BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 182

IN THE MATTER	of an appeal under Clause 14 of Schedule 1 of the Resource Management Act 1991 (**the Act**) concerning Variation 1 to the Kaipara District Plan, and an appeal under Section 120 of the Act
BETWEEN	C CALVELEY (ENV-2012-AKL-000138) Appellant MANGAWHAI HEADS HOLDINGS LIMITED (ENV-2013-AKL-000012) Appellant
AND	KAIPARA DISTRICT COUNCIL Respondent

Hearing:	at Auckland 5-9 and 29-30 May 2014
Court:	Environment Judge J J M Hassan Environment Commissioner R M Dunlop Deputy Environment Commissioner J Illingsworth
Appearances:	Mr A Webb for C Calveley and Mangawhai Heads Holdings Limited Mr M Allan for the Kaipara District Council Mr M Savage for Catherine Hawley, John Hawley, Mangawhai Ratepayers and Residents Association, Marunui Conservation Limited, The Friends of the Brynderwyns Society Incorporated (section 274 parties)
Date of Decision:	27 August 2014
Date of Issue:	27 August 2014

DECISION OF THE ENVIRONMENT COURT

The MHHL appeal

A: For the reasons set out:

(a) The appeal is disallowed in part and the Council's decisions are confirmed to the extent that:

(i) Land use consent to establish seven houses on Lot 1 DP 316176 is refused;

(ii) The appellant's application for lots 15 and 17 to 20 to be included as part of the subdivision of Lots 1 and 2 DP 316176 is refused;

(b) To allow for the inclusion in the subdivision consent for the subdivision of Lots 1 and 2 DP 316176 of conditions that give effect to this decision, we direct the Council to confer with the appellant and section 274 parties and file for the Court's approval, within 20 working days of the date of this decision, a full set of conditions that modify the 30 May Draft Conditions in the following respects:

(i) Ensuring Conditions 1p, 1q, 1r, 1s and 2f contain validly specified restrictions and principles to allow for the imposition of associated consent notices (in the manner we indicate for Condition 1p in Annexure A) and making consequential adjustments (as may be required) to those conditions referencing these "consent notice" conditions); and

(ii) Removing draft Condition 1n (concerning the Council's proposed rehabilitation (weed control) plan for the four valley floor wetland areas);

(iii) Removing or amending those draft conditions of the subdivision consent as pertain to Lots 15 and 17 to 20 and/or the land use consent for dwellings; and

(iv) Reflecting our decision in other respects.

(c) Pursuant to section 116(1) RMA, the subdivision consent shall not commence until the date of issue of our final decision on this appeal amending the Council's subdivision consent decision in respect of those remaining consent conditions to which paragraph (b) above refers (or such other date as that final decision specifies);

(d) For the avoidance of doubt, it is recorded that this decision is *final* in respect of our findings in (a) and (b) above, but *interim* in relation to the conditions as they are yet to be finalised;

(e) In the event that mutually agreed conditions are not filed by the Council, leave is reserved for any disputing party to file and serve submissions as to the subject condition(s) within a further five working days of the Council filing the updated conditions in accordance with paragraph (b) above.

The Plan appeal

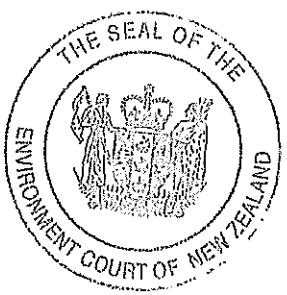
B: For the reasons set out by this interim decision:

(a) We direct the Council to amend Variation 1 to the Plan by the inclusion of a restricted discretionary activity rule to be prepared in accordance with our direction in paragraph (b) below;

(b) We direct the Council to confer with other parties and prepare and file with the Court for approval, draft rule(s) and related provisions for inclusion in Variation 1 to the Plan, to the following effect:

(i) To provide that, in respect of each Lots 1-4 and 6-14 of the subdivision consent the subject of the MHHL appeal (to be identified by appropriate Council consent number), the erection and use of a single dwelling that exceeds 50m^2 gfa on land to which that certificate of title has issued is a restricted discretionary activity provided that:

1. the dwelling does not exceed 350m^2 gfa; and
2. the subdivision consent has not lapsed; and
3. the land use consent for any such dwelling does not commence, pursuant to section 116 RMA, until a certificate of title has issued as a consequence of the subdivision of Lot 2 DP 316176 by the implementation of that identified subdivision consent;



(ii) To specify that the consent authority's power to decline a consent, or to grant a consent and impose conditions on the consent, is restricted to those matters specified in Condition 1p of the subdivision consent in the form to be approved by the Court;

(iii) To consequentially amend Rule 12.10c(1)(b) to reflect the inclusion of this restricted discretionary activity rule;

(c) Pending the issue of our final decision to allow the appeal in part by changing Variation 1 of the Plan in the manner we approve, Rule 12.10c(1)(b) remains unchanged;

(d) Leave is reserved for parties to make application for directions to allow for submissions as to the finalisation of any Plan provision wording issues as may remain in dispute between parties. Any such application must be made on notice and may not be made until after the Council has complied with the directions in (b).

Costs

C: Costs in both appeals are reserved, with a timetable to be set in our final decision(s).

REASONS

[1] Our reasons are in three parts – Part A is a general introduction, Part B concerns the subdivision appeal by Mangawhai Heads Holdings Limited, and Part C the Plan appeal.

PART A - INTRODUCTION

The subject site and environment

[2] These are related appeals in regard to some land at the end of Kapawiti Road, near the coastal township of Mangawhai in the Kaipara district. The land (*the Subject Site/Site*) has an area just over 47 hectares, and runs up a south-facing spur of the Brynderwyn Ranges.

[3] The Ranges are a prominent landscape feature of this part of the Kaipara and of the adjoining Whangarei districts. Under Variation 1: Landscapes to the proposed

Kaipara District Plan, the Ranges are classified as an Outstanding Natural Landscape (*ONL*) and the Site is part of ONL 14 *Bream Tail - Brynderwyn Ranges*.

[4] The Site is in two allotments:

(a) Lot 2 DP 316176 (the *Lower Part*) is 18.102 hectares in area;
(b) Lot 1 DP 316176 (the *Upper Part*) is 29.273 hectares in area. It is bisected by a 4-wheel drive access track that climbs the spur to the south-eastern boundary of the Whangarei district, on the ridgeline.

[5] While indigenous bush now predominates on the Site, historically it was used for grazing. Several grassed clearings (and access tracks) remain visible from public viewing points. Two telecommunication masts are also clearly visible higher up the ridgeline, to the east of the Site.

The rural residential subdivision proposal

[6] In separate applications made in October 2009, Mangawhai Heads Holdings Limited (*MHHL*) applied to the Kaipara District Council (the *Council*) for:

(a) Subdivision consent for a 20 lot development of the Site, and
(b) Land use consent for seven dwellings on the Upper Part of the Site.[1]

[7] "If required", access between the house lots in the Upper Part of the Site and Kapawiti Road was proposed to be via the existing 4-wheel drive track (as a private way). The application also included provision for the underground reticulation of power and telecommunication utilities.[2]

[8] Specific measures were proposed for the protection and enhancement of indigenous bush. These included:

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1 The application is somewhat ambiguous, referring to "seven houses on a lot (2 permitted, 5 additional)" and "5 additional houses" (i.e. on the basis that certificates of compliance are held for the dwellings shown for Lots 16 and 21). However, contour data, building platform and area, area and depth of excavation and other information was included for all proposed dwellings (including those for Lots 16 and 21). That was also the case for the accompanying drawings showing dimensioned floor plans, elevations and yard setbacks (where relevant). In view of that, we accept Mr Webb's explanation that the application was for all seven dwellings.

2 Land Use Consent Application: Subdivision Application Vol 3, Drawings C121 and C127. The application also proposed a vehicle parking bay and truck turnaround areas.

(a) A covenant over almost 19 hectares of the Site for bush conservation, protection and enhancement purposes;

(b) Obligations not to clear vegetation on each house lot beyond the curtilage of each defined dwelling building platform and to maintain remaining bush areas;[3] and

(c) Obligations in relation to pest and weed control.[4]

[9] The development was proposed to be implemented in seven stages over 10 years. MHHL sought a corresponding minimum consent term.[5]

[10] MHHL supported its application with a range of ecological, landscape and visual effects,[6] geotechnical, infrastructural and other technical assessments.[7]

The MHHL appeal

[11] Through its independent commissioner,[8] the Council refused five of the proposed lots[9] and associated dwellings in the Upper Part of the Site.[10] Of the 15 house lots approved, 13 were in the Lower Part of the Site.

[12] MHHL appealed the Council's decisions on both the subdivision and land use applications.[11] Effectively, MHHL's appeal sought to secure the full extent of rural-residential subdivision development it had applied for. It also challenged several of the conditions imposed in respect to the entire Site (and proposed revised conditions).

[13] Four submitters (Marunui Conservation Limited, Friends of the Brynderwyns Society Incorporated, C Hawley, and Mangawhai Ratepayers and Residents

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3 Application for Subdivision for 20 Rural-Residential Lots Kapawiti Road, Mangawhai, Vol 3 (*Subdivision Application Vol 3*) (e.g. Drawings C141-143).

4 Application for Subdivision for 20 Rural-Residential Lots Kapawiti Road, Mangawhai, Lot 2, Annexure 1.

5 Subdivision Application, Vol 1 at [7.1].

6 The visual and landscape assessment included recommended mitigation measures in regard to plantings on lots and the accessway, building heights and materials: Application for Land Use Consent, Kapawiti Road, Mangawhai, Vol 1 (September 2009) (*Land Use Consent Application*) at [1.11], Subdivision Application, Vol 2, Landscape and Visual Assessment at [12.0].

7 Submitted with the subdivision application.

8 Mr David Hill.

9 Lots 15 and 17-20.

10 Lots 16 and 21 were approved in the Upper Part of the Site.

11 Agreed Bundle, p.61, Notice of Appeal at [1].

Association) joined as section 274 parties (*section 274 parties*). They presented a joint case.

The Calveley Plan appeal

[14] C Calveley's appeal (*Plan appeal*) is the last remaining appeal against Variation 1 of the Kaipara District Plan (the *Plan*).[12] Prior to the hearing, C Calveley sought to confine the Plan appeal to assisting MHHL's intended development of the Subject Site, now included in an Outstanding Natural Landscape (*ONL*) classification under the Plan. The appellant gave notice withdrawing most of its original relief and seeking instead an exemption from the $50m^2$ gross floor area requirement in Rule 12.10.3c(1)(b) of the Plan for dwellings on the 13 consented lots of the Lower Part of the Site.[13]

[15] The section 274 parties[14] argued that this change of relief was beyond jurisdiction.[15] We set out why we disagree with that in Part C of this decision.

PART B - MHHL APPEAL

Statutory framework and relevant principles

The statutory framework

[16] The statutory framework for determination of the MHHL appeal is as follows:

(a) Section 290 gives us the same powers, duties, and discretions that the Council had at first instance, and empowers us to confirm, amend, or cancel those decisions (within the scope of the MHHL appeal);

(b) Section 290A requires us to have regard to the Council's decision;

(c) Section 104D specifies a "threshold" requirement which must be passed so that non-complying activities are eligible to be consented;

(d) Section 104 governs our consideration of the appeal;

(e) Section 104B (within the scope of the appeal) says we have discretion to grant or refuse the consents sought, with or without conditions;

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12 We refer to it as "the Plan" (instead of "the proposed Plan") since the Plan is operative except for the Calveley appeal on Variation 1 to the Plan.

13 Memorandum of Counsel for the Appellants, dated 5 May 2014.

14 The s 274 parties were the same as those who joined the MHHL appeal, except that C and J Hawley joined in the joint capacity (rather than C Hawley). Each were submitters on Variation 1.

15 Submissions on behalf of the section 274 parties, 29 May 2014. The Council did not oppose the change to relief.

(f) Sections 108 and 220 govern our discretion to impose conditions (section 220 applying only to the subdivision consent appeal); and

(g) Part 2 describes the RMA's purpose and principles to inform, guide and direct our determination of the appeal.

Non-complying activity classification and "bundling"

[17] It was common ground (and we agree) that:

(a) The Plan determines the activity classes for the subdivision and associated dwellings;[16] and

(b) Both the subdivision and associated dwellings should be "bundled" to be classified as "non-complying" activities.[17] That is in view of the inherent overlap between these activities and their consequential or flow-on effects.[18] For instance, the proposed subdivision consent conditions are designed to mitigate effects of the proposed dwellings on landscape values associated with the ONL.

Approach to assessing effects on the environment

[18] Determining the MHHL appeal requires that we assess the effects of the proposed subdivision and land use on the environment.[19]

[19] Part of that is to determine the state of the environment that would be affected. That is largely a factual enquiry on the evidence. As the perspective must be of the future (i.e. when the proposed activities are taking place), it involves a prediction as to the likely future state of the environment to be affected.

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16 That is by virtue of section 86F of the Act, by reason that the Calveley appeal is the only outstanding appeal on, and does not challenge those aspects of, the Plan.

17 The Plan classified the dwellings as a discretionary activity land use and the subdivision as a non-complying activity.

18 Case law indicates bundling is appropriate in such circumstances. See *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA), at [22], where the Court of Appeal found the absence of such overlap meant bundling was not appropriate; *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350, at [15], where the High Court found the presence of such overlap made a bundling approach appropriate; and *Tairua Marine Ltd v Waikato Regional Council* [2001] NZRMA 350, at [30], where "overlap" was described in terms of whether consideration of one application would affect the outcome of the other.

One of the alternative "threshold" tests for non-complying activities under section 104D, requires us to be satisfied that the adverse effects of the proposed subdivision and land use on the environment will be "minor" (section 104D(1)(a)). If section 104D is passed, section 104(1)(a) specifies that we must, subject to Part 2, have regard to actual and potential effects on the environment of allowing the proposed activities (together with other matters).

[20] A future environment can be modified through the implementation of presently-unimplemented resource consents or enjoyment of permitted activity rules. On that matter, the Court of Appeal decision in *Hawthorn*[20] is the leading authority. The passage usually cited is at [84]:

> 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.

[21] In *Save Kapiti Inc,*[21] D Gendall J observed that the distinction the Court of Appeal sought to draw in *Hawthorn* was between activities that were likely to happen and those that were not. That was in the sense that it was not appropriate to consider a future environment that was artificial.[22]

[22] MHHL argued that we should treat the future environment as being modified through the exercise of a list of current statutory rights and authorities it had obtained for the Subject Site.[23] All had been obtained after June 2009.

[23] They included a certificate of compliance (*CoC*) for two dwellings, and CoCs for farming, vegetation clearance and forestry (issued in 2009), and for track maintenance (issued in 2010). All of these CoCs will be superseded by exercise of the consents under appeal unless they have earlier lapsed (which is probable). On that basis, we agree with Mr Savage that it would be artificial and invalid to treat any of them as modifying the future environment. The same goes for a 10 lot subdivision consent for the Site that MHHL invited us to treat as modifying the future environment. That consent, which commenced in May 2012 would be superseded by the exercise of the consents under appeal.

[24] In addition, MHHL suggested we treat the environment as modified by the exercise of a set of unimplemented building consents (issued in 2011) for building a

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20 *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).
21 *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104(HC), D Gendall J.
22 *Save Kapiti Inc* at [70].
23 Appellant's opening submissions at [12]-[20].

number of sheds.[24] The age of the building consents suggests they have lapsed or will do shortly. In any case, their exercise would be superseded by the exercise of the consents under appeal. Therefore, it would be invalid for us to regard them as sources of environmental modification. Finally, Mr Webb proposed that we treat the future environment as being modified through the exercise of a permission to form a right of way which the Council apparently granted under the Local Government Act 1974. As that permission is not an RMA right, we consider it would be invalid to treat it as modifying the future environment.

Whether we can compare the environmental consequences of other scenarios

[25] Mr Webb also argued that these various statutory rights and authorities were relevant in terms of assessing the overall merits of MHHL's appeal (under section 104(1)(c)). That was in the sense that MHHL could revert to implementing some or all of them, in the event that it did not secure its preferred option or that option was rendered unviable.[25]

[26] As MHHL did not call any evidence on what would trigger it to revert to other options, Mr Webb's submission invited speculation, which we are not prepared to do. However, we accept that we can take judicial notice of the potential for MHHL to elect not to exercise the consents it secures following determination of its appeal.

[27] The subdivision consent conditions (and associated consent notices) are the means by which the proposed bush protection covenants and restrictions on vegetation clearance would be secured and enforced. Therefore, were MHHL to elect not to exercise the consents it secures, that would mean there would be no associated obligation to protect against bush clearance other than as provided for under the Plan (unless the 10 lot subdivision consent were exercised).

[28] We accept that it is relevant to take some account of that risk, under section 104(1)(c). For example, it is relevant to our application of section 6(c) (to "recognise and provide for" "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" as a "matter of national importance").

24 Joint Statement as to Contested Issues, 4 May 2014 at [21].
25 Appellant's opening submissions at [18], [19]; Appellant's reply submissions at [80].

However, in the absence of evidence, we can only draw broad conclusions on the extent of this risk.

[29] The position is similar in regard to landscape protection and visual effects. Non-exercise of the consents would mean protections under the consent conditions would not be triggered and matters would default to the lesser protections assured by the Plan (qualified by any existing use rights).

[30] We return to consider those comparisons in our later assessment of environmental effects.

Permitted baseline – section 104(2)

[31] It was common ground (and we agree) that our assessment of effects on the environment should not seek to discount the significance of any adverse effects according to the "permitted baseline" principle.[26]

Issues as to conditions – Newbury principle and Estate Homes

[32] The MHHL appeal seeks changes to a number of the conditions imposed by the Council's resource consents' decision. In considering issues as to conditions, we have applied the so-called *Newbury*[27] test. The test is that, to be valid at law, a resource consent condition must fulfill the following three conditions:[28]

(1) It must be imposed for a planning purpose;

(2) It must fairly and reasonably relate to the development for which permission is being given; and

(3) It must be reasonable, that is to say, it must be a condition which a reasonable local authority properly advised might impose.

26 In his opening submissions, Mr Webb noted that MHHL does not rely on the Court exercising discretion to consider a permitted baseline. That was also the position of other parties.

27 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731.

28 *Newbury District Council v Secretary of State for the Environment* 1 All ER 731 at 761.

[33] The application of the *Newbury* test to the RMA was clarified by the Supreme Court in *Estate Homes,*[29] as follows:

> ... conditions must be imposed for a planning purpose, rather than one outside of the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.
>
> ...
>
> The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision.
>
> ...
>
> We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

The planning framework

[34] Under section 104(1)(b) we must, subject to Part 2, have regard to various policy and planning instruments. We find that the relevant statutory instruments are[30] the Northland Regional Policy Statement (*RPS*) and proposed Regional Policy Statement (*proposed RPS*), and the Plan.

[35] The RPS includes objectives on outstanding natural landscapes (part 19.3) and ecology (part 23.3). The proposed RPS also includes provisions that address the effects of activities on indigenous ecosystems and species and outstanding natural landscapes.[31] As the proposed RPS is currently at the appeal stage,[32] however, we treat the operative

29 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149; (2007) 13 ELRNZ 33 at [61]-[66].

30 We agree with Mr Raeburn (Raeburn, evidence-in-chief at [8.7]) that the Site is not in the coastal environment. Therefore, we find that the New Zealand Coastal Policy Statement 2010 is not relevant. It was common ground (and we agree) that there are no relevant national policy statements, national environmental standards or regulations.

31 O'Connor, evidence-in-chief at App. 5.

32 O'Connor, evidence-in-chief at [67].

RPS as the dominant policy statement. We agree with Mr Raeburn[33] that the relevant Plan objectives, policies and other provisions give effect to the RPS in relevant respects.

[36] As Mr Raeburn identified, the Plan's relevant objectives and policies addressed the central issues in the MHHL appeal concerning access design, landscape and visual amenity and ecology. The essential difference between some of the planning experts was in how those provisions should influence consideration of the issues.

[37] We set out our findings on the influence of the various Plan (and RPS) objectives and policies in the next part of this decision, in the context of our findings on the various substantive issues.

Our findings on the substantive issues

Joint memorandum as to contested issues

[38] The evidence revealed the substantive issues for our determination of the MHHL appeal according to the statutory framework we have set out. A joint memorandum of the parties (*Joint Memorandum as to Contested Issues*) provides a helpful framework for our consideration of those issues.[34]

Whether ROW 1 enables safe access

[39] The *New Zealand Oxford Dictionary* defines "safety" as (relevantly), "the condition of being safe; freedom from danger or risks".[35]

[40] The safety or otherwise of ROW 1 for its intended users (particularly those who would live in or visit the dwellings sought for the upper part of the site) is relevant to our consideration of the proposal under Part 2, RMA. In particular, section 5(2) defines "sustainable management" in terms that refer to enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.

33 Raeburn, evidence-in-chief at [8.6].

34 Memorandum of Counsel for the respondent Attaching a Joint Statement of Contested Issues, dated 4 May 2014 (*Joint Memorandum as to Issues*).

35 *New Zealand Oxford Dictionary*, Oxford University Press (2005).

[41] In addition, the Plan includes the following Rural zone Policy[36] (and associated explanations):

> **12.6.17**
>
> **By requiring the provision of safe and practicable vehicular access from a public road to each site.**
>
> *Vehicular access to sites must be practicable, safe and convenient, and should avoid adverse effects on the environment. This may require the upgrading of existing roads or the provision of new roads within the subdivision to connect the subdivision to the District roading network.*

[42] As noted, MHHL's consent application proposed that dwellings in the Upper Part of the Site be served by a private way (referred to as *ROW 1*) running along the alignment of the present 4-wheel drive track. The application did not initially propose any upgrade to the existing track, and proposed this access subject to the qualifier "if required". It was explained that ROW 1 would have:

(a) A horizontal alignment of 5.5m (in the lower 660m section), 4.5m (in the middle 610m section) and 3m wide (in the top 430m section);[37] and

(b) A variable vertical alignment including grades ranging up to 30% (over a 60m length in the lower section) and greater than 20% (over lengths totaling 390m) in the middle section including a 120m length in excess of 27.9%.[38]

[43] In the face of the Council commissioner's finding that this is a "difficult and potentially hazardous accessway",[39] MHHL did not propose any change to its alignment on appeal. Instead, it proposed to address safety issues by the addition of a set of "mitigation" measures, namely:[40]

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36 We note that Mr Raeburn also identified as relevant Policy 12.6.18 *(by ensuring that roads provided within subdivision sites are suitable for the activities likely to establish on them and are compatible with the design and construction standards of roads in the District roading network to which the site is required to be connected to)*. However, the Plan defines "road" in terms that link to section 315 of the Local Government Act 1974. As ROW 1 would remain a private way, and not vested as a public road, we are not satisfied that it would come within that definition. As such, we do not consider Policy 12.6.18 would apply.

37 Young, evidence-in-chief at [8].

38 Bishop, evidence-in-chief at [5.1], [5.2].

39 Agreed Bundle, p.11 ff. [Council decision], [24.21].

40 Young, evidence-in-chief at [47].

(a) Use of a high friction exposed aggregate concrete surface;

(b) A prohibition on heavy commercial vehicles and a truck length restriction;

(c) Warning signage;

(d) A one way traffic signal system for the narrowest section between chainages 1060 and 1670;

(e) Retention of the parking area;

(f) Passing/stopping bays;

(g) Additional curve widening; and

(h) Safety barriers.

[44] The essential issue is whether those (and some other) "mitigation" measures are sufficient to ensure safe access to the Upper Part of the Site, or whether a more fundamental access re-design (particularly as to the horizontal and vertical alignment) is required. If the latter, a further issue arises as to whether we have jurisdiction (within the scope of the MHHL appeal) to provide for a fundamental re-design of the access.

[45] On the question of the safety of ROW 1, we heard from three transportation engineers – Mr Philip Young (for MHHL), Mr Neville Bishop (for the Council) and Mr Dean Scanlen (for the section 274 parties). In addition to their individual statements, these experts produced three joint statements.[41] We heard from Mr Craig Jepson (for MHHL) on the matter of the suitability of aggregates and Mr Scott Parker (for MHHL) on the capacity of trucks to negotiate ROW 1. We also heard from two New Zealand Fire Service (*NZFS*) officers (Mr Philip Nesbit, for MHHL and Mr Michael Moran for the Council) on the issues associated with NZFS and other emergency service vehicles accessing the Upper Part of the Site.[42] In addition, the planning experts addressed related Plan provisions.

