this judgment. As explored further below they involve three sets of relevant values: protection of natural features and landscape; culture; and social, economic, and cultural values.

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167 At [12](a), [12](c), and [12](d) and [201].
168 At [163] and [177].
169 At [170].
170 *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, above n 157.

[102] Policy 15 of the NZCPS was a particular focus in *EDS v King Salmon* and is in this case too. The Supreme Court held that:

(a) Policy 15 of the NZCPS, in relation to natural features and landscapes, states a policy of directing local authorities to avoid adverse effects of activities on natural character in areas of outstanding natural landscapes in the coastal environment.[171]

(b) The overall purpose of the direction is to "protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development".[172] It provides a graduated scheme of protection that requires avoidance of adverse effects in outstanding areas but allows for avoidance, mitigation or remedying in others.[173]

(c) The broad meaning of "effect" in s 3 must be assessed against the opening words of the policy.[174] Consistent with Objectives 2 and 6, "avoid" in Policy 15 bears its ordinary meaning as stated above.[175] Similarly, "inappropriate" use and development should be assessed against the characteristics of the environment that the Policy seeks to preserve.[176]

(d) Policies 15(a) and 15(b) provide "something in the nature of a bottom line".[177] It considered "there is no justification for reading down or otherwise undermining the clear terms" of the policy.[178]

[103] The NPSET was the second national policy statement formulated. Under s 45 of the RMA, its purpose is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act". Sections 62(3), 67(3) and 75(3) also require regional policy statements, regional plans and district plans to effect to it. The NPSET sets out the objectives and policies for managing the electricity transmission network under the RMA. The relevant Objectives and Policies are also set out in full in the Annex to this judgment. They set out relevant considerations for, and impose requirements on, decision-makers.

The relationship between the NZCPS and NPSET

[104] In an interim judgment in *Transpower New Zealand Ltd v Auckland Council*, Wylie J considered the respective relationships of the NZCPS and NPSET to the purposes of the RMA.[179] He noted that documents lower in the planning hierarchy are required to give effect to both of them and he considered *EDS v King Salmon*.[180] He noted that a national policy statement "can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary" and accepted that the NPSET does so provide.[181] Before

171 *EDS v King Salmon*, above n 112, at [58] and [61].
172 At [62].
173 At [90].
174 At [145].
175 At [96].
176 At [100]–[102] and [126].
177 At [132].
178 At [146].
179 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [77]–[84].
180 At [77]–[78].
181 At [82].

undertaking a detailed analysis of the text of the NPSET policies, regional policy statement and district plan provisions relevant there, he said:

> [83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".
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> [84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.

Regional and District planning instruments

[105] Regional and District planning instruments sit below the national policy statements but are more detailed in their provisions. The RCEP is required by s 67(3)(b) of the RMA to give effect to the NZCPS and national policy statements including the NPSET. The RCEP sets out issues, objectives and policies in relation to the coastal environment in the Bay of Plenty regarding the same three sets of values as the NZCPS and taking into account the requirements of the NPSET. The relevant provisions of the RCEP involve the same three sets of values involved in the NZCPS noted above.

[106] Consent authorities consider the granting of consents under s 104 of the RMA, which provides that "the consent authority must, subject to part 2, have regard to: actual and potential effects on the environment of allowing the activity; relevant provisions of planning instruments; and any other matter it considers relevant and necessary". Here, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (NESETA Regulations) specify what activities relating to existing transmission lines are permitted, controlled, restricted discretionary, discretionary, or non-complying. They are national environmental standards made under s 43 of the RMA and take precedence over the District Plan, under s 43B. Transpower's proposal here involved controlled, restricted discretionary or discretionary activities under the NESETA Regulations.[182]

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182 Environment Court, above n 1, at [55] and table 1.

[107] The Tauranga City Plan is a District Plan for the purposes of s 43AA of the RMA. Its purpose is to enable the Council to carry out its functions under the RMA. Relevant provisions are included in the Annex. They involve the same three sets of values involved in the NZCPS and RCEP.

The Court's treatment of the planning instruments

[108] The Environment Court agreed that the RCEP is comprehensive, has been tested and "provides a clear policy framework and consenting pathway for these applications."[183] Accordingly, its "evaluation of the statutory provisions focusses on the relevant policies in the RCEP". It also addressed the higher order policy documents and the District Plan.

[109] After outlining the NPSET and the NZCPS in its decision, the Environment Court noted the *Transpower New Zealand Ltd v Auckland Council* decision. Despite its later recourse to an overall judgment approach, the Court said:

> [77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

[110] The Court noted no party had identified any policy in the RPS which set out anything not otherwise found in the other planning instruments. It noted the RCEP gives effect to the RPS through more specific direction, and there was no contest in relation to any of the RPS provisions.[184] Therefore, it did not quote any of the RPS provisions. It set out relevant provisions of the RCEP. It considered it should have regard to the District Plan and iwi management plans and outlined some of their relevant provisions.

[111] The Court addressed the issue of whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure, for the purposes of Policies 4 and 6 of the NPSET.[185] It agreed with expert evidence that the proposal is a "substantial" rather than "major" upgrade and that it is not new infrastructure.[186] The Court also said it was guided by Policies 7 and 8 of the NPSET but concluded those policies were not determinative. They are expressed to deal with the planning and development of the transmission system, which "indicates these policies relate to future and new works rather than to upgrades of the existing system".[187]

[112] The Court said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui".[188]

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183 At [68].
184 At [78].
185 From [145].
186 At [150].
187 At [152].
188 At [194].

[113] In its concluding reasoning, the Court said:

> [259] ... While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.
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> ...
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> [267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b) RMA we must undertake a fair appraisal of the objectives and policies read as a whole.[189] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.
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> [268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.
>
> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
>
> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcomes would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on application of the planning instruments

[114] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in not giving the more directive provisions of the NZCPS priority over the less directive provisions of the NPSET. NZCPS is a mandatory document at the top of the hierarchy of planning instruments with the purpose under s 56 of achieving the purpose of the RMA. It could have, but did not, refer specifically to

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189 *Dye v Auckland Regional Council*, above n 127, at [25]; and *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].

NPSET. The NPSET states objectives and policies that are only relevant to achieving the purpose of the RMA. The NPSET is not as all-embracing of the RMA's purpose. It was intended to be only a guide for decision-makers—a relevant consideration, subject to part 2, which is not to prevail over the RMA's purpose. Accordingly, if one national policy statement has to give way to another, the NPSET must give way to the NZCPS, particularly Policy 15.

