New Zealand Productivity Commission

Project: Legal issues in the New Zealand planning system

Report by Dr Kenneth Palmer

Contents

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Deliverable 1

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A report which

- summarises the state of the jurisprudence on the interpretation of section 5 prior to *Environmental Defence Society vs New Zealand King Salmon*, identifying the key judgements in the jurisprudence's development;
- describes the background to the *Environmental Defence Society vs New Zealand King Salmon* case, the point of law under consideration, and what the Supreme Court decided on those points of law; and
- assesses the impact of *Environmental Defence Society vs New Zealand King Salmon* on the lower courts' future interpretation of section 5; and, to the extent it can be determined, on council plans and planning activities/processes.

1 The Interpretation of RMA, s 5 prior to *EDS v NZ King Salmon* (2014)

"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 wellbeing 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."

The recognition of sustainable management derives primarily from the UN Stockholm Conference in 1972 and subsequent acceptance by the *Brundtland Report* in 1986 that for long-term global survival all land, air and water regulation should have a "sustainable" objective.[1] At the end of 1998, a statement of government proposals for resource management reform was published under the title *People, Environment and Decision-Making: the Government's Proposals for Resource Management Law Reform* (MFE, 1988). This document set out a number of objectives for a new planning statute, which included sustainable management as one objective. Following the publication of the proposals paper, and after receiving feedback, the Resource Management Bill 1989 was introduced into Parliament. The Bill in fact adopted from the beginning the sole purpose "to promote the sustainable management of natural and physical resources". That concise purpose was not changed during the Bill progression through the House.

However, the definition of s 5(2), expressed in the Bill as s 4(2) being the definition of sustainable management, underwent a significant number of iterations during the progress through the House. In short, the purpose was defined under s 5(2) to apply to the activities of people and communities in a way that would not prejudice sustainability of the environment. Regarding the interpretation of s 5(2), academic debate and judicial assessment initially considered whether the conjunction "while" that connects the first part, being the "management" part, with the second part, being the "ecological" part, should be interpreted as a coordinating conjunction or subordinating conjunction. In the latter event,

[1] This initial part adapts an extract from Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers 2012), 17.2.1. Gro Brundtland *Our Common Future: World Commission on Environment and Development* (Oxford University Press, Oxford, 1987).

paras (a), (b) and (c) could be regarded as mandatory bottom lines.[2] [This uncertainty has been resolved in the recent *King Salmon* decision.]

The interpretation of the purpose of sustainable management in s 5 overall has been the subject of academic analysis and interpretation under a multitude of decisions from the respective courts. In *Falkner v Gisborne District Council*, the High Court determined that the regulatory regime should prevail over common law rights (to mitigate foreshore erosion) where appropriate for effective resource management. Barker J stated:[3]

> The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it….
>
> The effect of all this is simply that, where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly, a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection work proposed by the residents must be subject to that procedure.

The Court noted that compensation was not available in the normal course of events, but an application could be made under s 85 of the RMA for amendment of the rules where found to be unduly onerous. In elaboration, s 85 allows for an application to the Environment Court where a landowner believes that rules render land incapable of reasonable use, and place an unfair and unreasonable burden on the person owning the land. In this instance, the Court has a discretion to amend the rules to allow for reasonable use and removal of any unfair burden. In one New Zealand case, *Steven v Christchurch City (1998)*, a landowner was successful in having a heritage building listing removed, to enable her dwelling to be demolished or removed from the site and for the property to be sold at a realistic price. The main relevance of the reference to s 85, is to indicate the practical limits on the scope of rules to regulate property. The rules must not amount to unreasonable regulation, and should not give rise to any claim for actual taking of a legal interest, which can be asserted under the Public Works Act.

The relationships between the purpose in s 5, the matters of national importance stated in s 6, and other matters set out in s 7, have been considered in other decisions. The foremost decision on the interpretation of s 5 and relationship to ss 6, 7, was and remains *New Zealand Rail Ltd v Marlborough District Council*.[4] Regarding interpretation of the

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[2] Resource Management Bill 1989, cl 4. See Bruce Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago LR 51 (the "while" in s 5, vagueness of words, quality of decisions). Janet McLean "New Zealand's Resource Management Act 1991: Process with Purpose?" (1992) 7 Otago LR 538 (uncertainty of objectives, need for national standards).

[3] *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 632, [1995] NZRMA 462 at 477 (HC).

[4] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

sections, Greig J stated:[5]

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the [Environment Court], with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

A later widely acknowledged interpretation of s 5 was expressed in *North Shore City Council v Auckland Regional Council* where the Environment Court stated:[6]

> Application of s 5 in the way described … involves consideration of both main elements of s 5. The method calls for consideration of the aspects in which a proposal would represent management 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 wellbeing, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paras (a), (b) and (c).
>
> 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.

The *broad overall judgment* approach, involving elements of balancing conflicting objectives and making evaluative determinations, has been prior to 2014 the analysis generally followed in applying s 5 of the RMA. The High Court has also referred to the need, in the context of resource consent applications, to make an evaluative judgment in determining particular cases, and to have regard to other decisions or like circumstances where informative.[7]

The definition of "natural and physical resources" in s 5(1) includes "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".[8] The term "structure" means "any building, equipment, device, or other facility made by people and which is fixed to land".[9] By incorporating structures into the scope of sustainable management, and references to social, economic,

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[5] At 86.

[6] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94 (Judge Sheppard presiding).

[7] *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [35].

[8] RMA, s 2 (definition "natural and physical resources").

[9] RMA, s 2 (definition "structure"). Compare *Bilkey v Auckland City Council* (1992) 1 NZRMA 189 (PT) (building meaning).

and cultural well-being of people and communities, and health and safety, the purpose in s 5(1) clearly recognises the anthropocentric elements and focus in the management purpose, and the balance to be reached between competing elements.[10]

Under s 5(2)(a), the objective of sustaining the reasonably foreseeable needs of future generations allows for flexibility in respect of present consumption, forward planning and land use allocation, and the possible importation of resources that could be relevant to assessing depletion issues.[11]

The life-supporting capacity of air, water, soil and ecosystems receives specific recognition under s 5(2)(b), and must rank as an important bottom line type factor in respect of activities that may produce toxic wastes, serious air pollution or significant ecosystem damage, and reflects a deep ecological recognition.[12]

The avoidance or remedying, or mitigating any adverse effects of activities upon the environment under s 5(2)(c) duplicates para (b) in part, but may be extended to other activities not affecting life-supporting capacity. The term "environment" is defined:

> *environment* includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) amenity values; and
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

The term amenity values in para (c) is defined:

> *amenity values* means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

As stated, "amenity values" comprehend human appreciation of the "pleasantness, aesthetic coherence, and cultural and recreational attributes" of an area. In respect of plan

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[10] The economic utilisation of resources may be a relevant factor in zoning provision or resource consents: see *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477 (HC) at [116]-[121] (wind farm). Compare *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295, 5 NZTPA 33 (SC) (economic objectives); *Foodstuffs (Auckland) Ltd v Planning Tribunal (No 1 Div)* [1982] 2 NZLR 315 (HC); *Smith v Waimate West County Council* (1980) 7 NZTPA 241 at 259 (capital resources in plant and buildings); *Facoory v Goodwin Realty Ltd* (1991) 1 NZRMA 65 (PT); *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 86 (land subdivision); *Dart River Safaris Ltd v Kemp* [2001] NZRMA 433 (HC) (safety of jet boat operations); *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 310 (EnvC) (affordable housing provision in district plan); *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321 (HC) (affordable housing provision lawful).

[11] In respect of energy depletion, see *Smith v Waimate West County Council* (1980) 7 NZTPA 241 at 259 (minerals are defined to include fuel minerals); *Application by Petralgas Chemicals NZ Ltd* (1981) 8 NZTPA 106 (natural gas producing methanol); *Re an Application by NZ Synthetic Fuels Corp Ltd* (1981) 8 NZTPA 138 (gas for petroleum plant).

[12] Klaus Bosselmann, David Grinlinton, Prue Taylor (ed) *Environmental Law for a Sustainable Society* (2nd ed New Zealand Centre for Environmental Law, Auckland, 2013) at 28-33, 95-108; Klaus Bosselmann *The Principle of Sustainability* (Ashgate, England, 2008) at 63-66.

content, submissions, development applications, and enforcement proceedings to address objectionable elements, an assessment of amenity impact and location may be an important and sensitive environmental, social and economic consideration.[13]

The focus on sustainable management under s 5 and ss 6, 7, has been complemented and reinforced by the powers to issue regulations, and to prescribe national environmental standards, national policy statements, and the issue of the New Zealand coastal policy statement through the Minister of Conservation.[14]

The first NZCPS appeared in 1994 as required under the RMA. By contrast, the first national environmental standard which set minimum standards for air emissions did not appear until 10 years later in 2004. The absence of national standards and national policy statements for the first 13 years of the RMA did not have a significant impact at district plan level, as those plans were carried over into the new regime, but the absence had a greater impact on the consistency and quality of regional policy documents and regional plans where no existing comprehensive documents (outside the Auckland region) had been approved.[15]

1.1 Specificity of policy and urban limits

By 1991, the Auckland Regional Authority had prepared a number of documents and was able to progress according to the commonly held urban planning principles, and without any national policy statement direction under the RMA. The prescription of urban limits was introduced as an indicative policy under the first regional planning scheme approved in 1974. The ability of the regional policy document to include a strict policy imposing a metropolitan urban limit was challenged in 1995 in *Auckland Regional Council v North Shore City Council.*[16] The legal issue was whether the prescriptive limit was a legitimate "policy", or a "rule". To elaborate, RMA s 62(1)(e) states the *regional policy statement* may include the methods (*excluding rules*) used or to be used, to implement the policies. This description can be compared with the content of a *regional plan*, which under s 67(1)(c) *must state the rules (if any)* to implement the policies. The City Council argued that the metropolitan urban limits line drawn in the policy statement was in fact a rule, and it was not permissible for a rule to be included in the policy statement. The Court of Appeal determined that the line drawn on the map along one of the dividing highways was in fact a policy, albeit a rather precise policy, and not a rule in a technical sense. On that basis, the metropolitan urban limits set out in the policy statement were held to be effective, and of course binding then on the North Shore City Council in respect of the expansion limits of residential zoning in the district plan.

Various statements by the President Justice Cooke in delivering the judgment of the Court

[13] RMA, s 2 (definitions). A view could be taken that the RMA is too generous in taking into account aesthetic considerations and amenity values which may hold up development or increase costs.
[14] RMA, ss 43-58A.
[15] The first Auckland Regional Authority, Regional Planning Scheme became operative in April 1974, and set a blue print for the urban development of the region, including indicative zoning, urban limits, public utilities, roading, transportation.
[16] *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18.

of Appeal are of timely interest. In addressing the purpose of the Act in s 5 to promote the sustainable management of natural and physical resources, the Court stated:

> Section 5(2)(a) speaks of "the reasonably foreseeable needs of future generations". Such an Act is not to be approached in any narrow way or with an eye to the protection of supposedly vested administrative interests. Let it be said at once, however, that in presentation the arguments of counsel for the territorial authorities successfully avoided the pitfall of parochialism.[17]
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> …. Notable though the Resource Management Act is for the aspirations and principles embodied in it, their very generality seems to have led in the drafting to an accumulation of words verging in places on turgidity. But with the help of the comprehensive arguments of counsel and the tribunal's equally comprehensive reasoning, both of which covered many matters to which it will not be necessary to make express reference in this judgement, it has become possible to pass through the thicket without much difficulty. In the end the case turns on short points and can be disposed of simply.[18]

On the legal question whether a line drawn in the Regional Policy Statement north of North Shore City could be maintained as a fixed metropolitan urban boundary, the Court concluded:

> Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of "policies". In our opinion they all fall within the terms and intra vires the regional council.[19]

The Court of Appeal did not decide the merits of the location of the Metropolitan urban boundary as its jurisdiction was limited to questions of law, and it referred the case back to the Planning Tribunal (as it then was), to determine the appropriate boundary line.

The subsequent decision gave rise to the well known statement by Judge Sheppard on behalf of the Tribunal that applying section 5 involved "an overall broad judgment of whether a proposal will promote sustainable management of natural and physical resources".[20] For the reasons set out in that judgment, the northern boundary line for the metropolitan urban limit was readjusted to allow certain additional urban development behind Long Bay, but to limit the development in the proximity of Stillwater to ensure that the Okura coastal inlet would not be adversely affected as to water quality from any new subdivision run-off and stormwater discharges.

Those two decisions and subsequent decisions on the metropolitan urban boundaries, have

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[17] At 19.
[18] At 20.
[19] At 23.
[20] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94 (Judge Sheppard presiding).

generally maintained that policy up to the present time. As will be known, the proposed Auckland Unitary Plan allows for greater flexibility for future amendments to the urban boundary (if retained) at the instigation of Auckland Council or a private applicant for a plan change, with initial policy envisaging up to 40% of development within the next 30 year planning period occuring outside the Rural Urban Boundary (RUB), being the replacement of the former more rigid metropolitan urban limits.[21]

The prescription of the RUB boundary in the proposed Auckland unitary plan, could be affected by a National Policy Statement on urban development, under current consideration. Further the proposed amendments under the Resource Legislation Amendment Bill 2015, identify with greater clarity an obligation on councils under regional policy, regional and district plan documents, to make provision under ss 30 and 31 respectively for "the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in relation to [in respect of] residential and business land to meet the expected long-term demands of the region [of the district]".[22]

2 EDS v King Salmon case – background, points of law, findings

2.1 Case background

In *Environmental Defence Society v The New Zealand King Salmon Co Ltd*,[23] EDS challenged plan changes submitted by New Zealand King Salmon, raising legal points based on the application of the New Zealand Coastal Policy Statement 2010 (NZCPS). The objective was to establish eight salmon farms in the Marlborough Sounds. The King Salmon company filed the proposed plan changes with the unitary council in respect of the Marlborough Sounds resource management coastal plan. The operative plan stipulated that salmon farming in the respective eight locations was a "prohibited activity", and therefore could not be the subject of a resource consent application or approval. The proposed plan change was intended to alter the classification of the water areas to allow for salmon farming as a "discretionary activity". That plan change would then enable the consideration of the resource consent applications that could follow if the changes relating to the separate sites were approved.

After a hearing on direct referral to a Board of Inquiry, the Board interpreted policies in the NZCPS to avoid development on or adjacent to outstanding natural landscape areas

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[21] The New Zealand Productivity Commission, *Housing affordability inquiry* (March 2012), part 7 "Urban planning and housing affordability", states 7.5 "There is a strong case that the prevailing planning principles in New Zealand's growing urban areas, particularly in Auckland, have a significant negative influence on the prices of both new and existing housing. The Commission considers that a more balanced approach is required in the interest of housing affordability" (p 121). Compare also, New Zealand Productivity Commission, *Using land for housing* (September 2015).

[22] Resource Legislation Amendment Bill 2015, cls 11, 12 (amending RMA ss 30, 31). MfE & MBIE, *Proposed National Policy Statement on Urban Development Capacity: Consultation Document* (MfE Wellington ME 1241, June 2016) (submissions close 15 July 2016).

[23] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

(including seascapes), and applied a broad overall judgment in evaluating the merits of the applications. In one location, namely Papatua at Port Gore, the salmon farm site was within an outstanding natural landscape (ONL). Three policies under the NZCPA were relevant as to the outcome. Policy 8, *Aquaculture*, supported sites for aquaculture where were found to be appropriate. On the other hand, policy 13, *Preservation of natural character*, stated that the natural character of the coastal environment should be protected from inappropriate subdivision, use and development, and "(a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character". Similarly policy 15, *Natural features and natural landscapes*, including seascapes, stated that areas with these features should be protected from inappropriate use and development: '(a) to avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment"….