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41 Traffic Engineering Caucusing Statement of P Young, N Bishop and D Scanlen (30 July 2013) (*30 July Joint Statement*), Updated Traffic Engineering Caucusing Statement of P Young, N Bishop and D Scanlen (9 December 2013) (*9 December Joint Statement*), Joint Statement of Transportation Engineering Witnesses, 8 May 2014 (*8 May Joint Statement*).

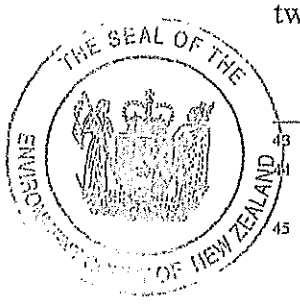
42 In addition, we received unsworn rebuttal and supplementary statements of evidence from Mr Michael Lister, NZFS Area Commander for the Whangarei Kaipara Area. The evidence was on behalf of the Council and entered by consent (in view of Mr Lister's then unavailability for medical reasons). Mr Lister's evidence was as to fire fighting services and capability including in rebuttal of Mr Nesbit.

[46] Mr Bishop, for the Council, explained what various standards and guidelines specify for vertical and horizontal alignments, as follows:[43]

Rule 12.10.25 of the Plan	Amongst its permitted activity driveway standards, it specifies a minimum width of 5.5m (if serving 7 – 30 dwellings) and maximum gradients of 1:5 (sealed) and 1:8 (gravel). Amongst its restricted discretionary activity criteria, it refers to whether, and to the extent, the vehicle access meets the Rule's[44] performance standards, and the Kaipara District Council's Engineering Standards 2011 (*Council Standards*).
The Council Standards	Amongst other things, these specify (in Table 5.1), for household equivalents of 4-6 dwellings in the rural sector, a minimum 50m sight distance and maximum 12.5% gradient (with an expectation of specific Council approval of gradients greater than 20%).
Austroads "Guide to Road Design Part 3: Geometric Design"	This indicates grades of 15-33% as "very slow" for light vehicles and "not negotiable" for commercial vehicles (with a note that, in terms of suitability, such grades are only to be used "in extreme cases and be of short lengths (no commercial vehicles))".
NZS 4404:2010 Land Development and Subdivision Engineering (*NZ Standard*)	This indicates maximum grades no steeper than 1 in 5, for private ways, private roads and accesses (although noting that grades of 1 in 4.5 may be used on straight lengths of access over a distance of up to 20m).

[47] As Rule 12.10.25 is a permitted activity rule, it does not operate as a binding standard. However, together with the other standards and guidelines, it provides some context for our consideration of the inherently relative concept of safe access design. The fact that the proposed ROW 1 was so much at variance from these various standards and guidelines put a significant premium on reliable expert opinion.

[48] As is the Court's usual practice, we directed that the transport engineers caucus with a view to narrowing points of difference. However, very little was achieved by the two joint witness statements of the transportation engineers lodged prior to the hearing.[45]



43 Bishop, evidence-in-chief at [3.4], [4.1], [4.4]-[4.15].
44 We agree with Mr Bishop that the reference in this provision to Rule 12.10.24 (signage) is a typographical error, and the reference should be treated as referring to Rule 12.10.25.
45 30 July Joint Statement, 9 December Joint Statement.

Following further Court directions during the hearing, the witnesses undertook further caucusing. Their resulting 8 May Joint Statement specified a series of agreed design conditions. However, it also revealed that, on the key issues of vertical and horizontal alignment, the opinions of Messrs Bishop and Scanlen remained fundamentally different from those of Mr Young.

[49] Mr Scanlen indicated that a vertical gradient above 22.2% could be satisfactory, provided that the maintenance regime would ensure that the carriageway was free of detritus and moss at all times.[46] Mr Bishop remained of the view that a gradient above generally 20% was not acceptable (other than in straight lengths less than 20 metres, where he considered 22.2% would be acceptable). In answer to the Court, following presentation of the 8 May Joint Statement, Mr Bishop said:

> I'm not convinced that, in this particular environment ... grades of up to 30% are acceptable from a safety point of view. And I stand by the baseline from the Standards and Guidelines that we collectively use throughout New Zealand although I do accept that there can be some departures from those ... where appropriate. As this stage, I cannot see ... the mitigation measures proposed ... give me confidence that this particular proposal could be as safe as I would prefer to see it.[47]

[50] On the matter of vertical alignment, Mr Young disagreed:

> No I think the grades as they stand on the [longitudinal] section can be accommodated. The big issue with safety ... is that traffic volume [is] very low, the speeds are very low, all of the people who will use it are familiar, they are volunteers, it's not a public road where you'd have things applicable to all comers, so I think that the disadvantages of grade can be overcome by first of all having a one-way operation and as wide [a] pavement as possible ... And as we can see from the video, and anybody who has actually driven up there, the grade while you're there on the site is not so much of an issue as it is when you're looking at a series of plans.[48]

46 8 May Joint Statement, table, item 11.
47 Transcript, p.504 at [23].
48 Transcript, p.505 at [2].

[51] On the matter of horizontal alignment, the 8 May Joint Statement recorded that safety could be improved in the sections where a 4.5 metre and 3 metre width was proposed. However, it also recorded that no agreement was reached as to the wording of a suitable condition.[49]

[52] We were not satisfied that Mr Young had a sufficiently reliable basis for the opinion he presented. It became apparent during Mr Allan's cross-examination that Mr Young had not prepared, directed or even supervised the preparation of the set of design plans he presented.[50] He relied significantly on a video he produced[51] showing a truck and cars driving up and down, and turning on the existing track. However, we found the video of limited value for testing the effectiveness or otherwise of his mitigation measures. He gave various examples of roads and accesses[52] in New Zealand with vertical alignments significantly steeper than the relevant guidelines. However, none was of an access in an environment bearing any sensible comparison.

[53] We acknowledge as valid Mr Young's point that the more challenging sections of ROW 1 would have very low traffic volumes and speeds compared to a public road, and most of its users could be expected to have close familiarity with it. However, we do not consider those factors mean we can rest assured that Mr Young's proposed mitigation measures would be adequate. That is especially given that the environment presents a combination of steep terrain, sharp back-to-back curves, dense adjacent covenanted vegetation and limited forward visibility. The dense vegetation would cause shading, dampness and detritus. We were not satisfied that the associated loss of traction risk would be adequately answered by a maintenance condition alone. This

49 8 May Joint Statement, table, items 1 and 2. In addition, Messrs Scanlen and Bishop recorded that "it may not be feasible to implement" such a condition. We understood that to refer to those witnesses' uncertainty as to the legal limits of what a condition can address within the scope of the application and appeal. We return to that topic later.

50 Transcript, p.156 at [25]-[34], p.157 at [1]-[5].

51 Young, rebuttal evidence at [24], Annexure C.

52 Famous amongst those is Baldwin Street, Dunedin, which Mr Moran explained was used by the NZFS for training. Transcript p.202 at [19]-[22].

would leave mitigation of the loss of traction risk overly reliant on successive dwelling owners and/or the management entity continuing to comply with the condition.[53]

[54] We have a related more general concern that, as a private way, ROW 1 would be at greater risk of deterioration over time than would be the case if it were to be vested in the Council as a local road. The Council made it clear to us that it would not want to have it vested.

[55] For all those reasons, we are persuaded that Mr Bishop was correct to observe that the proposed gradients would:

> ... present a risk to road users from excessive speeds and the inability to restrain an out-of-control vehicle, which when associated with the reverse curves presented in the mid-section of [ROW 1], give rise to a very high risk of severe or potentially fatal crashes.[54]

[56] Therefore, on the matter of vertical and horizontal alignments, we prefer the opinions of Messrs Bishop and Scanlen over those of Mr Young.

[57] As a result, we are in substantial agreement with the Council commissioner's findings.[55]

[58] The flaw in MHHL's approach has been in rigidly adhering to the alignment of the existing 4-wheel drive track. Overall we consider that the nature of the environment through which ROW 1 would pass is such as to require more than the mitigation measures Mr Young has proposed (and which were supplemented by the 8 May Joint

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53 On the topic of traction loss, we record that we were not persuaded that there would be any material risk that aggregate polishing would occur over time. On this topic, we prefer the opinions of Mr Jepson and Mr Young over that of Mr Bishop. Mr Jepson impressed us as a witness with significant practical experience as to the qualities and tolerances of different aggregates. By contrast, Mr Bishop did not appear to draw from his own experience and did not provide other reliable support for his theory. Specifically, he drew from an article concerning aggregate polishing in a high speed highway setting, well removed from the very low traffic loading of ROW 1. He also drew from a photograph of a concrete driveway demonstrating surface wear and reduced friction. However, his answers to the Court indicated that he had no knowledge of how the concrete driveway was constructed, what its concrete strength was, or what nature of aggregate was used. However, that does not overcome our concern as to the risk that traction loss could occur in this environment from the causes we have referred to.

54 Bishop, evidence-in-chief at [3.2].

55 Agreed Bundle, p.31, [24.21].

Statement). Specifically, on the weight of evidence, we find that a vertical alignment of generally not more than 22.2% would be necessary along most of the length of ROW 1.

[59] Finally, we note that our findings are not sensitive to MHHL's argument that we should assess the safety risk on the basis of discounting the two dwellings for which CoCs are held in the Upper Part of the Site.[56] Whether the precise number of dwellings to be accounted for is five or seven, we find that the safety deficiencies of proposed ROW 1 would be contrary to Policy 12.6.17 of the Plan. Those deficiencies are such that granting consent to the additional lots and dwelling in the Upper Part of the Site would not promote the sustainable management purpose of section 5(2).

Jurisdiction and scope

[60] That leads us to the second key issue on this topic, namely whether we have jurisdiction, within the scope of the MHHL appeal, to allow for necessary changes to the alignment of ROW 1.

[61] Realigning the relevant sections of ROW 1 horizontally and vertically would require significant earthworks (and associated indigenous vegetation clearance). We have no evidence on which to draw conclusions on the landscape and ecological effects of those additional activities.

[62] A related complication is that MHHL has not applied for the requisite resource consents. As the Site is within an ONL, Rule 12.10.1b applies. While we cannot be precise (in the absence of evidence as to design), we note Mr Raeburn's opinion that the earthworks could be a restricted discretionary activity and the vegetation clearance a discretionary activity under the rule.[57] In any event, it is likely to be appropriate to bundle these activities together with the related subdivision and dwellings so that they are all treated as non-complying. The inherent overlap between all these activities is emphasised by the fact that Rule 12.10.1b specifies consideration of the ONL values in its assessment criteria. It is also emphasised, in regard to ecology, in Policy 6.6.3:

56 MHHL opening submissions, Transcript p.4 and [9]-[19], p.8 at [14]-[20], p.22 at [18]-[29].
57 Raeburn, evidence-in-chief at [5.7a, b].

> By managing earthworks and vegetation clearance in all areas of the District in order to avoid, remedy or mitigate adverse effects on significant ecological areas, recognising that complete information on the exact geographic location of all these valued areas may not be available.

[63] In terms of the difficulties this causes, we were assisted by Mr Raeburn's answers to our questions of him.[58]

[64] We cannot draw any firm conclusion as to the effects that the significantly greater excavation and vegetation clearance would have or as to the Plan's related objectives and policies, in the absence of relevant evidence. As such, we cannot be satisfied that the requirements of section 104D would be met. Nor can we draw any safe conclusions as to whether a redesigned access would satisfy sections 6(b) and (c) RMA (as to outstanding natural landscapes and areas of significant indigenous vegetation and significant habitats of indigenous fauna).

[65] In his closing submissions, Mr Webb invited us to consider issuing a decision specifying the parameters for a safe access, acknowledging that other consents may be required to achieve it but leaving the implementation risk with MHHL.[59]

[66] We do not consider that we could make a decision that granted the consents MHHL seeks for the Upper Part of the Site. MHHL's application was framed on the basis that the existing access track would be used. It did not seek to encompass earthworks and vegetation clearance as would trigger Rule 12.10.1b. The assessment criteria of Rule 12.10.1b and Policy 6.6.3 demonstrate that those activities cannot be regarded as peripheral. An applicant can secure no more than has been applied for: *Shell New Zealand Ltd v Porirua City Council.*[60] We have no jurisdiction to expand the scope of what has been applied for, in determining the appeal: section 290.

[67] The best that can be offered, in regard to this option, is for MHHL to take cognizance of our reasoning should it re-consider its position in light of our decision.

58 Transcript, in answer to Commissioner Illingsworth and Judge Hassan – pp 641-646.
59 Transcript Part 2 Mr Webb closing p.132.
60 CA57/05, 19 May 2005, at [7]. See also *Sutton v Moule* (1992) 2 NZRMA 41 at 46; *Darroch v Whangarei District Council* A18/93 at p.27; *Manners-Wood v Queenstown Lakes District Council* W077/07 at [22].

[68] Alternatively, Mr Webb invited us to issue an interim decision for the purpose of enabling further evidence to be called. Compared with the alternative approach of declining the consents, he submitted that an interim decision would be comparatively shorter and less laboured, and probably less costly, for all parties.[61]

[69] For the following reasons, we do not consider this option appropriate.

[70] MHHL did not cite authority for its adjournment request. However, *AFFCO*[62] remains the leading authority. Where an applicant had omitted to apply for some of the consents necessary to implement its proposal, the Planning Tribunal granted an adjournment to allow the gap to be filled.

[71] However, unlike us, the Tribunal was satisfied that the substance of the proposal was already before it and that an adjournment would not unduly prejudice other parties.

[72] By contrast, the form of access design we have found necessary is not part of MHHL's access proposal (either as reflected in its application or the evidence before us). Even in light of the 8 May Joint Statement of the transportation engineers, Mr Webb maintained that MHHL considered "its design is OK, even for the extra lots".[63] While we have a broad adjournment discretion (through s 269), we must be careful to keep within the scope of MHHL's appeal in exercising it.

[73] There is also an issue of potential prejudice to other parties (including those not represented before us).

[74] The potential for prejudice is aggravated by the fact that the earthworks and vegetation clearance activities, as inter-related activities, should be bundled with the subdivision and dwelling activities. That is in order that the effects can be considered holistically in the manner that the Act and the Plan intend. The parties before us have not been able to inform our findings on those wider inter-relationships so that we could properly account for them in our decision.

61 Transcript Part 2 Mr Webb closing p.134.
62 *AFFCO New Zealand Limited v Far North District Council* (1994) 1B ELRNZ 101; [1994] NZRMA 224.
63 MHHL closing submissions, Transcript, p.134.

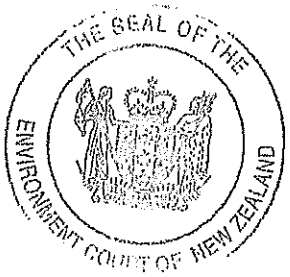
[75] While directions for further evidence could address this to some extent, it would be on the basis that we have in this decision recorded findings on the subdivision and land use activities. In any case, to attempt to cover this gap through directions for further evidence would also be potentially prejudicial to those who could seek to become section 274 parties as submitters on applications for excavation and vegetation clearance consent.

[76] At this point, we note that the ultimate decision made by the Tribunal in *AFFCO* (following its grant of adjournment), was to allow AFFCO's appeal and cancel the Council's resource consents decision. That occurred in circumstances where Northern Abattoir sought a further adjournment, which the Tribunal declined. The reasons are recorded by the Tribunal in its Record of Oral Decision.[64] The Tribunal's primary concern was that "the present proceedings have become unduly complicated". Those complications included "the possible participation, at a late stage, in the original appeals, of parties who did not take part in the original hearing of those appeals" and "the possibility of reopening the original appeals to hear fresh evidence" on the basis of an application by one of the new parties. Similar concerns and complexities arise in the current proceedings.

[77] For those reasons, to the extent we have any discretion to grant an adjournment, we decline to do so.

[78] In light of our earlier findings that ROW 1 as proposed would pose unacceptable safety risks for its intended users, we find that it would be contrary to both the RMA's sustainable management purpose (in section 5(2)) and Policy 12.6.17 to grant consents to the Lots 15 and 17 to 20 and the associated dwellings sought in the Upper Part of the Site.

[79] Therefore, we decline those aspects of MHHL's appeal.



[64] *AFFCO v Northland Regional Council* A21/95, delivered 13 March 1995.

Ecology issues

[80] On these issues, we heard from three ecologists – Mr Mark Poynter (for MHHL), Mr Myles Goodwin (for the Council) and Dr Andrea Julian (for the section 274 parties).

[81] In addition, we heard from three witnesses called by the section 274 parties on the topic of dogs and kiwi. Dr Hugh Robertson is a principal scientist with the Department of Conservation and long term researcher and peer-review author on kiwi. Mrs Wendy Sporle is a contract employee with Kiwis for Kiwi (a national charitable trust) with particular experience in advising on what is called "Kiwi Aversion Training" for dogs). Mrs Catherine Hawley is a section 274 party, and Managing Director of Marunui Conservation Limited (*Marunui*), a privately-owned Brown Kiwi sanctuary.

[82] The ecologists agreed that "covenanting the bush on the property which includes the [former] N65 feature, is a significant environmental benefit".[65] Within that context, the ecology issues contested were confined. They concerned the topics of dogs and risk to kiwi, Hochstetter's Frog habitat, wetlands, and pest management.[66]

[83] As context for the consideration of those issues, section 6(c) provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance ... (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[84] As to the meaning of "areas of significant indigenous vegetation" in section 6(c), the Plan refers to triggering criteria in the RPS.[67] Those indicate that an area's vegetation can be treated as "significant", for the purposes of section 6(c), if the vegetation would form[68] "ecological buffers, linkages or corridors to other areas of significant vegetation or significant habitats of indigenous fauna". The evidence we discuss shortly satisfies us that the Site's indigenous vegetation is part of such a corridor. On that basis, we are also satisfied that section 6(c), RMA applies.

65 Joint Witness Statement of Ecologists (undated) arising from 3-17 December caucusing (*Joint Ecologists' Statement*), [4f]. The N65 feature was a provision of the former district plan, serving to identify an area with section 6(c), RMA qualities.

66 Joint Memorandum as to Contested Issues, 4 May 2014.

67 See [6.3] of Chapter 6 on Ecological Areas.

68 See RPS App III at [5].

[85] In addition, we were referred to relevant Plan and RPS provisions on ecology. Of most relevance are Plan Objectives 6.5.1-6.5.3 and Policies 6.6.2-6.6.3. In the interests of economy, we do not set them out.

Dogs/risk to kiwi

[86] The Council and the section 274 parties sought that the following condition imposed by the Council's consent decision be retained:[69]

> A consent notice is to be imposed on each title requiring that no stock, cats, dogs or mustelids are permitted on any of the proposed lots except where stock are contained behind stock-proof fencing outside of covenanted areas.

[87] MHHL sought that the condition be modified such as to allow dogs to be present outside the bush covenanted areas provided that they have been certified under the Kiwi Aversion Training certification programme.[70]

[88] As to those respective positions, the Joint Memorandum described various sub-issues. From the substantial body of evidence heard, we reach the following findings.

[89] Marunui is a 426 hectare QEII Trust covenanted property[71] approximately 2km to the west of the Site. The 236 hectare Brynderwyn Scenic Reserve is approximately 1km from the western boundary of the Site.[72] With the support of the Department of Conservation, a programmed release to Marunui of Brown Kiwi, a threatened species with a conservation status of "Nationally Vulnerable",[73] began in 2013. It is expected that there will be 40 founding birds released there by 2015[74]. The aim is to return a viable population of Brown Kiwi to their recent distributional range in accordance with the objectives of the Kiwi Recovery Plan 2008-2018.[75]

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69 Agreed Bundle, tab 2, p.44.

70 In his opening submissions for MHHL (at [45]), Mr Webb also offered an amended condition to require dogs to be contained within a secured kiwi-proof run if unleashed and to be excluded from covenanted areas.

71 Hawley, evidence-in-chief at [5].

72 Dr Robertson explained that the Reserve boundary was approximately one kilometre from the western boundary of the Site (Robertson, EIC [5.13], [5.14]). The Scenic Reserve, located between Marunui and the Site, is shown in Mrs Hawley's EIC, Attachment A.

73 Robertson, evidence-in-chief at [6.6] (referring to *Robertson et al*, 2013).

74 Dr Robertson, evidence-in-chief at [1.5]. Dr Robertson is a long-term researcher and peer-review author on the subject of Brown Kiwi. Since 1991, he has worked as a scientist conducting and overseeing research work on kiwi, including as a member of the Kiwi Recovery Group. More particularly, since 1994 he has been involved in a long-term study of Brown Kiwi in central Northland.

75 Robertson , evidence-in-chief at [1.5], Kiwi Recovery Plan 2008-2018 (*Holzapfel et al*, 2008).

[90] As the Brown Kiwi population at Marunui increases, birds will need to disperse to establish their own territory".[76] We accept Dr Robertson's opinion, based on his experience in Northland, that "the prospects of re-establishing a viable population of Brown Kiwi in the Brynderwyn Hills are very good".[77] It was explained to us that the Site is well within the dispersal range of Brown Kiwi.[78] We also understand that the Scenic Reserve provides continuous suitable forest habitat between Marunui and the Site (and eastwards of it nearly as far as Bream Tail) with "no major obstacles in the way to prevent dispersal of kiwi such as rivers or tidal inlets".[79] On that basis, we accept that there are good prospects that kiwi will become established in the Reserve and a realistic potential that they will reach the Site.

[91] The evidence demonstrated to us that dogs are a serious risk to kiwi populations (particularly of Brown Kiwi) in Northland.[80] Dr Robertson explained that the life expectancy of adult kiwi in Northland (14 years) is about a third of what it is in locations where dogs (and ferrets) are scarce.[81] We accept that the successful dispersal of kiwi beyond Marunui will require ongoing effective predator management, especially of dogs. We heard that, if pest control stops, pests will very rapidly return.[82] There is added risk here in the fact that the Reserve's predator control programme relies on volunteers. As for the many private properties adjacent the Site, we understand that the potential for kiwi dispersal is unknown but likely to be limited to those properties with active predator control.[83] We understand, from Dr Robertson, that kiwi on properties

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76 Robertson, evidence-in-chief at [5.15].

77 Robertson, evidence-in-chief at [6.10].

78 Robertson, evidence-in-chief at [5.1]ff. Dr Robertson explained that, although the ability of kiwi to disperse is limited relative to other species, some young Brown Kiwi are known to disperse over relatively long distances. He said that, in one study it was shown that the "mean total dispersal distance, measured as the sum of all inter-capture distances, was 13.3 km, and the maximum distance was 54.9 km". (Mr Goodwin also regarded the bush of Marunui, the Scenic Reserve, and the Site as effectively "continuous", Goodwin, evidence-in-chief at [4.7]).

79 Robertson, evidence-in-chief at [5.13].

80 Robertson, evidence-in-chief at [6.6] (referring to *Robertson et al*, 2013). Dr Robertson also referred to statistics from peer-reviewed journal articles. In one study of 248 adult birds over a four year period (1994-98), 44% of bird deaths were caused by dogs. The study also showed 32% of sub-adult deaths were attributed to dogs. In a second (and we presume extreme) example about 500 Brown Kiwi in the Waitangi Forest are believed to have been killed by a single dog over a six week period.

81 Robertson, evidence-in-chief at [3.2].

82 Transcript, p.372

83 Joint Witness Statement of Ecologists (undated) arising from 3-17 December 2013 caucusing, [4(c)].

between the Scenic Reserve and the Site[84] would be at risk as they are at all mainland New Zealand sites.[85]

[92] It was explained that the Kiwi Aversion Training programme run by the Department of Conservation, although designed primarily for hunting and working dogs,[86] is increasingly being used to train domestic dogs.[87] We were told that the training would offer benefits for all dogs, although it would not eliminate the risk. Although the RMA is not a "no risk" statute, we understand from the evidence that some trained dogs would still present a significant risk to kiwi. Ms Sporle attested that there would still be a "very high risk for the kiwi".[88] Mr Poynter, who favoured a condition requiring kiwi aversion training,[89] accepted there would be a need for training to be ongoing and repeated at regular intervals.[90]

Discussion

[93] We find that the Plan does not provide explicit policy encouragement for a dog exclusion condition in this case. Rather, Policy 6.6.2b (and related explanatory text[91]), encourages the use of such conditions only in identified "high kiwi density" areas. Marunui is not listed as a "high density area" in Appendix F of the Plan (or in the other referenced sources). However, Method 6.7.1.5 refers to the Appendix F map as an example of where the Council may impose dog keeping conditions. The Method also refers to other referenced databases where high density kiwi habitat may be identified. As such, the Plan does not contend that dog keeping conditions be confined to Appendix F areas.