(b) The Court erred in finding that the proposal constitutes a substantial, rather than a major, upgrade and that it is not new infrastructure. This follows from the extent of works proposed in a different location, amounting to almost 40 new structures and several kilometres of lines, the benefit to mana whenua as promoted by Transpower, and the major nature of some of the new poles such as Poles 33C and 33D. Accordingly, the Court should have applied Policy 4 of the NPSET, which contains an "avoid" directive, rather than Policy 6.

(c) The Court failed to have regard to Policy IW 2 of the RCEP and its directive to avoid adverse effects on sites of cultural significance or to be sure that it is not possible to avoid them or not practicable to minimise them. It also failed to apply NH 4, which provides that adverse effects on the values and attributes of ONFLs must be avoided. Policy SO 1 confirms the primacy of IW 2 and NH 4.

[115] Mr Beatson, for Transpower, submits:

(a) There is no difference in the status of the NZCPS and the NPSET. When they are both engaged and read together, the specific overrides the general, according to *EDS v King Salmon* and *Transpower New Zealand Ltd v Auckland Council.* Therefore, the "reduce existing adverse effects" language in Policy 6 and "seek to avoid" language of Policy 8 of the NPSET should be preferred over the NZCPS "avoid". Making anything of the silence of NZCPS as to NPSET is a speculative and fruitless exercise.

(b) There is no bottom line, or absolute policy of avoidance of all adverse effects, in Policy 15(a) of the NZCPS. That policy directs that the adverse effects of *inappropriate* development should be avoided, which is context-dependent. The Court assessed the proposal against Policy 15(a) and other instruments. Policy IW 2 of the RCEP does not have direct relevance to this ground of appeal because it does not reference the criteria in set 2 to the RPS. The Court accepted Ms Golsby's expert planning evidence for the Council that Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them.[190]

(c) In any case, the RCEP gives effect to both the NZCPS and NPSET, as it is required to do by s 67(3) of the RMA. It reconciles the tensions between them. As the Environment Court held in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, higher order instruments should be regarded as particularised in the relevant plan unless there is a problem with the plan itself.[191]

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190 Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

191 *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479.

(d) The Court presumably did not engage with Policies NH 4, NH 5 and NH 11 on the basis of the evidence that effects on the ONFL were avoided. If NH 4 is triggered, Policies NH 5(a) and NH 11(a) provide an alternative consenting pathway. Transpower adopts the Councils' submissions on that issue. A project should not have to meet two different thresholds within the same policy context. Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them. The Court relied on the evidence of Ms Ryder for the Councils, and concluded the proposal was consistent with NH 4.[192]

(e) Even if there were adverse effects on the Māori values of ONFL 3, they would not have made a difference to the outcome. Māori values are only one part of the values and attributes associated with the ONFL. They would not necessarily lead to the conclusion there was an adverse effect on the ONFL as a whole. ONFL 3 is identified in the RCEP as having existing infrastructure located within it, which must be relevant to assessing the appropriateness of its relocation.

(f) The Court's findings that Policy 6 of NPSET had greater relevance than Policy 4, that the proposal was consistent with it, and that the finding that the proposal is a substantial upgrade, are not susceptible to being overturned on appeal unless it is clear there is no evidence to support the interpretation. This is not the case.

[116] Ms Hill, for the Councils, adopts Transpower's submissions. In addition, she submits:

(a) The Environment Court correctly applied *EDS v King Salmon* by directly applying the RCEP without recourse to the NZCPS and NPSET. There is no authority requiring otherwise. The process of reconciling the NZCPS and NPSET has already been undertaken through the recent development of the RCEP. If the Court is required to re-examine whether the NH policies appropriately reconcile relevant national policy statement directions in every subsequent consent application, planning processes could be rendered futile.

(b) The Court was not required to assess the proposal against the detail of each policy such as IW 2, but to undertake a fair appraisal of the objectives and policies read as a whole. The Court did consider the proposal against the intent of IW 2. It carefully evaluated the cultural effects based on the evidence of the tāngata whenua witnesses and Mr Brown and gave considerable attention to cultural mitigation opportunities.[193] It was conscious that the existing environment includes the existing bridge and national grid infrastructure.

(c) The finding of adverse effects was not contrary to Policies IW 2 or NH 4(b) because: those policies require consideration as a whole; avoidance of adverse effects is not required by IW 2; NH 4(b) only requires avoidance of effects on the particular "values and attributes" of ONFL 3; the effect of Poles 33C and 33D does not detract from the identified factors, values, and associations with the ONFL of the whole harbour; the Māori values component of the ONFL is only one

192 Environment Court, above n 1, at [228]–[229]. Statement of Evidence of Rebecca Keren Ryder, 11 February 2019 (CBD 202.0517).

193 Environment Court, above n 1, at [165], [167], [194]–[220], [232], [233] and [244]–[248].

of several components; and the Court was unable to confirm there were significant effects on the Māori values of ONFL 3.

Did the Court err in applying the planning instruments?

[117] I agree it was reasonable for the Environment Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction.[194] There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP undertaken below. It is arguable that provisions of the Tauranga City Plan further constrain the decision.[195] But this was not the subject of submission, so I do not consider it further.

[118] The more major difficulty with the Court's decision is that, consistent with its overall judgment approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition that the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested the regional and district plans "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable".[196] But it considered they did not "particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved".[197] Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how "potential conflict" between the NPSET and NZCPS is to be resolved, and moved to its overall judgment.[198] As I held above, the Court's employment of the overall judgment approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.

[120] Interpreting and applying the natural heritage provisions of the RCEP:

(a) Issue 7 of the RCEP, which gives a clue to its purpose, is that "Māori cultural values ... associated with natural character, natural features and landscapes ... are often not adequately recognised or provided for resulting in adverse effects on cultural values". Consistent with Policy 15 of the NZCPS, Objective 2(a) is to protect the attributes and values of ONFL from inappropriate use and development "and restore or rehabilitate the natural character of the coastal environment where appropriate".

(b) Te Awanui is identified in sch 3 of the RCEP as ONFL with medium to high Māori values, "a significant area of traditional history and identity" and as including "many cultural heritage sites", many of which are recorded in iwi management plans and Treaty settlement documents. That is reinforced by the recognition in the Tauranga City Plan of Te Ariki Pā/Maungatapu as a significant area for Ngāti Hē in terms of mauri, wāhi tapu, kōrero tuturu and whakaaronui o te wa. I

194 At [68] and [78].
195 For example, Policy 6A.1.7.1(g).
196 At [269].
197 At [269].
198 At [269].

found in Issue 2 that the proposal would constitute a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3.

(c) The natural heritage policies include a requirement on decision-makers in Policy NH 4 to avoid adverse effects on the values and attributes of the OFNL, in order to achieve Objective 2: protecting the attributes and values of ONFL from inappropriate use and development. This is consistent with and reflected in the Tauranga City Plan, as it must be. As noted in relation to Issue 2, I consider the proposal's adverse effect on Ngāti Hē's values in ONFL 3 would constitute an adverse effect on the ONFL.