Before the Board of Inquiry, EDS had submitted that policies 13 and 15 would prevent the plan change proceeding. The Board did not accept the EDS submission and, as noted, applied a broad overall judgment test, as commonly used up to that date. It determined that notwithstanding the words of policies 13 and 15 the plan change to facilitate the salmon farms could still be approved as to four locations. The direction in the policy to "avoid" development, by rezoning, was not seen as absolute, and in the particular factual circumstances the giving effect to the NZCPS overall would not be compromised. The plan change for Port Gore was upheld, along with plan changes in three other locations. The remaining four plan changes were not approved in respect of sensitive or unsuitable sites. The High Court upheld the decision of the Board, and the case then proceeded on direct appeal to the Supreme Court.

2.2 EDS v King Salmon - Supreme Court decision

The Supreme Court judgment commences with a comprehensive analysis of the structure of the RMA and its implementation at three levels, through the hierarchy of central government input at the top by way of national environment standards and national policy statements including the NZCPA, the second tier of regional policy and plan management, and the third level of district plans.[24]

Regarding the definition of "sustainable management" the Court makes a number of points. An initial point is to clarify the relationship between the first part of the definition, being the developmental interests or management part, and the second part being the intergenerational and environmental interests, which parts are connected by the pronoun "while". The Court discusses the academic controversy about interpretation of "while" in the definition. The Court rejects the view that the definition in s 5(2) should be read into separate parts with compliance with the intergenerational and environmental interests being a bottom line or condition precedent to any development. The Court states that s 5(2) should be read as a integrated whole…

[24] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

> As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".[25]

To the extent that NPS or NZCPS higher level documents may be relevant in any case involving a resource consent application, s 104, does not give the same priority to the higher level documents as applicable in the plan-making procedures. Section 104 does add that the consideration of effects on the environment, and the obligation to have regard to the higher level documents, is to carried out "subject to Part 2".

Returning then to Part 2, a court will be faced with applying s 5. The clarification by the Supreme Court in *King Salmon* that the two parts of s 5(2) are to be read in conjunction and the management part is to be implemented "at the same time as" the environmental protection part in sub-paragraphs (a), (b) and (c), will involve an overall broad approach or judgment in carrying out that particular task. There are indications in some statements in the *King Salmon* decision that greater weight should now be given to the higher level documents than in the past, and that may qualify the overall broad judgment as earlier expressed by the Planning Tribunal in the *North Shore* case.

The environmental considerations under paragraphs (a), (b) and (c), have an element of flexibility, which must involve an evaluation as to whether sustainable management will be achieved, giving appropriate weight to all relevant documents. This has been the approach taken by the Supreme Court in the companion decision *Sustain our Sounds v King Salmon*. In that case the Supreme Court was supportive of a rezoning to allow the salmon farms to be established in three coastal locations, and did not give an overriding priority to the matter of national importance in s 6(a) to protect the coastline from inappropriate development. The Court found that development could be appropriate, provided adaptive management conditions were imposed in either the plan change or a subsequent resource consent, to ensure that the purpose in s 5 was maintained.

That approach has been followed by the High Court and Environment Court in the respective *Man O' War* decisions on the Waiheke Island plan. A most recent decision in *RJ Davidson Family Trust v Marlborough District Council*, involved a decision (by a majority) to disallow consent for a further mussel farm in Beatrix Bay in Pelorus Sound in order to protect a king shag habitat. The Court revisits this issue of assessment and represents the last word.[26] At para 263, the Environment Court states (Judge Jackson):

> "Whether that process [applying s 104] can still be called an "overall broad judgment" is open to some doubt. The breadth of the judgment depends on the following matters in the district or regional plan:
> The status of the activity for which consent is applied;
> The particularity (or lack of it) in the relevant objectives and policies about the effects of the activity; and

[25] At [24(c)].
[26] *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

> The existence of any uncertainty, incompleteness or illegality (in those plans or in any higher order instruments)…".

Judge Jackson is one of the more academic judges on the Environment Court, and in his erudite analysis raises a number of issues regarding the interpretation approach now applicable.

In brief conclusion, it could be stated that the "overall broad judgment" is now too simplistic, and needs to be refined having regard to the various statements and applications of the *King Salmon* case. On the other hand, it cannot be concluded that the Supreme Court in *King Salmon* wholly rejected the overall broad assessment in a resource consent context (as asserted by Sir Geoffrey Palmer and Dr Roger Blakeley in their submission paper)[27].

The dynamic nature of the environment, biodiversity, and the individual facts of each case, will require an evaluation in the end as to whether or not the purpose of the Act has been achieved. The description of an "evaluation" was adopted by Baragwanath J in *Murphy v North Shore Council*. [28] The judgment under s 5 will be a matter of evaluation of the purpose overall, consideration of the particular factual situation and established needs of communities and the environment, and the ability to mitigate adverse effects. Where a proposal is significantly contrary to plan provisions, or protection of the broader environment, or provides inadequate information, it may fall short of sustainable management.

2.3 Obligation to give effect to higher documents

The Supreme Court in *EDS v King Salmon* further addresses the wording in the RMA that the contents of a regional policy statement, regional plan, and district plan "must give effect to" any national policy statement, and the NZCPS. Also a district plan must give effect to any regional policy statement.[29]

> **67 Content of regional plans**
> (3) A regional plan must give effect to—
> **(a)** any national policy statement; and
> **(b)** any New Zealand coastal policy statement; and
> **(c)** any regional policy statement.
>
> **75 Content of district plans**
> (3) A district plan must give effect to—
> **(a)** any national policy statement; and
> **(b)** any New Zealand coastal policy statement; and
> **(c)** any regional policy statement.

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[27] http://shed/inquiries/up/Submissions/sub-urban-planning-07-sir-geoffrey-palmer-and-dr-roger-blakeley-302Kb.pdf. The *Sustain our Sounds* decision considered below involves a broad judgment on the environmental merits, risks and adaptive management.

[28] *Murphy v Rodney District Council* [2004] 3 NZLR 421, [2004] NZRMA 393 (HC) (subdivision of rural lot refused as contrary to regional policy and likely to form an undesirable precedent).

[29] RMA, ss 62(3), 67(3), 75(3).

The Court interpreted the phrase “must give effect to" in a literal sense as a strong directive to mean “implement” and to be mandatory. It noted that specific policies are more prescriptive than policies at a higher level of abstraction.[30]

> [80] We have said that the “give effect to” requirement is a strong directive, particularly when viewed against the background that it replaced the previous “not inconsistent with” requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

Secondly, the word used in NZCPS policies 13 and 15 to “avoid” a particular outcome means “not allow” or “prevent the occurance of”. The Court stated the practical issue:

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

In the context of a change to the coastal plan in the location of an outstanding natural landscape, the Court concluded it was no longer correct or appropriate for the Board or other consent authority to override or discount the higher level documents by way of a “broad overall judgment” determination.[31]

The next question as to whether the proposed activity or development was “inappropriate” was stated to be heavily influenced by context, and allows a degree of flexibility having regard to what is sought to be protected. This approach applied to the term used in s 6(a), (b), and (f), and in policies 8, 13, 15. After lengthy consideration, the Supreme Court concluded that policies 13 and 15 are “something in the nature of a bottom line”:

> [132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited. The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which

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[30] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [77]-[80].

[31] At [92]-[97]. [The Court also recognises that the term “avoid” is used in s 5(2)(c) and this factor is considered in the Report on deliverable 2].

> contemplate the prohibition of particular activities in certain localities.

Under the hierarchy, prescribed in the RMA since 1991, the national policy statements and the New Zealand Coastal Policy Statement are higher-level documents which must, to the extent that the policies provide a minimum bottom line or directive, be given appropriate effect as a mandatory obligation. The Court observed that its decision was reinforced by the directives in the RMA on local authorities to amend regional documents and district plans without following the schedule 1 procedures, to give effect to the objectives and policies in the national documents.[32] On that basis, the decision allowing the plan change at the Port Gore site, adjacent to an ONL, was held to be incorrect.

A final legal point was whether on a plan change, the proponent should have given detailed consideration to alternative sites or locations for the farms. The Supreme Court considered the wording of s 32 which applied to the plan change process and required a preliminary "evaluation report" on the plan change and purpose. The Court stated:[33]

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.
>
> [171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. ….

In the particular situation of seeking exclusive occupation of a public water space for private gain, a consideration of alternative sites was considered to be desirable.

2.4 Sustain Our Sounds decision

By way of comparison, the Supreme Court gave a separate parallel judgment in *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* in respect of the three remaining plan

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[32] RMA, ss 44A, 55.

[33] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [170], [171].

change sites that were not in the location of outstanding natural landscapes or seascapes.[34] In this appeal by EDS, which opposed the approvals, the Court found that the plan changes were not ruled out by the policies in the NZCPS and the marine farm development could properly be held by the Board to be "appropriate" in the several locations, where mitigation conditions were added either in the plan change or in a subsequent resource consent. The outcome would be consistent with a precautionary approach, mandated under Policy 3 in the NZCPS, and consistent with an adaptive management approach. The latter mitigation or remediation was held to be supported by an adequate evidential foundation.[35] The conditions would allow the activities on the sites to be monitored as to water quality and trophic state, and to be reviewed to give further protection of the coastal environment. Maximum feed levels could be assessed to manage water quality levels and any significantly adverse nutrient pollution from the farming activities.

3 Future impact of EDS v King Salmon

3.1 Regional, district, unitary plan content

The significance of the *EDS v King Salmon* judgment has been the subject of differing viewpoints. Looking back over the structure of the RMA, it can be observed that the initial NZCPA 1994 was a much simplified document, with general policies largely restating the matters of national importance relating to the coastal marine area under s 6, which had to be taken into account and provided for in the normal course of preparing policy and plan documents. As such the NZCPA 1994 had little practical impact on development in the coastal area. The Court stated in the *EDS v King Salmon* case: [36]

> [134] Overall, the language of the [*NZCPS*] 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS [*2010*]. The greater direction given by the NZCPS [*2010*] was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS [*2010*]. The Minister described the NZCPS [2010] as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]". The Minister said that the NZCPS [*2010*] was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS *[2010*] made provision for

[34] *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, [2014] NZRMA 421.
[35] At [125].
[36] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195

aquaculture "in appropriate places".

An example of coastal development assessed against the former NZCPS 1994 is the decision in *Arrigato Investments Ltd v Auckland Regional Council* in which a bare coastal landscape above Pakiri beach was allowed by the Environment Court to be subdivided into 14 large lots.[37] The Court found the headland was not an outstanding natural landscape under the district plan, nor in its separate evaluation, and was given no additional protection under the NZCPA 1994. The applicant committed under the conditions of consent to extensive restorative planting of the landscape which was accepted as appropriate mitigation of any adverse effects of future dwellings on the lots. The Court of Appeal upheld this determination as a justifiable outcome on the facts. Subsequently, following a failure of sales, the regional council was able to acquire a majority of the lots to establish a regional park.

To the extent that the NZCPS 2010 has been interpreted to include specific policies with a sharper edge, the *EDS v King Salmon* decision in 2014 is consistent with the earlier decision of the Court of Appeal in the *ARC v North Shore City Council* case in 1995.[38] The latter case acknowledged that the metropolitan urban limit in the ARC regional policy document, once finalised was intended to be mandatory as to compliance with content under the district plans. As noted the Environment Court was later able to apply the broad overall judgment approach in determining on the merits the final boundary in the regional policy statement. That approach would now be qualified by the need to give effect to any NPS or the NZCPS in respect of any higher policy with a directive bottom line.[39]

For practical purposes looking ahead, the EDS's decision is a timely reminder of the obligation under the RMA for national policy statements to be given effect where that is the intention and purpose of the statement. This outcome is entirely appropriate and prevents local authorities undermining the right and prerogative of central government to give directions on matters of specific national policy, and to issue minimal national environmental standards. These documents could, for example, encompass the adequate allocation of land for urban expansion and standards for infrastructure.

The statements of obligation under a NPS or NZCPS can be amended if the content is found to be counter-productive or not in-line with sustainable management objectives which should be achieved in the making of the higher level documents. The Supreme Court in *EDS v King Salmon* has drawn attention to variations in language that can be adopted in expressing a policy:[40]

> [127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some

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[37] *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, [2001] NZRMA 481.
[38] *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, CA.
[39] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 94 (Judge Sheppard presiding). Noted *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [41], [42].
[40] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [127].

> policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance. [*footnotes in paragraph omitted*]

The variety of language identified is a salutory reminder that in law the interpretation of words may be critical to the effectiveness of provisions in a national policy statement or national standard. The last sentence of the quotation draws attention to the overall broad judgment being an undue simplification of the evaluation process.

3.2 Council level disputes

The EDS decision also applies to the obligation on a district plan to "give effect to" a regional policy statement under the plan hierarchy. In the past a number of cases have arisen between regional councils and territorial authorities over conflicts in policy and administration. This risk may be eliminated by the establishment of a unitary council where the regional policy, regional rules, and district plan rules are combined into one plan and differences sorted in-house. These disputes at all levels may be referred to the Environment Court for resolution.[41] Examples in a plan change context, include the *ARA v North Shore City Council* case and various cases in Canterbury regarding council disputes, with the regional councils traditionally opposing urban expansion.[42]

> **82 Disputes**
>
> (4) If a dispute about whether a regional policy statement or a plan gives effect to a national policy statement or New Zealand coastal policy statement is referred to the court, and the court considers that the policy statement or plan does not give effect to the other policy statement, the court must order the authority responsible for the policy statement or plan to amend it in accordance with section 55.
>
> (5) However, the court does not need to make an order under subsection (3) or (4) if it considers that the inconsistency, or failure to give effect to the other policy statement, is of minor significance that

[41] RMA, ss 33 (transfer of powers), 80 (combined documents), 82 (referral of disputes).
[42] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (Long Bay boundary); *Becmead Investments Ltd v Christchurch City Council* [1997] NZRMA 1 (irreversibility factor – urban accommodation pressures jusifying plan change); *Canterbury Regional Council v Selwyn District Council* [1997] NZRMA 25 (versatile soils not absolutely protected under RMA –plan change approved).

> does not affect the general intent and purpose of the policy statement, plan, or water conservation order concerned.
>
> (6) To avoid doubt, giving effect to a policy statement includes giving effect to it by complying with a direction described in section 55(2).

The provision for the Court under s 82(5) to allow inconsistencies of minor significance to remain is a pragmatic recognition of the need for a degree of flexibility in the implementation of higher level documents. The application of the minor waiver provision under the section was not considered in the *EDS v King Salmon* proceedings, presumably on the basis that the Board found the proposed plan change at Port Gore would have significant adverse effects.[43]

3.3 Resource consent applications and assessment

The *EDS v King Salmon* decision does not directly apply to an application for a resource consent. Under RMA, section 104, a consent authority must have regard to the effect of the development on the environment, which could be either positive or negative, and also *have regard to* relevant provisions of a national environmental standard, a national policy statement and the NZCPS.[44]

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
> **(a)** any actual and potential effects on the environment of allowing the activity; and
> **(b)** any relevant provisions of—
> **(i)** a national environmental standard:
> **(ii)** other regulations:
> **(iii)** a national policy statement:
> **(iv)** a New Zealand coastal policy statement:
> **(v)** a regional policy statement or proposed regional policy statement:
> **(vi)** a plan or proposed plan; and
> **(c)** any other matter the consent authority considers relevant and reasonably necessary to determine the application.