[94] On the weight of evidence, we are satisfied that a condition to restrict or prohibit dogs on the Site is justified and warranted under section 6(c), RMA.

[95] The Plan assists us in applying section 6(c) by identifying that a trigger for determining whether there are "areas of significant indigenous vegetation and significant habitats of indigenous fauna" is whether an area's vegetation would form "ecological

84 Shown on Exhibit 1 – Robertson.
85 Transcript, p.370.
86 Sporle, evidence-in-chief at [2.3].
87 Transcript, p.377.
88 Transcript, p.380.
89 Poynter, evidence-in-chief at [27].
90 Transcript, p.83 at [4]-[11].
91 Specifically, the Introduction to Chapter 6 and Associated Method 6.7.1.5.

buffers, linkages or corridors to other areas of significant vegetation or significant habitats of indigenous fauna". We are satisfied, on the basis of the evidence of Dr Robertson (supported by Mr Goodwin), that there is sufficient continuity and proximity between Marunui, the Scenic Reserve and the Site for this to form an effective linkage or corridor.

[96] As to pecking order, kiwi are our national bird. The evidence was unequivocal that they are at particular risk, especially from dogs, in Northland. Therefore, the protection direction in section 6(c) applies.

[97] We acknowledge that a condition restricting or prohibiting dogs on the Site would not address the risk that dogs from neighbouring properties could pose (indeed we encountered a less-than-friendly wanderer on our site visit). However, we are satisfied that this does not undermine the section 6(c) benefit and rationale for a condition. In particular, on the weight of evidence, we find that there is a sufficient likelihood that birds released at Marunui will establish in the Scenic Reserve. Despite the risk from dogs on neighbouring private land, the evidence satisfies us that there would be a sufficient potential that kiwi will reach the Site, as part of an ecological corridor. While that likelihood and potential is strongly reliant on continuation of a voluntary predator control programme in the Reserve, the RMA includes provision for condition review (section 128) should that programme fail in the future.

[98] For those reasons, we are satisfied that a dog prohibition or restriction condition would be sufficiently connected to the development (rather than being for ulterior purposes) in the manner expressed in *Newbury*, and clarified in *Estate Homes.*

[99] We are mindful of MHHL's concern that a full dog prohibition condition could detract from the desirability of the development in the eyes of some purchasers. However, we did not receive any evidence that would allow us to judge the degree of that risk. In any case, we accept as valid the concerns expressed by the Council and section 274 parties as to the enforcement and administration difficulties that would be presented by MHHL's alternative kiwi aversion training condition. Also, we find that MHHL's concerns about potential buyer resistance to such a condition are outweighed by the benefits of an effective condition for the purposes of section 6(c), RMA.

[100] On that basis, we have determined that we should retain a dog prohibition condition as intended by the Council's decision. As to how the condition is drafted, we note that it suffers from the same defects as proposed Condition 1p in purporting to direct that a consent notice be the means of prohibition. We make directions later in this decision for the condition to be redrafted to correct that defect.

Hochstetter's Frog

[101] We find that the section 274 parties' call for the inclusion of a condition for the protection, maintenance and enhancement of Hochstetter's Frog habitat was not justified on the evidence.

[102] The ecologists agreed that there had been no surveys and there was no record of that species of frog having been found on the Site.[92] However, Dr Julian argued for the potential existence of Hochstetter's Frog habitat on or in the vicinity of the Site, on the basis of her understanding of photographs that she attached to her evidence, dated January 2009 and February 2012. She labelled these "Hochstetter's frog in catchment". Dr Julian explained that the photographs were taken by a "neighbour living on the property adjacent to the south-west boundary of the site" who "found and photographed this species on two occasions in the stream immediately downstream from the subject site".[93] The neighbour was a submitter in opposition to the proposal at the Council hearing. As the neighbour did not give evidence before us, we have no way of knowing whether the photographs are a reliable foundation for Dr Julian's opinion. As such, we do not consider we can rely on Dr Julian's opinion on this matter to draw any safe conclusions.

[103] The consensus of the ecologists was that the main watercourse in the northern catchment of the Site (not presently of high quality) "may in the future be potential good quality" habitat. They agreed that this potential "should not be compromised by avoidable sediment input".[94]

[104] However, we are solely concerned with the proposal before us. As we have extensively discussed on the topic of the Safety of Access, the proposal does not involve

92 Ecologists' Joint Statement, [4(i)].
93 Dr Julian, evidence-in-chief at [3.8].
94 Ecologists' Joint Statement, [4(i)].

extensive earthworks for its access formation. While sediment could result from the establishment of building platforms, we did not hear evidence that the sediment controls imposed by conditions of the regional council resource consent would not be adequate. In any case, those consents were not appealed.

[105] For all those reasons, we are not satisfied that the condition sought by the section 274 parties is warranted or appropriate. As we reject the suggested condition on that basis, we do not consider it necessary to determine the question of jurisdiction raised by Mr Webb.

Wetland rehabilitation

[106] We find that the Council's call for us to impose additional requirements for rehabilitation of four wet areas (total approximately 1.23 hectares) on the valley floor of the Site is not justified on the evidence.[95]

[107] The Council's proposed rehabilitation involved herbicide spraying and native wetland planting programmes. The Council did not appear to claim that the four areas had any significance under section 6(c) nor under the Plan. Mr Goodwin referred to the areas as "modified wetlands", but acknowledged they were prone to significant drying in summer.[96] He accepted that the benefits of imposing these obligations were "not substantial". However, he considered they were worth imposing because he assessed the cost that the consent holder would incur as relatively small.[97]

[108] Mr Poynter pointed out that the bush covenant proposals, and requirements as to the exclusion of stock and control of weeds would each assist in restoring the areas, to the extent there was any value in doing so. He expected that the high fertility of the valley floor would also mean naturalised nutrient-tolerant wetland species would tend to continue to establish, irrespective of efforts to establish native species.[98] He considered the costs of initial restoration, and ongoing maintenance, would not be insignificant.

[109] Our site visit reinforced to us the relative lack of value that the four sites have in ecological terms. Even if Mr Goodwin is correct that the cost of these additional

95 Council submissions at [4.10].
96 Goodwin, evidence-in-chief at [15].
97 Goodwin, evidence-in-chief.
98 Poynter, evidence-in-chief [19(vi)].

requirements would be "small", that does not justify imposing a condition that does not have a sufficient resource management purpose. We do not consider that the additional requirements meet the *Newbury/Estate Homes* test of validity. In any event, we exercise our discretion against imposing them.

Rehabilitation of "deleted sites 15 and 17"

[110] The Joint Memorandum as to Contested Issues indicates that the section 274 parties also sought that "deleted sites 15 and 17" on the ridge be rehabilitated.[99] However, they did not significantly advance this in their evidence and submissions. We are satisfied that the bush covenant proposals, and the intended conditions as to the exclusion of stock and control of weeds, will be sufficient to address ecological rehabilitation on the Site. We decline to go further in the manner the section 274 parties have proposed.

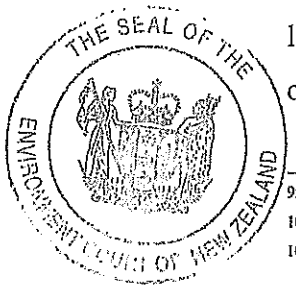
Pest management

[111] There were no issues as between the Council and MHHL on this topic. MHHL accepted the Council proposals for the relevant conditions (then 2(l) and (m)) to include three and five year timeframes, respectively, for the provision of reports on pest plant control work and implementation of the animal pest management strategy.[100]

[112] While the section 274 parties indicated they sought ongoing reports and more detailed weed and pest management conditions[101], they did not significantly advance this in their evidence and submissions. We are satisfied that, with the adjustments agreed between MHHL and the Council, the relevant conditions are adequate. Therefore, we decline to go further in the manner the section 274 parties have proposed.

Overall findings as to ecology

[113] We find that implementation of MHHL's proposal is overwhelmingly positive for the protection and enhancement of the Site's ecological values (leaving aside the unknown effects of any future access upgrade). If the consents are exercised in the limited form we have approved, that exercise will recognise and provide for protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna



99 Joint Memorandum as to Contested Issues, [13].
100 Joint Memorandum as to Contested Issues, [14].
101 Joint Memorandum as to Contested Issues, [14].

(section 6(c)). That exercise of the consents would also assist to fulfill the intention of a number of related Plan objectives and policies, in particular Objectives 6.5.1-6.5.3 and Policy 6.6.2b. Those benefits would arise through a combination of factors. Those include the proposed extensive bush covenants, restrictions on vegetation clearance, and associated conditions including for pest management and weed control, and total dog prohibition.

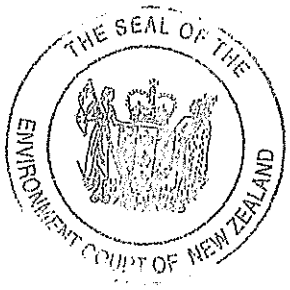
[114] However, those benefits hinge upon whether the development proceeds. We are mindful that our decision to decline the additional lots and dwellings sought for the Upper Part of the Site may impact on the development's viability (although MHHL did not call evidence on this). While that could be regrettable in ecological terms, Part 2 calls for us to weigh competing considerations. As we are not satisfied that ROW 1 would enable its future users to provide for their safety, we have reached our ultimate view that we should decline consent for the additional lots and dwellings.

Landscape and visual amenity effects

[115] On this matter, we heard from three landscape architects – Mr Simon Cocker (for MHHL), Ms Rebecca Skidmore (for the Council) and Ms Melean Absolum (for the section 274 parties). We heard from the planning experts on related Plan provisions.

[116] The Council opposed the additional dwellings sought in the Upper Part of the Site purely on "traffic safety and engineering grounds", noting that this marked a change from the position expressed in its commissioner's decision:

> ... the Decision also raised some landscape concerns in relation to houses on lots 18 – 20 and effects on the former N65 feature, however the Council's expert advice from Rebecca Skidmore indicates that consent can be granted for proposed lots 15 and 17 – 20, in visual/landscape terms, as, while there is potential for domestication of character, this can be mitigated adequately by imposing the standards in proposed condition [1p]. The Council is therefore not asking the Court to refuse consent for the Upper Lots on visual/landscape grounds on appeal (its concerns are focussed on traffic effects).[102]



[117] By contrast, the section 274 parties were concerned that the additional dwellings and ROW 1 would have a significant adverse effect on the landscape character of the

102 Council's opening submissions at [1.2a], [1.22].

Brynderwyns which they considered could not be adequately mitigated. Part of their concern was as to the cumulative effects the additional dwellings would have in conjunction with the consented Lower Part of the Site.[103]

[118] The fact that the Site is part of the Plan's ONL 14 Bream Tail – Brynderwyn Ranges (*ONL 14*)) is relevant to s 6(b), which directs us as follows:

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

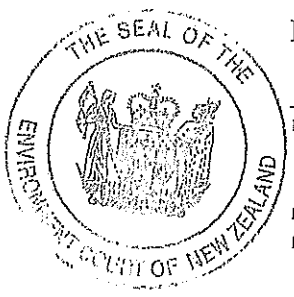
[119] In complying with that direction, we are guided by how the Plan has formulated this ONL and what it expresses as its related objectives and policies. We found Mr Savage's submissions on these matters particularly helpful.

[120] He submitted (and we agree) that:

> The starting point for the assessment of landscape effects must involve developing an understanding of the characteristics and values of this ONL.[104]

[121] We note that this is identified as the first step of landscape assessment under related Policy 18.6.1.

[122] As to how to identify the characteristics and values of ONL 14, Mr Savage referred to the applicable "worksheet" in the Kaipara District Landscape Technical Report 2010 (as did Ms Absolum).[105] Again, we agree. Mr Savage's approach is supported by the Explanation to Policy 18.6.1, which states that the key characteristics and values to be protected are "as identified in Appendix 18A and the worksheets of the Kaipara District Landscape Technical Report 2010".



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103 Joint Memorandum as to Contested Issues, [16(b)]. In addition, the Joint Memorandum recorded issues as to certain conditions (which are addressed below) and as to matters pertaining to the Plan appeal (addressed in Part B of this decision).

104 Section 274 parties' submissions at [26].

105 Referring to the copy in Absolum, evidence-in-chief, App 1 pp 718-722.

[123] We also agree with Mr Savage that, once the key characteristics and values are identified, the next step in landscape effects' assessment should be to consider what the Plan intends as its "planning approach", under its relevant objectives and policies.

[124] The intended planning approach is expressed through Objective 18.5.1 and Policy 18.6.1 (and their associated Explanation). Given their importance, we set them out in full:

> **18.5.1**
> To protect Outstanding Natural Landscapes from inappropriate subdivision, use and development, including in terms of the type, scale, design, intensity and location of any subdivision, use and development.
>
> **18.6.1**
> To recognise and protect Outstanding Natural Landscapes from inappropriate subdivision, use and development by:
>
> (a) identifying and confirming the extent, values and characteristics of Outstanding Natural Landscapes;
> (b) protecting natural and physical features and natural systems (such as landforms, indigenous vegetation and watercourses) that contribute to the character and values of Outstanding Natural Landscapes;
> (c) managing the potential adverse effects of activities including earthworks, vegetation clearance and the location, scale, design and external appearance of buildings structures and accessways;
> (d) protecting the character and values of features and landscapes by managing the potential significant adverse effects of locating inappropriate significant built elements outside Outstanding Natural Landscapes;
> (e) recognising the importance of views of Outstanding Natural Landscapes;
> (f) avoiding significant adverse effects that would compromise the values and characteristics of Outstanding Natural Landscapes, particularly when viewed from public places including public roads;
> (g) recognising the on-going contribution to the social and economic wellbeing of the District derived from activities and maintaining appropriate opportunities for these within Outstanding Natural Landscapes. These activities include farming, forestry operations and renewable energy activities and associated electricity transmission activities; and
> (h) encouraging and recognising the wider benefits of sensitive development that protects Outstanding Natural Landscapes.

The Council has recognised and protected Outstanding Natural Landscapes in the District and has mapped them. Subdivision, use and development within Outstanding Natural Landscapes will be managed so that the key physical characteristics and values that make up each individual landscape will be protected (as identified in Appendix 18A and the worksheets of the Kaipara District Landscape Technical Report 2010) from inappropriate subdivision, use and development. The impact of different activities on Outstanding Natural Landscapes will vary depending on the sensitivity of the landscape to a proposed activity. While generally, Outstanding Natural Landscapes have lower capacity to absorb change, this does not preclude built structures and elements or other land use activities where appropriate. The key focus is protecting the identified values of the Outstanding Natural Landscapes. However, it is recognised that there are other 'competing' policy directions such as the National Policy Statement on Renewable Energy that also need to be taken into account. When considering the effects of activities on these landscapes reference also needs to be had to Appendix 18B which contains assessment criteria.

Subdivision boundaries and the alignment and location of network utilities (including roading networks) should recognise natural topography, important natural features, views and patterns of the landscape to appropriately avoid adverse effects on landscape values. Enhancing existing environmental systems will be encouraged. For example, this may include extending areas of existing indigenous vegetation to provide ecological linkages and strengthen landscape patterns, and integrating elements such as waterways with subdivision, use and development. Activities which have the potential for adverse effects on these Outstanding Natural Landscapes will be subject to management through the Plan.

In assessing applications for resource consent for subdivision, use and development consideration will be given to the benefits of the proposal in terms of the protection and enhancement of scientific, geological and landscape values being offered. This could be by way of voluntary protection measures, covenant, consent notices or financial contributions. For example the use of covenants to control the volume and extent of land disturbance activities, protection of indigenous vegetation, design and external appearance and location of, accessways, buildings and structures including signage, lighting and fencing.

[125] However, we do not agree with how Mr Savage interpreted the planning approach expressed by those provisions.

[126] He submitted that the Plan's "objectives and policies" ought to lead us to "prevent the 'occurrence of', or 'not allow' development that will impact on the recognised values and characteristics of the ONL" (as identified from the technical

worksheet).[106] We understand that submission to draw on observations in *King Salmon*[107] as to the meaning of a requirement to "avoid adverse effects" in certain policies of the New Zealand Coastal Policy Statement 2010 (*NZCPS*). However, the Court was careful to note it was interpreting those words in the context of how they were used in that instrument.[108]

[127] Mr Savage argued that the word "inappropriate" (in the phrase "inappropriate subdivision, use and development", as is used in Objective 18.5.1 and s 6(b)) should be read with reference to what is "sought to be protected". That submission is soundly based on *King Salmon* where the Supreme Court (by majority) found (in regard to its interpretation of the NZCPS and section 6(b), that:

> ... where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use and development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is sought to be protected.[109]

[128] By majority, the Supreme Court explicitly rejected an interpretation of treating "inappropriate" (and "appropriate") as a mechanism that allowed an overall broad judgment such as to allow for "beneficial" development that would have serious adverse effects on what is sought to be protected.[110]

[129] However, we consider Mr Savage has erred in seeking to read Objective 18.5.1 and Policy 18.6.1 through the lens of cases that were not concerned with the Plan. According to the Court of Appeal decision in *Powell*[111] the proper approach to plan interpretation, where the meaning of a provision is not clear on its face, is to consider the provision in its immediate plan context. According to that approach, when interpreting the meaning of "inappropriate subdivision, use and development" in Objective 18.5.1, it is appropriate that we consider associated Policy 18.6.1. That contextual approach to interpretation also reflects the statutory purpose of plan policies as being to implement plan objectives.[112]

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106 Section 274 parties' submissions at [31].
107 *EDS v The New Zealand King Salmon Company and ors* [2014] NZSC 38.
108 *King Salmon* [62].
109 *King Salmon* [2014] NZRMA 195 at [101].
110 *King Salmon* [104].
111 *Powell v Dunedin City Council* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174 (CA).
112 Section 75, RMA.

[130] As we read Policy 18.6.1, it is well-aligned with *King Salmon* in that it indicates that judgments as to what constitutes "inappropriate subdivision, use and development" should be made with reference to what is "sought to be protected". That is indicated by paragraphs (a) and (b) of the policy. The associated Explanation also guides us to refer to the applicable worksheet to determine an ONL's characteristics and values. To that extent, Mr Savage's submissions are sound.

[131] However, neither Policy 18.6.1 nor Objective 18.5.1 suggest that subdivision development inevitably must be inappropriate. Objective 18.5.1 itself directs that consideration should be given to the "type, scale, design, intensity and location" of the subdivision, use and development. Relevant to that, paragraphs (c) and (d) of Policy 18.6.1 allow for protection through the management of the potential adverse effects of the development in issue. Paragraph (h) invites us to encourage and recognise the wider benefits of sensitive developments that protect ONLs.

[132] In an overall sense, Objective 18.5.1 and Policy 18.6.1 recognise the potential for sensitively designed and managed developments to effectively protect an ONL's values and characteristics. Whether this will be so depends both on the development and the nature of the values and characteristics of the ONL itself. In that regard, we find that the worksheet indicates that ONL 14 has a capacity to tolerate some managed development without significant loss of identified values and characteristics. Mr Savage noted that the worksheet identifies the "paucity of buildings and structures located on the ranges" and the potential for any development to "detract from the simplicity and starkness of the unit". However, it also comments that the telecommunication towers to the east and "more generally, tracks … detract from the naturalness of the feature" and tend to "draw the eye".[113] The latter is certainly part of the landscape environment of the Subject Site. In addition, the worksheet identifies the "mitigating feature" of the predominately southern orientation of the Ranges. It notes that this often means hazy or shadowed views due to the angle of the sun. We experienced that on our site visit.

113 Absolum, evidence-in-chief App 1 at [721].

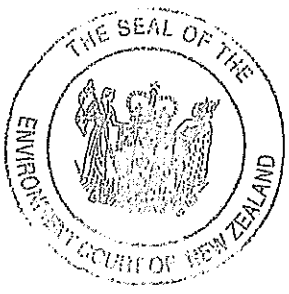
[133] With reference to *Upper Clutha Environment Society Inc*,[114] Mr Savage also submitted that it is important to distinguish effects on landscape values from those on visual amenity values.

[134] We accept that these concepts should not be conflated. One reason not to do so is that the RMA specifies different statutory directions. Section 6(b) directs us to "recognise and provide for" what it specifies. Section 7(c) directs us to have "particular regard to" the "maintenance and enhancement of amenity values" (and we find that encompasses visual amenity values).

[135] However, landscape values and visual amenity values can certainly overlap. As to their inter-relationship, we take guidance from Policy 18.6.1. It recognises the overlap between effects on visual amenity values and landscape values. In particular, paragraph (e) refers to recognising the importance of views of ONLs and paragraph (f) (on avoiding compromising the values and characteristics of ONLs) includes the phrase "particularly when viewed from public places including public roads". Policy 18.6.1 also recognises that landscape values go beyond simple visual reference points. In particular, paragraph (b) refers to protection of natural and physical features and natural systems (including indigenous vegetation).

[136] On the question of whether the landscape of the development could have affect beyond its visual impacts, we heard divergent opinions:

(a) Ms Absolum acknowledged that the adverse visual effects of the dwellings on the Upper Part of the Site would be "low/moderate". However, she considered the cumulative effect that these dwellings and 13 consented lots on the Lower Part of the Site would have on amenity values and landscape character would be significant.[115] She considered that the dwellings would sit "on the landform" rather than within it, and argued this was contrary to "accepted landscape principles".[116] She considered that the introduction of buildings and residential activity would be "intrusive, reduce the



114 *The Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* C104/2002.
115 Absolum, evidence-in-chief at [8.5].
116 Absolum, evidence-in-chief at [7.24].

naturalness of this landscape, change its character and adversely affect amenity values".[117]

(b) Ms Skidmore acknowledged that the clustering of dwellings on and in close proximity to the main ridgeline of the ranges would increase "domestication of the landscape". However, she noted that the site would be primarily viewed from distant locations.[118] She considered "existing vegetation and proposed revegetation and planting, together with controls on building scale, form and other elements of site development will ... assist to ensure site development is subservient to the surrounding natural patterns."[119] Mr Cocker supported Ms Skidmore's opinion.

[137] These differences of opinion are largely overtaken by our decision to decline consents for the additional lots and dwellings sought for the Upper Part of the Site. However, we consider that we should record why we prefer the opinions of Ms Skidmore (supported by Mr Cocker) on these matters:

(a) We found Ms Skidmore's observation that viewing of the Site would be primarily from distant locations borne out by our site visit. That visit also confirmed to us the accuracy of comments in the technical worksheet for ONL 14 that the receiving environment is already modified, including by tracks (a feature on the Site) that "detract from the naturalness of the feature" and tend to "draw the eye". We also experienced the mitigating influence of the sun's haze, as noted in the worksheet. We consider that lights at night can be discounted on account of public viewing distances and few vehicle movements. As such, we are satisfied that the receiving environment is capable of absorbing well-managed development of the kind and in the locality MHHL has proposed.

(b) We are satisfied that Condition 1p, if redrafted in accordance with our directions, would ensure a development pattern in keeping with the planning approach intended by Objective 18.5.1 and Policy 18.6.1. In particular, we find Condition 1p's controls and restrictions on existing vegetation protection and proposed revegetation and planting, building

117 Absolum, evidence-in-chief at [7.24].
118 Skidmore, evidence-in-chief at [6.1].
119 Skidmore, evidence-in-chief at [4.9].

scale, form, building colour and materials, and other elements of site development, will be effective in ensuring the consented development is subservient to the surrounding natural patterns. As such, we found Ms Absolum's opinion that the dwellings would "sit on the land form" was not supported by the evidence.

(c) Ms Absolum and Ms Skidmore agreed that increased domestication would occur from allowing additional lots and dwellings in the Upper Part of the Site. While that would adversely affect the ONL, we agree with Ms Skidmore that it would not be sufficient in itself to render the development contrary to Objective 18.5.1 and Policy 18.6.1. Specifically, that is on the basis of our earlier finding on the capacity of the receiving environment to tolerate some well-managed development. In addition, as we read Policy 18.6.1, it does not intend to preclude residential development within an ONL where the "potential adverse effects of activities including earthworks, vegetation clearance and the location, scale, design and external appearance of buildings structures and accessways" are properly managed. We consider that would be the case for the proposal.