(d) Under Policies NH 4A and 9A respectively:

(i) The assessment of adverse effects should: recognise the activities existing at the time the area was assessed as ONFL and have regard to the restoration of the affected attributes and values and the effects on the cultural and spiritual values of the tāngata whenua.

(ii) Recognise and provide for Māori cultural values, including by "avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape", "assessing whether restoration of cultural landscape features can be enabled", and "applying the relevant iwi resource management policies". Those policies object to power pylons and emphasise that "Marae provide the basis for the cultural richness of Tauranga Moana".[199]

(e) So, if a proposal is found to adversely affect the values and attributes of the ONFL having regard to all those considerations, as I have held this one does, the default decision is that it should be avoided under NH 4.

(f) But, nevertheless, Policy NH 5(a)(ia) requires decision-makers to "consider providing for" proposals that relate to the construction, operation, maintenance, protection or upgrading of national grid, even though will adversely affect those values and attributes. Policy 11(1) in turn sets out the requirements for NH 5(a) to apply, including that:

> (a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and
>
> (b) The avoidance of effects required by Policy NH 4 is not possible; and
>
> ...
>
> (d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and
>
> (e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

(g) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, if all the circumstances specified in NH 11 apply, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A (including the iwi management plans).

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199 Ngāi Te Rangi Resource Management Plan. See also Te Awanui Tauranga Harbour Iwi Management Plan 2008 (Objective 1, Policies 1, 2, 10), Tauranga Moana Iwi Management Plan 2016 (Policies 15.1, 15.2, 15.4).

[121] The Iwi Resource Management Policies of the RCEP must also be applied:

(a) Schedule 6 of the RCEP identifies Te Awanui as an ASCV, with reference to iwi management plans and other historical documents and Treaty settlement documents.

(b) Policy IW 1 of the RCEP requires proposals "which may" affect the relationship of Māori and their culture, traditions and taonga, to "recognise and provide" for" areas of significant cultural value identified in sch 6, and other sites of cultural value identified in hapū resource management plans or evidence. Policy IW 5 provides that "only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga".

(c) Similarly, but slightly differently to Policy NH 4, Policy IW 2 requires "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS" to be avoided as a default. As Advice Note 2 states, ASCVs are likely to strongly meet one or more criteria in Appendix F. Unlike the ONFL, the ASCV applies directly to the land on which the Marae is situated. I held in Issue 2 that the proposal constitutes a significant adverse effect on an area of cultural significance to Ngāti Hē.

(d) The qualification in IW 2 is that, where avoidance is "not practicable", the adverse effects must be remedied or mitigated. Where that is not possible either, it may be that offsetting positive effects can be provided. Policy 7C.4.3.1 of the District Plan expands slightly on that.

[122] The issues, objectives and policies related to activities in the coastal marine area must also be interpreted and applied:

(a) Issue 40 recognises that activities in the coastal marine area can promote social, cultural, and economic wellbeing, may need to be located in the coastal marine area in appropriate locations and in appropriate circumstances, but may cause adverse effects.

(b) Policy SO 1 recognises infrastructure is appropriate in the coastal marine area but that is explicitly made subject to the NH and IW policies "and an assessment of adverse effects on the location", which involve the practicability tests as above. That is reinforced by Objective 10A.3.3 and Policies 10A.3.3.2(c) and 10A.3.3.2(d) of the District Plan that minor upgrading of electric lines "avoids or mitigates" and "address[es]", respectively, potential adverse effects. Objective 10B.1.1 and Policy 10B.1.1.1 of the District Plan provides that adverse effects should be "avoided, remedied or mitigated to the extent practicable". Policy 10A.3.3.1 requires network utility infrastructure to be placed underground unless certain conditions apply.

[123] So, read carefully together, the iwi resource management policies are consistent with the natural heritage policies and with the structures and occupation of space (SO) policies:

(a) Policy IW 2 of the RCEP requires that adverse effects on areas of spiritual, historical or cultural significance to tāngata whenua must be avoided "where practicable". The Environment Court erred in failing

to interpret and apply Policy IW 2. This is not a matter of evidence, however expert. Expert witnesses cannot and should not give evidence on issues of law, as it appears Ms Golsby was permitted to do.[200] The interpretation and application of the law is a matter for the Court.

(b) Similarly, Policies NH 4 and 4A of the RCEP require that "adverse effects must be avoided on the values and attributes of ONFL". However, a decision-maker can still consider providing for a proposal in relation to the national grid if, under NH 5(a)(ia) and NH 11(1), there are "no practical alternative locations available" outside the areas listed in NH 4, the "avoidance of effects" is not possible, and "adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements". The Court did not apply these either.

(c) I do not accept the submission that there cannot be two different thresholds in the IW and NH policies. The thresholds are similar and must each be satisfied for the proposal to proceed.

(d) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, in the circumstances specified in NH 11, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A.

(e) Under Policy SO 1, the analysis of adverse effects overrides the default approach that infrastructure is appropriate in the coastal marine area. Policy SO 2 also invokes the requirements of both the NZCPS and NPSET.

[124] The last point expressly directs reference to the "requirements" of NZCPS and NPSET. Even if it did not, as I held in Issue 3, a Court will refer to part 2 and higher order planning instruments if careful purposive interpretation and application of the relevant policies requires that. But it is wrong to turn first to the NZCPS and NPSET. Whether consent needs to be declined depends on an application of the RCEP (and District Plan) provisions interpreted in light of the NZCPS and NPSET.

[125] I agree with the Environment Court that the NZCPS itself does not necessarily require consent to be declined.[201] That is clear on the face of the relevant policies and because of the operative role of the RCEP. I also agree with the Court that, in relation to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as "trumping" the other and neither should be given priority over or "give way" to the other.[202] As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. In *Transpower New Zealand Ltd v Auckland Council,* Wylie J characterised the NPSET as providing relevant considerations in general.[203] I agree that a number of the policies do that. And it may be that the NPSET is not as "all embracing" of the RMA's purpose as

200 Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).
201 Environment Court, above n 1, at [267].
202 At [77].
203 *Transpower New Zealand Ltd v Auckland Council*, above n 179, at [82].

the NZCPS.[204] But the terms of both national policies inform the interpretation and application of the relevant planning instrument to the specific issue in determining the outcome, as Wylie J demonstrated.[205]

[126] I do not agree with the implication of the Environment Court's reasoning that the NZCPS and NPSET conflict in their application to this proposal.[206] I accept the submissions of Mr Beatson and Ms Hill that, in relation to this issue, the RCEP gives effect to the NZCPS and NPSET and reconciles them. I consider their requirements are consistent with each other as expressed in both the RCEP and District Plan. In more detail:

(a) Objective 2 and Policy 15 of the NZCPS, as interpreted by the Supreme Court in *EDS v King Salmon*, reinforce the nature of the natural heritage policies of the RCEP as bottom lines in requiring adverse effects to be avoided. The circumstances in which use and development are "appropriate" under Policy 15 are set out in the RCEP. Adverse effects should be avoided, but may be considered if no practical alternative locations are available, avoidance of adverse effects is not possible and they are avoided to the extent "practicable".