In applying s 104, the consent authority may continue to use the "overall broad judgment" evaluation first laid down by the Environment Court. In practice the EDS decision may mean that greater weight is given in a resource consent application to various policies in the national policy statements and in the NZCPS, but those documents do not normally rule out the exercise of discretion or amount to a veto of the discretion of the consent authority to approve an application. Recently the Environment Court approved the building of a compatible dwelling on Waiheke Island within an outstanding landscape area. It applied the *King Salmon* case in coming to its decision.[45]

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[43] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [153].
[44] RMA, s 104(1)(b).
[45] *Man O' War Station Ltd v Auckland Council* [2015] NZEnvC 260, [2015] NZRMA 287 (approval of resource consent to erect dwelling on Waiheke Island coastline not prohibited by NZCPS).

By contrast a national environmental standard may specify a bottom-line which applies to a resource consent or limits the scope or nature of the consent. Standards on harmful air emissions, and contaminated land working are of particular importance.[46]

Regarding the wording of s 104(1) above, which is the paramount directive for determining resource consents and of fundamental daily importance under the RMA, an observation can be made in respect of the reservation in the phrase "the consent authority must, subject to Part 2, have regard to". In an earlier different context, the Court of Appeal has stated "The qualification "Subject to" is a standard drafting method of making clear that other provisions referred to are to prevail in the event of a conflict".[47]

The phrase "subject to Part 2" may for inexperienced decision-makers, councillors and planning officers hide or minimalise the significance of the sustainable management purpose under s 5, guided by ss 6 and 7, in the evaluation process, as the ultimate objective of the RMA. For example in *Auckland City Council v John Woolley Trust*, the council had refused a consent for a restricted discretionary activity to remove a large tree on a residential property. The Environment Court on appeal granted the consent. The legal issue was whether s 5 in Part 2 was a relevant consideration. In the High Court, Randerson J, in upholding the approval of consent, stated:[48]

> [47] I would add that the words "subject to Part 2" in s 104(1) must be given some meaning consistent with both s 104C and s 77B(3). Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA.

In agreeing that Part 2 of the RMA is the "engine room" of the Act, consideration should be given to rephrasing s 104. Instead of a reservation of Part 2, which tends to minimise its visibility and importance, the reference could be better expressed in a positive form as an overriding or paramount objective of the evaluation of a resource consent application, ie the wellbeing of people and communities, taking into account plan policy and environmental effects. For example s 104(1) could be advantageously reworded:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must have regard to–
> **(a) the purpose and principles in Part 2 of this Act as a primary or overriding matter; and**
> **(aa)** any actual and potential effects on the environment of allowing the activity; and

[46] RMA, s 44A(7). Eg NES for air quality 2004; NES for managing contaminates in soil (2011).
[47] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257, 260, per Cooke P (rezoning of Karikari peninsula challenged as overlooking Maori ancestral connection).
[48] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47].

(b) any relevant provisions of—
(i) a national environmental standard:
(ii) other regulations:
(iii) a national policy statement:
(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

3.4 Summary

One text comment on *EDS v King Salmon* has been "This case does cast doubt on the use by decision-makers of the overall broad judgment approach in all circumstances. The full impact of the decision will only become clear following the development of additional case law…".[49] That statement can now be clarified and put into perspective.

(a) Plan content and changes

The impact of *EDS v NZ King Salmon* on the Environment Court's interpretation of section 5 is primarily relevant in the context of determining the content of a regional policy or regional and district plan, where it is mandatory under the RMA for any higher-level policy with a specific direction to be given effect to. As stated, that is an appropriate and reasonable outcome which will enable the higher-level documents to be observed and given effect to where that is the intention of the government (or regional council) in issuing the documents. If the provisions of the documents are found to be counter-productive or not reasonably achievable, the remedy may be for the higher-level document to be amended or revised, or withdrawn and reissued. It is important that these documents continue to have a role and certainty which has always been envisaged under the RMA structure. The ability to amend a NPS is more flexible and efficient than amending the RMA.[50]

The EDS decision also applies to the obligation on a district plan to "give effect to" a regional policy statement under the plan hierarchy. In the past a number of cases have arisen between regional councils and territorial authorities over conflicts in policy and administration. These disputes at all levels may be referred to the Environment Court for resolution, and inconsistencies of minor significance may be allowed to remain.[51]

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[49] Ceri Warnock and Maree Baker-Galloway, *Focus on Resource Management Law* (LexisNexis 2015), 3.12.
[50] The National Policy Statement for Freshwater Management 2014 contains a number of policies expressed in a mandatory manner to which effect must be given. A progressive implementation programme allows for an extended time period to 2025 or 2030 for plans to be amended as directed. Some of the expectations may be difficult to achieve or define. The NPS may be modified or amended as found necessary.
[51] RMA, s 82 (disputes) above.

In submitting a plan change the applicant may as part of the s 32 evaluation, be expected to address alternative sites if relevant and practicable, especially if related to a use of public space.

(b) Resource consents

In a resource consent situation, the Courts have stated that it should be assumed the regional policies and plans, and district plans are compliant with higher level documents, to minimise the time and cost of hearings at the regional and district levels, and on any appeal.[52]

The *EDS v King Salmon* case does not directly affect the present practices in relation to a resource consent application coming under s 104. The assessment of environmental effects as part of the documents of an application, stipulated in accordance with sch 4 of the Act, may now require more detail if engaging a higher-level document.[53]

Section 104 requires the consent authority to have due and proper regard to the higher-level policy documents, and that level of discretion is appropriate and does not need to be altered. If the ability of the consent authority to come to an appropriate decision on the merits is frustrated by the higher-level document, this concern or issue can be referred back to the Ministry and consideration given to any amendment to that document. The advantage of the policy document input, as indicated, is that an amendment to the RMA is not required, and flexibility remains with government to implement policy considerations.

The ability for policy to influence the interpretation of sustainable management in s 5 was first articulated in the 1994 decision of *NZ Rail Ltd v Marlborough District Council*. The approach is largely endorsed in *EDS v King Salmon* subject to the clarification that the ability to apply policy to a decision on a plan matter regarding sustainable management could be subject to any specific policy directive, as found in that case under the NZCPS.[54]

The relationship between the management focus under the first part of s 5(2) and the second environmental part introduced by the pronoun "while", has now been clarified under the EDS's decision… That is, "while" means "at the same time as". This clarification of the interpretation is consistent with the overall broad judgment approach.

An interesting side issue is an approach taken in recent UK planning law, that a presumption should apply that applications for planning permission should be approved, and any refusal of the planning application should be justified. That would introduce a new

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[52] *Auckland Regional Council v Living Earth Ltd* [2008] NZCA 349, [2009] NZRMA 22 (application under district plan for composting activity on Puketutu Island outside urban limits in regional plan – consent upheld).
[53] RMA s 88(2), sch 4 (as substituted 2013).
[54] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [40], [142], [147], [150]

onus on a council that does not apply at the present time in New Zealand law under the RMA. Since the *Wellington Club* case in the 1960s, the approach in plan matters has been that no legal onus applies to an applicant to prove that a local authority plan is deficient, but the procedure is an objective inquiry into merits. Any appeal is effectively a de novo inquiry on the merits requiring a full rehearing on the basis that the council hearing may have be inadequate. [That assumption could be revisited where accedited independent panel members may now be appointed to undertake this function].[55]

In New Zealand, a presumption that a resource consent application should be approved applies only where the activity is listed as a controlled activity.[56] That class commonly applies to land subdivisions in land already zoned for urban development. No presumption applies to discretionary activities, and limiting gateways apply to non-complying activities. In these applications there is an evidential and legal burden to satisfy the single purpose of sustainable management.[57]

4 Conclusion

- The state of jurisprudence on the interpretation of s 5 prior to the EDS decision 2014, was that the interpretation of ss 5, 6, 7 allows for a degree of flexibility as the words are of wide meaning and there is a deliberate openness about the language intended to allow the application of policy in a broad and general way (*NZ Rail* case).
- As determined by *EDS v King Salmon* in 2014 the mandatory specific content of any national policy statement and any NZCPS must be given effect to the regional plans and district plans. The policy may be of a type that prevents development, and it is no longer appropriate to apply an "overall broad judgment" on a plan change application to the extent that the higher-level documents are not given effect to.
- In respect of any resource consent application, unless the application is prevented as constituting a prohibited activity, the hearing authority must have regard to the higher-level policy documents and subject to giving the content of those documents due and proper weight, the documents do not necessarily prevent the granting of a resource consent.
- For example the National Policy Statement on Freshwater Management 2014, may as a matter of weight require conditions to be imposed to recognise and achieve quality standards, efficient water allocation, and the satisfaction of national

[55] *Wellington Club Inc v Carson* [1972] NZLR 698, 4 NZTPA 309 (club land zoning); *Leith v Auckland City Council* [1995] NZRMA 400, 408 (zoning on Great Barrier Island).
[56] RMA s 87A(2).
[57] RMA s 87A(3), (4), (5). See *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [122] (approval of telecommunications tower).

objectives and attributes. This type of weighting is emphasised in the *EDS v King Salmon* decision.[58]

- The *King Salmon* decision should be regarded as a positive clarification of the hierarchy of documents under the RMA, and the proper interpretation and application. The decision is not, on the facts of the appeal, restrictive of positive and desirable development within regions. The *Sustain our Sounds* case, on other facts, upholds development of three marine farm sites. If any national policy statement or part of the NZCPS is found to prevent appropriate development, the remedy is for that policy statement or document to be amended to remove the restraint, and to introduce new policies to achieve desirable outcomes.

- The purpose of the RMA can be assessed as to positive or negative messages, and in any situation could be dependent upon applying s 5 overall in a positive manner. The purpose in s 5(1) of promoting sustainable management has a positive connotation. The reference in the sustainable management definition in s 5(2) to "use, development" … of resources in a way which enables people and communities to provide for their social, economic, cultural wellbeing…. has a proactive and desirable development focus as to outcome.

- Conversely, the further reference in s 5(2) to "protection" of natural and physical resources may have a negative message.

- Under s 6 the matters of national importance generally are negative or cautionary, and refer to preservation or protection, maintenance and enhancement of environmental features, and all appear to be restrictive or limiting in their application.

- The reference in s 6(e) to the relationship of Māori to their ancestral land, is ambivalent to the extent that Māori may be protective of the *status quo*, especially if asserting cultural connections to land or water. By contrast, in recent years the commercial activities by the large Māori incorporations, following Treaty settlements, may be proactive in development. Examples include development of commercial centres, marae, papakianga housing and other cultural purposes within district plans, and waterfront uses and fisheries.

- Section 7 requires councils and consent authorities to have particular regard to a number of aspects, and contains a mix of positive and negative factors. The reference in s 7(b) to "the efficient use and development of natural and physical resources" opens up an economic approach to planning. The cases on that section have emphasised positive developments, without imposing a procedural obligation on an applicant to examine alternative sites, or to analyse the economic benefits of using alternative sites or methods. References on the phrase can be found in the High Court decision in *Meridian Energy Ltd v Central Otago District Council*,

[58] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [148]-[150].

regarding the Project Hayes wind farm assessment.[59] The High Court noted that s 32 in relation to plan changes, focuses on benefits and costs.

- The amendments to s 32 in 2013, specifically require a minister or local authority in the evaluation report in policy statements or plan making to consider benefits and costs including opportunities for economic growth and employment. This emphasis and recognition of positive economic and employment outcomes in administration of the RMA could well be replicated in s 7, and in the guidelines for assessment of resource consents under a revision of s 104.

- It is agreed that the RMA contains no clear statement in support of "positive and desirable development". At best, this objective is implicit or hidden within the matters (some conflicting) expressed in ss 5, 6 and 7, s 32, and s 104. A clear reference to "positive and desirable development, including economic growth and employment" could be usefully inserted in s 7, and in s104.

- The qualification on the "overall broad judgment" approach previously assumed in respect of national policy documents is a necessary correction having regard to the structure of the RMA, and the desirability of central government maintaining its power of direction on minimum environmental standards and policy matters.

- A recent High Court decision upholding the ability of the Auckland Council on a regional assessment to identify places of outstanding natural landscape (ONL) on Waiheke Island under the regional policy statement, follows the *King Salmon* case. The decision supports the ability of the council to protect the environmental values, and protect the island from over-development in inappropriate places, which could negate sustainable management. The ONL classification will not necessary prevent a resource consent being granted where compatible with the higher level policies.[60]

- The *EDS v King Salmon* decision confirms the strategic importance of the scope and content of any NPS, NZCPS, and regional policy statement, as any mandatory part "must be given effect to" in the regional plan and district plan rules.[61] The only qualification is that in the event of a conflict, the Environment Court may allow an inconsistency of minor significance to remain.[62]

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[59] *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482. See also D Nolan, *Environmental and Resource Management Law* (5th ed LexisNexis, Wellington, 2015), ch 3 (RMA purposes and plan content).

[60] *Man O' War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329 (ONL notations upheld); *Man O' War Station Ltd v Auckland Council* [2015] NZEnvC 260, [2015] NZRMA 287 (dwelling approved in coastal area where avoiding adverse effects); *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035, [2016] NZRMA 55 (minimum lot size for rural subdivision affirmed at 25ha).

[61] RMA ss 67(3)(c), 75(3)(c).

[62] RMA s 82(5).

- Any regional policy statement must in itself give effect to a national policy statement (and NZCPS), and national environmental standard, which confirms the overriding functions and powers of central government under the RMA.

- The proposed "national planning template" may have similar features and legal consequences, and should enhance the content and national consistency of policies, plans and practice.[63]

….

13 June 2016

[63] Resource Legislation Amendment Bill 2015, cl 37 (to insert ss 58B-58J).

New Zealand Productivity Commission

Project: Legal issues in the New Zealand planning system

Report by Dr Kenneth Palmer [revised draft 1 June 2016]

Deliverable 2

Contents

A report which

- summarises the statutory and case-law guidance on s 5 (2) (c) regarding its bottom-line status (along with 5 (2) (a) and (b)) and regarding when mitigation is acceptable (as opposed to avoidance or remediation) and what amount of mitigation is sufficient?
- explains the nature and location of legal guidance (statutory or case-law) on how the benefits of proposed developments should be weighed against their adverse effects on the environment (assuming that the developer does undertake some mitigation as required by 5 (2) (c).
- assesses gaps or weaknesses in the guidance referred to in the two bullets above, and indicates how they might best be remedied in policy and/or legal terms.

1 Statutory and case-law guidance on s 5(2)(c)

1.1 S 5 meaning and early case decisions

The first part of the deliverable is a report which summarises the statutory and case-law guidance on s 5(2)(c) regarding its bottom-line status (along with s 5(2)(a) and (b)) and regarding when mitigation is acceptable (as opposed to avoidance or remediation) and what amount of mitigation is sufficient?

Section 5 of the RMA expresses the primary purpose of the Act. It states:

"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 wellbeing 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."

The case law guidance on s 5(2)(c) is relatively sparse, for reasons that will be elaborated upon.

In the early decision in 1994 of the Planning Tribunal in *Foxley Engineering Limited v Wellington City Council*, a statement was made:[1]

> The provisions of s 5(2)(a), (b) and (c) may be considered cumulative safeguards which exist in order to ensure that the land resource is managed in such a way, or such a rate, which enables the people of the community to provide for the various aspects of their social well-being and their health and safety. They are safeguards which must be met before the Act's purpose is fulfilled. The promotion of sustainable management has to be determined therefore in the context of these qualifications which may be accorded the same legal weight.