[138] With or without the additional lots and dwellings on the Upper Part of the Site, we find that the proposal is not contrary to Objective 18.5.1 and Policy 18.6.1. It is in keeping with the intentions of those provisions. Informed by those findings, we find the proposal recognises and provides for the matters in, and is not, contrary to section 6(b).

Whether the additional lots and dwellings satisfy section 104D

[139] We have considered the activities' adverse effects as a whole, in light of the mitigating influence of the proposed consent conditions (and in this case, also of the proposal's subdivision design): *Bethwaite; Stokes.*[120] We find that those adverse effects are more than minor. That is because of the unacceptable danger that we find ROW 1 would pose for its intended users, in the event that we were to grant consent to the additional lots and dwellings sought for the Upper Part of the Site. That danger overwhelms the proposal's positive ecological effects and acceptable (and we find, minor) landscape and visual effects.

[120] *Bethwaite and Church Property Trustees v Christchurch City Council* C085/93; *Stokes v Christchurch City Council* [1999] NZRMA 409.

[140] However, we also find that the proposal would not be contrary to the Plan's objectives and policies (section 104D(1)(b)). That is despite our finding that granting consent to the additional lots and dwellings in the Upper Part of the Site would be contrary to[121] Policy 12.2.17. As such, the proposal would satisfy section 104D.

[141] Mr Allan[122] referred to us several longstanding authorities.[123] He also helpfully noted two more recent related decisions (which we refer to as *Queenstown Central Ltd - (1)*[124] and *Queenstown Central Ltd - (2)).*[125] In those cases, the High Court found that a proposal was contrary to a single objective in the relevant plan. It determined that was sufficient for the proposal to have failed section 104D(1)(b).[126]

[142] We find the reasoning in those decisions assists in indicating the contextual nature of the section 104D(1)(b) inquiry. In *Queenstown Central Ltd - (2),* Fogarty J observed that ordinary principles on the interpretation of legal instruments apply to the interpretation of any plan change. He observed that those principles allowed account to be taken of the factual context and the "mischief" sought to be remedied.[127] We find the Environment Court decision in *Akaroa Civic Trust*[128] also assists on the importance of a contextual analysis of the relevant Plan provisions. There, the Court observed[129] that section 104D(1)(b) was "not a numbers game" and what was required was a consideration of the objectives and policies as a whole. That contextual analysis could result in a proposal passing or failing the section 104D(1)(b) gateway on the basis of even a single objective or policy (albeit in exceptional cases). We have also noted that *Man O'War*[130] expressed agreement with the legal analysis of section 104D(1)(b) in *Akaroa Civic Trust.*

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121 The meaning of "contrary to" in section 104D(1)(b) is well settled as opposed to in nature; different; opposite to: *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

122 Supplementary Submissions of Counsel for Kaipara District Council dated 29 May 2014 (*Council's Supplementary Submissions*).

123 *Tairua Marine Ltd v Waikato Regional Council* CIV-2005-485-1490, 29 June 2006, HC, Auckland, Asher J, (or the related Environment Court decision); *Dye v Auckland Regional Council* [2001] NZRMA 513; *Bunnings Ltd v Hastings District Council* (2011) 16 ELRNZ 767, at [127].

124 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZRMA 239.

125 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

126 *Queenstown Central - (1)*, at [126]-[127]; *Queenstown Central - (2),* at [37].

127 *Queenstown Central - (2),* at [24].

128 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.

129 *Akaroa Civic Trust* at [74].

130 *Man O'War Station Ltd v Auckland City Council* [2010] NZEnvC 248 at [124].

[143] However, we respectfully suggest that Mr Allan went somewhat astray in his application of a contextual approach to Policy 12.6.17 (and its companion Policy 12.6.18[131])[132]. That was in the fact that he sought to argue that those policies should be treated as having more dominant influence by reason of the evidence on the safety deficiencies of ROW 1. While we have found valid the Council's concerns as to those safety deficiencies, we consider it invalid to bring them into our contextual analysis of Policy 12.6.17. Rather, as *Powell*[133] has identified, the proper focus of a contextual analysis is on how particular Plan provisions fit within their immediate Plan context (not to be confused with the particular factual context in any case).

[144] As we read Policy 12.6.17 in its immediate Plan context, it is not intended to have the dominance that Mr Allan has argued for. Rather, it is simply a policy (as is Policy 12.6.18) amongst several others intended to have some influence in the mix of matters in any particular factual context. We find that the proposal (with or without the additional lots and dwellings sought for the Upper Part of the Site) would not be "contrary to the objectives and policies of" the Plan, in the sense of being "opposed to in nature; different; opposite to" the Plan's objectives and policies considered as a whole.

[145] On that basis, we have considered the proposal (including the additional lots and dwellings sought) under section 104.

Our consideration under section 104 (including as to Part 2)

[146] On the basis of our earlier findings, we find that we should decline consent for the additional lots and dwellings sought for the Upper Part of the Site.

[147] That is in view of our finding that ROW 1 would be unsafe for its intended users. While safety is a relative concept, we consider ROW 1's defects are unacceptable, bearing in mind Mr Bishop's well-founded opinion that they would pose a very high risk of severe, potentially fatal, crashes. While ROW 1 is a singular failing, it goes to the

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131 We acknowledge that Mr Allan (supported by Mr Raeburn) also saw Policy 12.6.18 as relevant (i.e. *By ensuring that roads provided within subdivision sites are suitable for activities likely to establish on them and are compatible with the design and construction standards of roads in the District roading network to which the site is required to be connected to*). We disagree with that as a private way does not appear to come within the Plan's definition of "road". However, for the reasons we have noted, it does not affect our finding concerning section 104D(1)(b).

132 Council's supplementary submissions at [12].

133 *Powell v Dunedin City Council* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174 (CA).

heart of the proposal. Its deficiencies cannot be resolved through consent conditions, as achieving an acceptably safe vertical and horizontal alignment would require significant earthworks and vegetation clearance, for which further land use consent beyond the scope of MHHL's application would be required.

[148] Our consideration of the matters in section 104(1) is to be "subject to Part 2". We find granting consent to the additional lots and dwellings sought would not promote sustainable management in accordance with Part 2. That is because, contrary to section 5(2), such a decision would not enable intended users of ROW 1 to provide for their safety. In view of that, we find we must decline consent to the additional lots and dwellings despite the lack of any conflict with any of the provisions of sections 6-8 RMA, and the positive protection that the proposal would give to areas of significant indigenous vegetation and significant habitats of indigenous fauna (section 6(c)).

[149] We find that granting consent to the additional lots and dwellings sought would be contrary to Policy 12.6.17 of the Plan. Policy 12.6.17 does not bind our discretion, and we have noted a number of supportive objectives and policies in both the Plan and the RPS. However, we find Policy 12.6.17 to give us direction that is consistent with our findings concerning section 5(2). We have given it corresponding weight in our determination.

[150] In addition, we find that declining consents for the additional lots and dwellings in the Upper Part of the Site is more consistent with the intention of Policy 6.6.3 as to the management of earthworks and vegetation clearance to address ecological effects.

[151] On the basis of our earlier findings, having assessed the proposal on the basis that the additional lots and dwellings are excluded, we find that it would promote sustainable management in accordance with Part 2, and is supported by the Plan's objectives and policies considered as a whole. That finding is subject to the need to attend to various technical defects in the final set of proposed consent conditions, as we next address.

Issues concerning the proposed conditions (sections 104(1)(c), 108)

[152] As part of the relief in its appeal, MHHL sought changes to conditions imposed by the Council's subdivision consent decision, and offered a set of draft conditions.[134] These were the subject of further discussion which significantly narrowed points of difference between MHHL and the Council prior to and during the hearing. In light of those discussions, we received a number of iterations of possible condition wording, identifying points of agreement and disagreement between the parties. Subject to our following observations, we find that the final set of conditions[135] (*30 May Draft Conditions*) is appropriate for inclusion in the subdivision consent (on the basis that consents for the additional lots and dwellings in the Upper Part of the Site are declined).

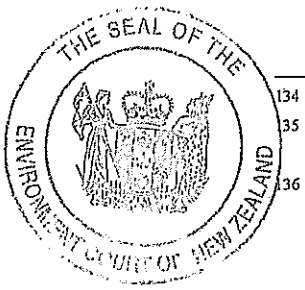
Whether Condition 1p is intra vires

[153] Our following findings concerning proposed Condition 1p are also relevant to Part C of our decision (concerning the Plan appeal).

Condition 1p[136] is designed to be the key means by which visual and landscape effects of the development are managed, in response to the Site's ONL classification.

[154] It commences "A consent notice (to be complied with on an on-going basis) is to be imposed on each of the titles of the household lots ... requiring that ..." and then sets out:

(a) A requirement to submit a detailed design report from a landscape architect to demonstrate compliance with specified design parameters;
(b) A list of matters for the Council to consider in its assessment of that detailed design report;
(c) A detailed prescription of how "compliance with the consent notice shall be determined" by the specified Council manager. This prescription (in the form of "standards" and "guidelines") purports to limit the relevant Council manager's "discretion" in determining compliance with the



134 Agreed Bundle, p.75 ff.
135 For convenience, we refer to the Council's document entitled "Annexure B Draft Set of Conditions (if Consent is Granted for Unconsented Dwellings and Lots)" dated 30 May 2014.
136 Initially, this was numbered "1r". It became "1p" in the final iteration of proposed consent conditions in Annexure B to Memorandum of Counsel for the Respondent Concerning Conditions, dated 28 May 2014 (*28 May memorandum*).

"consent notice". The prescription covers matters as to "design and landscape standards" (listed i – vi), architectural standards and guidelines (vii – x), a light reflectance standard (xi), and a number of "household lot – specific standards" (xii – xxxi).

[155] Condition 1p seeks to control the mass, form, design and appearance of dwellings. While it is somewhat unusual for a subdivision consent condition to encompass this extent of land use control, we do not consider this would invalidate the condition. In terms of our powers in sections 104B and 108(2), and *Newbury* and *Estate Homes,*[137] we are satisfied that there is a sufficient logical connection between the subject activity and the condition (and that it does not relate to external or ulterior concerns). That is in the sense that we have treated the subdivision and land use as bundled activities. Their inherent inter-relationship is reinforced by relevant Plan objectives and policies on the ONL and ecology issues.

[156] However, we find the drafting of Condition 1p is flawed in two related respects. One is that it purports to require the imposition of a consent notice[138] (i.e. "A consent notice ... is to be imposed"). Another is that it assumes that the Council has a discretion as to the imposition of a consent notice, and purports to direct and limit how the Council is to exercise that purported discretion.

[157] The obligation to issue a consent notice is provided for in section 221(1). That section does not contemplate any discretion. Rather, if the stated pre-requisites in section 221(1) are met, a consent notice *shall* be imposed. That obligation is triggered automatically if the subdivision includes a condition that imposes any restriction that is to be complied with by the subdividing owner and subsequent owners on a continuing basis after the deposit of a survey plan.[139]

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137 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, at [66]. That decision clarified the application to the RMA of the common law tests expressed in *Newbury DC v Secretary of State for the Environment; Newbury DC v Synthetic Rubber Co Ltd.* [1981] AC 578; [1980] 1 All ER 731 (HL). Specifically, *Estate Homes* made clear that it was not necessary to establish an effects' nexus.

138 Under the RMA, "consent notice" means a notice issued under section 221. Under section 221(3), a consent notice is deemed to be an instrument creating an interest in land (within the meaning of section 62 of the Land Transfer Act 1952). It may be registered. When it is, it is deemed to be a covenant running with the land, binding subsequent owners.

139 A second requirement is that the condition cannot be one in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued.

[158] The High Court decision of Fogarty J in *Barker v Queenstown Lakes District Council*[140] signals that, to meet that prerequisite, the subdivision consent must include a condition that is, in substance, restrictive (i.e. imposing "restraint", rather than enabling) and required to be *complied with* on a continuing basis.

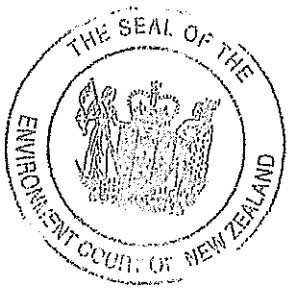
[159] Condition 1p refers to "standards" and "guidelines" on "design and landscape" (listed i – vi) and architectural design (vii – x), light reflectance (xi). It also refers to what it terms "household lot –specific standards" (xii – xxxi). These are intended as key means for addressing the various ecological, landscape and visual effects that we have discussed. We accept that these standards and guidelines are intended to impose ongoing compliance obligations (in the sense of restraining, not enabling, the subdividing owner and subsequent owners). However, the intended standards and guidelines need to be expressed within Condition 1p. The associated principles can guide the administration of Condition 1p by the relevant Council manager. However, that administration cannot legally be by means of the exercise of a non-existent discretion in the framing of related consent notices. The obligation to impose consent notices, carrying forward these obligations to successive owners, will be triggered by Condition 1p provided that the condition is correctly expressed.

[160] In essence, Condition 1p must set the boundaries of what is authorised and how associated administrative discretions are exercised.

[161] The task of fixing Condition 1p is reasonably significant. As such, we make directions on this matter later in this decision. To assist the parties in giving effect to those directions, we have included (in the Annexure A) indicative drafting notes.

Issues concerning other proposed conditions

[162] For the same reasons, proposed Conditions 1q and 1r will also need to be redrafted so that their requirements are expressed within those conditions (not assumed to be matters that associated consent notices will impose).



140 *Barker v Queenstown Lakes District Council* [2007] NZRMA 103; [2006] NZAR 716; (2006) 7 NZCPR 216, Fogarty J, (23 June 2006).

[163] Condition 2k specifies an obligation to pay a cash contribution in lieu of reserves, based on "1% of the assessed value of "nominal" building sites, the value to be determined by a registered valuer appointed by the Council (but paid for by the consent holder)". MHHL sought that this be amended to the effect that the consent holder would be able to obtain its own registered valuer's determination and to force any dispute between the valuers to arbitration. The Council opposed this change, raising concerns as to uncertainty and the unsuitability of arbitration within the context of a consent condition. MHHL submitted those concerns were misplaced.

[164] We agree with the Council that arbitration does not have a comfortable place within a consent condition of this kind. That is in the sense that it would treat a regulatory responsibility of the Council as a matter for negotiation. However, we consider the consent holder ought to have the opportunity to obtain their own registered valuer's report and provide this to the Council to consider. In addition, we consider that the Council's cost recovery ought to be according to the principles of s 36, RMA. Should the valuers' assessments differ, the Council should be left to reach its own determination on which assessment to prefer. We direct the Council to provide to us for approval a condition revised on that basis. With those changes, we consider the condition will provide a properly balanced basis for the Council's exercise of its statutory function in administration of the consent.

[165] As to proposed Condition 2i (as to planting), we accept MHHL's submissions in reply that this should specify a maintenance period of three years on the basis that we find that submission adequately supported on the evidence.

[166] MHHL's submissions in reply record that it accepts the Council's proposed review condition, a lapse period of seven years for the subdivision consent, and the latest proposed condition as to the establishment of a residents' association. On that basis, we accept the Council's submissions on those conditions, and direct that these be included in the subdivision consent on this basis.

PART C – THE PLAN APPEAL

Introduction

[167] As we have noted, the appellant now seeks only:

> an exemption from the requirement in Rule 12.10.3c(1)(b) of the District Plan that the gross floor area for dwellings on the 13 consented lots [of the Lower Site] do not exceed 50m^2 (the *modified relief*).[141]

[168] The reference to "the 13 consented lots" is to 13 house lots in the Lower Part of the Site that the Council granted subdivision consent for.[142]

[169] Rule 12.10.3c(1)(b) is a permitted activity performance standard pertaining to the erection and alteration of buildings and structures within an ONL. The rule reads relevantly, (our emphasis):

> (1) Subject to the exclusion in (2) below, the Erection and Alteration of Buildings and Structures (including dwellings) located in an Outstanding Landscape is a permitted activity if [it]:
>
> ...
>
> (b) Does **not exceed 50m^2 gross floor area**; or any alteration / additions to the building or structure do not exceed 40% of the gross floor area of the dwelling or 40% of the volume of the structure (whichever is the smaller)
>
> ...

[170] The appellant seeks relief only from the 50m^2 gfa requirement. It seeks that this be replaced with a maximum building coverage (not gfa) requirement of 350m^2 for dwellings on the 13 consented lots.

[171] Failure to meet any performance standard of Rule 12.10.3c results in "discretionary activity" status and triggers the following assessment criterion for the consideration of a resource consent application:

> Whether and the extent to which the proposal will affect the values of any Outstanding Landscape Area or Outstanding Natural Feature identified in Map Series 2 or Visual Amenity

141 Memorandum of Counsel for the Appellants, dated 5 May 2014, [2].
142 Council opening submissions, [8.1].

Landscape identified in Appendix G; and the extent to which the subdivision, use or development meets the additional assessment criteria contained in Appendix 18B.

Note 1: A description of the landscapes and features is provided in Appendix 18A. The values associated with Outstanding Landscape Areas and Visual Amenity Landscapes are described in the Kaipara District Landscape Report (2010).

[172] The essence of the appellant's argument was that Condition 1p (by its various controls on dwelling design and treatment and vegetation protection and planting) would provide sufficient control of the effects of dwellings in the Lower Part of the Site. As such, it argued that the additional controls imposed through Rule 12.10.3c(1)(b) were not warranted.

[173] The Council did not oppose this relief, provided certain provisos were satisfied.[143] One proviso was that the exemption had to be explicitly linked to the existing subdivision consent and confined to the 13 residential lots in the Lower Part of the Site. Further, it could only apply if the requirements of Condition 1p are included in consent notices on the titles. Finally, should the subdivision consent lapse without being implemented, the Council sought that Rule 12.10.3c(1)(b) apply as normal.[144]

[174] Those provisos were not questioned by the appellant.[145] Mr Webb explained that the only point of difference the appellant had with the Council concerned its preference for the 350m^2 limit to be expressed as building coverage rather than gfa (the Council's preference).[146] In essence, a building coverage limit would allow opportunity for a more generous maximum building area.

[175] The section 274 parties argued that the modified relief was beyond the scope of the appeal and hence beyond jurisdiction.

[176] They also argued that the modified relief was inappropriate. Their concern centred on potential landscape outcomes.

143 Council's opening submissions, [1.2(b)].
144 Council's opening submissions, [9.7(b)].
145 Appellant's submissions in reply, [97].
146 Appellant's opening submissions, [47], appellant's submissions in reply, [102].

[177] One dimension to this was loss of certainty. The s 274 parties were concerned as to whether the landscape outcomes likely to result from applying Condition 1p would be "sufficiently certain to justify an exemption from" Rule 12.10.3c(1)(b) "when compared with the outcomes likely to result, if dwellings were assessed against the criteria in Appendix 18B, which would otherwise apply".[147] They were also concerned that the modified relief would compromise the ability to address cumulative landscape effects.[148]

[178] The section 274 parties' first preference was that we decline the appeal and make no change to Rule 12.10.3c(1)(b). As an alternative (*section 274 parties' alternative option*), Mr Savage suggested that we could leave Rule 12.10.3c(1)(b) unchanged but add discretionary activity assessment criteria into Rule 12.10.3c. Those criteria would, in essence, refer to the matters specified in the proposed Condition 1p.[149] Mr Savage argued that this would allow for the cumulative effects of several dwellings to be considered in the context of consent applications.[150]

[179] Despite its looseness, we accept that the section 274 parties' alternative option falls somewhere between a full grant or decline of the modified relief. That is on the basis that the modified discretionary activity rule would be framed in a way that gave an applicant greater consenting security than it would have if Rule 12.10.3c was unchanged. As such, we consider we have jurisdiction to consider it.

[180] We have approached our consideration of the appeal on the footing that Condition 1p is redrafted according to our directions in Part B.

Statutory framework and principles for consideration of the issues

[181] Counsels' submissions and evidence did not generally address the RMA's statutory framework for determining the Plan appeal. However, we have identified this as follows:

(a) Sections 290 and 290A, as we describe in Part B of this decision, also apply to the determination of plan appeals;

147 Statement of Contested Issues, [17].
148 Transcript, p.597 at [8]-[13].
149 Transcript, discussion between Mr Savage and Judge Hassan, pp 605-607.
150 Transcript, Mr Savage, p.605.

(b) Clause 15 of Schedule 1, which governs the hearing of plan appeals;

(c) Section 72, which relevantly describes the purpose of plan preparation as being to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act;

(d) Section 74, which specifies a range of things plan preparation must be in accordance with (including Part 2 and the requirements of section 32) and directs that we have regard to certain matters;

(e) Section 75, which sets out the required content of district plans and what they must either give effect to or not be inconsistent with; and

(f) Section 76, which specifies the function and effect of district plan rules.

[182] Subject to being satisfied as to scope and jurisdiction, we understand that our task in testing the modified relief,[151] as against other options (primarily, leaving the Plan unchanged or somewhere in between), is to determine:

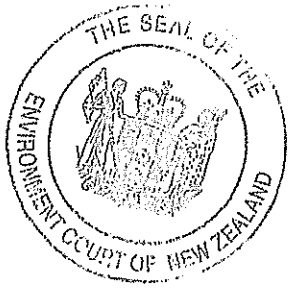
(a) Whether the modified relief would achieve the Plan's applicable objectives and achieve and implement its policies (sections 75(1), 76(1));

(b) What would be the most appropriate option for achieving the Plan's objectives (having regard to comparative efficiency and effectiveness, taking account of benefits and costs, and the risk of acting or not acting if there is uncertain or insufficient information) (sections 74, 32)[152];

(c) Whether the modified relief accords with Part 2; and

(d) What would better assist the Council to carry out its functions in order to achieve the RMA's purpose (section 72).

[183] As was the dominant focus in submissions and evidence, our inquiry centres on the relative implications for the protection of the identified landscape values and characteristics of ONL-14.



151 In regard to section 75(3) and (4), no party sought to argue that granting the modified relief would mean that the Proposed Plan would fail to give effect to any national policy statement, the New Zealand Coastal Policy Statement 2010 or the RPS (or the proposed RPS) nor to render the Proposed Plan inconsistent with any other relevant, planning policy or regulatory instrument. On the evidence, we are satisfied no such issues arise.

152 The applicable version of section 32 being the version that preceded the Resource Management Amendment Act 2013: see section 434 of that Act.

Scope and jurisdiction

[184] Given that the appellant's evidence did not address the full scope of relief sought by the Plan appeal, the Court directed the appellant to clarify its position. Just before the hearing, the appellant informed the Court and parties[153] of its narrowed and modified relief.

[185] In their submissions,[154] the section 274 parties argued that the modified relief went beyond the scope of the appellant's originating submission and hence was beyond jurisdiction.

[186] There was no material difference between counsel as to the relevant legal principles. In essence, the test is whether the submission, read as a whole, fairly and reasonably raised the relief either expressly or by implication. Analysis of the submission should be approached in a realistic and workable fashion.[155] Where the parties differed was in how those principles should bear upon our consideration of the modified relief.

[187] Mr Savage maintained that the appellant's originating Plan submission did not refer to the Site nor state anywhere that it sought an exclusion of the Site from Rule 12.10.3c. He argued that the submission, read as a whole fairly and reasonably, could not be construed as seeking such relief (either expressly or by implication).[156] On that basis, he said the modified relief went beyond the scope of the appellant's originating submission.

[188] For the Council, Mr Allan, submitted that the modified relief was within scope. Taking us through a copy of the originating Plan submission,[157] he pointed out that it specifically challenged Rule 12.10.3 (as it then was). The submission said the rule was

153 Memorandum of Counsel for the Appellants dated 5 May 2014.

154 Section 274 parties' submissions, [6(h)].

155 Mr Savage relied on *Re An Application by Vivid Holdings Ltd* [1999] NZRMA 467, *Campbell v Christchurch City Council* [2002] NZRMA 332, and *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408, at 413. Mr Allan referred to *Queenstown Airport Corporation Ltd v QLDC* [2013] NZEnvC 224 (where the Court referred to the above *Royal Forest & Bird* decision). Mr Webb adopted Mr Allan's submissions (Appellant's submissions in reply [97]).