(b) Objective 3 and Policy 2 of the NZCPS, as outlined above, reinforce the Iwi Resource Management policies of the RCEP as cultural bottom lines in requiring adverse effects to be avoided unless "not practicable".

(c) Objective 6 and Policy 6 of the NZCPS reinforce the recognition in Issue 40 and Policies SO 1 and SO 2 of the importance to well-being of use and development of electricity transmission in "appropriate places and forms" on the coast or coastal marine area and within "appropriate limits". Policy 6 specifically references the need to make "appropriate" provision for marae and associated developments of tāngata whenua, to "consider how adverse visual impacts of development can be avoided" and "as far practicable and reasonable" apply controls of conditions to avoid those effects. Policy 6 also recognises that activities with a "functional need to be located in the coastal marine area" should be, in "appropriate" places, and those that do not, should not.

(d) The NPSET similarly recognises the national significance of electricity transmission while managing its adverse effects. Policies 2, 5, 6, 7 and 8 put requirements on decision-makers. But Policy 2 is general in requiring that they "recognise and provide for the effective operation" etc of the network. Policy 5 is more specific in requiring decision-makers to "enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects. That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to "reduce" existing adverse effects where there are "substantial upgrades of transmission

204 At [84].
205 At [85]–[104].
206 Environment Court, above n 1, at [269].

infrastructure". And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to "avoid" or "seek to avoid" certain adverse effects.

[127] I do not consider Mr Gardner-Hopkins' submission that the Court erred in finding the proposal constitutes a "substantial" rather than "major" upgrade makes much difference to the outcome. Policy 4 of the NPSET requires decision-makers to "have regard" to the extent to which adverse effects of major upgrades have been minimised, which must be relevant anyway, under other provisions. Policy 6 adds an element of proactivity in requiring "substantial upgrades" to be used as an opportunity to "reduce existing adverse effects". Each bears on the outcome of the application, but neither is determinative. If it does matter, I consider it was open to the Court to find the proposal was a "substantial" upgrade on the basis of the evidence before it. I am more dubious about the Court's conclusion that Policies 7 and 8 relate only to future and new works rather than to upgrades of the existing system. I see no reason why upgrades do not involve planning of the transmission system and the purpose of those policies, of avoiding adverse effects, may apply to upgrades.

[128] More generally, to the extent that there is room for differences to be found between the NZCPS and NPSET, both instruments are reconciled and given effect in the RCEP and District Plan. But the Court needed to carefully interpret the RCEP and apply it to the facts here, as outlined above, in light of the higher order instruments. Reference to the general principles in part 2 of the Act, particularly ss 6(e), 7(a) and 8, simply confirms the analysis undertaken above.

[129] I found in Issue 2 that as a matter of fact and law, the proposal would have a significant adverse effect on an "area of spiritual, historical or cultural significance to tāngata whenua" and a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL. That means the bottom lines in Policies IW 2 and NH 4 of the RCEP respectively may be invoked:

(a) Under IW 2, the adverse effects on Rangataua Bay as an "area of spiritual historical or cultural significance to tāngata whenua" must be avoided "where practicable".

(b) Under NH 4, NH 5(a)(ia) and NH (11), the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 must be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

[130] So, whether the cultural bottom lines in the RCEP are engaged depends on whether the "practicable", "possible" and "practical" thresholds are met. That requires consideration of the alternatives to the proposal, which is the next issue.

Issue 5: Was the Court wrong in its assessment of alternatives?

[131] In this issue, I deal with the grounds of appeal regarding whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual. Both of those issues relate to how the Court assessed the alternatives.

Law of alternatives

[132] In *EDS v King Salmon*, the Supreme Court considered whether a decision-maker was required to consider alternatives sites when determining a site-specific plan change that is located in, or fails to avoid, significant

adverse effects on an ONFL.[207] It considered previous case law, including the High Court's judgment in *Meridian Energy Ltd v Central Otago District Council*, which rejected the proposition that alternatives must be considered.[208]

[133] The Supreme Court held that consideration of alternatives may be necessary depending on "the nature and circumstances" of the particular application and the justifications advanced in support of it.[209] If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect the preservation of the natural character, or that a particular site has features that make it especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities.[210] In that case, it considered the obligation to consider alternatives sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.[211]

The Environment Court's treatment of alternatives

[134] In its decision, the Environment Court stated:[212]

> [46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.

[135] In its second preliminary issue section, the Court considered whether it was necessary for Transpower to consider alternative methods for realignment of the A-Line and, if so, whether its assessment and evaluation was adequate.[213] In summary, the Court said:

(a) An assessment of alternatives "may be relevant" under s 104(1)(a) of the RMA if the adverse effects are significant or, under the RCEP, if there are adverse effects of an activity on the values and attributes of ONFL 3.[214] The Court referenced Policies NH 4 and NH 5.

(b) It noted that the identification of the attributes of ONFL 3 in sch 3 of the RCEP recognises that the current uses of ONFL 3 includes national grid infrastructure.[215] It considered it may follow, "in the absence of any policy for the removal of such uses", that it "might be considered to be generally appropriate within it on the basis that they do not undermine or threaten the things that are to be protected".[216] This does not take into account IW 2, NH 4, NH 5 and NH 11(1).

(c) The Court considered "an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms"

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207 *EDS v King Salmon*, above n 112, at [156].
208 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
209 *EDS v King Salmon*, above n 112, at [170].
210 At [170].
211 At [172].
212 Environment Court, above n 1, at [46], citing Transpower's *Assessment of Effects on the Environment*, above n 32.
213 At [113].
214 At [115].
215 At [116].
216 At [116].

and "[a]ll that is required is a description of the alternatives considered and why they are not being pursued".[217]

(d) The Court considered a list of seven options considered by Transpower in Table 2, entitled "Principal options considered by Transpower":

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge—east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

(e) The Court recorded that Transpower rejected option 2 for cultural reasons and lack of wider benefits.[218] Transpower rejected the options attaching a cable to the bridge or beneath the seabed for reasons of operational and security of supply risk, unacceptable costs and the need for substantial termination structures on either side of the waterway. Transpower shortlisted the two aerial crossing options. Its preferred option was the single span, option 3(a).