The indication in the *Foxley* decision that the provisions in paragraphs (a), (b) and (c), could amount to mandatory bottom lines which were a condition precedent to an approval, could have raised the significance and status of those paragraphs. However the statement expressed on s 5(2) has been qualified in later cases.

An instructive judgment is *Mangakahia Maori Komiti v Northland Regional Council,* where iwi appealed against the grant of several water permits to 17 farmers to take a specified volume of water from two rivers for irrigation purposes. Iwi claimed the resource was a taonga under the Treaty of Waitangi and the depletion would affect the spirituality and quality of the flow, and adversely affect the fishing capacity. Two of the consents were granted for nine and a half years. The Planning Tribunal noted the earlier statement in the *Foxley* case, made by a different division of the Tribunal. In considering whether the several water grants could comply with the wording of the second part of s 5(2), the Tribunal (Judge Bollard presiding) stated:[2]

> Paragraphs (a), (b) and (c) of s 5(2) are sometimes spoken of as "bottom line" requirements. Yet, one's immediate inclination is not to place too much reliance upon such a catch phrase. It seems preferable to approach the three paragraphs on the footing that each is to be afforded full significance and applied accordingly in the circumstances of the particular case, so that promotion of the Act's purpose is effectively achieved. The majority consider on this basis that, subject to the conditions hereafter appearing and the granting of consent for six-year terms, the three paragraphs will be properly invoked and applied. As regards para (c), it is necessary to remember that the word "environment" which para (c) includes is defined as including "(a) ecosystems and their constituent parts, including people and communities; and (b) all natural and physical resources; and (c) amenity values; and (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters". The concluding constituent (d) is by no means an easy provision to interpret and apply in differing circumstances. In this case it would seem that certain elements of paras (a), (b) and (c) of the definition may be claimed at least to be affected by, or to have an effect upon, economic and cultural conditions.

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[1] Planning Tribunal, W 12/94, 16 March 1994 at 40 (Judge Kenderdine presiding), (quoted *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193 at 210 river irrigation abstraction affecting iwi cultural concerns – mitigation by limiting abstraction and consent term).

[2] *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193 at 214 (Judge Bollard presiding).

After considering the competing claims to the use of the water resource, the Tribunal concluded:[3]

> In reality, this case calls for a difficult judgment to be made in relation to anthropocentric and biocentric aspects of consideration. Some cases (such as this) are of singular difficulty because s 5 leaves it to the decision-maker at the end of the day to make what is, in essence, a value judgment based on the weighing of considerations that may, in effect, be irreconcilable. Hence, one may argue for the application of a strategic approach to sustainability, with the application of s 5 being clarified via the "rigour of thinking" to be applied by the planning process which the Act embraces. Even so, the applicants/second appellants have come to the Tribunal at this stage seeking consent in circumstances where a comprehensive case has been presented, plainly revealing the exertion of much expert effort in its preparation.
>
> In summary, to refuse consent altogether would be unjustified in the Tribunal's view, allowing for all that was said for the komiti. On the other hand, in the view of the majority, to grant the second appellants all that they seek would be an insufficient recognition of the special relationship of the tangata whenua with the river. Against the background of the depth of tangata whenua feeling and concern in relation to the river as a taonga, the consent period will be such as to ensure that practical experience in irrigation can be gained and data gathered, so that the council, the tangata whenua, and the farming owners can reconsider the question of whether irrigation via the river should be continued, and if so, whether to the same degree. The council's overall management of the river and associated catchment will also be expected to be more developed and defined at that stage.

In the outcome, the Tribunal reduced the two longer term consents to six years, and affirmed the volume of water to be taken. The statements of the Tribunal presided over by Judge Bollard can be accepted as a model of the approach generally taken by the successor Environment Court in the interpretation and application of s 5(2).

The provisions in s 5(2)(c) are not rigid bottom lines, and are regarded as alternatives with no legal hierarchy. In any plan matter or consent application, there could be a number or raft of positive and adverse effects of varing degrees. It may be reasonable for some effects to be avoided completely, and for some effects to be remedied wholly or in part through preventive action or conditions, and for any remaining effects to be mitigated to an extent reasonably possible. The mitigation could be on site, or possibly through off site or offset compensation.[4]

1.2 Exercise of discretion and fairness principles

The exercise of any legal discretion (as required in plan procedures and resource consent assessments) will be subject to directions in the relevant legislation as to fair procedure and as to relevant matters to consider. The RMA directs a local authority or hearing panel or consent authority to establish a procedure that is appropriate and fair in the circumstances.[5] The LGA

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[3] At 216.

[4] A condition on a consent to address offset compensation could be recognised under the Resource Legislation Amendment Bill 2015, cl 62 which will insert s 104(1)(ab).

[5] RMA, s 39. See D Nolan *Environmental and Resource Management Law* (5th ed LexisNexis Wellington 2015), ch 3, at 3.103-3.114; ch 4, 4.45- 4.82.

has its own purpose and sets of principles to be applied in decision-making under that Act.[6] These principles differ from those under the RMA and the Land Transport Management Act 2003, but can be reconciled in the different contexts.

Under general law, well known principles apply to the assessment and evaluation of any regulatory situation, and the making of a decision. The foremost legal statement is contained in the *Wednesbury Corporation* case which concerned a consent to allow Sunday opening of a picture theatre. Lord Greene stated:[7]

> The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those collateral matters ….
> Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as matters which are relevant to the question

These statements have been applied by all courts in the New Zealand context.

1.3 Best practicable option condition

Relevant to the issue of avoiding, remedying or mitigating any adverse effects on the environment, is the ability of the consent authority to impose conditions which it considers to be appropriate. One type of condition that may be imposed in respect of a discharge permit or coastal permit that would involve discharge of contaminants, is a condition requiring the holder to adopt the "best practicable option" to prevent or minimise adverse effects on the environment of the discharge. A qualification applies to this type of condition, requiring the consent authority to have regard to the nature of the discharge and the receiving environment, other alternatives including a condition requiring the observance of minimum standards of quality of the receiving environment [which could be specified under an NES or NPS], and to be satisfied that the best practicable option approach is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.[8] The BPO is defined:[9]

> "*best practicable option*, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—
> (a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
> (b) the financial implications, and the effects on the environment, of that option when compared with other options; and

[6] LGA, ss 10, 1, 11A, 12, 14, 39.
[7] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, at 228. See Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012), chs 2, 17, 18.
[8] RMA, ss 108(2)(e), (8).
[9] RMA, s 2.

(c) the current state of technical knowledge and the likelihood that the option can be successfully applied."

With reference to the definition, it is relevant to note that it focuses on the nature of the discharge or emission, sensitivity of the receiving environment, the financial implications of the option, and the current state of technical knowledge and the likelihood that the option can be successfully applied.

This definition underscores the pragmatic approach to assessing applications for discharges of contaminants, with a realisation that avoiding, remedying or mitigating adverse effects may not be possible beyond the present state of technology and the ability to finance the application of that technology. The best practicable option type condition may have particular relevance to approval of infrastructure relating to sewerage treatment, and other processes which may be necessary but do have certain adverse effects on the environment which may not be able to be avoided. The assessment highlights the extensive variability of factual situations which have to be accommodated under the RMA. The level of avoidance of adverse effects of activities will be relative to the activity, the justification for the activity, and in particular the location. Other broader considerations of cultural acceptability may also be relevant.[10]

1.4 Cultural issues affecting mitigation

Another example of the cultural situation is *Te Rununga o Taumarere v Northern Regional Council* regarding an application for approval of a new sewerage outlet in the Bay of Islands.[11] The Tribunal found the reticulated sewerage and new treatment plant was required, the treatment process was an efficient use of resources, and satisfied the scientific requirements for a safe and effective system. The only opposition was from tangata whenua as to the discharge point for the treated sewage. The location was opposed as offensive to iwi, and a site that would prevent the cultural practice of gathering of shellfish. The Tribunal found the treatment plant would remedy adverse effects on the physical environment and be an efficient use of resources. In assessing all matters under Part 2 and s 104, the Tribunal stated "the individual contents of Part 2 are not absolutes to be achieved at all costs (see *NZ Rail* …case) and that in some cases some of them conflict with others of them, and difficult judgments can be required about which is to yield to another and to what extent".[12]

The Tribunal concluded that the cultural offence to Maori was sufficient to disallow the approval of the sewage treatment project, and it recommended that the council should investigate other disposal options. This decision (like the *TV3* decision below), indicates that in certain situations cultural opposition by Maori recognised under s 6(e) as a matter of national importance, may prevail over other processes that satisfy the balance of sustainable management considerations in s 5.

The contrasting case of *Marr v Bay of Plenty Regional Council* (2011) provides a good example of the importance of the consideration of existing capital investment as recognised under s 104(2A).[13] The owners of the Tasman Mill at Kawerau applied for renewal of consents to

[10] The decision in *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347, [2011] NZRMA 89, regarding the renewal of discharge consents for the Tasman mill, is an excellent example of complex decision-making (set out below).
[11] *Te Rununga o Taumarere v Northern Regional Council* [1996] NZRMA 77 (Judge Sheppard presiding).
[12] At 95.
[13] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347, [2011] NZRMA 89.

discharge contaminants into the air and into the Tarawera River. Objections and an appeal were received from local Iwi. The Environment Court, which included a Maori land court judge, assessed the acceptability of the discharges, and problems in relation to avoiding, remedying or mitigating the clearly acknowledged adverse effects on the air and water environments. The RMA under s 107 provides that in exceptional circumstances or temporary situations, the bottom line rules to avoid contaminants may be overridden. In this regard, the Court considered the substantial capital investment and history of the Tasman Mill originally authorised by a local Act of Parliament. After considering the effect on the social environment, in particular the economic impact and employment opportunities at Kawarau, the Court concluded that the consents should be renewed despite the fact that there would not be complete avoidance, remedying or mitigation of the adverse effects, which could be expected under s 5. The Court applied the conventional broad overall judgment test. The decision can be endorsed having regard to the economic and social benefits of the Tasman Mill. This case provides an example of the flexibility that exists under the RMA.

1.5 Section 5(2)(c) terms and definitions

Addressing the phrase in s 5(2)(c) "avoiding, remedying or mitigating", it is of note that none of those terms is specifically defined in s 2 of the Act. However, it can also be noted that one other consequence of the *EDS v King Salmon* decision, is the greater weight to be given to the first word "avoiding" and in particular "avoid". It is the avoid term which featured in the particular NZCPA Policies 13 and 15, and required that development in outstanding natural landscape areas should not proceed. The Supreme Court interpreted the term "avoid" to be a mandatory direction, in the sense of "do not allow" or "disallow" any activity which would not avoid the consequence outlined in the policy, namely detraction from the outstanding natural landscapes.[14]

As indicated, this interpretation does give greater weight to the term "avoid" in sub-paragraph (c). The greater weight is subject to the accepted interpretation of paragraph (c) that the words "avoiding, remedying or mitigating" are used as equal alternatives with no hierarchy, and the fact that something cannot be avoided will not necessarily prevent an activity or use being approved, when assessed on an overall judgment as constituting acceptable sustainable management of natural and physical resources.

In this type of situation, the alternatives of remedying, or mitigating the adverse effects, will come to the forefront. In practice the broadest option of mitigation is the one which has had the most focus, in the event of any adverse effects from a proposed activity or development. For example, a plan change or consent application to erect a high-rise apartment block or medium-height dwellings, may have the effect of blocking out views previously enjoyed by adjoining properties, and this may be something that cannot be avoided under the zoning, height rules, or a discretion available on a resource consent. However it may be possible to mitigate the intrusion on the landscape by limiting the horizontal size and height of the building and allowing view shafts, or by imposing other conditions that might have the result of partially mitigating the adverse effects.

1.6 Prior approvals of affected persons

[14] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195 at [97].

In all resource consent applications, an important consideration for an applicant is whether the consent authority will require the application to be notified. Public notification is required if the application will have more than a minor effect on the environment, and limited notification is required if some other person is affected in a minor manner, but not less than minor.[15] In practice applicants often approach persons or corporates likely to be affected and endeavour to obtain a signature for prior approval of the application. In this event, the consent authority must not have regard to any effect on a person who has given written approval of the application.[16]

Ministry or local authority statistics indicate that on yearly average 90-95% of applications for resource consents are not publically notified. This outcome is an endorsement of the present procedures and discretions under the RMA. [The lack of notification of neighbours is another issue if a presumption of approval is introduced].[17]

To obtain prior approval an offer of environmental compensation or some other benefit may be agreed between the parties. The RMA contains no directive that these side agreements must be disclosed to the council or the consent authority, and the Court has taken a view that side agreements are private matters and not a concern for the Court.[18] This opportunity and outcome provides significant scope for satisfying the expectations under s 5(2)(c) of avoiding, remedying, or mitigating any adverse effects of activities on the environment, by agreement with other persons, and by consultation with the relevant council. Mitigation may be monetary.

1.7 Resource consents and permitted baseline principle

The permitted baseline principle states that in considering whether an application should be notified, and in assessing the resource consent application and effects on the environment, any activities which constitute a "permitted activity" in the zone or site, and the environmental effects from that permitted activity, may be disregarded or discounted. The focus is placed on the additional effects from the activity that require the consent.

The permitted activity principle has now been incorporated in ss 95D and 95E concerning notification, and in the guidelines in s 104 for the assessment of resource consent applications. Section 104(2) states:

> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

The permitted baseline test is also relevant to consideration of effects on the receiving environment outside the subject site, which may allow certain activities as of right. The effect

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[15] RMA, ss 95A-95E. A significant number of cases on judicial review have been taken to the High Court challenging notification decisions of consent authorities. See *Sutton v Canterbury Regional Council* [2015] NZHC 313, [2015] NZRMA 93 (water permit for irrigation – failure to notify other water permit holder); *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235.

[16] RMA, s 104(3)(a), (4).

[17] The cases of non-notification successfully challenged on judicial review, are an extremely small proportion of applications: see *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 (non-notified supermarket consent upheld).

[18] *BP Oil Ltd v Palmerston City Council* [1995] NZRMA 504, at 508. [An ethical question of disclosure to the consent authority or Environmnet Court arises and is presently unresolved.]

of the development on those activities, which may give rise to adverse impact matters, will be a matter for assessment.[19]

The permitted baseline elements may qualify the impact and obligation under s 5(2)(c) of avoiding, remedying or mitigating any adverse effects of activities on the environment. The effects which presently exist or could arise under "permitted activities" are strictly outside this directive, and can be regarded as immune.

An issue arising in *Auckland Regional Council v Living Earth Ltd* was the application of the "permitted baseline test".[20] The ARA appealed a decision allowing a composting facility outside the urban boundary. The rural zone location on Pukatutu Island allowed pig farming as a permitted activity. The legal point was whether the odour from the composting plant could be acknowledged to be within the degree of odour expected from a piggery. The CA confirmed the permitted baseline could be applied to allow a similar type of odour. The appeal against the consent failed.

1.8 Summary

In the report on Deliverable 1 as to the interpretation of s 5, it was recorded that the Courts have moved away from the bottom line interpretation and apply a consensus that the interpretation of s 5 requires an overall broad judgment. The only significant qualification, has been the reminder set out in *EDS v King Salmon*, that where a plan change or new plan is being prepared, a higher level document may prevail or qualify the overall broad judgment approach, and the local authority and any hearings authority may be bound to implement or give effect to a higher level document.