156 Section 274 parties' submissions at [46].

157 Agreed Bundle, tab 4.

too onerous to be a permitted activity rule[158] and that the gross floor area restriction should be "at least 100m^2".[159] He noted that the submission sought, in the alternative, that the identified objectives and policies be amended or deleted "so that they present a sensible and manageable technique that is affordable in relation to the limited forms of development likely to occur and that do not denigrate from the provisions of any underlying zone".[160] Mr Allan observed that this was "leaving it fairly open in terms of the possibilities".[161]

[189] Mr Allan submitted that, in seeking an exemption from the 50m^2 gfa performance standard of Rule 12.10.3, the modified relief was simply a subset of the original relief. In the same way, he submitted that the fact that the modified relief was confined to just the Site was also fine.[162] On that basis, he submitted that the modified relief was conceivably what could have eventuated "further down the track".[163]

[190] In response, Mr Savage focused on the fact that the originating submission made no mention of the Site. He submitted that Mr Allan was "drawing rather a long bow" to say that people would understand "an unmentioned property should be excluded from the operation of the discretionary activity control".[164]

Discussion

[191] Subject to one proviso, we are satisfied that the modified relief is within the scope of the appellant's originating submission, and as such there is no jurisdictional bar to our consideration of it.

[192] Our proviso concerns the appellant's request that the 50m^2 maximum gfa requirement be replaced with one setting a limit of 350m^2 expressed as a maximum building coverage. Our concern is that the originating submission did not indicate that the appellant challenged the use of a gfa limitation *per se*. It recorded that this should be "at least 100m^2". That could have left a reasonable reader of the submission to assume acceptance of the use of gfa. As we later discuss, those differences are not simply

158 Agreed Bundle, tab 4, p.93, [2(g)].
159 Agreed Bundle, tab 4, p.93, [2(g)].
160 Agreed Bundle, tab 4, p.95, [4(b)].
161 Transcript, Mr Allan, p.601.
162 Transcript, Mr Allan, pp600-601.
163 Transcript, Mr Allan, p.602.
164 Transcript, Mr Savage, p.604.

technical but could result in different environmental effects. As such, we are not satisfied that we have jurisdiction to grant that aspect of the modified relief.

[193] Aside from that proviso, we are satisfied that the originating submission can be fairly read, on its face, to have sought either the removal of Rule 12.10.3 or its amendment such as to result in what it is termed an "affordable" outcome for "the limited forms of development" to which the rule applied. Although it did not mention the Subject Site, it did seek that the Council prepare "an alternative landscape chapter in full consultation with affected landowners".[165] The Site was one that was included within the identified ONL regime and hence was one of the parcels of land to which the submission referred. As such, the Site was included by implication. The submission allowed the Council scope to give relief from some or all of Rule 12.10.3 for some or all of the land to which the submission referred. Conceivably, that could have been limited to modifying Rule 12.10.3c(1)(b) only insofar as the Site was concerned, and only in the manner now pursued by the modified relief.

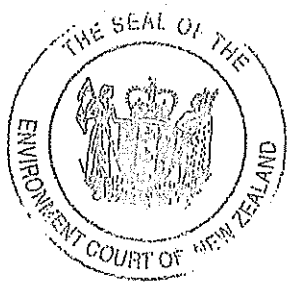
[194] Therefore, we agree with Mr Allan (and Mr Webb) that the modified relief (subject to our stated proviso) is within the scope of the originating submission. We consider it on that basis.

The evidence

[195] We heard from Mr Cocker, Ms Skidmore and Ms Absolum on landscape implications and Mr Putt, Mr Raeburn and Ms O'Connor on planning issues.

[196] That evidence presented two competing theories on landscape outcomes and related Council processes.

[197] Mr Cocker and Ms Skidmore each considered that the landscape assessment rigour that Condition 1p provided for the Site was potentially superior (and certainly not inferior) to that which could arise through a consent application process under Rule 12.10.3c(1)(b) (through the assessment criteria of Appendix 18B of the Plan). Mr Cocker considered Condition 1p superior in terms of the certainty of outcome it would



[165] Agreed Bundle, tab 4, p.95, [4(c)].

deliver.[166] Ms Skidmore considered the requirements of Condition 1p (secured by consent notice on titles) were "clear and specific to the characteristics of the subject site".[167] By contrast, she characterised the assessment criteria of Appendix 18B as "open-ended".[168]

[198] By contrast, Ms Absolum considered the consent notice process of Condition 1p was not an appropriate substitute for the statutory scrutiny of a resource consent application. This was in view of the level of potential adverse effects she anticipated to arise from residential development of 13 lots in the Lower Part of the Site.[169] Those potential effects made it important, in her view, that the Council retained an appropriate level of discretion. She noted that the Council would have that discretion with a consent application regime, but not in its administration of a consent notice. The 9 December Joint Witness Statement of Landscape Architects indicates that Ms Skidmore also recognised the legal difference between resource consenting and the administration of consent notices.[170]

[199] The planning witnesses generally concurred with the contrasting positions of the landscape experts on which they relied. In addition, Mr Putt characterised the modified relief as comprehensive and the unmodified operation of Rule 12.10.3c(1)(b) as *ad hoc*.[171] As to Ms Absolum's concern regarding the potential effects of adding 13 dwellings to the Lower Part of the Site, Mr Raeburn acknowledged that there was no consent specifically sought for those dwellings. However, he observed that there had been "considerable assessment of proposed dwelling sites and appropriate standards [imposed] in relation to those sites".[172] Ms O'Connor questioned whether there was a legal basis for the Council to refuse to issue a consent notice, in the event of dispute.[173] She noted that a factor favouring retention of Rule 12.10.3c(1)(b) unchanged was that it could be 13 or more years before dwellings were constructed.[174]

166 Cocker evidence-in-chief at [66].
167 Skidmore, evidence-in-chief at [5.2].
168 Skidmore, evidence-in-chief at [5.2].
169 Absolum, evidence-in-chief at [6.8].
170 Joint Witness Statement of Landscape Architects, dated 9 December 2014, [4.1].
171 Putt, evidence-in-chief at [6.2].
172 Raeburn, evidence-in-chief at [13.3].
173 O'Connor, evidence-in-chief at [27].
174 O'Connor, evidence-in-chief at [25].

Discussion

[200] We are mindful that the various witnesses' assessments have been on the basis of the present wording of Condition 1p. We have approached our consideration on the basis that Condition 1p is re-drafted in accordance with our directions.

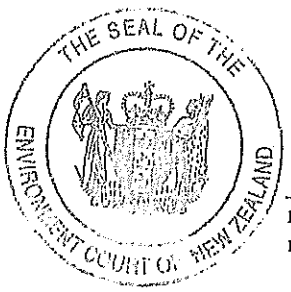
Would the modified relief achieve the Plan's objectives and achieve and implement its policies?

[201] The Plan contains a range of district-wide and Rural zone objectives and policies. It also includes objectives and policies specific to ONLs, in its Chapter 18 on Landscapes and Natural Features. We find that objectives and policies of Chapter 18 are of most relevance to the consideration of the modified relief (especially Objective 18.5.1 and Policy 18.6.1, the text of which we set out in Part B). In addition, Rural zone Policy 12.6.3a has some relevance. It allows for intensification partnered with effective off-setting.

[202] However, our findings, in Part B, that the proposal is not contrary to Objective 18.5.1 and Policy 18.6.1,[175] are of limited relevance to our consideration or the modified relief in the Plan appeal. That is because, by contrast to the Upper Part of the Site, we did not receive specific design evidence as to dwellings for the 13 consented lots in the Lower Part of the Site.

[203] The confined nature of the information before the Council commissioner on dwellings intended for the Lower Part of the Site led him to express the following rider to his decision to grant subdivision consent for the 13 lots:[176]

> I note the decision is made with some reservation because the associated land use residential dwelling application has not been made available for consideration at the same time. That, in my view, is a significant omission in terms of an integrated consideration of the overall proposed development. It is evident from the landscape and visual effect assessments that houses on some of these lower lots will have adverse effects. However, that is not a matter before me – I simply note that granting this part of the subdivision does not, and should not be presumed to, imply that houses on all lots will or should necessarily follow.



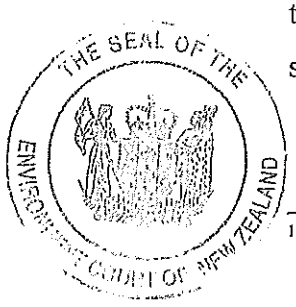
175 Refer [137(c)], [138].
176 Agreed Bundle, pp 39-40, [27.13].

[204] In view of the Council commissioner's expressed reservations, we are cautious about Mr Raeburn's observation that there had been "considerable assessment of proposed dwelling sites and appropriate standards [imposed] in relation to those sites". In addition to what was before the Council commissioner, we have the assessments of the landscape and planning experts. We have taken some assurance from the consensus opinions of Ms Skidmore and Messrs Cocker, Putt and Raeburn that Condition 1p would effectively address the substance of what Appendix 18A covers.

[205] We accept as valid the opinions of Mr Cocker and Ms Skidmore as to the clarity and specificity that Condition 1p could offer, as compared to the potential "open ended" nature of Appendix 18B's criteria. That is not to criticise those criteria. Rather, it is to reflect the relative uncertainty and openness of a discretionary activity consenting process. Under s 104, there can be no assurance that a comprehensive approach will be taken across various consent applications to deliver a comprehensive landscape outcome in keeping with Objective 18.5.1 and Policy 18.6.1. As Mr Putt observed, a case-by-case approach, as would arise under Rule 12.10.3c(1)(b), could be *ad hoc*. While an open discretionary consenting process would allow scope for considering cumulative effects, it does not give assurance that the cumulative outcome of individual consent decisions would be to protect the values and characteristics of ONL-14 as Objective 18.5.1 and Policy 18.6.1 intend.

[206] However, we cannot be fully satisfied that the modified relief would safely achieve Objective 18.5.1 and achieve and implement Policy 18.6.1, given that the evidence we have received from the landscape and planning experts has not been based on specific information on the design and bulk of dwellings in the Lower Part of the Site.[177] To that extent, we share the concerns of Ms Absolum and Ms O'Connor as to the risks that would be associated with complete exemption.

[207] In that respect, we are not satisfied that the modified relief would be adequate for the achievement of landscape outcomes in keeping with the Plan's ONL intentions and section 6(b).



[177] The subdivision application only went as far as identifying building platforms in the Kapawiti Road, Mangawhai Heads Geotechnical Investigation report included as part of the application.

[208] Incorporating Condition 1p (when redrafted) into the rules' regime would assist to achieve a more holistic landscape outcome for the Site, in keeping with Objective 18.5.1 and Policy 18.6.1.

[209] That takes us to the middle ground signaled by Mr Savage as section 274 parties' alternative option.

[210] To best ensure a comprehensive landscape outcome in keeping with Objective 18.5.1 and Policy 18.6.1, we consider the consent category chosen must deliver appropriate certainty to consent applicants. Mr Savage submitted that a "discretionary" activity categorisation was appropriate. For the reasons we set out, we consider that would be too uncertain. We consider the choice should be between "controlled" and "restricted discretionary" activity classification. Of those two, we have determined that restricted discretionary is the more appropriate as it would allow greater capacity to address cumulative ONL effects (and scope for decline if necessary).

[211] We give directions on this later in this decision.

What is the most appropriate option for achieving the Plan's objectives?

[212] For the same reasons, we conclude that the most appropriate option for achieving the Plan's objectives is a restricted discretionary activity rule including the elements we describe later in this decision. That is because we find this would be comparatively the most efficient and effective option. In reaching that view, on the relatively limited evidence before us, we have taken account of benefits and costs in the manner we have identified. As we have explained, we have also taken into account the fact that we did not receive specific information on the designs and bulk of dwellings in the Lower Part of the Site. We have also had regard to the commissioner's caution in the Council's decision, that the subdivision consent should not be presumed to imply that houses on all lots will or should necessarily follow. Similarly, we find that the matter is best managed by a regime that enables the consent authority to decline consent.

Would the modified relief be in accordance with Part 2?

[213] In view of our findings that we cannot be satisfied that the modified relief would safely achieve Objective 18.5.1 and achieve and implement Policy 18.6.1, we cannot be

satisfied that the modified relief would accord with Part 2. In particular, we cannot safely assume that the modified relief would give effect to our duty under section 6(b) as to ONL-14.

[214] However, on the basis of those findings, we are satisfied that a restricted discretionary activity rule (including the elements we describe later in this decision) would be in accordance with Part 2. Because it would achieve more certainty and continuity across the Site (through its linkage to Condition 1p), we are satisfied that it would be superior in this regard to leaving Rule 12.10.3c(1)(b) to apply unchanged to the Site.

What would better assist the Council to carry out its functions in order to achieve the purpose of this Act?

[215] Those same findings lead us to conclude that a restricted discretionary activity rule (including the elements we shortly describe) would best assist the Council to carry out its functions in order to achieve the purpose of this Act.

The Council's decision

[216] In accordance with section 290A, we have had regard to the Council's decisions on the Plan insofar as these pertain to C Calveley's originating submission. Relevant extracts were provided to us by Mr Allan,[178] in response to our directions following conclusion of the hearing.[179] The decision records that the relevant aspect of C Calveley's relief was accepted in part. However, it does not record reasons specific to that submission. Instead, its approach was to address reasons more generically. As the reasoning in the decision does not address anything material to the modified relief, we do not accord the decision any significant weight.

The key elements of a new restricted discretionary activity rule

[217] We have determined that both the modified relief and the status quo should be rejected in favour of including in the Plan (in conjunction with an unchanged Rule 12.10.3c(1)(b)), a new restricted discretionary activity rule that includes the following elements:

178 Memorandum of Counsel for the Respondent dated 5 August 2014.
179 Minute dated 30 July 2014.

(a) It would apply only to the 13 specified dwellings in the Lower Part of the Site, and be subject to the provisos sought by the Council;

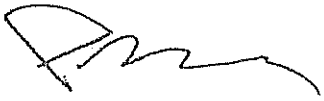
(b) It would apply to any such dwelling that exceeded the Rule's 50m^2 gfa restriction, but did not exceed 350m^2 gfa. (We record earlier that we are not satisfied that the appellant's request for gfa to be replaced with maximum building coverage is within jurisdiction. In addition, we reject this request on its merits as it could result in unacceptably large and dominant dwellings);

(c) It would specify that the consent authority's discretion to impose conditions is restricted to those matters specified in Condition 1p;

(d) Applications would be treated on a non-notified basis. We are satisfied that, in the particular circumstances, this is appropriate having regard to both due process and outcome dimensions. That is in view of the consenting history of this matter, the limited focus on up to 13 potential dwellings in the Lower Part of the Site, and the particular nature of the landscape assessment required.

[218] Mr Allan suggested[180] that the logical location for the exemption provision is at Rule 12.10.3c(2) (where an exemption is already expressed in respect of another subdivision). Given that we have found the more appropriate course is to leave 12.10.3c(1)(b) unchanged but include a new restricted discretionary activity rule, the precise location of it may need to be re-considered.

For the Court:



J J M Hassan

Environment Judge

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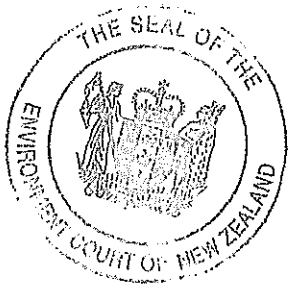


180 Council's opening submissions, [9.7(c)].

ANNEXURE A

Indicative drafting pertaining to directions in Part B

(p) This condition applies only in respect of [*specify applicable lots*] (*Subject Lots*) and must be complied with on a continuing basis by the subdividing owner and subsequent owners of each of those Subject Lots after the deposit of a survey plan.

(i) Prior to or at the time of a building consent application for a dwelling on a Subject Lot, a design report from a registered landscape architect that accords with the requirements of this condition (*Design Report*) must be submitted to the Council's Regulatory Manager (Resource Consents) for approval by the Manager.

(ii) No dwelling may be constructed on a Subject Lot prior to the approval of a Design Report for that dwelling.

(iii) To be approved, every Design Report must address:

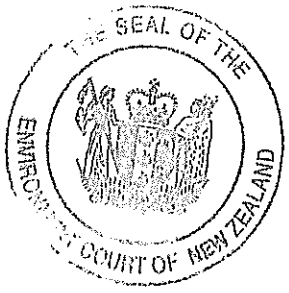
- Site layout;
- Building mass and form;
- External building finishes and colour;
- Circulation and parking;
- Landscape design

and demonstrate to the reasonable satisfaction of the Manager (informed by a review of the Design Report by a Council-appointed independent landscape architect) that the design of the dwelling and associated landscape treatment of the Subject Lot will meet:

- Standards i) – xi) in the left hand columns of the tables below (having regard to any associated Guidelines listed in the right hand columns of those tables); and
- Standard [xii] under the following heading "Household Lot-Specific Standards", [*Note – this is presently unnumbered in the latest draft conditions, and pertains to chimneys and aerials*]; and

- Each of the following Standards listed under that heading as are specified to apply to the Subject Lot.

[*Note the following tables and draft conditions will need to be amended to reflect our decision to decline consents for the additional lots and dwellings sought in the Upper Part of the Site*].



IN THE COURT OF APPEAL OF NEW ZEALAND

CA422/2015
[2017] NZCA 24

	BETWEEN	MAN O'WAR STATION LIMITED Appellant
	AND	AUCKLAND COUNCIL Respondent

Hearing:	29 June 2016
Court:	Harrison, Miller and Cooper JJ
Counsel:	M E Casey QC and MJE Williams for Appellant B O'Callahan and J A Burns for Respondent R B Enright and M C Wright for Environmental Defence Society Incorporated P R Gardner for Federated Farmers of New Zealand Incorporated
Judgment:	24 February 2017 at 12 pm

JUDGMENT OF THE COURT

A We answer the questions of law as follows:

(1) Is the identification (including mapping) of an outstanding natural landscape in a planning instrument prepared under the Resource Management Act 1991 for the purpose of s 6(b) of that Act informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

No.

(2) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Resource

Management Act 1991 changed (being elevated) as a result of the degree of protection required for an outstanding natural landscape (particularly in the coastal environment) by reason of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*?

No.

(3) Where a landscape has been identified as an outstanding natural landscape under a policy framework and approach to outstanding natural landscape identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

No.

(4) Is it relevant to the identification of an outstanding natural landscape (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an outstanding natural landscape should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

No.

(5) Was the High Court correct to find that in assessing whether or not a landscape is an outstanding natural landscape there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

In assessing whether or not a landscape is an outstanding natural landscape a regional council should consider whether the landscape in question is outstanding in regional terms.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] Man O'War Station Ltd (MOWS) owns land at the eastern end of Waiheke Island and on the nearby Ponui Island in the Hauraki Gulf. The landholding comprises 2,364 ha. Substantial parts of it are in pasture and MOWS operates it as a farm.

[2] Proposed change 8 to the Auckland Regional Policy Statement (ARPS) introduced new policy provisions for outstanding natural landscapes (ONLs) in the Auckland Region. The identified ONLs were shown on maps forming part of the proposed change. Two ONLs, referred to as ONL 78 (Waiheke Island Eastern End) and ONL 85 (Ponui Island) together covered 1,925 ha of MOWS's land.

[3] The proposed change underwent the normal public notification and submission process. MOWS made submissions because it was concerned that ONLs 78 and 85 would inhibit the ongoing use and development of its land for pastoral farming and other activities. Following the receipt of submissions the Council undertook further landscape assessment work, which resulted in a revised set of ONL maps when the Council released its decisions on the submissions in 2010. Ten appeals were filed in the Environment Court against the Council's decisions, one of them by MOWS.

[4] A process of alternative dispute resolution followed, which resulted in a memorandum of counsel setting out an agreed basis for settlement of all but three of the appeals. A new version of the proposed change was produced showing changes to the text agreed between the parties with the exception of MOWS. In the absence of unanimity the Environment Court was not able to formally resolve the appeals by consent, but it proceeded to hear the outstanding appeals on the basis of the new version of the change agreed by the other parties. Its decision was based on this version of the change, which it referred to as the "Hearings version".[1] We understand MOWS did not oppose that approach.

[5] MOWS did not succeed on its appeal in the Environment Court. Apart from some limited amendments, the Hearings version of the proposed change was confirmed by the Environment Court. MOWS appealed to the High Court on questions of law, but its appeal was dismissed.[2] MOWS now appeals to this Court on questions of law pursuant to leave granted by the High Court under s 308 of the Resource Management Act 1991 (the Act) and s 144 of the Summary Proceedings Act 1957.[3]

[6] We set out the five questions raised below.[4] They reflect MOWS's concerns that in identifying the ONLs the Council, and subsequently the Environment Court, set the bar too low, and that the strict approach to avoidance of adverse effects in outstanding areas of the coastal environment flowing from the Supreme Court's

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1 *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167, [2014] NZRMA 335 at [2].
2 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329.
3 *Man O'War Station Ltd v Auckland Council* [2015] NZHC 1537.
4 Below at [31].

decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* will impede the reasonable use and development of its land.[5]

The Environment Court decision

[7] The Court recorded that a number of matters had been agreed between MOWS and the Council.[6] Significantly, it was agreed that all of the areas where the ONL classification was disputed had sufficient *natural* qualities for the purposes of s 6(b) of the Act.[7] Appendix F-2 of the proposed change gave descriptions of each of the ONLs, dealing separately with, among other things, their "Landscape Type, Nature and Description", "Expressiveness" and "Transient Values".[8] The Environment Court did not set out the relevant provisions of the Appendix, but it will be helpful to mention some of them at this point. The Landscape Type, Nature and Description for ONL 78 included the following:

> Very extensive sequence of rolling to steep hill country and rocky/embayed coastline at the eastern end of Waiheke Island, including large areas of remnant native forest intermixed with open pasture and vineyards, and a convoluted shoreline. (Includes the Stoney Batter historic defence features and landscape context).

It was ranked as high or very high in respect of other attributes mentioned in the Appendix. Under the heading Expressiveness it was described as a "[v]ery iconic sequence of landforms and natural/pastoral landcover flanked by a wild and highly scenic coastal edge". Under the heading Transient Values it read: "Highly atmospheric interaction with the Hauraki Gulf, affected by weather and light conditions, time of year/day. Abundant coastal birdlife."

[8] ONL 85's Landscape Type, Nature and Description was described as follows:

> Very extensive island feature, comprising a natural sequence of coastal headlands, cliffs, bays and beaches framed by [an] inland backdrop of rolling

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

6 *Man O'War v Auckland Council*, above n 1, at [4].

7 Section 6(b) refers to the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development

8 The drafting of the Appendix and the headings used was clearly designed to address the factors set out in Environment Court decisions articulating a methodology for landscape assessment, such as *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) [*WESI*].

> hill country that contains a mixture of remnant native forest and open pasture.

Under Expressiveness the wording was as follows:

> Extensive and relatively cohesive combination of remnant forest, open pasture and natural coastal margins contribute to a landscape that displays many of the hallmarks of the archetypal Hauraki Gulf landscape.

[9] The Court noted that MOWS called evidence that ONL 78 comprised coastal and interior landscape character areas with only parts of the former being an ONL. The Court referred to a related dispute about whether the "quality bar" for an ONL should be set at a regional or national level, MOWS arguing ("with a degree of equivocation") that the latter should apply.[9] There was also a contest about the boundaries of ONLs 78 and 85 in five specific locations.[10]

[10] The Court referred to the decision of the Supreme Court in *King Salmon*, which had been delivered after the Environment Court hearing, noting that it had received submissions from the parties discussing the potential impact of the decision. The Court then summarised the law applicable at the time of the hearing of the appeals in May 2013. In the course of the summary, the Court referred to the fact that under s 62(3) of the Act, a regional policy statement must give effect to a New Zealand coastal policy statement. The Court later quoted provisions of the New Zealand Coastal Policy Statement 2010 (NZCPS) of particular relevance. These included, amongst others, policy 13, which includes the following:

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

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9 *Man O'War v Auckland Council*, above n 1, at [5(c)].
10 At [5(d)].

including by:

(c) …

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

[11] The Court also referred to policy 15, which relevantly says:

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;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district …

[12] Also included in the Court's summary of the relevant law was a discussion of the factors for assessing the significance of landscapes set out in previous Environment Court decisions.[11]

[13] After largely rejecting a challenge by MOWS of the use of the term naturalness in various provisions of the proposed change, the Court discussed the possible impact of *King Salmon* on both the wording of parts of the proposed change, and on the proper extent of mapping of ONLs on the properties owned by MOWS on Waiheke and Ponui Islands. It is clear from this discussion that the Court was aware of the key aspects of the decision.

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[11] At [14], citing *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 (EnvC) and *WESI*, above n 8. The Environment Court referred to the landscape assessment considerations as the *WESI* factors.