217 At [117].
218 At [122].

(f) The Court considered in some detail the potential alternatives of under-seabed and bridge-attachment cables because they were particularly mentioned by TEPS, the Marae and Ngāi Te Rangi.[219] The cost of the bridge-crossing option was estimated by Transpower at more than 10 times that of the aerial crossing.[220] The costs of undergrounding was "at least an order of magnitude more" than an aerial route.[221] On that basis, the Court considered these alternatives were "impracticable".[222]

(g) The Court held that "[a] relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible".[223] But it considered that the cost alone meant Transpower "has a clear reason for discounting a bridge option".[224] It considered imposing a condition requiring that cost "could well be unreasonable" and "would also be likely to go beyond the Court's proper role in adjudicating disputes under the RMA".[225] The Court considered that, if it were to conclude that level of expenditure was necessary to avoid, remedy or mitigate the adverse effects "then the more appropriate course could be to refuse consent to the proposal".[226] It accepted Transpower's dismissal of the under-sea options on the same basis.

(h) The Court considered all of the alternatives would place tall structures in the ONFL "whether above or below it or on its margins".[227]

(i) Accordingly, it concluded "the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound".[228]

[136] Later, in considering the cultural effects of the proposal, the Court held that the alternatives may have greater effects on the values and attributes of the harbour than the proposal.[229] In acknowledging Ngāti Hē's view that the effects of a new Pole 33C outweigh the benefits of the A-Line removal, the Court said "there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire".[230] It noted evidence, though not from NZTA, that NZTA has no plans to upgrade the bridge to a standard that could support the lines.[231] The Court also said:

> [219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an

219 At [123] and [124]–[137].
220 At [130].
221 At [136].
222 At [265].
223 At [138].
224 At [139].
225 At [140].
226 At [140].
227 At [143].
228 At [144].
229 At [213].
230 At [214].
231 At [215].

inappropriate position: it simply recognises that if an activity requires resources consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[137] As noted in relation to Issue 4, in its concluding reasoning, the Court said:

> [265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[138] And, in the last two sentences of its last paragraph, the Court said:

> [209] … In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on alternatives

[139] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) It is accepted there is a functional need for the lines to cross Rangataua Bay at some location. But Transpower did not try very hard to consider alternatives. It did not commission a detailed investigation as to whether strengthening the bridge would feasibly accommodate the A-Line. Its costs were "back of the envelope" figures provided by email.

(b) The RCEP's requirements that adverse effects be avoided in the IW 2 and NH 11 policies mean the Court must satisfy itself there are not possible alternatives or no practicable alternatives that would avoid the adverse effects. The terms "not practicable" and "not possible" in Policies IW 2 and NH 11 establish a very high threshold. The term "not possible" must impose a higher threshold than "not practicable". The threshold in NH 11(1)(d) is not met because it only requires having regard to technical and operational requirements.

(c) The Environment Court did not engage with what it understood the two terms to mean. It simply listed the relevant policies, applied the *Meridian Energy Ltd v Central Otago District Council* test, and made no assessment of the requirements. It dismissed the bridge and under-sea alternatives solely for cost reasons, but cost is not the determining element—its weight depends on the context. The Court made no findings as to whether the bridge and under-sea alternatives were "possible" or "practicable", or what they mean in the regulatory context here, so it failed to have regard to Policies IW 2 and NH 11.

(d) It would accord with the spirit of part 2 of the RMA, consistent with *McGuire v Hastings District Council*, to prefer an alternative. Transpower's 2017 Options Report identifies two alternative ways of achieving the project while avoiding the adverse effects required to be avoided by IW 2. They would involve using a cable across the bridge, with a termination structure of, at most, half the height of the

proposed structures, some distance away from the Marae.[232] It was not established that the termination structures of these alternatives, however "Dalek-like" (as apparently discussed at the Environment Court hearing), would need to be placed where Pole 33C is proposed to go or whether they could go in a different location, further away from the Marae.

(e) Posing the status quo as the obvious counterfactual was a mistake, given the evidence. At the least, the Court should have acknowledged that declining consent would not necessarily deprive Ngāti Hē and others of the benefits of the current proposal in removing the A-Line alignment across Rangataua Bay. But it is unlikely the status quo would be maintained, given the evidence that Pole 117, on a cliff face, is subject to erosion and episodic erosion events of three to six metres at a time.

(f) Mr McNeill, Transpower's Investigations Project Manager, agreed that if Transpower had known the proposal did not have Ngāti Hē and Maungatapu Marae support, it would have said "no way" and would "continue to meet and to, yeah, come up with other proposals…".[233] Ms Raewyn Moss, a General Manager at Transpower, gave evidence that Transpower would need to consider whether to proceed with the Matapihi aspect of the proposal if that was the only aspect granted consent.[234] Another Transpower witness confirmed it was possible from an engineering perspective, with modification to how the lines connected.[235]

(g) Transpower has an obligation to address the historical breach of the Treaty of Waitangi, especially given the assurance that the A-Line would be relocated to the new B-Line path when the B-Line was proposed some 25 years ago. Otherwise, the existing bridge and motorway will be a justification for further infrastructure being located alongside them with further negative cumulative effects.

[140] Mr Beatson, for Transpower, submits:

(a) The approach in *Meridian Energy Ltd v Central Otago District Council* is correct. Transpower undertook a comprehensive analysis of all technically viable alternative options. "Practicable" imports feasibility, viability, and cost considerations. In NH 11(1), "practicable" is clearly informed by Transpower's technical and operational requirements.

(b) Transpower satisfied the requirements of NH 5 and NH 11, given avoidance of all effects is not possible and adverse effects are avoided to the extent practicable. Ugly termination structures of 23 metres, characterised as "Daleks" would be required for any alternate option.[236] The alternatives of laying the relocated A-Line on or under

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232 Transpower New Zealand Ltd *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at 16–18 (CBD 304.1087–304.1089).

233 NOE 34/19–21.

234 NOE 27/12–15.

235 NOE 114/10–20.

236 Evidence of Richard Joyce (1 February 2019) (CB 203.623) at [28] and following photograph.

the seabed or attached to the bridge were found to be impracticable, not solely for cost reasons. The Court's findings were reasonable and supported by evidence.

(c) The Court was entitled to rely on, and prefer, the evidence of Transpower as to its plans and ability to retain the existing A-Line alignment if consent is declined. Mr McNeill's comments provide no guarantee unspecified alternatives would have been pursued. Ms Moss provided clear statements that Transpower would maintain Poles 116 and 117.[237] It is not clear whether it would be practically possible to split the Matapihi and Maungatapu aspects of the proposal.