Further, in this part, it is acknowledged that the content of a national policy statement or a national environmental standard may directly affect the ability to include a provision in a regional policy statement or regional or district plan, and may qualify the ability to apply for a resource consent or specify the class of consent to be obtained. For example, reference can be made to the NPS on contaminated land.[21] These documents may require certain conditions to be imposed which qualify any general discretion available under s 5(2)(3) in avoiding, remedying, or mitigating any adverse effects of activities on the environment. A NES or NPS may set minimum standards for avoiding, remedying or mitigating adverse effects.

2 Guidance on benefits of proposed developments

2.1 Benefit as a purpose of the RMA

The purpose of the RMA is to "promote the sustainable management of natural and physical resources". The word "promote" has a pro-active connotation, and by implication encompasses the benefits of management and development. Likewise the first half of s 5(2) which defines "sustainable management" speaks of 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

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[19] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) (effects from small lot lifestyle subdivision).
[20] *Auckland Regional Council v Living Earth Ltd* [2008] NZCA 349, [2009] NZRMA 22 at [62].
[21] Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

for their social, economic, and cultural wellbeing and for their health and safety…". This management focus on wellbeing underscores the importance of benefits to people and communities.

The recognition under s 5(2)(c) of the relevance to sustainable management of "avoiding, remedying or mitigating any adverse effects of activities on the environment", needs to be assessed in the context of the exercise of discretion and recognition of the first half of the purpose definition. The interpretation of s 5 in the *New Zealand Rail v Marlborough District Council* case, by Greig J, stated "there is a deliberate openness about the language, its meanings and its connotations, which I think is intended to allow the application of policy in a general and broad way".[22] This decision has led to the "overall broad judgment" approach, as qualified more recently in the *EDS v King Salmon* decision.[23]

The recognition of s 5 as aspirational, was considered in *TV3 Network Services Ltd v Waikato District Council*, a case where a consent to erect at TV translator on a hill top was opposed by iwi as offending the relationship with a place regarded as waahi tapu. The Environment Court disallowed the application on the cultural ground. On further appeal to the High Court, Hammond J, in referring to the purpose and principles in Part 2 of the RMA (ss 5-8), stated:[24]

> The importance of these sections should not be under-estimated, or read down. For, they contain the spirit of the new legislation….
> In my view Part 2 of the RMA is critical to the new statute. It requires Courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the hortatory statutory objectives firmly in view. The fact that there are some difficult issues of interpretation of Part 2 itself, and its relationship with the rest of the RMA, does not absolve consent authorities and Courts from wrestling with those problems; or justify the side tracking of part 2.

The Court affirmed the decision to disallow the consent giving priority to the cultural connection to the site over the wider community benefits of the TV translator location. The Court also observed that the case was one where a mediated dispute resolution approach by the parties could have produced a better outcome. In essence, this was a case where iwi required the site to be wholly avoided, and would not compromise under some form of mitigation.

2.2 Adverse effects meaning and benefits

In interpreting and applying s 5(2)(c), the primary word "adverse" is not defined, and will be given a weight determined by the nature of the adverse effect, measured having regard to definitions of other terms. Two words have been defined, and will be applied in the context of the definitions.

Firstly, "effects" is a term defined expansively in RMA s 3. The meaning of effects covers almost all possible types of effect of high or low probability, temporary or permanent, past, present or future, or of a cumulative nature. In addition under s 3(a) any *positive* or adverse effect is included:

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[22] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 86.
[23] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.
[24] *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 539, at 543.

S 3 Meaning of effect
In this Act, unless the context otherwise requires, the term *effect* includes—
(a) any positive or adverse effect; and
(b) any temporary or permanent effect; and
(c) any past, present, or future effect; and
(d) any cumulative effect which arises over time or in combination with other effects—
regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
(e) any potential effect of high probability; and
(f) any potential effect of low probability which has a high potential impact.

The reference to a positive effect is important in respect of the assessment of plan rules, and more particularly resource consent applications. Although s 5(2)(c) refers to consideration only of any "adverse effects", the possibility of balancing those adverse effects with positive effects, is not ruled out in the overall assessment exercise, and has in recent times become relevant to the offer of offset or offsite compensation, as a way of remedying or mitigating any adverse effects on a development site. The *Buller Coalmine* cases approving the respective Stockton and Denniston Plateau mines are examples of off-site and offset compensation to relocate wetlands and endangered snail and lizard species.[25]

Also a possibility of an offer of offset compensation, is being recognised under the Resource Legislation Amendment Bill 2015, as relevant to assessment of an application, and in the redefinition of the power to impose conditions under s 108. Offsite or offset conditions will be possible with the consent of the applicant.[26]

Regarding the term "cumulative" under s 3(d), in *Dye v Auckland Regional Council*, the Court of Appeal clarified the meaning of the term, in the context of an approval by the Environment Court of six housing sites in a rural area adjacent to the Kumeu township.[27] The spread of housing into the countryside was opposed by the Regional Council which wished to maintain the metropolitan urban limits policy. The CA ruled that a cumulative effect was not caused by the consent application alone, and the applicant was not accountable for any other land owners in the future seeking the same type of consent. The Court did acknowledge that a precedent consequence was a relevant consideration under the broader discretion in determining whether sustainable management would be achieved. The consent was affirmed.

2.3 Environment and amenity values meaning

The remaining term in s 5(2)(c) which is defined is that of "environment":[28]

environment includes—
(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

[25] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 HC (Stockton mine). *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 293 (Denniston open cast coal mine).
[26] Resource Legislation Amendment Bill 2015, cls 62, 63 (amending ss 104, 108).
[27] *Dye v Auckland Regional Council* [2001] NZRMA 513.
[28] RMA s 2.

It may be noted in respect of the term "natural and physical resources" under (b), that an extended definition in s 2 applies:

> *natural and physical resources* includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

This inclusive definition enables virtually every relevant matter relating to the natural and physical environment to be considered, and the inclusion of structures encompasses the built environment. Structure is also defined in s 2:

> *Structure* means any building, equipment, device, or other facility made by people and which is affixed to land; and includes any raft

Finally, the term "amenity values" under (c) is defined:

> *amenity values* means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

The amenity values recognition applies a location assessment proportionate to the effect on the environment of any zone change or development application. Reference to people's appreciation of "pleasantness, aesthetic coherence, and cultural and recreational attributes" is central to the development of reasonable and effective policies relating to zoning, and neighbourhoods, and central to the concept of enabling people and communities to provide for their wellbeing and health and safety.[29]

In the context of enforcement proceedings and cultural matters, offence is a matter for the Court, as representative of New Zealand society as a whole, to determine, and not by the viewpoint of a reasonable Maori person or the Maori community at large.[30]

2.4 Zoning and Activity Classes

The structure of the RMA empowers regional, district and unitary councils to provide policy and plans and to include rules for the implementation of the policy. It is of note that the RMA does not use the term "zoning", and technically there is no obligation for zones to be established. In the decision, *Application by Christchurch City Council* (1995), the Planning Tribunal was prepared to make a declaration to the effect that the council was under no obligation to include zones, and could approach the regulation of resource management by way of performance standards.[31]

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[29] In *Zadrahl v Wellington City Council* [1995] 1 NZLR 700, the HC held that in an enforcement situation, the question whether an action or thing was objectionable or offensive was to be tested by the perception and standards of ordinary people in the location.

[30] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, at 305 CA (construction of trunk sewerage main in designated corridor across stonefields not offensive to community as a whole). This ruling is relevant to present day opposition to a SHA housing development in the Stonefields location.

[31] *Application by Christchurch City Council* [1995] NZRMA 129.

The performance standards approach was subsequently found to have its own limitations, being difficulties with defining what was an appropriate or permissible activity within various locations, and the difficulty of separating commercial or industrial activities which could intrude into residential areas, and give rise to inappropriate and adverse environmental consequences. Since that decision, almost all local authorities at the district level have adopted zoning plans as the most effective and efficient approach in terms of any s 32 analysis. Performance standards remain appropriate in areas where measurements are primarily by performance, namely air contaminant discharges in industrial and business zones, and discharges of waste onto land or water, and controls in respect of noise and odour levels.[32]

Assuming that zoning systems will remain under the RMA, as generally adopted in other comparable countries as binding or indicative, the next consideration is whether a zone or performance standard, should allow the activity as a permitted activity, or one subject to a resource consent application, or possibly a prohibited activity.[33]

This exercise will be informed by the edict under s 5(2)(c) to "avoid, remedy or mitigate any adverse effects of activities on the environment", and the general obligation on all persons under s17(1), to avoid, remedy or mitigate adverse effects:

> S 17 *Duty to avoid, remedy, or mitigate adverse effects*
>
> (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with—
>
> (a) any of sections 10, 10A, 10B, and 20A [exiting use rights]; or
>
> (b) a national environmental standard, a rule, a resource consent, or a designation.

The failure to observe the duty under s 17, may commonly be a basis for the issue of an abatement notice by a council enforcement officer, or an application to the Environment Court for an enforcement order, to require the person responsible to end or mitigate the adverse effects, or comply with any breach of the RMA or plans or consent conditions.

2.5 Classification of activities within zones

In practice, the consideration of zoning, and classification of activities, is an obligation on the local authorities in the first instance. Implicit in the delegation of power by central government to local authorities is an expectation that the councils will use their discretion in a reasonable and proper manner, having regard primarily to the purposes and objectives under Part 2 of the RMA. A safeguard against failure to exercise the discretion in a proactive or positive manner to deal with recognised problems of sustainable management, is the right of appeal on plan

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[32] See D Nolan *Environmental and Resource Management Law* (5th ed LexisNexis, Wellington 2015), ch 3. *Waikato Environmental Protection Soc Inc v Waikato Regional Council* [2008] NZRMA 431 (discharge of odour from proposed mushroom compost plant – measurement of community impact).

[33] In the UK, since 1947, all council location and development plans are regarded as indicative only, and a guide as to the assessment and granting of planning permission. Certain minor uses or structures are exempted from these controls, in the sense of permitted activities. Public submission rights are generally limited to major developments or those with significant environmental effects. No appeal rights apply, other than by judicial review on points of law.

matters to the Environment Court, and to the High Court on a question of law, or by way of judicial review of a Council decision.[34] Misuse or failure to exercise appropriate planning responsibilities, may lead to other outcomes, in particular in relation to the Canterbury Regional Council, which was replaced by government-appointed commissioners after long term default in preparing and administering effectively a regional water allocation plan. Normally that type of statutory intervention, which has been compounded in Christchurch by the need for special steps to regenerate Christchurch following the major earthquakes, is not normally required.[35]

The remedy of appeal to a higher court can be very effective, as seen in *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*.[36] In this case, the Coromandel District Council had set out in the proposed plan that mining would be a prohibited activity in all areas (excluding existing use rights). This loss of opportunity to develop further mining or prospecting was challenged by the mining industry and the Ministry. The justifications for prohibiting mining were addressed on the facts. Reasons for the policy based on a precautionary approach, or a staged approach to development, were put forward as justifications for the prohibition. On the other hand, the Court of Appeal recognised that if the adverse effects of a particular type of activity were sufficiently known, and were not effects of a nature to prohibit the activity completely, then it would inappropriate to prevent the type of activity or development being listed as one for which a resource consent could be sought. It was not justifiable to put the onus on the property owner or developer to first seek a plan change to allow the activity to be considered on its merits.

In respect of a submission by the Watchdog Group seeking to maintain the prohibition, stating that the Environment Court had wrongly described the RMA as having a "permissive, effects-based philosophy", the CA commented:[37]

> We doubt that the Environment Court was seeking to downplay any aspect of the Act, or to promote the control of effects on the environment to an exclusive status. The labels "permissive" and "effects-based" do not comprehensively describe the sustainable management purpose in s 5 of the Act. The use of those labels should not overshadow the numerous matters that are required to be considered by local authorities when undertaking the processes required by the Act.

The Council was directed to reconsider the exclusion of mining, to the extent that its wholesale prohibition was not justified.

In relation to higher level documents such as National Policy Statements and the NZCPS, where the policies may be expressed in such a way as to be construed as mandatory, the *EDS v King Salmon* decision is a reminder that the policy statements may have that effect, and if the term "avoid" is used in a policy statement it may be construed as mandatory or a prohibition on any proposed action which contradicts the policy statement. Of relevance in the EDS case,

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[34] RMA ss 120 (resource consents), 299 (High Court), sch 1, cl 14 (plan appeals).
[35] See Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010; Greater Christchurch Regeneration Act 2016.
[36] *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2007] 1 NZLR 526.
[37] At 573.

no party challenged the identification of the outstanding natural landscape in the Marlborough Sounds, adjacent to the proposed Port Gore salmon farm site.[38]

As noted, in the complementary decision in *Save Our Sounds Inc v King Salmon*, the three other sites initially approved in areas which were not outstanding natural landscapes, were upheld as appropriate marine farm locations justifying a change of the plan from a prohibited activity to a place where a resource consent could be granted.[39] The Court accepted that the evidence was sufficient to satisfy the requirements, effectively under s 5(2)(c), that the salmon farms could proceed with suitable conditions to satisfy the expectation of "avoiding, remedying, or mitigating any adverse effects of activities on the environment". The Court accepted that a precautionary approach was desirable, but that type of approach did not in itself rule out the consent being granted. Where degradation of the water quality could occur, conditions relating to adaptive management, could be effective to allow for a review of the activity, and the imposition of additional conditions to protect the water quality environment.

2.6 Plan preparation, s 5(2) and s 32 report

Although the words in s 5(2)(a), (b) and (c) are important statements in the preparation of plans, the qualified broad overall judgment approach, and the interpretation of terms in (c), avoiding, remedying or mitigating as alternatives, has allowed a significant degree of flexibility as to planning for activities and any adverse environmental effects on the physical environment. Clearly, what will amount to sufficient mitigation of an activity to become acceptable, is a matter of rational and objective assessment of effects, including positive effects and benefits.

Relevant to this exercise will be the assessment contemplated under s 32 of the RMA which refers to identifying and assessing benefits and costs, including opportunities for economic growth and employment. The element of mitigation to be set out in the plan policy and rules, will need to have regard to all relevant matters as acknowledged in the *Coromandel Watchdog* case.[40] What amount of mitigation will be sufficient is a relative concept to be assessed in the context of broader national policies, regional policy, district policy, and the social and economic conditions within the region. In the areas of large population growth, the degree of mitigation expected may be quite different from that that would be appropriate in a low growth area. Promotion of sustainable management is the overriding purpose and touchstone of the RMA and the benefits of proposed activities must be weighed against adverse effects. The rules may qualify common law rights to develop or protect properties.[41]

The most relevant part in s 32(2) states:

> (2) An assessment under subsection (1)(b)(ii) must—
>
> (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

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[38] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.
[39] *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, [2014] NZRMA 421
[40] *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2007] 1 NZLR 526.
[41] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, at 623 (Barker J) (rules upheld requiring a resource consent before taking self-help steps to protect property from sea erosion).

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

In relation to plan preparation, the benefits of proposed developments will first be flagged under the consultation process that occurs under Schedule 1 before the plan is released. Part of this process requires the evaluation report to be prepared under s 32. This report requires examination as to whether the proposed plan provisions are the most appropriate way to achieve the purpose of the Act. Under s 32(2), as set out, the assessment must identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions (compare s 5(2)), including the opportunities for:

(i) Economic growth that are anticipated to be provided or reduced;
(ii) Employment that are anticipated to be provided or reduced…

And if possible quantify the benefits and costs referred to. This focus on the relevance of economic growth and employment (added 2013) has consequences for plan policy and rules, and invites an appropriate focus on the social and economic elements of sustainable management, which could have been minimised prior to 2013 by some local authorities in preparing the respective RMA documents.