[14] The Court noted that there was substantial agreement about the wording of the relevant issues, objectives and policies of the proposed change, with argument confined to a "handful of aspects".[12]

[15] In the course of its judgment, the Court dealt specifically with concerns advanced by MOWS about Method 6.4.23.2(i), a provision providing for the control of subdivision but contemplating the avoidance of further subdivision, particularly where ONLs are also areas of high natural character and areas of significant indigenous vegetation and significant habitats of indigenous fauna. The associated statement of reasons for the method was also challenged by MOWS. The Court found the challenged provisions were appropriate:

> [52] We have determined that retaining the contested Method in the ARPS is consistent with national and regional planning documents and meets the requirements of pt 2 RMA. In giving effect to the RPS objectives and policies, our current view is that Method 6.4.23.2(i) is appropriate in ensuring that Policy 15 of the NZCPS is addressed in district plans by avoiding adverse effects of subdivision on outstanding natural landscapes in the coastal environment. It also recognises the importance of protecting outstanding natural landscapes required by s 6(b) and provides an appropriate mechanism for achieving this.

[16] However, leave was reserved for the parties to make further submissions on the wording of the provisions discussed in the light of the *King Salmon* decision.[13] This aspect of the decision was summarised at the end of the judgment as follows:

> [151] The current indication is that the Hearings Version text of PC8 should be confirmed except for the limited amendments indicated in the body of the decision. This conclusion is tentative however in light of the recent decision of the Supreme Court in *King Salmon*.

[17] We were advised by Mr Casey QC, counsel for MOWS, that MOWS did not take up the opportunity to make further submissions on the text of the proposed change that the Environment Court afforded to it, taking the view that it was clear that the policies would be made more restrictive in future as a result of the *King Salmon* decision. There was also the opportunity to further engage (which we were told MOWS did) with both the relevant objectives and policies and the extent of the

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12 At [40].
13 At [54].

provision for ONLs on its land in the Auckland Unitary Plan process then underway.[14]

[18] The Environment Court then turned to the issues concerning the extent and boundaries of ONLs 78 and 85. The Court discussed an argument advanced by MOWS that in assessing whether a landscape was outstanding, for the purpose of s 6(b) of the Act, the threshold should be set "at the very highest level", the bar being set on the basis of a national scale.[15]

[19] In dealing with this submission, the Court observed:

> [67] It will be seen from analysis of the parties' cases that follows, that we struggle with the approach advocated by MOWS that identification of ONLs should be on a national rather than a regional scale. Two concerns arise. First, the task could become enormously complex — query impossible. Second, one might be forgiven for postulating that if pristine areas of New Zealand like parts of Fiordland, the Southern Alps and certain high country lakes, were to be regarded as the benchmark, nothing else might ever qualify to be mapped as Outstanding. These remarks should be seen as tentative at this stage because MOWS has [signalled] it wishes to maintain this line of submission. We simply signal our discomfort and leave the matter open for the present.

[20] We take it that the reference to MOWS signalling a desire to "maintain this line of submission" was a reference to the possibility that further submissions would be advanced on the issue in response to the *King Salmon* decision. In the event, that did not occur. It is clear from the judgment as a whole that the Environment Court proceeded on the basis that the quality of the relevant landscape for the purposes of s 6(b) of the Act was to be assessed on a regional scale.[16]

[21] The judgment contained a detailed discussion of the evidence called by the parties from landscape experts concerning ONL 78. It is unnecessary for us to give the detail of this part of the judgment. It is sufficient to note that MOWS contended that parts of ONL 78 and ONL 85 did not comprise coherent landscapes and were not appropriately characterised as outstanding. It was the case of MOWS that ONL

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14 MOWS referred us to a statement of evidence given by a council planning officer, Mr McPhee, to the Auckland Unitary Plan Independent Hearings Panel suggesting various policy changes. We understand that decisions on content of the Unitary Plan have been made, but they cannot affect the outcome of this appeal.

15 At [57].

16 See at [83] where there was a further reference to adopting a "regional perspective".

78 comprised coastal and interior landscape character areas with only parts of the former being an ONL.[17] In addition, as noted above, the boundaries of the ONLs were disputed in respect of specific locations.[18]

[22] The Court prefaced its findings in relation to the disputed extent of ONL 78 by referring to an inspection that the Court itself had made. In the course of this it had viewed all parts of the land proposed to be included in the ONL from both land and sea viewpoints illustrated in photographic evidence given by the landscape witnesses.[19] It said:

> [128] During the visit it became obvious to us that the appellant's property on Waiheke Island offered a mosaic of landscape features including the bush clad eastern slopes of the Puke Range, an interspersed network of bush gullies, pastureland, vineyards and geological features, flanked by a series of coastal headlands, escarpments and ridges leading out to the waters of the Hauraki Gulf. These features interact in a manner that, viewed from either land or sea, makes it difficult to identify distinctly separate landscapes for assessment of significance in a regional context. This observation is consistent with the approach taken by Mr Brown and summarised earlier. In particular we consider that these "landscapes" have varying degrees of connectedness to the coast but ultimately read in the round for the viewer. With one exception near Cactus Bay that we will come to, we do not find it appropriate to separate coastal and inland landscape areas for individual assessment as recommended by Ms Gilbert … .

[23] The Court then discussed particular parts of the ONL largely expressing its agreement with conclusions reached by the Council's witness, Mr Brown, whose evidence was generally preferred to that of the MOWS landscape witnesses, Mr Mansergh and Ms Gilbert.

[24] The Court made orders that ONLs 78 and 85 be revised in accordance with its decision, "subject to possible further consideration of mapping should wording in the ARPS change after further agreement or input from parties".[20] We were not

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17 At [5(c)].
18 At [5(d)].
19 At [127].
20 At [152].

referred to any relevant further change to the wording of the ARPS, or agreement or input from the parties.[21]

[25] It is fair to say that nowhere in the Court's decision was there a comprehensive statement of why it considered ONLs 78 and 85 were outstanding. We infer the explanation for that is that there were concessions that substantial parts of them were properly so described,[22] perhaps subject to the qualification (the Court referred to a "degree of equivocation" on this, as noted above) that the bar should be set on a national scale rather than on a regional one. The Court clearly rejected the latter contention, and then dealt with particular issues that had been raised as to the extent and boundaries of the ONLs.

[26] While MOWS has argued strongly for a national comparator in this Court, there is no argument that, adopting a regional comparison, the Environment Court had no evidence on which it could confirm the ONLs. The merits of the Court's conclusions are not matters for this Court.

The High Court judgment

[27] The High Court judgment dealt with four alleged errors of law in the Environment Court decision. It was said that the Environment Court had erred in failing to:

(a) address the *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* (*WESI*) factors when determining whether the landscapes in question were ONLs;[23]

(b) undertake the assessment of whether areas of MOWS's property were ONLs by reference to landscapes in New Zealand as a whole, rather than by reference to landscapes in the Auckland region;

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21 The High Court judgment recorded that, although the Environment Court decision was called an "Interim Decision" and contemplated possible further consideration of mapping, MOWS in fact accepted that it was a final decision as to the mapping of the ONLs: *Man O'War v Auckland Council*, above n 2, at [4]–[5].

22 The maps attached to the evidence of Mr Mansergh, one of MOWS witnesses, showed substantial areas that he acknowledged should be classified as ONL.

23 *WESI*, above n 8.

(c) recognise that, as a result of clarification of the level of protection required for ONLs in the coastal environment in *King Salmon*, the threshold for classification as an ONL was significantly elevated above that applied under proposed change 8; and

(d) recognise that, given the implications of the judgment in *King Salmon*, it was required to determine which parts of MOWS's property fell within the coastal environment and which did not.

[28] The High Court rejected MOWS's case on each of the identified issues. It held that the Environment Court had undertaken an appropriate assessment of the disputed ONL areas noting that the Court had referred to the *WESI* factors and had analysed the relevant evidence on the issue without error. The conclusions as to which areas were ONLs were factual determinations unable to be appealed.

[29] On the question of whether the assessment should have been by reference to landscapes in New Zealand as a whole rather than by reference to landscapes in the Auckland region, the Environment Court rejected the proposition that a national comparator should be used. Andrews J thought that if s 6 had intended only nationally significant landscapes to be protected, the Act would have said so. She also expressed the view that it was unnecessary to have a comparator for the purpose of identifying an ONL.

[30] Further, the Court rejected MOWS's argument that as a consequence of the *King Salmon* judgment the identification of ONLs must necessarily be made more restrictive. The Court also held that it was unnecessary to determine which part of MOWS's land fell within the coastal environment and which part fell outside it.

The questions of law

[31] The High Court granted leave to appeal on the following questions:

(a) Is the identification (including mapping) of an ONL in a planning instrument prepared under the Act for the purpose of s 6(b) of the Act

informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?

(b) Has the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act changed (being elevated) as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the Supreme Court's decision in *King Salmon*?

(c) Where a landscape has been identified as an ONL under a policy framework and approach to ONL identification that were permissive of adverse effects and are not now correct in law or need to be changed by reason of *King Salmon*, should that landscape be re-assessed in light of the required changes to the policy framework and approach?

(d) Is it relevant to the identification of an ONL (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an ONL should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

(e) Was the High Court correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator — that is, a basis for comparison with other landscapes, nationally or in the relevant region or district?

MOWS's principal argument

[32] Although five questions have been asked, Mr Casey submitted that the central issue is the proper interpretation and application of the word outstanding in s 6(b) of the Act, policies 13 and 15 of the NZCPS and the relevant provisions of the ARPS.

[33] MOWS's principal argument is that proposed change 8 was prepared prior to the Supreme Court's decision in *King Salmon*, and that both the policies it contains and the maps showing land identified as ONLs reflected the law as it was understood at that time. This involved a common understanding that the protection to be afforded to an ONL was one factor in the overall judgment called for by s 5 of the Act. Under that approach, consent might be granted for uses and developments in an ONL, including those adversely affecting the landscape, if considered appropriate by reference to other considerations based on achieving the Act's purpose of sustainable management. Since such an approach is no longer possible after the Supreme Court's judgment in *King Salmon*, Mr Casey submitted that the proper approach to identifying an ONL should be to apply the concept only to landscapes that are exceptional on a national scale or short of that, only to landscapes that are *clearly* outstanding, and not just "notable", "representative" or even "magnificent".

[34] Mr Casey pointed to various provisions in the proposed change that he claimed showed that the Council had based its approach on the law as understood prior to *King Salmon*. He submitted that, overall, the proposed change 8 policy framework is permissive and enabling of ongoing use and development of MOWS's land for rural production and tolerant of adverse effects, including potentially significant adverse effects that can be "managed" and need not be "avoided".

[35] Similarly as to the maps, MOWS argues that the extent of the ONLs reflects a pre-*King Salmon* origin in which, in accordance with the overall judgment approach, the use and further development of rural land for farming purposes could take place, subject to obtaining any necessary resource consent under the policy framework provided.

[36] The fundamental proposition advanced by Mr Casey is that the decision in *King Salmon* involves a significant change to the approach previously taken to the protection of ONLs in the coastal environment, so that all adverse effects within them will now have to be avoided. This is said to flow from the Supreme Court's interpretation of policy 15 of the NZCPS as creating an environmental bottom line, to be implemented by regional and district councils in formulating regional and district planning instruments.

[37] The argument makes it necessary to set out our understanding of what was established by the majority judgment in *King Salmon*.

King Salmon

[38] King Salmon had applied for changes to the Marlborough Sounds Resource Management Plan so as to change the status of salmon farming from prohibited to discretionary activity in eight locations. It also sought resource consents to enable it to undertake salmon farming at those locations and one other for terms of 35 years. A Board of Inquiry decided the plan should be changed and resource consents granted for salmon farming at four of the proposed locations. Opponents of the proposals appealed to the High Court but their appeals were dismissed.[24] Under s 149V(5) of the Act an appeal could not be filed in this Court, but s 149V(6) provided for applications for leave to appeal to the Supreme Court and that Court granted the Environmental Defence Society leave to appeal.

[39] The appeal by the Environmental Defence Society focused on only one of the plan changes, related to Papatua in Port Gore. The Board found that this was an area of outstanding natural character and an outstanding natural landscape. In considering whether to grant the plan change application, the Board was required to give effect to the NZCPS, but because of the findings about the natural character and landscape, policies 13(1)(a) and 15(a) of the NZCPS could not be complied with if consent were granted. The Board nevertheless granted the plan change. It took the view that although the relevant policies in the NZCPS had to be given considerable weight they were not determinative and it was required to give effect to the NZCPS as a whole. The Board considered that it was required to reach an overall judgment on King Salmon's application in light of the principles contained in pt 2 of the Act, and in particular s 5.

[40] The Supreme Court granted leave to appeal on two questions of law, but we need only discuss the judgment insofar as it relates to the first of those questions. That question asked whether the Board's approval of the Papatua plan change was

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[24] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371.

made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of policies 8, 13 and 15 of the NZCPS.[25]

[41] The Board had found that the area affected by the plan change was in a relatively remote bay and that all of the relevant landscape experts had identified part of the area adjoining the proposed farm as an ONL. The Board said:[26]

> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.

[42] The Board nevertheless stated that it had to balance the adverse effects against the benefits of economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources, purporting to apply to s 5 of the Act. Section 5 provides as follows:

> **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.

[43] The Board concluded:

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[25] Policy 8 deals specifically with aquaculture and contemplates that regional policy statements and regional coastal plans would make provision for aquaculture activities in appropriate places in the coastal environment.

[26] Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013 at [1236].

> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[44] The Supreme Court gave an overview of the structure of the Act, summarising the hierarchy of planning instruments provided for, addressing the provisions of pt 2 and referring to the "central role" played by the NZCPS in the statutory framework.[27] Importantly, the Court said that because no party had challenged the NZCPS it was proceeding on the basis that it conformed with the Act's requirements, and with pt 2 in particular.

[45] The Court noted that two different approaches to s 5 had been identified in early jurisprudence under the Act. The first was to hold that the section contemplated an environmental bottom line. This was to treat s 5(2) of the Act as requiring adverse effects to be avoided, remedied or mitigated, irrespective of benefits that may accrue from a particular proposal.

[46] The second approach was to hold that the section required an overall judgment to be made, which the Supreme Court identified as having its origins in the judgment of Greig J *New Zealand Rail Ltd v Marlborough District Council*.[28] The Supreme Court observed that in that case, the Judge had rejected a contention that the requirement of s 6(a) to preserve the natural character of a particular environment was absolute. Rather, he held that the preservation of the natural character was subordinate to s 5's primary purpose: to promote sustainable management. The protection of natural character was not an end or objective of itself, but an "accessory to the principal purpose" of sustainable management.[29]

[47] Similarly, in *North Shore City Council v Auckland Regional Council* the Environment Court held that:[30]

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27 *King Salmon*, above n 5, at [33].
28 At [39], citing *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
29 *New Zealand Rail Ltd v Marlborough District Council*, above n 28, at 85.
30 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94.

> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose … . Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

[48] The Supreme Court also noted that the Environment Court had held that the NZCPS is to be approached in the same way. Particular policies in the NZCPS may be irreconcilable in the context of a particular case[31] and the Court's role is to reach an overall judgment having considered all relevant factors.[32]

[49] The Court concluded that the directions in policies 13(1)(a) and (b) and 15(a) and (b) had as their overall purpose the preservation of the natural character of the coastal environment, protecting it and the natural features and landscapes from inappropriate subdivision, use and development. The Court observed:[33]

> Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects. In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of" … .

[50] The next important aspect of the decision for present purposes is the emphasis given to s 67(3) of the Act, which provides that a regional plan must "give effect to" any national policy statement, any NZCPS and any regional policy statement. The hierarchy established by the Act meant that the Board was required to give effect to the NZCPS in considering the plan change applications.[34] To give effect to is to implement, and was a matter of "firm obligation".[35]

[51] The Court interpreted the word avoid, used in s 5(2)(c) and policies 13(1)(a)–(b) and 15(a)–(b) of the NZCPS as meaning "not allow" or "prevent the occurrence of".[36] The Court observed that the scope of the word

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31 *King Salmon*, above n 5, at [42], citing *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 .
32 *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*, above n 31, at [258].
33 *King Salmon*, above n 5, at [62] (footnote omitted).
34 At [77].
35 At [77].
36 At [96].

inappropriate, used in s 6(a) and (b) of the Act, is heavily affected by context.[37] It said:

> [101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.

[52] Consequently, in the particular context of s 6(b) of the Act, a planning instrument that provided that *any* subdivision, use or development adversely affecting an area of outstanding natural attributes is inappropriate, would be consistent with the provision. Further:[38]

> … the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected … . The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning.

[53] And in the context of the NZCPS:[39]

> … the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character*. The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

In the result, inappropriate is to be interpreted in s 6(a) and (b) against the "backdrop of what is sought to be protected or preserved".[40]

[54] The Court recognised, however, that the discussion of the meaning of both avoid and inappropriate did not resolve what it described as the fundamental issue in the case: whether the Board was correct to adopt the overall judgment approach.

[55] The Court held that the Board's approach was incorrect. Its reasoning turned on the following considerations:

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37 At [100].
38 At [102].
39 At [102].
40 At [105].

(a) Section 58(a) of the Act, prescribing the contents of New Zealand coastal policy statements, enabled the Minister for the Environment to set national priorities in relation to the preservation of the natural character of the coastal environment. The provision contemplated the possibility of objectives and policies that would provide absolute protection from the adverse effects of development in relation to particular areas. This was seen as inconsistent with the overall judgment approach: the Court thought it inconceivable that regional councils would be able to act in a manner inconsistent with the priorities set by the Minister on the basis that the priorities set by the Minister were only relevant considerations. Similar reasoning applied in respect of other subsections of s 58.

(b) Section 58A of the Act provides that a New Zealand coastal policy statement can incorporate material by reference under sch 1AA. Matters in cl 1 of the schedule include "standards, requirements, or recommended practices". The Court considered the language of the schedule envisaged matters that were prescriptive and expected to be followed, once again contemplating that a New Zealand coastal policy statement can be directive in nature.

(c) The language of the relevant policies in the NZCPS itself. Here the Court focused on the word avoid in policies 13(1)(a) and 15(a) contrasting it with words in other objectives and policies in the NZCPS containing more flexibility and being less prescriptive in nature. The Court observed that when dealing with a plan change application the decision-maker would first need to identify the policies that were relevant, paying careful attention to the way in which they were expressed. Acknowledging the possibility that particular policies in the NZCPS might be inconsistent, the Court recognised that it would only be where there was no proper basis for reading the provisions as not in conflict that there would be any

justification for reaching a determination that one policy should prevail over another. The Court said:[41]

> 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.

This was to concede a limited role for s 5, that of assisting a "purposive interpretation" of the NZCPS.[42]

(d) The overall judgment approach in relation to the implementation of the NZCPS would be inconsistent with the process required before a national coastal policy statement can be issued. The statutory process would have been less elaborate if all that was intended was the creation of a list of relevant factors to guide decision-makers.

(e) The overall judgment approach would create uncertainty. Suggestions that the NZCPS could be applied in the round or as a whole were neither easy to understand or apply. This could result in protracted decision-making processes with uncertain outcomes.

(f) The overall judgment approach had the potential, at least in the case of plan change applications seeking zoning changes in particular coastal areas with outstanding natural attributes, to "undermine the strategic, region-wide approach" that the Court considered the NZCPS requires of regional councils.[43]

(g) While s 5 set out the Act's overall objective, Parliament had provided for a hierarchy of planning documents. The purpose of those documents was:[44]

> … to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content

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41 At [130].
42 At [88].
43 At [139].
44 At [151].

> and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.

(h) The NZCPS was an instrument "at the top of the hierarchy". Its objectives and policies reflected "considered choices" made on a variety of issues. The Court said: "As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice."[45] The Minister had been fully entitled to require that particular parts of the coastal environment be protected from the adverse effects of development, as had been done by adopting policies 13(1)(a) and 15(a) in relation to coastal areas with features designated as outstanding.

[56] Policies 13(1)(a) and 15(a) would not be given effect to if the plan change in question were to be granted because of the Board's finding that implementing the proposed change would result in significant adverse effects on areas with outstanding natural character and landscape. Those policies were strongly worded directives and the plan change did not comply with s 67(3)(b) of the Act because it did not give effect to those policies of the NZCPS.

[57] As we understand the decision, the overall judgment approach was rejected because of the prescriptive nature of the relevant provisions in policies 13 and 15 of the NZCPS. Because those policies were so specific and clear in what they prohibited, the overall judgment approach, by which a decision would be made balancing various considerations under s 5 of the Act with a view of achieving the Act's overall purpose, was not lawful. This case involves application of the same prescriptive provisions of the NZCPS that were engaged in *King Salmon.*

[58] The preceding discussion enables us to deal quite briefly with the questions of law we are asked to answer.

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[45] At [152].

First question

[59] This question asks whether the identification (including mapping) of an ONL for the purpose of s 6(b) is informed by, or dependent upon, the protection afforded to the landscape under the Act and/or the planning instrument. The suggestion is that whether or not land qualifies as an ONL and the extent of the land so described must be influenced by the consequences of according it that status in terms of what may take place on the land.

[60] We accept some of the propositions on which MOWS's argument that the level of protection should be taken into account is based. For example, it is clear that both the policies and the maps in proposed change 8 were developed prior to the Supreme Court's decision in *King Salmon* and that the Council would not have contemplated at the time that the land in the ONLs would be subject to the inevitably more restrictive regime flowing from the Supreme Court's decision. Mr Casey was right to characterise the overall effect of the policies in the proposed change as contemplating ongoing use of the land and a degree of development for rural production purposes.

[61] However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected. Although that was underlined in *King Salmon*, the Court was simply reflecting an important legislative requirement established when the Act was enacted. The same is true in respect of areas identified as having outstanding natural character in the coastal environment, in accordance with policies 13(1)(a) and 15(a)–(b) of the NZCPS.

[62] The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL

arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.

[63] The result of this approach may mean that, in some cases, restrictions of an onerous nature are imposed on the owners of the land affected. In a dissenting judgment in *King Salmon* William Young J drew attention to the potentially wide reach of the restrictions resulting from the decision having regard to the broad definition of effect in s 3 of the Act (the definition embraces, amongst other things, any positive or adverse effect, whether temporary or permanent).

[64] William Young J considered that the effect of the majority's judgment was that regional councils would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character".[46] He raised the possibility of significantly disproportionate outcomes as a result of the strict approach inherent in the majority judgment.

[65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.

[66] In the present case, as the Environment Court noted, it was agreed that the areas to which the ONLs were applied are sufficiently natural for the purposes of s 6(b) of the Act. It is also clear that there are a number of different elements currently forming part of the ONLs. Thus significant areas of native vegetation and pastoral land are both elements of ONL 78 together with buildings (albeit said to be subservient to other elements) and vineyard and olive grove activities. Although

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[46] *King Salmon*, above n 5, at [201].

natural, it is not pristine or remote. As Mr O'Callahan acknowledged on behalf of Auckland Council, it is in that setting the question of whether any new activity or development would amount to an adverse effect would need to be assessed.

[67] Mr Casey endeavoured to persuade us that a more restrictive regime will be in place under the new Auckland Unitary Plan. However, that is not an appropriate matter for us to assess in the context of a second appeal on questions of law arising from a decision on a different planning instrument, and we decline to do so. Relevantly, as Mr Casey's submissions tended to demonstrate, the policy content of the Hearings version of the ARPS provided a context that means the ONLs would not be inimical to the ongoing use of MOWS's land for its current uses.

[68] We should add that none of the questions raised for this Court was designed to test the lawfulness of the policies of the ARPS post *King Salmon*, and as has been seen, only a few of those provisions were apparently the subject of argument in the Environment Court.

[69] The first question must be answered no.

Second question

[70] This question asks whether the threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) of the Act has changed as a result of the degree of protection required for an ONL (particularly in the coastal environment) by reason of the decision in *King Salmon*.

[71] We do not consider that *King Salmon* is a judgment about the threshold to be applied in deciding whether a landscape is outstanding for the purposes of s 6(b) of the Act. The questions for the Board in that case, and for the Supreme Court on appeal, were whether a spot zoning should be allowed and a resource consent granted enabling salmon farming to proceed in an area already identified as of outstanding quality. The Supreme Court did not hear or deal with an argument that the area was not outstanding. Nor was there any dispute about the Board's finding that the proposed salmon farm would have significant adverse effects on the natural character and landscape of the area. The argument in the Supreme Court was, rather,

about whether the proposed plan change and resource consent could be granted on an overall judgment approach under s 5 notwithstanding the adverse effects on that environment.