(d) Mr Thomson confirmed maintenance of the A-Line is achievable if realignment does not proceed, with Pole 117 being relocated further inland.[238] The Court accepted Transpower could apply for a new consent for the anchor blocks associated with Pole 117 and continue to operate until all appeals were determined. Mr Beatson advises this is what has transpired. The Court also noted other regulatory avenues open to Transpower to secure the failing poles.

(e) What Transpower is trying to do is entirely consistent with *McGuire v Hastings District Council.* It has worked extremely hard to come up with a solution that it felt struck the right balance between cost and resolving the ongoing source of contention. It put it forward in good faith and got agreement and still considers it is a suitable response. There is no legal obligation on Transpower to move the A-Line under the RMA. Transpower does not have the obligations of the Crown under s 9 of the State-Owned Enterprises Act 1986 and there has been a Treaty settlement with Ngāi Te Rangi. Transpower would not be creating an additional transgression by maintaining the A-Line where it is. But dialogue with Ngāti Hē would continue in any case.

[141] Ms Hill, for the Councils, submits:

(a) *Meridian Energy Ltd v Central Otago District Council* does not require all possible alternatives to be evaluated nor proof that the intended proposal is the best of the alternatives. Avoidance of adverse effects to the "extent practicable" under NH 11(d) and NH 11(e) clearly relates to the particular proposal rather than to alternatives.

(b) The Environment Court did not dismiss particular options but assessed the adequacy of Transpower's consideration of them and whether a clear rationale for discounting an option was provided.[239] It set out detailed reasons why Transpower discounted particular options. It clearly considered whether avoidance of adverse effects was "not possible" having regard to the alternatives.[240] The Court assessed mitigating or offsetting adverse effects and found the alternatives were impracticable. It found the alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, and avoidance of adverse effects was not possible under any scenario.

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237 Statement of Evidence of Raewyn Moss, 1 February 2019 at [38] (CBD 203.0612); and NOE 15/18–22.

238 Statement of Evidence of Colin Thomson, 1 February 2019 at [26] (CBD 203.645).

239 Environment Court, above n 1, at [46] and [144].

240 At [143].

(c) The Councils adopt the submissions of Transpower in relation to the status quo issue. In addition, it is difficult to know how such an error, if established, would be material to the outcome. Even if the prospect of the A-Line remaining is less certain than the Court considered it to be, the Court would be unable to establish there is another feasible alternative to the status quo with the requisite certainty or to direct Transpower to implement that.

Did the Court err in its treatment of alternatives?

[142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).

[143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.[241] *EDS v King Salmon* has overtaken *Meridian Energy Ltd v Central Otago District Council* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

[144] In *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Inc*, the Supreme Court considered the meaning of "practicable" in the context of the Civil Aviation Act 1990:[242]

> [65] 'Practicable' is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

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241 At [115].

242 *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Inc* [2017] NZSC 199, [2018] 1 NZLR 780.

[145] The Environment Court dealt with practicability rather differently. In its conclusion, the Court considered that the alternatives favoured by Ngāti Hē were technically feasible but would "entail costs of an order of magnitude greater" than the proposal.[243] It therefore concluded, apparently because it did not consider it had the power to require Transpower to amend its proposal, that the alternatives "appear from the evidence to be impracticable".[244] The Court determined that, when faced with a range of competing concerns and no possible outcome would be wholly without adverse effects, it had to decide which outcome better promotes the sustainable management of natural and physical resources as defined in s 5 of the RMA.[245]

[146] The Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.[246]

[147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

[148] What cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances. I do not rule out the possibility that, if the Court had itself examined robust costings of the alternatives, it may still have concluded the cost to be too high to be "practicable". I do not consider the reference in NH 11(d) to having regard to technical and operational requirements excludes the possibility of having regard to cost implications. A court would have to consider and weigh that. For the same reason, it may reasonable for a court to conclude that no "practical" alternative locations are available. It is hard to draw a meaningful distinction between "practical" and "practicable" in this context.

[149] But the requirement of Policy NH 11(1)(b), that "the avoidance of effects required by Policy NH 4 is not possible", does not involve an assessment of costs. The plain meaning of "possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost. That interpretation is reinforced by the use of "practical" in NH 11(1)(a) and "practicable" in NH 11(d). This interpretation is not inconsistent with the wording of NH 11(1)(a) because (a) relates to the practicality of alternative locations while (b) relates to the possibility of avoidance of effects. It is not inconsistent with NH 11(1)(d) and (e) because they relate to the avoidance,

243 Environment Court, above n 1, at [46] and [265.
244 At [265].
245 At [270].
246 At [265].

remedying or mitigation of all "adverse effects" to the extent practicable, while (b) requires the avoidance of effects required by Policy NH 4 to be possible. Policy NH 4 relates to the values and attributes of ONFL, which are different. It is the values and attributes of the ONFL that are the subject of the cultural bottom line in Policy 15(a) of the NZCPS, supported by part 2 of the RMA.

[150] So, the technical feasibility of the alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. Policy NH 11(1)(b) is therefore not satisfied and consideration of providing for the proposal under Policy NH 5 is not available.

[151] I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

[152] The status quo was one of the alternatives that Transpower, and the Court, considered. The Court was obliged to consider Transpower's evidence that it would walk away from the realignment project if the appeal was granted. It was open to the Court to regard that as an obvious option for Transpower. It was not required to give greater weight to Mr McNeill's evidence or even to make a finding either way. Predicting the future of this proposal is inherently speculative. But examination of the status quo option needed to be included in the analysis of alternatives. It was not a matter of preferring the proposal to the status quo, as the Court said. In law, it was a matter of whether the proposal was lawfully available, given the alternatives.

[153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Relief

Law of relief on RMA appeals

[154] Section 299 of the RMA provides that appeals are made in accordance with the High Court Rules 2016. Rule 20.19 provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
>
> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
>
> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.

...

(3) The court may give the decision-maker any direction it thinks fit relating to—

(a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

...

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[155] As Dunningham J observed in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, the "usual course" is to refer the matter back to the Environment Court.[247] But "the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court".[248]

[156] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau*, Heath J quashed a decision imposing a condition and referred it back to the Environment Court for rehearing, leaving the rest of the decision undisturbed.[249]

[157] In *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council*, Gault J said:[250]

> [207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted. The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same. That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble, and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

Submissions on relief

[158] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the errors are material. He submits it cannot be assumed the Environment Court would reach the same decision and the matter should be referred back to it for reconsideration. He also submits that I should refuse the consent if I find the effects of the proposal are adverse in terms of Policy 15(a) of the NZCPS and Policies IW 2 and NH 4 of the RCEP and that Transpower has failed to demonstrate it is not practicable or possible to avoid those effects. It would only be if I definitively found that there are practicable alternatives that would avoid the adverse effects, and other errors, that I could quash the consents and not refer the matter back to the Environment Court.