The s 32 report should be available to the public for consideration in the submission processes applied to plan preparation, and when the assessment under s 32 is challenged or found to be wanting, s 32A provides for those matters to be raised in submissions on the proposed plan, and to be reassessed at that level. Finally, at the point when the plan may be approved by the local authority, the authority must revisit s 32 to determine whether or not the result will satisfy the intent and thrust of another s 32 evaluation. This process is today well-known, with guidance issued through the Ministry for the Environment. Most local authorities are up to the mark with preparing or commissioning and auditing an effective s 32 report.

2.7 Consent applications and Environmental Assessments

Where a resource consent is lodged, any adverse effects should be identified under the mandatory assessment of environmental effects required with the application, as comprehensively prescribed in sch 4 of the RMA. The focus is primarily upon environmental effects, but includes social and economic effects, a description of any mitigation measures, and any consultation undertaken with persons who may be affected. The matters in Part 2 of the RMA (ss 5, 6, 7) will be considered. The depth of assessment is to be proportionate to the scale and significance of the effects, and may refer to positive effects.[42]

In relation to positive effects, the consent authority must have particular regard under s 7(b) to "the efficient use and development of natural and physical resources", and under s 7(j) "the benefits to be derived from the use and development of renewable energy". These expressions encompass the benefits of an application (or possible plan provision for renewable energy

[42] RMA, s 88(2), sch 4.

sites), in contrast to other matters set out in ss 6 and 7 which focus more on the effects in a negative way on the environment. In the *Meridian Energy* case regarding refusal of a windfarm consent in Central Otago, the High Court held that an applicant was not required to show that other sites were available or provide an economic analysis of alternative sites or developments.[43]

Regarding the assessment of effects, the decision of the Court of Appeal in *Auckland Regional Council v Living Earth Ltd*, is instructive.[44] A refusal of consents to establish a composting facility on Puketutu Island in the Manukau Harbour from both the City Council and Regional Authority Council was first appealed in the Environment Court. The Court allowed the appeals and granted the consents. The matter was then appealed to the Court of Appeal. One of the grounds was that the Environment Court had not in its decision considered in a detailed way the policies in the regional document, and that the consents were contrary to regional policy.

The Court of Appeal took the view that as the district plan had to give effect to the regional policy statement, it should be assumed the district plan had in its preparation taken on board the higher level document. The Court looking back on earlier decisions, accepted "the concept of plan integrity (and issues associated with the precedent effect of granting resource consents) has continued to have some relevance under the RMA". Further the fact that if granting a consent would undermine the integrity of the relevant plan, the conditions for granting a non-complying activity consent will not usually be satisfied.[45] The Court concluded that no error of law could be established in relation to the decision of the Environment Court, which had taken the overall broad judgment approach.

In practice, it is not uncommon for conditions imposed in relation to new activities to go beyond the incremental effect of the new activity, and have some impact on the effects which are part of a permitted baseline quota or element. The ability to impose this type of condition, may be clarified by the amendment before Parliament under the Resource Legislation Amendment Bill, which redefines s 108, and requires the consent of the applicant to conditions which do not directly arise out of rules requiring the application or relate to adverse effects on the environment.

This amendment could add an element of complexity to the consenting process in requiring identification of the basis for conditions. However to the extent that the conditions are likely to be consented to by the applicant, as a necessary concession to obtaining approval, any difficulties in practice may not be significant.[46]

2.8 Benefits of proposed developments

In relation to plan changes or resource consent applications, the benefits of a proposed development may be legitimately put forward by any applicant or developer, who is effectively seeking to persuade the council or Environment Court to grant approval. The positive side and benefits will be emphasised. Although the recognition of positive effects is relatively muted and hidden in s 3, it would be commonplace knowledge and practice today for the benefits of any development requiring a consent to be given substantial emphasis by the applicant.

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[43] *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477 at [94] (Project Hayes windfarm proposal – later discontinued).
[44] *Auckland Regional Council v Living Earth Ltd* [2008] NZCA 349, [2009] NZRMA 22.
[45] At [27].
[46] Resource Legislation Amendment Bill 2015, cl 64.

The applicant would probably also offer any draft conditions as foreseen to be desirable to avoid, mitigate or remedy any perceived adverse effects. These matters could include considerations of traffic and noise management, provision of amenities such as local parks and play facilities, local shops and recreational venues, and commercial or industrial opportunities in a large comprehensive development. Many plans include infrastructure for the larger developments, and amenities to achieve a balanced overall community. Examples include major developments such as the Sylvia Park Shopping Centre, and Westgate Shopping Centre in Auckland, and many other retail development sites throughout New Zealand. Inclusion of large car parks is often a feature in selling points, emphasising the benefit and convenience available to the public.

Most district plans have no design criteria or guidelines for buildings, which could be desirable to enhance the visual amenity. Some councils may rely upon informal design panel referrals or consultation to enhance design outcomes. In areas of oustanding natural landscapes, design rules may be included to mitigate adverse effects from structures on the landscapes.[47]

In the context of housing, district plan rules may include policy and possibly rule obligations for a percentage of houses to be set aside or developed as affordable housing. This may be offered as an incentive to approval of new developments. In the *Infinity Investment Group* decision, Chrisholm J stated "…I accept that the primary objective of the plan must be to achieve an RMA purpose, not interference in the marketplace. But I am satisfied, at least in the present context, [the plan change] has the necessary RMA objective".[48]

The legitimacy of incentives has been endorsed by the UK House of Lords in the *Tesco Stores* case involving an offer to finance a link road to a proposed superstore. The Lords recognised that in this modern age, many amenities enjoyed by the public, are unlikely to be provided out of local or central government funding, and it is proper for major developers to offer these facilities under preliminary planning agreements. These agreements should be regarded as material considerations in the assessment of the consenting process as matters of planning gain.[49]

Another aspect of benefit, will be an acceptance of longstanding legal obligations on land subdividers to install public utilities in the nature of sewerage reticulation, water supply, roading, power and telecommunications services. Large developments may be guided by structure plans, and include local parks, sites for retail and business, and other facilities.[50]

The Resource Legislation Amendment Bill proposes to add to s 104, that in assessing a consent application, the authority must have regard to:[51]

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[47] See *Urban Auckland – the Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2005] NZRMA 155, HC – basic design guideline overlooked. The Queenstown Lakes District Council Plan includes guidelines applying to ONL locations. The MfE, *New Zealand Design Protocol* (2005) is a nonbinding guideline.

[48] *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321 HC (plan change policy and rules to encourage affordable housing quota). Chisholm J at [51].

[49] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (judgment of Lord Hoffmann in particular).

[50] RMA, Part 10, ss 218-246 – subdivision and reclamation.

[51] Resource Legislation Amendment Bill 2015, cl 62(1).

> S 104(1)(ab) any measure proposed by the applicant for the purpose of ensuring positive effects on the environment to offset any adverse effects on the environment that will or may result from allowing the activity;

This amendment will provide an improved balance in focusing on positive effects but could be expressed more broadly to encompass all benefits, whether or not related to offsetting any adverse effects.

2.9 Rural-urban boundaries

In relation to land subdivision in areas zoned for rural activities, a longstanding issue in New Zealand has been the question of rural-urban boundaries, the avoidance of sporadic development into the rural areas, and the desirability of incremental development around existing urban sites. These matters were formally recognised as matters of national importance under the Town and Country Planning Act 1977, s 3 but do not specifically apply under s 6 of the RMA. Section 6 does retain longstanding matters of (a) the preservation of the natural character of the coastal environment, wetlands, lakes and rivers and their margins, and protection from inappropriate subdivision, use and development, and (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development, and (c) protection of areas of significant indigenous vegetation and significant habitats. Subject to those matters, the ability of councils to provide adequate zoning for urban and industrial expansion is relatively unconstrained under the RMA.

Section 7(b) identifies the efficient use and development of natural and physical resources, and this provision may provide a justification for policies against urban expansion, where there is no existing infrastructure in place, and substantial costs could be passed onto buyers in an inefficient manner.[52] These constraints have supported other policies of higher-density zoning, with infill housing now being a common zoning objective. The former constraints on infill subdivision have been reduced, and are likely to be reduced further in the future, especially in the Auckland region.[53]

In addition to issues as to connecting trunk infrastructure, another aspect that has limited subdivision of rural land has been the question of precedent of granting of consents on an *ad hoc* basis. A significant series of cases, upheld at all levels of the courts, has established in the past a *de facto* presumption against permitting housing in rural areas.[54]

3 Gaps and Weaknesses in the Guidance

Looking back over the legal situation and sustainable management outcomes, and the case law, the decisions taken can be seen to represent reasonable and justifiable outcomes in the social, economic and environmental conditions applying at the time. Recent changes in population increases within New Zealand, with a significant inflow of population into the Auckland region, have given rise to questions whether the RMA, LGA, and LTMA purposes and procedures are adequate, and to this extent whether changes should be made. One aspect is the

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[52] *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 (economic analysis of proposed rural resort and housing development).

[53] *Lee v Auckland City Council* [1995] NZRMA 241 is an example of an increase in minimum lot size to reduce housing density, in a period when no urban pressure supported higher densities.

[54] *Murphy v Rodney District Council* [2004] 3 NZLR 421, [2004] NZRMA 393 HC (refusal of 6 lot subdivision). [This trend is considered further under Deliverable 3.]

variation of purposes under the respective Acts and the need for better collaboration in policy and strategic planning. Amendments to the Acts or issue of an NPS under the RMA could require councils to be proactive in an enhanced collaborative manner.

Considering the range of changes that could be made and the vehicles for those changes, the following brief points can be made.

3.1 RMA s 5 purpose

The implementation of the sustainable management purpose, does not appear to give rise to any fundamental problem, other than complexity of present plan documents and cost of process. The overall broad judgment approach allows a significant degree of policy and flexibility for councils in determining what is appropriate management to promote social, economic and cultural wellbeing, and health and safety, for communities and people.

The recognition of the environmental matters under s 5(2)(a)(b)(c) has not been interpreted as a fixed bottom line. The Supreme Court in the *EDS v King Salmon* case interpreted the preceding conjunction "while" to mean "at the same time as", in effect confirming the need to weigh up the competing factors in their context, in coming to an evaluation as to the appropriate decision. It is also noted in the *Coromandel* case, this evaluation process is complex, and will take into consideration an extensive range of factors.

The proposed national planning template could assist in the move to consistency of policy, definitions and rules, and reduction in plan complexity.

3.2 S 6 Matters of national importance

Section 6 is essentially aimed at protection of certain elements of the environment, flags the relationship of Maori with their culture and the environment, and is a desirable qualification of the generality of sustainable management. As stated in the *New Zealand Rail* case, this part allows for a degree of policy and flexibility. Matters of national importance do not trump the objective of sustainable management under s 5, and are to be provided for in the context of ultimately achieving sustainable management. For that outcome, in certain situations significant compromises may be made in the application of the matters of national importance. That is a desirable outcome to ensure that all appropriate circumstances can be assessed and implemented if found to be desirable.

The proposed addition to s 6 under the Resource Legislation Bill, (s 6(h)) "the management of significant risks from natural hazards" is not controversial and can be endorsed. Natural hazards is defined in s 2, and includes earthquakes. The Christchurch earthquakes provide a reminder of the need to plan for this risk in allowing development in vulnerable areas. The definition includes flooding, and this is highly relevant to predictable sea level rise, and the need for protective overlays to be included in plans regarding development in flood-prone areas.

3.3 S 7 Other matters

Potentially, another clause could be added in this section, relating to the desirability of ensuring sufficient land availability for urban expansion, as formerly contemplated in the 2013 proposals to rewrite ss 6 and 7. However the Resource Legislation Amendment Bill 2015, cls 11 and 12

will effectively achieve the same outcome by providing specifically for plan functions of local authorities to ensure sufficient development capacity in respect of residential and business land to meet the expected long term demands of the region and district. Regarding the benefits, of additional housing stock and any affordable housing, this objective is not likely to be contradicted or undermined by wording in s 5(2) or in s 6.

Of comparative note, planning laws in New South Wales, South Australia, and British Columbia, all include a specific purpose of making provision for affordable housing.[55] In the UK a statutory duty applies to local authorities, who administer grants from central government, to house the homeless. This social welfare obligation has never been part of New Zealand domestic law.

3.4 S 32 evaluation

The addition to the s 32 evaluation, required as part of the plan preparation process, to consider the effects of rules on economic growth and employment, ought to be sufficient to remind local authorities of the significance and importance of providing for those outcomes, or avoiding policies that may cause a reduction in economic growth or employment.

It could be asserted that the identification and location of the economic growth and employment matters in s 32 is somewhat obscure, but for local authorities which have competent staff and consultants, the present provisions can be regarded as adequate. The same matters could be given greater visibility on a resource consent application and assessment where relevant.

3.5 Rural-urban boundaries

In relation to plans which include rural-urban boundaries, or policies on expansion into rural areas, these policies and rules have been justified in the past through a long series of cases reaching the Environment Court, and higher courts, and unless there is some significant change in the objectives of the RMA, it is difficult to see that any particular type of amendment of the Act is required other than those presently before the House. It is acknowledged that recent new reports indicate the government, through an NPS, will rule out any permanent urban boundary or require further land to be made available for housing if a trigger of unaffordability is reached. Accepting this action, the focus on urban expansion and affordability of land and housing could move to directions on the provision of new infrastructure where required, and the financing of the infrastructure.[56]

3.6 Public participation

The public participation principle is relatively recent in goverance and law, dating from the Town and Country Planning Act 1953 in New Zealand.[57] The RMA provides for input from communities, in addition to the normal consultation expected with central government, iwi groups, other local authorities, Crown ministries and agencies, utility providers, and large stakeholders. Whether public participation should be reduced to written submissions only with

[55] Environmental and Planning Assessment Act 1979 (NSW); Development Act 1993 (SA); Environmental Management Act 2004, Local Government Act 1966 (BC).
[56] See New Zealand Productivity Commission, *Housing affordability inquiry* (March 2012), part 7 "Urban planning and housing affordability"; New Zealand Productivity Commission, *Using land for housing* (September 2015) (financing of infrastructure). Ministerial statements at 31 May 2016.
[57] *Ideal Laundry Ltd v Petone Borough* [1957] NZLR 1038, CA (validity of plan process upheld).

no council hearings and no appeal rights on plan matters, are important aspects of an efficient and democratic system of management. Changes would require high level policy and political decisions. The principle is whether planning should be by the community with generous rights of submissions, hearings, and appeals; or for and on behalf of the community by the elected councils and officials with minimal rights to be consulted or to comment or to be notified of any resource consent applications.

Overseas countries have a variety of systems and procedures, that may appear to be more efficient and less generous to consultation and participation. Presently the trend in NZ is to increase participation by councils with iwi and hapu through mandatory participation arrangements.[58] Input into conservation land plans is limited to the Minister and do not include any appeal rights. Appeal rights generally favour the participants with financial resources or access to finding sources and do not necessarily address the public interest.[59]

3.7 Relevance of existing or new financial or capital investment

Concerning the assessment of benefits in relation to a resource consent application, it is relevant that under s 104(2a) a consent authority must have regard to the value of the investment of an existing consent holder, when considering an application to renew or extend a resource content which may be due to expire. A consent for land use or a subdivision has indefinite duration, so the provision is mainly applicable to consents relating to occupation of a coastal marine area, discharges of contaminants into the air or into water, or a consent to take or use water for power generation, irrigation, and municipal water supplies. As discussed, the case of *Marr v Bay of Plenty Regional Council* (2011) provides a sound example of the importance of the consideration of existing capital investment.