[72] As a result there is nothing in the majority judgment of a definitional nature about ONLs. While the Court discussed the Marlborough Sounds Plan, it did so in terms that recorded that the Council, in developing the plan, had assessed the landscapes in the Sounds for the purpose of identifying those that could be described as outstanding, and noted that the plan described the criteria against which the Council made that assessment and contained maps identifying the areas of outstanding value. The Court observed that the exercise carried out was a "thoroughgoing one".[47] But nothing was said about the considerations taken into account by the Council in fixing on the outstanding areas.

[73] Overall, there is no language in the decision that suggests the Court was endeavouring to raise the test or threshold for deciding whether a landscape is outstanding. This question must also be answered no.

Third question

[74] The third question raised is whether a landscape identified as an ONL should be reassessed if the identification took place under a policy framework, and an approach to ONL identification, not now correct in law or needing to be changed by reason by *King Salmon*. Although couched in general terms, the obvious intent is to ask whether ONLs 78 and 85 should be reassessed by reason of *King Salmon*.

[75] The difficulty with this question is that it again attempts to link policies in the ARPS that apply to ONLs with the identification of ONLs. These are conceptually separate ideas. We see nothing in *King Salmon* that affects the identification of ONLs even if the policy framework might need adjusting as a result of the decision.

[76] Further, it must be noted that the Environment Court was well aware of the decision in *King Salmon* and plainly did not consider that it had any implications for

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47 At [73].

the extent of the ONLs identified in the ARPS. In fact, it recorded its agreement with a submission made to it by counsel for the Council that whether and to what extent land owned by MOWS is an ONL is a matter of fact, to be resolved on the basis of its view of the evidence called and an application of the relevant criteria in the proposed change. The "planning consequences" (that is, the impact of policies on the land) would flow from the fact the land was an ONL, and were not relevant to determining whether or not it was an ONL.[48]

[77] Finally, as we have already said, the policy framework contained in the ARPS as it stood in terms of the Hearings version did contemplate ongoing use of the land and a degree of development of it for rural production purposes.

[78] This question must also be answered no.

Fourth question

[79] The fourth question asks whether it is relevant to the identification as ONL of a landscape (particularly in the coastal environment) comprising a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming. The question goes on to refer to whether the identification of an ONL should take account of future changes over time by reason of that landscape's character as a working farm.

[80] This is a further question predicated on a link between identification of an ONL and the activities contemplated by the relevant planning instrument within that ONL. For reasons we have already explained, we are not persuaded that there is a logical link between the two. Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

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[48] *Man O'War v Auckland Council*, above n 1, at [38]–[39].

Fifth question

[81] The final question asked whether the High Court was correct to find that in assessing whether or not a landscape is an ONL there is no need to incorporate a comparator, that is, a basis of a comparison with other landscapes, nationally or in the relevant region.

[82] This question is again intended to accommodate MOWS's argument that as a consequence of the *King Salmon* decision a higher threshold should be applied to the identification of an ONL. It therefore covers some of the same ground as the second question.

[83] Here, however, Mr Casey made the explicit submission that the High Court had been wrong to determine that for the purpose of assessing whether a landscape is outstanding there is no need to have a point of reference against which to determine whether a landscape is outstanding. MOWS also submitted that the comparator should be landscapes acknowledged as being of national significance. Mr Casey argued that this follows from the use of the word outstanding in s 6(b), when other subsections in that section do not employ similar adjectives, and from the fact that the section itself is addressing matters said to be of national importance.

[84] In developing this aspect of the argument, Mr Casey referred to *WESI*, in which the Court referred to dictionary definitions of outstanding as "conspicuous, eminent, especially because of excellence; remarkable in" and definitions from other Environment Court decisions.[49] He submitted that an outstanding landscape is one that "stands out from the rest", which necessarily requires an assessment of what the rest is. He also noted the Court's observation that a landscape "may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes."[50]

[85] In the present case, the Environment Court proceeded on the basis that the identification of ONLs involved an assessment that took into account the landscapes

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[49] *WESI*, above n 8, at [82].

[50] At [82], citing *Munro v Waitaki District Council* Environment Court C98/97, 25 September 1997.

in the region rather than an assessment on a national basis. We have quoted what the Court said on this issue above.[51]

[86] We do not see any error in the Environment Court's approach. The question of whether or not a landscape may be described as outstanding necessarily involves a comparison with other landscapes. We also accept that the adjective is a strong one importing the concept that the landscape in question is of special quality. However, we suspect little is to be gained by applying a range of synonyms for what in the end involves a reasonably direct appeal to the judgment of the decision-maker. Whatever comparator is taken, the ultimate question is whether the landscape is indeed able to be described as outstanding.

[87] We do not accept Mr Casey's argument that a comparison is required with landscapes that may be described as outstanding on a national basis. The fact that the word outstanding has to be construed in a section dealing with matters of national importance does not support MOWS's submission. We see no reason why a landscape judged to be outstanding in regional terms should not be protected as a matter of national importance, the legislative policy being achieved by the protection of ONLs throughout the country on this basis.

[88] It is necessary to take into account that in developing a regional policy statement, the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region. The purpose of regional policy statements, set out in s 59 of the Act, is to achieve the purpose of the Act (that is, the sustainable management of natural and physical resources)[52] by:[53]

> … providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

[89] Further, the council must prepare and change the regional policy statement in accordance with its functions under s 30.[54] These specifically include "the

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51 Above at [19]–[20].
52 Resource Management Act 1991, s 5(1).
53 Section 59.
54 Section 61(1)(a).

preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance".[55]

[90] In addition, s 61(1)(b) requires the council to prepare its regional policy statement in accordance with the provisions of pt 2. That embraces the protection of outstanding natural features and landscapes from inappropriate development, in terms of s 6(b). Further, the regional policy statement must give effect to any national policy statement or New Zealand coastal policy statement.[56] In this respect, the position applicable to the regional policy statement is the same that applies to regional plans under s 67(3) of the Act, a provision prominent in the reasoning of the Supreme Court in *King Salmon*.

[91] It is appropriate also to underline that in *King Salmon* the Supreme Court emphasised in several places that a regional council has a responsibility to consider issues on a regional basis. For example, it observed:[57]

> It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[92] Further, although the context was slightly different, the Court noted:

> [171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. … Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application.

[93] These statements support our conclusion that the task of the regional council in formulating its regional policy statement is to assess the environment on a regional basis. That means ONLs should be those that are outstanding in terms of the region's natural environment. That is the approach the Environment Court took here.

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55 Section 30(1)(b).
56 Section 62(3).
57 *King Salmon*, above n 5, at [69].

Result

[94] For the reasons given the first four questions are answered no. Although these were posed as questions of law the underlying issue was essentially one of fact and judgment on the merits, not matters properly pursued in this Court.

[95] We answer the fifth question by stating that in assessing whether or not a landscape is an ONL a regional council should consider whether the landscape in question is outstanding in regional terms.

[96] The appeal is dismissed.

[97] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel. We did not find it necessary to call on the other parties and no costs orders are made in respect of them.

Solicitors:
Clendons North Shore, Auckland for Appellant
Kirkland Morrison O'Callahan & Ho, Auckland for Respondent

DOUBLE SIDED

ORIGINAL

Decision No. C 73 /2002

IN THE MATTER of the Resource Management Act 199 1

AND

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

BETWEEN WAKATIPU ENVIRONMENTAL SOCIETY

(RMA 1043/98, 1394/98, 1165/98)

LAKES -DISTRICT RURAL LANDOWNERS TNC

(RMA 1402/98)

Referrers

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson presiding
Environment Commissioner R S Tasker
Alternate Environment Commissioner R Grigg

HEARING at WANAKA on 2, 3, 4, 5, 6 and 11, 12, 13 July 2001; 29, 30 April 2002 and at **QUEENSTOWN** on 1 May 2002

Final submissions received 8 May 2002

APPEARANCES

Mr A Borick for Upper Clutha Environmental Society Inc. – under section 271A of -the Act
Mr G M Todd for the Lakes Landcare Group, P J McRae and for D W McRrae – under section 271A of the Act
Mr N S Marquet for the Queenstown Lakes District Council
Mr W J Goldsmith for Waterfall Creek Partnership Ltd - under section 271A of the Act

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Mr R T Chapman for the Sharpridge Trust - under section 271A of the Act
Mr M E Parker for Infinity Investments Ltd - under section 271A of the Act
Mr A More for Mr S and Mrs V Laming - under section 271A of the Act

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DECISION (RE GLENDHU BAY TO HILLEND)

[A] Introduction

[1] This decision identifies the outstanding natural landscapes and visual amenity landscapes between Glendhu Bay and Hillend at Wanaka in the Queenstown Lakes District. It is a further step[1] in the resolution of references under the Resource Management Act 1991 ("the Act" or "the RMA") of the proposed district plan as revised in 1998 ("the revised plan")[2] of the Queenstown Lakes District Council ("the Council").

[2] As we explained in decision C163/2001 ("the Roy's Peninsula decision") the position concerning parties to these cases is quite complex. Neither of the referrers appeared at the hearing, but at the pre-hearing conferences it was clear that the two referrers had each had their respective positions taken over, in the Wanaka area, by section 271A parties as follows:

- Lakes District Rural Landowners Incorporated by the Lakes Landcare Group which is an unincorporated body of farmers; and
- Wakatipu Environmental Society Incorporated by the Upper Clutha Environmental Society Inc ("UCESI").

Earlier decisions on Part 4 of the revised plan include C180/99, C74/2000, C129/2001 and C162/2001.

2 References to the revised plan in this decision are to the February 2002 reprint which includes changes as the results of various decisions on other references to this Court.

There has been no opposition to that course.

[3] At the hearing of these references, in addition to the named parties and the two section 271A parties just discussed, six other landowners appeared under section 2'71A of the Act and were represented by counsel:

(1) Mrs P J McRae who farms in partnership a property Glendhu Station – at Glendhu Bay including land on the Fern Burn River flats and on the western flanks of Roy's Peak;.

(2) Mr D W McRae who farms Alpha Burn Station on the northern flanks of Koy's Peak and land on the northern side of the Mt Aspiring Road including Damper Bay;

(3) Sharpridge Trust which owns land between Mt Aspiring Road and Lake Wanaka, close to Damper Bay;

(4) Mr S and Mrs V Laming who own the land to the east of the Sharpridge Trust land;

(5) The Waterfall Partnership which owns land between the road and the lake immediately north-west of Waterfall Creek near the Rippon Vineyard; and

(6) Infinity Investments Ltd which has an interest in Hillend Station underneath the east ridge of Mt Alpha, and with one boundary on the Cardrona Valley Road.

[4] It is common ground that much of the massif between Glendhu Bay and the Cardrona Road – including most of Roy's Peak and Mt Alpha – is at least an outstanding natural landscape. The issues in this area are, as usual, where the outstanding natural landscape(s) within the meaning of section 6(b) of the Act end, and other landscapes begin. In particular there are four specific questions we answer in this decision:

(1) What is the extent of the visual amenity landscape ("VAL") in the Fern Burn catchment at Glendhu Bay?

(2) Is the strip of land along the Mt Aspiring Road between Damper Bay and Waterfall Creek an outstanding natural landscape or not?

(3) Where are the bounds of the outstanding natural landscape on the area of land identified as the Mt Alpha fan close to Hillend?

(4) Whether there should be (as requested by the UCESI) an Inner Upper Clutha outstanding natural landscape (ONL (IUC)), by analogy with the outstanding natural landscape of the Wakatipu Basin?

[5] We should add that the hearing of these issues took place at two times – the first in 2001 and the second in 2002. The first hearing related mainly to the Glendhu area and resulted in the Roy's Peninsula decision. Issues as to the extent of the Visual Amenity Landscape[3] in the Fern Burn catchment were raised in the July 2001 hearing but not decided. We have decided to resolve that issue in this decision – as the answer to question (1) above – because consideration of the facts relevant to -that issue, as to what constitutes a landscape, helps us with the determination of -the other questions which were raised at the 2002 hearing. That second hearing related principally to the area to the south of Wanaka township between Hillend to the east and Damper Bay to the west.

[6] Before we decide the specific factual issues, there is a legal. question which we have to deal with: "What is a landscape?" Since, to the best of our abilities, we answered this in our first decision: ***Wakatipu Environmental Society Inc and Others v Queenstown Lakes District Council***[4] ("the first *Queenstown landscape decision")* it may be slightly surprising that the question has been asked again. However Mr Goldsmith, for the Waterfall Creek Partnership, submitted that the concept of a 'landscape' has changed in subsequent decisions, and that the 'simplicity' of the original distinction between an outstanding natural landscape and what the Court identified in the Queenstown Lakes District as a 'visual amenity landscape' has been lost. In particular he submitted that questions of scale have more recently been introduced which were not (allegedly) part of the original concept of 'landscape'. We now turn to consider this issue.

3 As defined in Part 4 of the revised plan.

4 [2000] NZRMA 59.

[B] ***The scale of landscapes***

[7] In the *first* Queenstown *landscape decision* the Court stated that[5]:

> ... *a precise definition of 'landscape' cannot be given* ...

and continued to mention three ways ofperceiving landscape:

> (1) ... *as a large subset of the 'environment"*
>
> (2) ... *as a link between individual . . . resources and the environment as a whole*[7]
>
> *(3) under the amended Pigeon Bay assessment criteria.'*

[8] After discussing the meaning of 'outstanding natural landscapes' we then looked at how the landscapes of the district could be usefully analysed[9] and stated:

> *In very broad terms we make a tripartite distinction . . . : outstanding natural landscapes andfeatures; what we shall call visual amenity landscapes, to which particular regard is to be had under s 7, and landscapes in respect of which there is no significant resource management issue. We must always bear in mind that such a categorisation is a vey crude way of dealing with the richness and variety of most of New Zealand's landscapes let alone those of the Queenstown-Lakes District.*
>
> *The outstanding natural landscapes of the district are Romantic landscapes – the mountains and lakes. Each landscape in the second category of visual amenity landscapes wears a cloak of human activity much more obviously – these are pastoral or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces. The extra quality they possess that brings them into the category of "visual amenity landscape" is their prominence because they are:*

5 [2000] NZRMA 59 at para (74).
6 [2000] NZRMA 59 at para (77).
7 [2000] NZRMA 59 at para (78).
8 [2000] NZRMA 59 at para (80).
9 [2000] NZRMA 59 at para (92) to (94).

- *adjacent to outstanding naturalfeatures or landscapes; or*
- *on ridges or hills; or*
- *because they are adjacent to important scenic roads; or*
- *a combination of the above.*

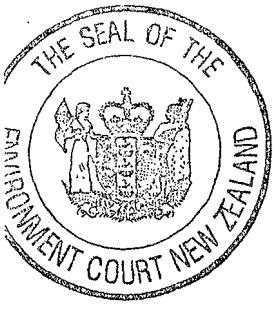
These aspects mean they require particular regard under s 7. The third category is all other landscapes. Of course such landscapes may have other qualities that make their protection a matter to which regard is to be had ***or*** *even a matter of national importance,*

It must always be borne in mind that all landscapes form a continuum physically and ecologically in the many ways they are perceived.' Consequently we cannot over-emphasize the crudeness of our three way division – derived from Mr Rackham's evidence – but it is the only way we can make findings of "fact" sufficient to identify the resource management issues. [Footnotes omitted].

Despite the warnings in this passage about the crudity of the division and the continuum of landscapes Mr Goldsmith relied on this passage as showing that the distinc-tion between outstanding natural landscapes and VAL was, to use his word, 'simple'.

[9] In the *first Queenstown landscape decision* the Court did not have to determine precisely **where the** edges of the district's outstanding natural landscapes are. In subsequent hearings **the** issue has arisen as to **where** the boundaries are in relation to specific areas of I.and. At those hearings some of the parties and their landscape witnesses have attempted to divide up the relevant landscapes into small parts or units and to classify those separately. Generally the Court has held that approach to be incorrect. In doing so, submits Mr Goldsmith, it has introduced complications as to scale which are inconsistent with the *first Queenstown landscape decision.*

[10] The Court stated in ***Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council***[10] *("the third Queenstown landscape decision "):*



[10] C75/2001 at para [27].

> *Perhaps the most important practical point we can make about other rural landscapes ("ORL") in this district is that an area has to be of sufficient size to include the qualities that enable it to be described as a "landscape". The obvious area most likely to qualify as an ORL ["other rural landscape "] is part of the extensive Hawea Flats. ... Returning to the Wakatipu Basin: the Domain Road triangle may or may not qualify as ORL – we have yet to determine that issue in a specific case. However any area that is smaller than that triangle would have difficulty in qualifying as an ORL or any type of landscape because it would be too small. As we have already stated it demonstrates an inadequate grasp of the amended* ***Pigeon Bay*** *criteria to find small pieces of ORL included in a VAL or ONL.* [Footnotes omitted].

[11] The Court applied the same approach ***in Wakatipu Environmental Society Inc v Queenstown Lakes District Council'"*** (the *"West Malaghan Road decision "*) when we stated:

> *... when appreciating or evaluating a landscape one does not look at one part – say the valley floor – in isolation. A valley floor is only a floor because there are walls. Referring to the container metaphors that have been used for the Wakatipu Basin, the smaller Arthur's Point bowl (roughly a circle centred on Big Beach) only has a bottom (the river flats, and the Paterson terraces) because it has the mountains and the escarpment as its sides. As Mr Kruger observed when under cross-examination by Mr Todd his water cup would not be a cup if it did not have a bottom: it would not hold water.*

[12] Mr Goldsmith submitted that the later decisions are not consistent with the *first Queenstown landscape decision*[12] which made its tripartite classification without regard to scale; that the definitions were simple and did not need. to be supplemented by a 'subjective' scale; and that shortly after the *first Queenstown landscape decision* the Court analysed small areas as VAL's. On that last point he referred to a sentence in a passage in *Waterston v Queenstown Lakes District Council*[13] where the Court stated:

11 C3/2002 at para [33].
12 [2000] NZRMA 59.
13 C169/2000 at para [20].

> ... *In our view this part of Ferry Hill has four landscape components. They start with a separation at the level of the row of poplars – with a more natural (outstanding) landscape above. The second component is a visual amenity landscape below the poplars down to fourth components are the bank and lower terrace* ***respectively.*** *The second component should be* ***treated as a*** *whole in order to avoid resource consent creep with unacceptable cumulative effects* . . . [Footnote excluded, and underlining added].

Mr Goldsmith submitted that the Court was there finding that a small area of one title could to be a separate (visual amenity) landscape.

[13] That passage in *Waterston* needs to be read in context. The Court had already[14] identified all of the second, third and fourth landscape components of the appellant's land as falling "into the visual amenity landscape". In other words the Court held that Mr Waterston's particular site is part of a visual amenity landscape. In our view Mr Goldsmith is reading too much into paragraph [20] of *Waterston* as identifying different landscape components as different landscapes – although we concede the relevant sentence is not accurately expressed and should perhaps have said that: "The *second component is [part off a visual amenity landscape".*

[14] Further Mr Goldsmith's suggestions that using 'scale' in the assessment of landscapes as new, unnecessary and subjective are all wrong. As to novelty: the *first Queenstown landscape decision* expressly referred to questions of scale. We stated[15]:

> ...
>
> *To individual landowners who look at their house, pasture, shelterbelts and sheds and cannot believe that their land is an outstanding natural landscape we point out* ***that*** *the land is part of an outstanding natural landscape and questions of the wider context and of scale need to be considered.*

14 C169/2000 atpara [10].
15 [2000] NZRMA 59 at para (105).

[15] As to its necessity: in almost every reference on the Council's revised plans' Rural General zones since the *first Queenstown landscape decision* a landowner has argued that a relatively small piece of land is a separate landscape: the West *Malaghan Road decision* is an illustration of that; as is ***Fordyce Farms Ltd v Queenstown Lakes District Council***[16]**;** so too is this case. It is necessary to have some concept of scale in the definition of landscape. At an absurd extreme it would be possible, otherwise, for a rural landowner with a large garden to argue that it is a separate landscape.

[16] As for scale being 'subjective': that is a curious submission because, of all the elusive concepts involved in landscapes scale is nearly unique in that it can be objectively assessed by measuring the area being considered (as we shall see when discussing the next issue).

[17] We are satisfied that *we* can *follow* the *third Queenstown landscape decision* and the *West Malaghan Road decision* and that they are consistent with the *first decision.*

[C] ***The visual amenity landscape at Glendhu Bay***

[18] The relevance of scale is demonstrated by Mr Vivian's evidence on the Fern Burn area[17]:

> *The Motatapu [Road] Valley is approximately 2 kilometres in width and extends for approximately 3 kilometres in depth. It is one of the largest, wildest, valleys of the district (outside of the Upper Clutha or Wakatipu Basins – if they can be considered valleys). The area identified by Miss Kidson as being VAL is approximately 600 hectares in area. It is of a sufficient size to be considered a VAL, independent of the wider ONL, without compromising the integrated management of the effects of the use, development and protection of ONL's.*

16 Decision C39/2002.

17 Evidence of C Vivian, para 5.8: he rather misleadingly calls it the 'Motatapu Valley' but it is clear from the context and his references to the evidence of the Council's landscape witness Ms E J Kidson, that he is refer-ring to what the latter describes as "Glendhu Bay" and we have called "the Fern Bum". His misnomer is, we believe, caused by the fact that the road up the Fern Bum flats is the "Motatapu Road" leading to the station of that name.

[19] All of the expert landscape witnesses (Mr PJ Baxter, Ms D J Lucas, Ms E J Kidson) who gave evidence on the Fern Burn agreed that its floor was a VAL. There was no evidence to the contrary and we find accordingly.

[20] That evidence suggests that in most circumstances in the district a flat area that has the following characteristics may begin to be considered as a. separate landscape:

(a) it must contain at least one (preferably more) rectangle with al; least 1.5 x 2 kilometre sides;
(b) no part of the landscape may 'be more than 1 kilometre from such a rectangle;
(c) it must contain a minimum area of 600 hectares;
(d) internal **comers** should be rounded.

We do not decide that such a quantitative measure of scale is appropriate, but introduce it to the parties as an inference from the common stance of the landscape experts in these proceedings, in case it is useful in future. An area that meets the above areal and shape characteristics is not necessarily a separate landscape, but may meet the minimum objective features. We also caution that it appears to us:

- that the more open a landscape is, the greater the area it must contain to be seen as a landscape;
- that the area qualifications might not invariably apply, for **example** on hillsides; and
- they could not apply to a feature which is, by definition, part of a landscape.

[21] On the scale criteria the terrace above the Fern Burn flats identified by Mr Baxter as a VAL would not qualify as an individual landscape because i-t is too small. However, because the scale criteria have not been tested we do not use them to determine **the** issues in this case, but consider the remainder of the evidence.

[22] In fact there was no substantial evidence as to why the terrace should be classified as a VAL. We have also considered the lay evidence of Mrs P J McRae of Glendhu Station, Mr J H Aspinall on behalf of the Lakes Landcare Group and Federated Farmers of New Zealand, and Mr D W McRae of Alpha Bum Station. On this occasion the evidence of the expert witnesses, other than Mr Baxter, is more persuasive.

[D] The Waterfall **Creek to Damper Bay** *valley*

[23] The road from Wanaka. to the Matutuki Valley ("the Mt Aspiring Road") after running behind Larch Hill, runs northwest parallel with the edge of Lake Wanaka. The road does not follow the lake edge. Between Waterfall Creek and Damper Bay it leads through a shallow valley ("the Damper/Waterfall valley") between the steep sides of Roy's Peak (on the left) and a row of *roches moutonnee* (rock sheep) on the right. It was common ground that the slopes of Roy's Peak were included in an outstanding natural landscape as were the waters and shores of Lake Wakatipu up to (at least) the crest of the rocky ridge (of *roches moutonnee)* between the lakeshore and Mt Aspiring Road. The question for us to determine here is whether the flatter land either side of the Mt Aspiring Road is part of a western tongue of VAL protruding from the pastoral landscapes around Wanaka township to the south and east.