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247 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [112].

248 At [112].

249 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC) at [69].

250 *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76.

[159] Mr Beatson, for Transpower, submits that the Environment Court has not made an error of law. Thus, the High Court is not able to interfere with a decision made on the merits where there is no error of law.

[160] Ms Hill, for the Councils, submits that it is not the role of the High Court to weigh the evidence or substitute its own assessment of the consistency of the proposal with a plan. If the Court finds the Environment Court erred in its approach to assessing effects, Ms Hill submits the matter should be remitted to the Environment Court to reconsider in light of this Court's directions.

Should the decision be remitted?

[161] In summary, I have concluded the Environment Court made errors of law in:

(a) its findings regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of ONFL 3;
(b) its "overall judgment" approach and treatment of part 2 of the RMA;
(c) interpreting and applying to the proposal the cultural bottom lines in the planning instruments; and
(d) its treatment of the practicability, or practicality and possibility of avoiding the adverse effects of the proposal.

[162] These are material errors. I have determined the true and only reasonable conclusion about the adverse effects of the proposal. I have indicated the correct approach to interpreting and applying the planning instruments. I have interpreted and applied the meaning of Policy NH 11(1)(b) in light of the Environment Court's existing findings. But the Court's findings were not premised on the legal need for it to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal.

[163] I consider it is desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the questions about the alternatives that I have identified. It is likely that further evidence on that will be required from Transpower.

[164] The interpretation of "possible" in Policy NH 11(1)(b) in this judgment suggests that, if the proposal remains as it is and the Environment Court comes to the same conclusion as it did before on the basis of further evidence about alternatives, the proposal will not proceed as it is. But further consideration of alternatives with a narrower focus on the size, nature and location of Pole 33C might lead Transpower to amend its proposal. Evidence of Ngāti Hē's considered views of any such alternatives would be required in order to determine the adverse effects of any such amendments. With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[165] Furthermore, no issue has been taken with the part of the realignment proposal from Matapihi north. There are clear benefits to that part of the proposal, including to Ngāi Tūkairangi. If the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. There is evidence that may be possible, but the implications are not clear to me. I leave that to the Environment Court as well.

Result

[166] I quash the Environment Court's decision and remit the application to it for further consideration, consistent with this judgment.

[167] Costs should be able to be worked out between counsel. If not, I give leave for the appellant to file and serve a memorandum of up to 10 pages on outstanding issues regarding costs within 10 working days of the judgment and leave for the respondents to file and serve a memorandum of an equivalent length within 10 days of that. If that happens, the appellant then has five days to file and serve a memorandum in reply of up to five pages.

Annex: Relevant planning provisions

New Zealand Coastal Policy Statement 2010

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

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

Objective 3

To take account of the principles of the Treaty, recognise the role of tāngata whenua as kaitiaki and provide for tāngata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tāngata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tāngata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tāngata whenua.

...

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;

...

Policy 2 The Treaty of Waitangi, tangata whenua and Maori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tāngata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

...

(c) with the consent of tāngata whenua and as far as practicable in accordance with tikanga Māori, incorporate matauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision-making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; ...

(f) provide for opportunities for tāngata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment, through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tāngata whenua;

(iii) ...; and

(g) in consultation and collaboration with tāngata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tāngata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori ...

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, ... are activities important to the social, economic and cultural well-being of people and communities.

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;

...

(d) recognise tāngata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;

...

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment;

(2) Additionally, in relation to the coastal marine area:

...

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there

Policy 15 Natural features and natural landscapes

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

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

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

National Policy Statement on Electricity Transmission

5. Objective

To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:

- managing the adverse environmental effects of the network; and
- managing the adverse effects of other activities on the network.

7. Managing the environmental effects of transmission

Policy 2

In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.

Policy 3

When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.

Policy 4

When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

Policy 5

When considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.

Policy 6

Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.

Policy 7

Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.

Policy 8

In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

Bay of Plenty Regional Coastal Environment Plan

Issues of the RCEP

1.2 Natural Heritage

Issue 7 Māori cultural values, practices and mātauranga associated with natural character, natural features and landscapes and indigenous biodiversity are often not adequately recognised or provided for resulting in adverse effects on cultural values.

1.4 Iwi Resource Management

Issue 17 Ko te moana ko au, ko au ko te moana (I am the sea – the sea is me). Tangata whenua, as indigenous peoples, have rights protected by the Te Tiriti o Waitangi (the Treaty of Waitangi) and that consequently the RMA accords tangata whenua a status distinct from that of interest groups and members of the public.

Issue 19 Wāhi tapu and other sites of significance to tāngata whenua can be adversely affected by human activities and coastal erosion. Degradation of coastal resources and the lack of recognition of the role of tāngata whenua as kaitiaki of this resource can adversely affect the relationship of Māori and their ancestral lands, waters, sites, wāhi tapu and other taonga.

Issue 20 Māori have a world-view that is unique and that can be misunderstood, unrecognised and insufficiently provided for in the statutory decision-making process.

Issue 26 Policy 6 of the NZCPS recognises tangata whenua needs for papakainga, marae and associated developments in the coastal environment; but tangata whenua aspirations in relation to use, values and development are not well understood, particularly in the coastal marine area.

1.8 Activities in the coastal marine area

Issue 40 The use and development of resources in the coastal marine area can promote social, cultural and economic wellbeing and provide significant social, cultural and economic benefits but may also cause adverse effects on the coastal environment.

Objectives of the RCEP

2.2 Natural Heritage

Objective 2 Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development, and restore or rehabilitate the natural character of the coastal environment where appropriate.

2.4 Iwi Resource Management

Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of Tāngata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

2.8 Activities in the Coastal Marine Area

Objective 27 Activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and provided for in appropriate locations, recognising the positional requirements of some activities.

Objective 28 The operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

Policies of the RCEP

Natural Heritage (NH) Policies

Policy NH 4 Adverse effects must be avoided on the values and attributes of the following areas:

...

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3).

...

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules ... 3 to this Plan..:

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape ...

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

Policy NH 5 Consider providing for ... use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

...

(a) The proposal:

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid;

Policy NH 9A

Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

(a) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

(b) Assessing whether restoration of cultural landscape features can be enabled; and

(c) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Policy NH 11

(1) An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

...

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

Iwi Resource Management (IW) Policies

Policy IW 1

Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:

(a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;

(b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;

(c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and

(d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and.

(e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 2 Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Policy IW 8 Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Structures and Occupation of Space (SO) Policies

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:

...

(c) Structures associated with new and existing regionally significant infrastructure...