A recommendation could be that the scope of s 104(2a) should be expanded to apply to renewal of any resource consents, and all new resource consent applications. For example, the value of the investment, offered under a proposed resource consent, could be highly significant, and important in situations where that investment would not be available from local or central government, and should be given greater weight. In practice, this is often the situation and councils are generally supportive of local investment.

For example the Sylvia Park Shopping Development included meeting the capital costs of a new railway station for public transport on an existing rail line, and other environmental-type compensation. Most developers would highlight the benefits of capital investment in a plan change or consent application, but in the interests of consistency, the relevance of that type of investment should be applied to both new as well as existing resource consents.

3.8 Development contributions under the LGA

The move to separate development costs and imposts out of the RMA process into the LGA 2002, by way of development contributions levied upon approval of a project, has possibly sidelined the significance of contributions overall under the LGA and RMA. The right of appeal under the RMA on financial conditions does not cover contributions under the LGA. The more recent provision for a review of the LGA charges has provided a useful check on any council assessments.[60]

[58] Resource Legislation Amendment Bill 2015, cl 38 (inserting ss 58K-58P).
[59] The Ministry for the Environment has a contestable group fund to support appeals.
[60] Local Government Act 2002, ss 197AA-207.

Any separate entry into a development agreement does not oblige a local authority to grant a resource consent or other consent, but the economic value and employment potential of such agreements, could be given greater prominence and relevance in the resource consent process.[61] To avoid any claims of pre-judgment which could arise out of the entry into an agreement, it should be mandatory in this situation for the local authority to appoint completely independent commissioners (not including councillors) to assess the plan change or resource consent application.

It is recommended that a further addition could be made to s 104, [in addition to s 104(1)(ab) proposed under the Resource legislation Amd Bill] that in considering a resource consent application, the consent authority should have regard to any development agreement entered into (under the LGA) or otherwise, in particular where it provides for offset compensation.

Another possible addition to s 104, could be to give greater visibility to potential positive effects, as identified in s 3(a) of the Act. In line with the pragmatic recognition in the *Tesco Stores* UK case of the trend and capacity of private enterprise to provide development gains or benefits, s 104 could include a statement "when considering an application for a consent, the consent authority must have regard to any monetary benefit or any other benefit proposed by the applicant." This provision could provide a better balance and transparency between the physical environmental considerations that may tend to dominate in some assessments, and the economic and social benefits that may derive from a development and are recognised under s 5.

3.9 Presumptions on consent application

As noted in development report 1, a provision that has been incorporated into UK planning law, is a presumption in respect of a planning application, that the application should be approved, unless there are appropriate reasons not to approve the application. This type of presumption does not apply in New Zealand unless the matter is a controlled activity consent. In respect of a discretionary activity or limited discretionary activity, there is no presumption either way, and the matter should be assessed on the merits.

In respect of a non-complying activity, there is a limited presumption against approval under S104(D). The non-complying activity can only be approved if it is found to have minor effects on the environment, or the consent will not be contrary to rules in the district or regional plan. This guideline can be justified as part of a policy of requiring plan changes for significant matters that will affect the integrity of a plan, or perhaps have a major effect on the environment. That rationale may be appropriate in some situations, but in many other cases of non-complying activities, which are effectively a residual category in regional and district plans, the hurdle raised to obtain consent could be seen as too high, and limiting appropriate development. The matter has particular application in respect of subdivision of rural land, where the activity is usually classified as a non-complying activity. In these circumstances, many decisions of the Environment Court indicate that it will be difficult for a consent to be granted, as the court may well consider an undesirable precedent will be established, and that alone is enough to reject the application. [62] A number of cases have suffered this particular

[61] Local Government Act 2002, ss 207A-207F. Compare *Anderton v Auckand City Council* [1978] 1 NZLR 657 HC (negotiations with council over Remuera shopping centre prejudging consent approval).
[62] *Murphy v Rodney District Council* [2004] 3 NZLR 421, [2004] NZRMA 393 HC (refusal of 6 lot subdivision).

outcome. A case could be made for repeal of the non-complying classification, and replacement with the discretionary activity classification.[63]

If the question of presumption is to be considered, the UK approach could be evaluated. This could assist appropriate development. A change in presumption could also be a ground for reconsidering the rules relating to limited notification. A case could be made for neighbours to be notified in a broader number of situations, and have an opportunity to make a written submission to the council without any formal hearing or appeal rights. Private plan changes to allow development are expensive and not realistic for the majority of land owners.

3.10 Consents for housing in rural areas

The character of New Zealand as a relatively empty country is perpetuated by a raft of restrictions, deriving since 1973 under matters of national importance: [64]

> (d) the avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:
> (e) the prevention of sporadic subdivision and urban development in rural areas:
> (f) the avoidance of unnecessary expansion of urban areas into rural areas or adjoining cities….

The policies required extra protection of productive soils and pastoral farming at a time when farming was the mainstay of the New Zealand economy. The policies do not acknowledge or embrace the early settlement within the country landscape when cottages and farm houses were able to be erected without any consents from the local authority as to location. A return to a historical and less regimented control over the countryside could be desirable at this present time. The matters above were not repeated in the RMA, but they carry a long shadow in regional policy statements and district plan rules which generally exclude any cluster housing in rural areas. Many cases indicate that local authorities may be unduly conservative and cautious in their unwillingness to give consents to cluster innovations and settlement on lifestyle blocks in rural areas. [65]

The small lot developments may not require expensive infrastructure. It can be noted that Waiheke Island is an outstanding example of incremental development. That island does not possess any comprehensive sewerage system, and has no public water supply. Regardless of these historical shortcomings, the Island continues as a vibrant and highly desirable area for urban settlement.

3.11 Mismatch between the RMA, LGA, LTMA

[63] RMA s 87B (discretionary activity the residual default classifiaction). In the EEZ offshore area, only one type of consent category applies, the marine consent: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
[64] Town and Country Planning Act 1977, s 3, first added to the TCPA 1953 in 1973. The statements were aimed at preventing lifestyle developments (10 arce blocks) in the Auckand region in particular.
[65] Councils generally opposed the use of rural Crown land for ohu settlements promoted by the Kirk labour government in the 1960s.

As stated by a High Court Judge, the provisions of Part 2, in particular s 5, are the "engine room" of the RMA.[66] This engine room may be comprehensive in scope but deficient in powers of implementation by local authorities.

The RMA empowers regional councils, district councils and unitary authorities with the functions of the establishment, implementation and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region and district, and empowers policy statements and plan rules which may be binding on development and activities on property.[67] These functions must be read in the context of obtaining the purpose of the RMA Part 2, and giving effect to national policy statements, national environmental standards and the NZ Coastal policy statement. The definition of "sustainable management" in s 5 is pervasive, and would extend to all activities which contribute to sustainable management, and may also enhance or detract from the environment. Adverse effects on the environment are acknowleged and may need to be avoided, remedied, or mitigated.[68] In practice, the majority of regional policy statements, and regional and district plans, are comprehensive and promote sustainable management.

An issue arises as to whether those plans and objectives can in fact be implemented by the local authority. Historically, urban settlements have been assisted by initiatives and funding by central government, which manages the State highway network, and has responsibility for Crown land, government buildings, funding public schools and hospitals, erecting correction centres, and providing State houses, and the development of land for State housing. The present housing function is administered by Housing NZ.

Regarding the ability of local government to undertake the implementation of the regional and district plans, the powers of local government to spend public money are limited by the powers conferred under the Local Government Act 2002.

Prior to 2002, under the former Municipal Corporations Acts, and the Local Government Act 1974, specific proactive powers were set out enabling local authorities to provide roads, water supply and wastewater infrastructure, and if desired to subdivide land and make the land available for both commercial and residential development.[69] With certain incentives to local councils from central government, a number of local authorities developed pensioner housing and council housing for rental. The funding and construction of infrastructure by councils was a norm, and benefited the owners of adjacent private land who wished to develop the land for commercial or residential structures. Special rates on the locations could be used to finance borrowing for the works. In the past, subsidies have been available from central government to assist the provision of sanitary works.[70]

Under the Local Government Act 2002, the specific powers formerly set out were omitted, upon the reform premise that the newly conferred "power of general competence" and purpose provided under s 10 conferred all necessary authority for continuing these types of developments. Under s 10(b) the purpose of local government was "to promote the social,

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[66] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47].
[67] RMA ss 30, 31.
[68] RMA s (2)(c).
[69] Kenneth Palmer *Local Government Law in New Zealand* (2nd ed Law Book Co 1993), ch 14 'property development and administration'. LGA 1974, ss 247C, 549, 550, 572
[70] Health Act 1956, ss 27, 27A (subsidies in the discretion of the Minister).

economic, environmental, and cultural well-being of communities in the present and for future". This purpose was all encompassing.[71]

In reality, after the 2002 Act came into operation, a number of local authorities in areas with expanding populations, ceased to plan and undertake works for infrastructure development. This lack of focus was partly addressed by amendment in 2011, by the insertion of LGA s 11A, which required local authorities performing their role to have particular regard to core services, which included "network infrastructure".[72]

However, the responsibility for providing network infrastructure, was no longer a core service under the direct control of larger local authorities. The local authorities had in the past established council-controlled organisations, as provided under the LGA and encouraged by central government, to show greater transparency in the funding and management of development activities of councils.[73] For example in the Auckland region, Watercare Services Limited, controlled by an independent board of directors, assumed the function of water supply, and sewerage and wastewater reticulation and treatment. As a consequence, any decisions on the extension of water and sewerage infrastructure into new urban areas or into rural areas, became the prime responsibility of the directors of of Watercare, and the strategic planning obligations and implementation were not regarded by the elected council members as part of their responsibility.[74]

In considering Watercare responsibility for new reticulation, the former councils and the Auckland Council since 2010, has under the council-controlled organisation structure, the opportunity to influence policy and works by approving the 'statement of intent' acquired from a CCO, and borrowing by the CCO will be subject to limits which the elected council may impose.[75] A reasonable inference can be drawn that elected councils have largely sidelined their fiscal responsibility for urban expansion, which in many cases is dependent upon development of infrastructure and services. The council-controlled organisations have control over these works in accordance with policy and operational plans.

Another legal factor that is relevant, is the amendment to the LGA in 2012, by substitution of the purpose under s 10(b). The former broad purpose of enabling well-being, which complements the purpose under the RMA s 5 of promoting sustainable management for community wellbeing, was repealed, and replaced with a more limited purpose of councils to meet needs for good quality local infrastructure, and local public services.

> **10 Purpose of local government**
>
> (1) The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and

[71] Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers 2012), 1.3.
[72] At 1.3.
[73] The establishment of the first local authority trading enterprises (LATE) were compelled by central government as a condition to receiving any roading grants. Under LGA 2002, the LATE became a CCO.
[74] Watercare website: www.watercare.co.nz
[75] LGA 2002, ss 60, 62.

> (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.
>
> (2) In this Act, *good-quality*, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—
>
> (a) efficient; and
>
> (b) effective; and
>
> (c) appropriate to present and anticipated future circumstances.

The reference to good quality local infrastructure clearly continues the power of a local authority to expend public funds on local infrastructure (the latter term is not defined). However the qualification of providing good-quality infrastructure in a way "that is most cost-effective for households and businesses" is certainly a disincentive for local authorities to increase rates or borrow money for the expansion of infrastructure into new areas at public expense.[76] In any event decisions on these operational matters will in Auckland, in all probability be made by the directors of the council controlled organisation.

The former specific powers of a local authority to subdivide land, and erect buildings for commercial and residential purposes, for rental or lease or disposal, appear to be legally doubtful under the revised powers conferred in 2012. Provision of land subdivision and housing is not strictly "local infrastructure", and is not a conventional "local public service". Although a matter of legal uncertainty, conclusions could be drawn that local authorities are no longer empowered to be proactive in providing housing or leading in the area of land subdivision. As a consequence only the Housing Corporation, and private enterprise have the legal capacity to carry out these functions, and implement any supportive zoning of land for urban expansion.[77]

The downside of local authorities not having any specific responsibility for public housing, and no powers of compulsory acquisition for these purposes, leaves the local authorities in a position of dependence on central government and on private enterprise.[78] A local authority has no power to direct the Crown or private enterprise to develop land and erect housing. However, a council could offer some minor incentives by way of rates holidays or rate reductions, if necessary to stimulate industrial, commercial, and residential development.

The Land Transport Management Act 2003 has been the subject of a raft of amendments, and has a brief purpose "to contribute to an effective, efficient, and safe land transprt system in the public interest."[79] The Minister must issue a government policy statement on land transport. The Act includes provisions for consultation with local authorities, iwi and affected persons. The division of responsibility for state highways controlled by the NZTA, and the balance of public roads controlled by local authorities, appears to be a satisfactory allocation of functions.

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[76] During the Parlimentary hearings on the LG Bill amending s 10(b), many concerns about the negative affects of the amendment were raised, but no action was taken. The committee was split on the amendment and made no recommendation. The Bill passed by a majority of one.

[77] Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers 2012), 15.8.1 (position before 2012 amendment to s 10).

[78] The interpretation of the power to acquire land under LGA s 189 remains uncertain due to the changes to s 10(b).

[79] Land Transport Management Act 2003, s 3.

The degree of consultation with local authorities, and the requirement and designation procedures applying to new roading, appear to work adequately.

The only substantial issue appears to be the constraints on funding of local authority roading and rail. The constraints include matters of tolling, and any subsidies for new projects will be subject to the strategies and the management hierarchy of regional land transport plans. The most obvious and efficient method of obtaining extra funding for local authority transport is an increase in the present local authorites fuel tax payable to local authorities, but for policy reasons, central government does not appear willing to assist local authorities on this funding solution.[80] As a consequence, the capacity to develop and fund arterial and local roads to serve subdivisions outside traditional urban limits, is constrained, and partly supports the policies for intensification of existing housing areas rather than expansion of urban limits.

For the future, it could be possible to provide for greater integration of policies and planning under the RMA, LGA, and LTMA, by the Crown and local authorities, through increased collaborative management or amendments to the respective Acts.

4 Conclusion

- In brief conclusion, this report has endeavoured to summarise the statutory caselaw guidance on RMA s 5(2)(c) regarding the bottom-line status and when mitigation is acceptable. As indicated, the approach taken will depend upon the guidelines in the RMA overall, including any relevant national policy statements and standards, and regional policy statements. The overall broad judgment approach will apply.
- The nature and location of the legal guidance and principles deriving from caselaw, the question of recognition of benefits in the process, the weighing of those benefits against adverse effects, and observance of policies and plan rules, have been traversed. The situation applying to plan rules, does not wholly apply to resource consent applications where a greater degree of flexibility in an assessment can be expected.
- In assessing the gaps and weaknesses in the guidance, attention has been drawn to certain matters that could be clarified or improved in the processes, with various comments offered on present issues in the implementation of the RMA and constraints under the LGA. The matter of benefits could be given more prominence. Limitations on the powers of local authorities under the LGA since 2012 to mitigate situations having adverse effects have been noted.
- Finally the appendix offers a redraft of RMA s 104, being the guidelines for assessment of resource consents. If that section is further reformed in the future, the recommendations could be considered.

[80] Local Government Act 1774, part 11, ss 181-200 (local authorities fuel tax - presently in force). Compare LGA 1974, part 11A (additional regional petrol tax - repealed 1996). Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers 2012), 6.13 Petroleum tax.