[24] The most complete summary of the amended ***Pigeon*** Bay factors affecting assessment of the setting of the Damper/Waterfall valley was given in Mr B Espie's landscape evidence for the Council. He discussed each factor in turn as follows:

(a) Natural Science Factors'*:

> *In simple terms the mountain slopes beginning shortly to the west of the Wanaka Mount Aspiring Road and the hummocky formations in the area of the Rippon Vineyard and around point 11581 are formed of glacially-sculpted schist, while the tongue of flatter land thatfollows the road and the land surrounding Wanaka are formed of tills, gravels and alluvium. There is a difference in the formative*

18 B Espie paragraphs 3.6 to 3.8.

processes that have acted on the hummocky areas and the mountain slopes. The hummocky areas have been overrun by glaciation, resulting in their rounded appearance while, above a certain altitude, the mountain slopes have not.

The topography of the subject area reflects the geological underlay. The mountain slopes form a steep wall to the southwest and *the road follows the shallow [Damper/Waterfall]* valley area *of tills and gravels. The topography again becomes steep in the hummocky areas, which appear as intermittent obstacles between the road and the lake, but in many areas the flatter low ground extends from the road to the lake surface. The mountain slopes are generally covered in low unkempt scrub-like vegetation while the flatter land contains pasture and intermittent shelter and amenity trees, particularly towards the southeast as the road approaches Wanaka. The hummocky topography is also grazed pasture but contains many schist faces and outcrops and ureas of scrub.*

A detailed ecological study of the site was not conducted but it is evident that the vegetation of *the tongue of flatter land [through which the Mt Aspiring Road runs] and the hummocky landforms is typical of a farmed, pastoral landscape. Grazed exotic pasture dominates, punctuated by shelter trees. Exotic amenity tree planting increases significantly in the eastern area adjacent to the Pleasant Lodge Holiday Park and the Rippon Vineyard where grapevines are also visible. The areas of hummocky topography are mainly pasture but contain areas of briar rose, matagouri and kanuka scrub. Areas of native wetland vegetation are evident, particularly in the northern end of the subject area. The ecology of the steep mountain slopes is of an unkempt scrub-like appearance consisting* of *briar rose, bracken fern and matagouri giving way to yellower areas* of *native grasses on the upper slopes.*

(b) Aesthetics[19]:

[19] B Espie, Evidence in chief, paragraphs 3.9 and 3.10.

...

The upper Clutha area demonstrates very high aesthetic value. It is dominated by ranges of high, natural mountain peaks and vast lakes and draws large numbers of domestic and international tourists. In the subject area historic use of the land has heavily influenced the. aesthetics that exist today. The mountain slopes (particularly the lower slopes) are covered in many exotic wilding species but overall have a wild and unkempt aesthetic pattern. When viewed in context these slopes are part of a romantic landscape, as is the vast lake surface and distant mountain backdrop. The aestheticpattern that exists on the tongue of flat land that follows the [Mt Aspiring] road is not wild and is chnracterised by verdant grazed paddocks and signs of a working use of the land. This could be termed a pastoral aesthetic pattern. However, when looking north and east from the road the view is still romantic and wild with the hummocky landforms forming a foreground to views of the lake surface and distant dramatic mountain peaks.

(c) Legibility':

. ..[I]t is obvious that the land of the subject area visible reflects it's formative processes. Areas of bedrock that have been weathered by glaciation are visible in the form of the mountain slopes and hummocks. The tongue of flat land is visible as an area of glacial and fluvial deposition.

(d) Transience[21]:

The wider landscape of the upper Clutha area demonstrates transient values to a significant extent. Dramatic aesthetic effects result [from] changing light conditions throughout the day and year, weather conditions (particularly seasonal snow), and seasonal changes in deciduous vegetation and agricultural land use. These effects are visible on a broad scale throughout the district but occur more dramatically in areas of high altitude or variable topography. In the

2.0
21 B Espie, Evidence in chief paragraph 3.14.
B Espie, Evidence in chief, paragraph 3.17.

subject area this is the case in the form of snow cover on the mountain slopes, the play of light conditions on the variable topography of the mountains and the areas of hummocky topography and the seasonal changes in vegetation and agricultural activity [in the Damper/Waterfall valley], particularly in the south eastern portion.

(e) Shared and Recognised Values[22]:

The impact of natural science factors are shared and recognised by observers to some extent. I consider that most observers would recognise that the mountain slopes and the hummocky landforms are weathered bedrock while the shallow valley is an area of deposition. I consider that the aesthetic and transient values of the subject area would be shared and recognised by most locals and visitors to the area, and that to the west of a certain point on the Wanaka Mount Aspiring Road the aesthetics of the landscape when read as a whole are consistent with a dramatic, romantic mountain and lake landscape.

Mr Espie has a touching faith in the geomorphological education of the majority of visitors to the area, but we consider that he is correct in his assessment of the general effect on visitors of driving through this valley.

(f) Takata whenua and (g) Historical values.

In fact neither Mr Espie nor any other witness identified any specific values attached to the Damper/Waterfall valley. Mr Espie was cross-examined in some detail on his evidence but his answers did not weaken his evidence overall.

[25] For the landowners Mr Baxter considered that the Damper/Waterfall valley[23]:

... being the landscape adjacent and on either side of the road [and] ... not visible from the lake or township . . . is of sufficient scale and place to be landscape on its own merits,

22 B Espie, Evidence in chief, paragraph 3.19.
23 P J Baxter, April 2002 evidence, paragraph 14.

He comes to that conclusion:

> *... on the basis that it is a distinct visual experience for people within that particular area. I then ask whether the experience of that landscape is predominantly of ONL type elements or predominantly of VAL type elements. I believe that the experience of the viewer within that landscape is more likely to be dominated by the pastoral surrounds and foreground, I form that view for the following reasons.*
>
> a. *The steep ONL slopes on the left-hand side (driving towards Glendhu Bay), while being fairly close to the road, are so steep and high they are largely above and outside the primary visual experience when driving along that road.*
> b. *The ONL of Lake Wanaka and the far shores are very distant.,*

[26] We have difficulties with accepting Mr Baxter's evidence on this issue because it seems:

- unduly reliant on a visual assessment;
- to be made from the road; and
- to be a restricted visual assessment.

We do not think it is unfair to suggest that Mr Baxter has taken a driver's assessment of the Damper/Waterfall valley. All his photographs[24] of the valley are taken looking along the road and do not show Roy's Peak on the left. A more objective photograph of the view north-west from the Waterfall creek turnoff was produced[25] by Mr Espie for the Council.

[27] We accept that a 'visual' assessment is very important in the overall landscape assessment, but it needs to be much fuller than a 'drive along the road' view. Even a

24 Photographs 6 and 7 to his primary April 2002 evidence; and photographs 1 to 4 to his rebuttal evidence.

25 B Espie, photograph 1.

passenger looking at right angles to the road would see a different landscape aspect than Mr Baxter's photographs suggest.

[28] Another omission from Mr Baxter's assessment of categories (he mentions it earlier in his discussion of the amended ***Pigeon Bay*** criteria) is the presence and character of the line of rock sheep along the other side of the Damper/Waterfall valley floor, between the road and the lake.

[29] The subjectivity of visual assessments is also shown by comparing two photographs taken from the entrance to the property called "Whare Kea" on the Mt Aspiring Road as it runs through the Damper Waterfall. valley. Mr Baxter's photograph[26] is taken from a few metres south of the entrance. It looks north-west along the road and then round to the north and east through an angle of about 90° to 100°. In the foreground is the gravelled entrance to Whare Mea property. The entrance is flanked by stone walls and then a very solid square post and rail fence. The drive to the right of the photograph is lined by an avenue of small willow trees, The roche moutonnee ridge in the middle ground is largely obscured by the low trees. The bright light and relief show a bland, light green, pastoral landscape. The unfocused mountains in the background look much like the many ranges in New Zealand seen from a distance. There is only one glimpse of Lake Wanaka in the photograph.

[30] By contrast, Ms Lucas' photograph 2 taken from a point on the Mt Aspiring Road only 30 metres west shows neither road nor willows. It looks north-east directly across the fields (now more brown than green) to the line of rock sheep covered in much darker scrub and trees (mainly pines). Beyond are two larger mirrors of lake surface and focused 'higher' closer mountains.

[31] Of course neither photograph is more valid than the other. Each suggests that the photographer is recording and showing what they want the viewer to see. Perhaps the photographer is (subconsciously?) manipulating the relevant technical factors (including location, direction, focus, film speed, print colour saturation) when taking the photograph to achieve their desired result.

[26] P J Baxter, Rebuttal evidence Photo 2.

[32] For UCESI Ms Lucas recognised that the Damper/Waterfall valley was less wild and more modified than the ridges on either side. She wrote[27]:

> *There are thus 2 options for addressing the landscape categorisation. Separate the [Damper Waterfall Valley] from the ridge lands, the former as VAL the latter as ONL and/or ONF, to recognise their differing values.*
>
> *This was the approach I took in the preliminary mapping in my overview evidence (June 2001, attachment G). However, refined mapping reveals that the resultant VAL map unit would be very spatially limited.*
>
> *The second option is to combine the rock ridge and [the Damper Waterfall valley] as an integrated whole – recognising the hard rock and softer rock areas that had been more thoroughly gouged out to form a trough.*
>
> *A combination of rock ridge and trough as a single mapping unit would be recognised as an outstanding natural landscape in total.*

[33] In cross-examination Mr Goldsmith asked Ms Lucas why she had changed her position between July 2001 and 2002. Her answer was that the Court in its Roy's Peninsula decision had emphasised the need to look at the big picture. That had "persuaded"[28] her that, for this area, the categorisation of the Damper/Waterfall valley as ONL was the correct option.

[34] Of the two witnesses discussed we prefer the evidence of Ms Lucas. Despite its subjectivity it is fuller, more open and coherent than that of Mr Baxter. As it happens, we heard more objective evidence from Mr Espie who was called by the Council. We were quite impressed by his written evidence on the Damper/Waterfall valley and by his careful, considered answers in cross-examination.

[35] In his evidence in chief Mr Espie wrote of the shallow valley[29]:

27 D J Lucas, April 2002 evidence, paragraphs 65-68.
28 Notes of evidence, p.35 line 35.
29 B Espie, Evidence in chief, paragraph 4.15.

> ... *This tongue of land is not outstanding or particularly natural when looked at in isolation but it is part of a landscape that is outstanding and natural when assessed as a whole.*

One of the additional details that helps us to prefer Mr Espie's evidence is his identification of the interest and value of the line of small (roche moutonnee) hills copying the higher range beyond the lake to the north-east.

[36] Mr Goldsmith submitted that since there was disagreement between the experts as to whether the Damper/Waterfall valley was ONL or VAL it could not be an ONL because the issue was so difficult. He referred to the *first Queenstown landscape decision*[30] where we stated:

> ... *usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis.*

[37] The real issue here is similar to the problem identified in the *first Queenstown landscape decision*[31] where the Court pointed out that:

> ... *while the Remarkables Mountains were on the whole agreed to be an outstanding natural landscape none of the witnesses for the other parties was prepared to say where the outstanding natural landscape terminated.*

The need for expert analysis is not as to the existence of an outstanding natural landscape, but as to where it ends.

[38] As we have stated, it is common ground in this case that the mountains to the left of the Mt Aspiring Road (driving away from Wanaka) and the lake to the right, as well as the lake edge to the crest of the low ridgeline, are all part of -the outstanding natural landscape. The general argument is that the thin strip of land (the Damper/Waterfall valley) between the large outstanding natural landscape(s) on either side is not a part of

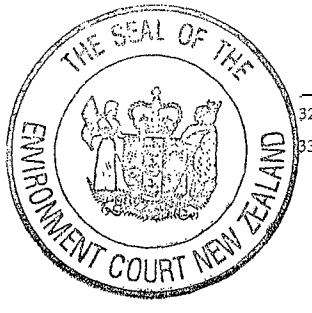
30 [2000] NZRMA 59 atpara (99).
31 [2000] NZRMA 59 at para (96).

that landscape but a separate "visual amenity" landscape. The specific argument is that it cannot be an outstanding natural landscape because there is disagreement about that issue.

[39] In our view the issue in respect of the shallow valley that is the Damper/Waterfall valley turns on its facts: it is so narrow that the suggestion it is a separate landscape does not make sense. While the Damper/Waterfall valley is a thin continuation of the same type of rural landscape that curls around Wanaka town it is the wrong shape to be seen as a separate landscape. Far from having a minimum width of 1.5 kilometres it is, on Mr Baxter's evidence, in at least one place (and, we think, two) less than 500 metres wide[32].

[40] For Mr and Mrs Laming, Mr More submitted that the Damper/Waterfall valley was not ONL but either VAL or some other rural landscape. We have already found that the valley is not a VAL. As for his alternative argument: he referred to ***Prospectus Nominees Ltd v Queenstown Lakes District Council***[33] where, the Court (differently constituted) held that an allotment containing 2.2 hectares and zoned Rural General on Beacon Point at Wanaka was in the third category of landscapes. In our opinion the Court was there faced with a different, and difficult, issue in that the land was sandwiched between Lake Wanaka's outstanding natural landscape and the urban landscape of Penrith Park which is an extension of Wanaka township. The issue before the Court was which category did the relevant lot fall into when the obvious 'urban' category was, on the face of it, precluded by the land's Rural-General zoning.

[41] In our respectful view the Court in ***Prospectus Nominees*** may have treated the tripartite division of rural landscapes a little too rigidly. In the *first Queenstown landscape decision* we did not have to consider in detail a landscape 'boundary' adjacent to a town. But certainly the earlier decision made it clear that the categories of landscape are not zonings. They are findings of fact and opinion of the kind required by section 6(b) and section 7 of the Act. So it appears to us that it was open to the Court in *Prospectus Nominees* to hold that the relevant land was part of the townscape because



[32] Comparing Mr Baxter's document 5.2 with his Attachment A.
[33] Decision C238/2001.

of its physical and other characteristics including its immediate proximity to Wanaka township.

[42] By contrast the Damper/Waterfall valley has ONL on both sides. So, while the valley is too narrow to be a separate landscape, we find that it fits comfortably into the outstanding natural landscapes on each side.

[E] The Mt Alpha Fan

[43] 'The mountain that dominates the views southwest of Wanaka town is Mt Alpha. It rises to 1.630 metres above sea level. From Wanaka it presents a huge triangular face ("the .Mt Alpha face"): one side is the northern ridge which runs across Roy's Peak (1578 metres) and down to Damper Bay. The second side runs east down to the appropriately named Hillend on the Casdrona Valley Road. The bottom or third side runs along the foot of the mountain (close to and parallel with the Mt Aspiring Road for several kilometres) between Damper Bay and Hillend.

[44] For the most part, the Mt Alpha face is steep and rough. However underneath the Mt Alpha-Hillend ridge there is a large smooth(ish) fan ("the Alpha fan") which looks rather different from the rest of the lower Alpha face. While the upper Mt Alpha face is steep tussock slopes, broken by rock outcrops and cliffs, the lower face is generally covered in bracken and scrub species. The exception is the Alpha fan which shows a greener pastoral character on a smoother surface at a gentler angle,

[45] Mr Espie described the fan as follows[34]:

- *Geology is almost exclusively deposited material in the form of tills and gravels. Topography and ecology are reflective of this but also include many aspects of human modification in the form of clutter of structures, roads and very extensive exotic ecology in the form of pasture grasses and introduced tree planting.*

[34] B Espie, Evidence in chief, para 4.4.

- *Aesthetic values are consistent with a farmed valley floor. The observers experience in this landscape is of being in a relatively open rurally populated landscape surrounded by distant mountain peaks. The immediate surroundings appear more modified and domesticated than the natural backdrop.*
- *Formative processes are legible in parts such as those adjacent to riverbeds but are generally less obvious and obscured by the trappings of human modification.*
- *Transient values are visible in the mountain backdrop to this landscape in the form of variable light and weather conditions, and in the seasonal change in agricultural activity and deciduous vegetation.*
- *I believe it is generally shared and recognised by observers that this is a relatively flat landscape, traditionally used for agriculture [and] surrounded by natural mountain peaks.*

[46] However on this area we find Mr Espie's evidence on the Mt Alpha face a little confusing because he conflates[35] two questions:

(1) Whether the Mt Alpha face is an ONL? and
(2) Whether it should be included in a special "Inner/Upper Clutha" category of ONL?

[47] Consequently Mr Espie draws the boundary of the ONL high on the Mt Alpha face, so as to exclude the Alpha fan.

[48] Mr Baxter's primary evidence on the Alpha fan was[36]:

To the southern end of the subject site, in the vicinity of Hillend Station, the distinction between VAL and ONL landscape is less apparent. I acknowledge

35 B Espie, Evidence in chief, paragraphs 5.6 to 5.8 and 6.4.
36 P J Baxter, April 2002, Evidence para 19.

that, while not the subject of this hearing, it is reasonable to expect that the rolling pastoral land that surrounds Wanaka to be substantially VAL. The challenge then is where does that landscape transition from VAL to ONL occur? I have... shown that transition to occur on a continuous contour along the upper edge of a terrace, than runs along that Hillend face. In my opinion this reflects a change in gradient that, whilst not reflecting land use changes, is contiguous with the geological underlay. . . .

[49] Ms Lucas considered the physiognomy of the Mt Alpha face a little more fully[37]:

I refer to this landscape unit as the . . . Alpha fan as it now displays a surface created by fan-building processes . . . This fan deposition material overlies moraine. (Mr Haworth has referred to this landform as a "terrace", perhaps due to its smoothness and river-truncated front edge formed by outwash during the last great glacial retreat).

The . . . Alpha fan is a strongly rolling surface below the steep mountain slope. I understand the landform unit derives from moraine smeared on this mountain slope by an earlier glaciation (some 30,000 years ago). The younger fans running off the mountain slopes above are now overwhelming it. No longer a rippled surface, the moraine has been buried and smoothed. The toe has been truncated by the later glaciation. ...

The stark line across the mountain slope above the landform unit is merely a management boundary – a bracken line . . . that comes and goes. I assess the Mt Alpha fan to be part of the mountain range landscape.

The . . . Alpha fan is very prominent from around the Wanaka basin, and its smooth sloping surface, uninterrupted except for a few tree clumps, "displays" any contrasts with the open grassland character.

37 D J Lucas, April 2002, Evidence paragraphs 47-51 and 53.

Due to the prominence and coherence of this displayed, sloping fan surface, I assess it to be part of the outstanding natural landscape of the Alpha Range.

...

The landscapes of the rock ridge and Mt. Alpha face are front stage. They are very highly visible, from the traditional town and from the much expanded town toward Beacon Point, and from the major recreational area around and in the waters of Roys Bay, Eely Point, Bremner Bay to Beacon Point. They are also overviewed from important recreational areas, such as from Mt. Iron Reserve, similar to the view from Mt. Barker.

[50] We have quoted that passage because it shows both strengths and weaknesses in Ms Lucas' evidence. Examples of the latter are that it does not seem entirely consistent to call the Mt Alpha fan both 'strongly rolling' and 'smooth'. Nor are we sure what is meant by the sentence in which the 'sloping surface' phrase occurs. As to strength, Ms Lucas gives map information both about the geomorphology and about -the context of the Mt Alpha fan.

[51] We observe first that the Mt Alpha fan could be joined with either the ONL that arcs around it, or the VAL underneath it. There are no artificially small or strained shapes involved in this situation. The complication, is that the geomorphological and pastoral characteristics rather contradict each other. The former make the fan 'read' with the mountainous side, while the latter suggest it is part of the pastoral, visual amenity landscape of the flats as Ms Lucas accepted in cross-examination by Mr Parker. However, those visual amenity landscape characteristics are relatively ephemeral, and they could, if a landowner managed their land differently, be reversed. By comparison, the geomorphological characteristics, whilst ultimately also in flux, are relatively solid as a basis for the categorisation we have to make.

[52] While we can understand Mr Baxter's assessment if the Mt Alpha fan is viewed from Studholme Road (east) and the Cardrona Valley Road, we consider Ms Lucas' assessment is more comprehensive. The obvious demarcation between the Alpha face (including the fan) and the flat land to the north is not obvious from those two roads or from Wanaka. It is very visible from Mt Iron and Mt Barker: the demarcation is the river-truncated end of the fan as identified on Ms Lucas' plan. We hold that lowest line

is the limit of the ONL because it is the most clearly definable line although we accept this is a finely balanced decision.

[F] An Inner Upper Clutha Outstanding Natural Landscape?

[53] Within the district-wide outstanding natural landscapes we also held that there was an exceptional category of landscapes in the Wakatipu Basin. The *first* Queenstown *landscape decision* stated[38]:

> *The Wakatipu Basin is more difficult to manage sustainably. The outstanding natural landscapes and features of the basin differ from most of the other outstanding natural landscapes of the district in that they are more visible from more viewpoints by more people. The scale of the basin is also important as Mr Kruger pointed out. People in the basin are never more than 2-3 kilometres from an outstanding natural feature or landscape. Consequently, we find that it is generally inappropriate to allow any developmentfor residential, industrial or commercial activities on the outstanding natural landscape or features. We accept Mr Kruger's evidence (and Mr Rough said something similar) that, for these reasons, the Wakatipu Basin needs to be treated as a special case and as a coherent whole. We find that there has been inappropriate urban sprawl in the basin – in particular on Centennial Road in the vicinity of Arrow Junction and again along parts of Malaghan Road on its south side . . .*
>
> *We consider the cumulative effects have already gone further than is desirable. In the outstanding natural landscape of the Wakatipu Basin, and on the outstanding natural features in it, any further structures are undesirable – they should be avoided* . . . (Footnotes excluded).

[54] The Upper Clutha Environmental Society suggests there should be a similar category of landscape in the Clutha catchment of the district. We gave our reasons why there should be no such general area – an "ONL Inner Upper Clutha" - in our Roy's

[38] [2000] NZRMA 59 at para (136).

Peninsula decision, but reserved the issue whether we should find a pocket of such category on the Alpha face and the land underneath it.

[55] Mr Borick submitted for UCESI that only one planner or resource manager - Mr Vivian for the Council, at the first Wanaka hearing in July 2001 – had given evidence on this issue, and his opinion was that there should be a pocket of "Inner Upper Clutha" ONL in the same way as there is an ONL (Wakatipu Basin). That is a misconception of Mr Vivian's evidence in chief. He proceeds on the assumption that there is such a category as ONL (IUC). He does not give reasons why there should be such a category.

[56] At the 2002 hearing Mr Haworth gave evidence (and in effect submissions) why the Mt Alpha face should be an outstanding natural landscape (Inner Upper Clutha). However we see no reason to depart from our conclusions in the Roy's Peninsula decision to the effect that the objectives and. policies of Part 4 of the revised plan as they relate to ONL (district wide) are adequate to cope with any applications for subdivision in the ONL.

[57] The conditions of overdomestication that already exist in the Wakatipu Basin do not apply on the Mt Alpha face or above Lake Wanaka on the western side of Roy's Bay. We concede there have been at least one or two inappropriate developments, but not on the scale that has happened in the Wakatipu Basin. We prefer the evidence of Mr Espie to that of Mr Haworth on this issue. We hold that there should be no special category of "Outstanding Natural Landscape (Inner Upper Clutha)" in this area.

[58] Of course having regard to those objectives and policies and the assessment matters in Part 5 of the revised plan it is more likely that applications for subdivision and residential development in this outstanding natural landscape will succeed if they do not draw straight survey lines and/or build fences over complex topography, and if they maintain and/or enhance naturalness by, for example:

(a) imposing covenants to remove exotic plants such as larches (perhaps even sweet briar); and

(b) imposing covenants to keep out cattle to enable endemic regeneration and to improve water and wetland quality.

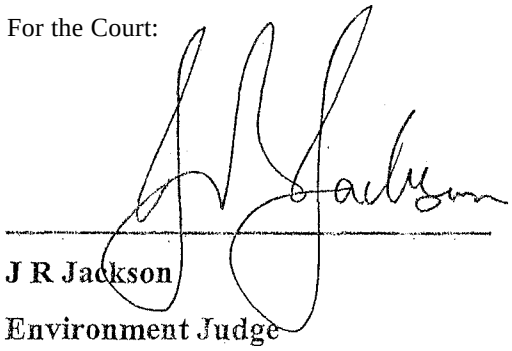
[G] Outcome

[59] It does not appear that any formal orders are necessary as the outcome of this decision but in case we are wrong about that we reserve leave for any party to apply.

[60] Costs are reserved, although we consider any order for costs in respect of the Wanaka part of the Part 4 references is unlikely.

DATED at CHRISTCHURCH 26th **June *2002.***

For the Court:



J R Jackson
Environment Judge

Issued: 27 JUN 2002