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission;

Schedule 3 of the RCEP identifies areas of Outstanding Natural Features and Landscapes (ONFL) using the criteria of Policy 15(c) of the NZCPS and Appendix F, set 2 to the RPS.

Te Awanui Harbour, Waimapu Estuary & Welcome Bay — ONFL 3

Description:

Tauranga Harbour is a shallow tidal estuary of 224 km^2. At low tide, 93% of the seabed is exposed. The harbour and its estuarine margins comprise numerous bays,

estuaries, wetland and saltmarsh. The key attributes which drive the requirement for classification as ONFL, and require protection, relate to the high natural science

values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns.

Current uses:

Bridges, national grid infrastructure, wharves, moorings, residential development, boardwalks, stormwater and sewer infrastructure, boat ramps, reclamations,

recreational activities such as water skiing, fishing, boating, channel markers, navigational signs.

Evaluation of Māori values: Medium to High

Ancient pa, mahinga kai, wāhi tapu, kāinga, taunga ika.

Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.

Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

Schedule 6 of the RCEP identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi — known as *"Mai i ngā Kurī a Whārei ki Wairakei."* Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi — Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land.

Maintenance of kaimoana and coastal water quality is particularly important.

...

Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.

Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

Bay of Plenty Regional Policy Statement (RPS)

Policy IW 2B: Recognising matters of significance to Māori

Proposals which may affect the relationship of Māori and their culture and traditions must:

(a) Recognise and provide for:

(i) Traditional Māori uses and practices relating to natural and physical resources such as mahinga mātaitai, waahi tapu, papakāinga and taonga raranga;

(ii) The role of tangata whenua as kaitiaki of the mauri of their resources;

(iii) The mana whenua relationship of tangata whenua with, and their role as kaitiaki of, the mauri of natural resources;

(iv) Sites of cultural significance identified in iwi and hapu resource management plans; and

(b) Recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act

Exercise the functions and powers of local authorities in a manner that:

(a) Takes into account the principles of the Treaty of Waitangi;
(b) Recognises that the principles of the Treaty will continue to evolve and be defined;
(c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and kaupapa Māori, among council decision makers, staff and the community;
(d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and
(e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

Policy IW 4B: Taking into account iwi and hapū resource management plans

Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.

Policy IW 5B: Adverse effects on matters of significance to Maori

When considering proposals that may adversely affect any matter of significance to Māori recognise and provide for avoiding, remedying or mitigating adverse effects on:

(a) The exercise of kaitiakitanga;
(b) Mauri, particularly in relation to fresh, geothermal and coastal waters, land and air;
(c) Mahinga kai and areas of natural resources used for customary purposes;
(d) Places sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; and
(e) Existing and zoned marae or papakāinga land.

Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

Encourage tangata whenua to recommend appropriate measures to avoid, remedy or mitigate adverse environmental effects on cultural values, resources or sites, from the use and development activities as part of consultation for resource consent applications and in their own resource management plans.

Tauranga City Plan (the District Plan)

Objectives

Objective 6A.1.3	The natural character of the City's coastal environment, wetlands, rivers and streams is preserved and protected from inappropriate subdivision, use and development.
Objective 6A.1.7	The landscape character values of the City's harbour environment is maintained and enhanced.

Objective 6A.1.8	The open space character of the coastal marine area and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins is maintained and enhanced.
Objective 10A.3.3	Construction, Operation and Maintenance of Network Utilities a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values; b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.
Policies	
Policy 6A.1.7.1	By ensuring that subdivision, use and development along the margins of Tauranga Harbour does not adversely affect the landscape character values of that environment by: ... g) Protecting areas of cultural value; h) Avoiding built form of a scale that dominates the harbour's landscape character; i) Siting buildings, structures, infrastructure and services to avoid or minimise visual impacts on the harbour margins environment; ... m) Ensuring activities maintain and enhance the factors, values and associations of outstanding natural features and landscapes and/or important amenity landscapes.
Policy 6A.1.8.1	By ensuring that buildings, structures and activities along the margins of the coastal marine area, outstanding natural features and landscapes and important amenity landscapes do not compromise the natural character, factors, values and associations of those areas, through: a) The impact of the bulk and scale of buildings, structures and activities on the amenity of the environment; ... d) Buildings, structures and activities detracting from the existing open space character and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins;
Policy 7C.4.3.1	By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria: a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;

b) The magnitude, scale and nature of effects in relation to the values and associations of the area;

c) The opportunities for remediation, mitigation or enhancement;

d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.

Policy 10A.3.3.1 Undergrounding of Infrastructure Associated with Network Utilities

By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:

a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;

b) The existence of a natural or physical feature or structure makes underground placement impractical; c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;

d) It is existing infrastructure.

Policy 10A.3.3.2 Effects on the Environment

By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:

a) On other network utilities;

b) Of emissions of noise, light or hazardous substances;

c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;

d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.

Objective 10B.1.1 Electricity Transmission Network

The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.

Policy 10B.1.1.1 Electricity Transmission Network

By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

The Tauranga City Plan identifies Te Ariki Pā/Maungatapu as a significant Māori area of Ngāti Hē (Area No M41). Its values are recorded as:

Mauri: The mauri and mana of the place or resource holds special significance to Māori;

Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;

Kōrero Tuturu/Historical: The area has special historical and cultural significance to the hapū;

Whakaaronui o te Wa/ Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

Iwi Management Plans

The Te Awanui Tauranga Harbour Iwi Management Plan 2008

OBJECTIVE

1. To reduce the impacts on cultural values resulting from infrastructural development in, on or near Te Awanui.

POLICIES

1. To restrict the placement of structures in, on or near Te Awanui, and to promote the efficient use of existing structures around Te Awanui.

...

8. To avoid adverse effects on culturally important areas, including waterways and cultural important landscape features as a result of works, including the storage and or disposal of spoil as a product of works.

...

10. Iwi object to the development of power pylons in Te Awanui, appropriate alternative routes need to be investigated in conjunction with tāngata whenua.

The Tauranga Moana Iwi Management Plan 2016-2026

15.1 Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).

15.2 Pylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.

...

15.4 In relation to the placement, alteration or extension of structures, within Tauranga Moana:

(a) Ensure that:

(i) tāngata whenua values are recognised and provided for.

...

(b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas.

Ngāi Te Rangi Resource Management Plan

All environmental activities that take place within the rohe of Ngaiterangi must take into account the impact on the cultural, social, and economic survival of the Ngaiterangi hapu.

...

The cultural significance of Ngaiterangi's links to their lands and the values they hold in respect of land, whether still in customary title or not, should be acknowledged and respected in all resource management activities.

...

Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities — Maori and non Maori — shall be recognised in the

development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.

...

Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

Reported by: Justin Carter, *Barrister*