APPENDIX

104 Consideration of applications *[amendments in italics]*

(1) When considering an application for a resource consent and any submissions received, the consent authority must have regard to–

(*a) the purpose and principles in Part 2 of this Act as a primary or overriding matter; and*
(aa) any actual and potential effects on the environment of allowing the activity; and
(*ab) any measure proposed by the applicant for the purpose of ensuring positive effects on the environment to offset any adverse effects on the environment that will or may result from allowing the activity; and [insert by Resource Legislation Bill]*

(b) any relevant provisions of—
(i) a national environmental standard:
(ii) other regulations:
(iii) a national policy statement:
(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(*aa*), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

(2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must have regard to the value of the investment or proposed investment of the existing consent holder.

substitute

(2A) When considering an application, the consent authority must have regard to the value of the investment or proposed investment, and any past investment.

(2B) When considering an application, where relevant, the consent authority must have regard to the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated, including the opportunities for—
(i) economic growth that are anticipated to be provided; and
(ii) employment that are anticipated to be provided. [compare wording in s 32]

(2C) When considering an application, the consent authority must have regard to any development contribution, development agreement, monetary benefit or other benefit relating to the application.

***Other more radical changes**:*

Abolish the non-complying activity classification under s 77A and s 87A(5), and discontinue the higher gateways for approval under s 104D. This will enable the more balanced default class of a discretionary activity under s 87B(1) to take full effect.

Include a presumption in favour of approval of all resource consent applications (subject to conditions) unless good reason justifies refusal, coupled with a broader obligation on the council to require applicants to give limited notification to adjoining land owners (UK position).

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1 June 2016

New Zealand Productivity Commission

Project: Legal issues in the New Zealand planning system

Report by Dr Kenneth Palmer

Deliverable 3

Contents

A report which:

- briefly describes the place of the Environment Court in the judicial hierarchy, and the role of the Court under the Resource Management Act, and the relative roles of the High Court and Environment Court
- assesses whether there is any merit in the position expressed by some planners that the High Court, rather than the Environment Court, is the primary source of binding judgments on planning cases.
- reviews Environment Court case law on a small selection (eg, 3-4) of topics, and assesses whether the case law constitutes a coherent and consistent set of judgments.

1 Environment Court in the judicial hierarchy, and the relative roles of the High Court and Environment Court

1.1 Introduction

The Environment Court is established under Part 11 of the Resource Management Act 1991 (RMA).

To appreciate the position of the Environment Court in the judicial hierarchy, and in the structure of the constitutional and judicial system in New Zealand, it is desirable to briefly trace the history of the Court.

The origin of the Court is under the Town and Country Planning Act 1953, which established a planning appeal board to consider appeals from council decisions in the preparation of plans, and in the assessment of planning consent applications and decisions.

Prior to that Act, the Town-planning Act 1926, the first planning statute in New Zealand, provided for the establishment of a zoning plan as the appropriate method of regulation and separation of incompatible activities, and was constituted under a structure of ministerial responsibility. Local authorities with a population of 1,000 persons or more were placed under a duty to prepare planning schemes for the district within specified time limits. The schemes were to guide the development of the district "in such a way as will most effectively tend to promote its healthfulness, amenity, convenience and advancement".[1] County councils, in areas not having an urban population of 1,000 persons, were not subject to mandatory direction to prepare a planning scheme.

In 1929, the concept of regional planning was introduced under which adjoining city or town councils and county councils could voluntarily join together to plan for infrastructure crossing council boundaries. The 1926 Act was not effective in leading to planning schemes, due to a lack of expertise on the content of planning documents. Another factor was a reservation of a power of interim control under the 1926 Act if no scheme had been prepared, whereby the council had a discretion to refuse a permit for any development (or subdivision) where considered to be contrary to "town planning principles". Those principles were not defined. The power was effective to control adverse development, but was criticised judicially as being vague and uncertain, and the rule of law required more specific regulation.[2]

Where the planning schemes were prepared, they would be submitted to a town planning board headed by the Minister of Works, which would approve the scheme and could consider applications for exemption or change.[3] The board, headed by the Minister, identified the system as one of ministerial responsibility, being a system that was adopted in the UK in 1947, and remains the governance structure for planning permission in that country.

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[1] Town-planning Act 1926, s 3. Kenneth Palmer *Planning Law in New Zealand* (Sweet & Maxwell, Wellington, 1977), 7.

[2] *Wong v Northcote Borough* [1952] NZLR 417 (power used to require building to be set back from the roadside boundary – decision upheld subject to criticism).

[3] Kenneth Palmer *Planning Law in New Zealand* (Sweet & Maxwell, Wellington, 1977), 8.

1.2 Town and Country Planning Act 1953

The Town and Country Planning Act 1953 (TPCA 1953), represented a change from ministerial responsibility, to a more legalistic model, under which local authorities were directed to prepare planning schemes, with persons affected having a right to make submission to the council, and having a right of appeal to the inaugural Planning Appeal Board. This board was constituted with a legally qualified chairperson, who could be a stipendiary magistrate, and included two other members on the board. The change from a ministerial supervisory panel to an independent appeal board led to increased involvement of the legal profession in the administration of the planning process, with the other professions participating as council officers, planning consultants and expert witnesses. The appeal board, as a statutory board, had no inherent jurisdiction to give declaratory or advisory judgments, but was given jurisdiction to hear appeals concerning plan content, land use consents and subdivision approvals. In respect of water right applications the board had jurisdiction under other legislation. This jurisdiction had a partial effect of integrating or co-ordinating outcomes in relation to land use activities, land subdivision, and water rights.[4]

In 1957, the plan making procedure was the subject of legal challenge in the *Ideal Laundry* case.[5] The Court of Appeal ruled that the provision for public participation, submissions to the council, and appeal rights to the town planning board, were sufficient processes to safeguard property rights, and operative scheme ordinances (rules) would have the binding status of a regulation.

In 1972 the nature of the jurisdiction of the Appeal Board was clarified in the *Wellington Club* case.[6] The High Court determined that the board was correct to hold a formal rehearing of evidence on an appeal, as the council hearings could be informal, and might not fairly safeguard rights of owners. Further, the appeal should be in the nature of an inquiry on the merits of any zoning or consent granted, and no legal onus applied to establish that the local authority views were correct or incorrect.

As a comment, that legal situation of a full rehearing on an appeal has continued to the present day, and could be the subject of further consideration. The circumstances governing the hearing of submissions before councils have substantially changed since 1953, and today the quality of the decision-making at that level would satisfy most legal expectations as to a fair hearing and objective decision-making. This situation, is relevant to considerations later in this report, as to whether the jurisdiction of the Environment Court could be reduced or modified.

The 1953 Act did not bind the Crown in carrying out public works unless the Crown used the requirement procedure, and that immunity enabled central government to construct substantial infrastructure in the nature of state highways, hydro power stations, and electricity reticulation. Other public buildings such as schools, hospitals, and prisons, could be erected

[4] Kenneth Palmer "Reflections on the History and Role of the Environment Court in New Zealand" (2010) 27 Environmental and Planning Law Journal (NSW) 1

[5] *Ideal Laundry Ltd v Petone Borough* [1957] NZLR 1038 (plan enforceable to regulate new commercial building location and size).

[6] *Wellington Club Inc v Carson, Wellington City* [1972] NZLR 698 (Woodhouse J) (proposed zoning subject to appeal).

as the Minister for Works determined. Motorways were planned by way of centre line declarations, which could not be the subject of any public input or appeal rights.[7]

The 1953 Act was successful in enabling local authorities to prepare district schemes. In particular regulations issued in 1960 providing for a model planning scheme, with indicative zones, and regulation, were adapted by many local authorities as a template, for their first planning documents.[8] [Of note the planning template approach is to be resurrected in the Resource Legislation Amendment Bill 2015 before Parliament].

1.3 Town and Country Planning Act 1977

The Town and Country Planning Act 1977 constituted a further step in the evolution of the planning structure and appellate body. The 1977 Act replaced the Appeal Board with the Planning Tribunal, which was stated to be a court of record, with all powers and duties to maintain a record inherent in that court. The chairperson was now required to be a District Court Judge, and the jurisdiction was increased beyond appeals on plan and resource consent matters, to allow for declarations on questions of law as to the interpretation and application of district plans and regional plans, and existing use rights.[9]

In addition the 1977 Act provided for regional plans, which would be prepared by the regional councils, and subject to any appeals, would then be referred to the Minister of Works for approval. The Minister could give directions on any matter of national importance, or a matter having significance beyond the region. These matters if not agreed could be referred bck to the Tribunal for a recommendation. The Minister would ultimately approve the regional plan by order in council.[10]

By 1977, the judicial workload had increased and the Act provided for three divisions of the Planning Tribunal to be constituted. The procedures undertaken by the Planning Tribunal generally followed the protocols and procedures within the District Court, being the court of the same level of jurisdiction. The Tribunal would sit with two or possibly three planning commissioners, and remained a specialist-type tribunal, rather than a body presided over solely by a judge. Increases in the complexity of controls, in accordance with Ministry, council and public expectations under the 1977 Act, led to an increasing judicialisation of the processes at the appeal level. The 1977 Act, like the previous 1953 Act, allowed for appeals on questions of law from the Planning Tribunal to the High Court.

Early High Court decisions clarified the legal position that the Planning Tribunal procedures and functions were of a judicial nature, and accordingly rules of fair procedure applied to the processes, requiring in particular disclosure of relevant documents and evidence to all parties before the tribunal, to comply with principles of natural justice.[11]

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[7] Kenneth Palmer *Planning Law in New Zealand* (Sweet & Maxwell, Wellington, 1977), 23-25. *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301 (University buildings not subject to council approval).

[8] Town and Country Planning Regulations 1960, reg 15 (every scheme statement…and every code [scheme rules] shall follow generally the form set out in the 4th schedule [model scheme], but with such additions, omissions, alterations, and substitutions as may be necessary to express clearly and accurately the intentions and requirements of the district scheme…". See Kenneth Palmer *Planning Law in New Zealand* (Sweet & Maxwell, Wellington, 1977), vol 1, 21-22.

[9] Kenneth Palmer, *Planning and Development Law in New Zealand* (Law Book Co, Sydney, 1984), ch 4.

[10] At 47-51.

[11] *Denton v Auckland City* [1969] NZLR 256 (disclosure of council reports - now required under RMA s 42A).

Both the 1953 and 1977 Acts made provision for assessment of compensation for a person whose property was adversely affected and lost value as a result of zoning or other ordinances in the district schemes. Conversely, provision had earlier been made in the 1926 Act for the assessment of betterment, against those property owner whose values increased as a result of zoning. The provision for betterment in this circumstance was omitted from the 1977 Act, as in practice no betterment had been collected on the basis of increase in value from rezoning. On the other hand, claims for compensation for adverse effect on land value, were circumscribed by certain conditions, and only a handful of cases were attempted, generally with no success.[12] [The provisions for compensation were omitted from the RMA in 1991].

The objectives of planning under the 1977 Act, comprised first an expansion of the matters of national importance. These matters identified the need to conservation, protection and enhancement of the physical, cultural and social environment; preservation of the natural character of the coastal environment from unnecessary subdivision and development; avoidance of encroachment of urban development on land having high actual or potential value for the production of food; the prevention of sporadic subdivision and urban development in rural areas; the avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities [aimed at Auckand in particular], and the relationship of the Maori people and their culture and traditions with their ancestral land.[13]

As outlined in the report on Deliverable 2, the inclusion of the constraints on urbanisation of rural land, have had a longstanding impact supporting the policies limiting urban expansion. These constraints have applied not only to intensive urbanisation, but also the expansion of lifestyle blocks into rural areas. As noted, at this period in New Zealand history, the economic value of the rural area and productivity dominated the economy, and strong government support existed for protecting rural land with minimal urban encroachment.[14] That policy was to undergo a significant change under the RMA at the ministry level, but at the local authority level the tradition of protecting rural land has been largely maintained.[15]

Secondly, the general purposes of planning at the regional, district and maritime level, were similar to purposes first established in 1953, namely that planning should have for general purposes "the wise use and management of the resources, and the direction and control of the development, of a region, district or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social and general welfare of the people, and the amenities of every part of the region, district or area."[16]

Of interest, the general purpose in s 4 of the 1977 Act was expressed to be subject to the matters of national importance being achieved under s 3. The relationship of being "subject to" something was considered in the *EDS v Mangonui County Council* case, where the Court of Appeal accorded the matters of national importance priority over the generality of

[12] TCPA 1977, ss 126, 127. See Kenneth Palmer, *Planning and Development Law in New Zealand* (Law Book Co, Sydney, 1984), ch 13, 733-744 (compensation claims for plan effect). RMA, s 85 (no compensation expectation).
[13] TCPA 1977, s 3.
[14] Kenneth Palmer, *Planning and Development Law in New Zealand* (Law Book Co, Sydney, 1984), 225-229 (rural growth controls)
[15] Derek Nolan ed, *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015), 3.93 (Palmer author).
[16] TCPA 1977, s 4.

planning objectives.[17] By contrast under the RMA, the priorities between the matters of national importance and the general purposes of planning, have been reversed. Under the RMA, the general purpose of sustainable management in s 5 prevails over the matters of national importance in s 6. The latter matters are to be considered as subsidiary to the purpose of achieving sustainable management of natural and physical resources.

1.4 Resource Management Act 1991

The RMA heralded a new era of visionary planning to promote sustainable management of natural and physical resources, as the overriding objective, which has been recognised as the touchstone or lodestar of the legislation. The interpretation of the purpose, matters of national importance, and other matters, specified in ss 5, 6, 7, has been considered in Deliverable Parts 1 and 2. As discussed, the *New Zealand Rail* case included the seminal statement by Justice Greig on the interpretation of those sections:[18]

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and promote the objectives and policies and the principles under the Act".

The final sentence recognises and affirms a view of the function and role of the Planning Tribunal [now the Environment Court], that with special expertise and skills it is expected to take a leadership role in supervising the content of regional and district plans, to the extent that these matters come before the court on appeals. On those occasions, the Court may be able to promote the objectives and policies under the RMA, and set informative guidelines for other councils to emulate.

Another holding in the *NZ Rail* decision is a statement by the Judge on the question whether the cost of the works to be carried out by the Port company in establishing a new export wharf could be the subject of challenge under the appeal procedures:[19]

> Financial visibility in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management under s 5(2)…it is the broad aspects of economics rather than the narrow consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

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[17] *Environmental Defence Soc Inc v Mangonui County Council* [1989] 3 NZLR 257, (1987) 13 NZTPA 197 CA (resort development on Karikari peninsula opposed). The "subject to" phrase continues to feature and raise interpretation difficulties in cases: *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [259] (refusal of mussel and oyster farm in Sounds).

[18] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70, at 86.

[19] At 88.

This deference to the ability of the Crown, local authorities, and other developers to make financial decisions, which should not be the subject of an appeal, has been maintained as a general principle in all hearings. This retains the independence of the financial commitments and avoids the Environment Court dabbling in or taking any supervisory role in public or private expenditure.

As further noted in the Deliverables 1 and 2, the Planning Tribunal in 1977 made the widely endorsed statement that "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…".[20]

The overall broad judgment approach has been qualified by the Supreme Court in the *King Salmon* case, where a higher level document is relevant, such as a national policy statement, national environmental standard, or the NZCPS. Any directive policy or standard must be given effect to by local authorities in plans and probably within the decision-making context on resource consent applications.[21] Other than that qualification, the overall broad judgment approach to interpreting and applying Part 2 remains applicable.

1.5 Environment Court establishment

The next step in evolution of the appellate body, was under the Resource Management Amendment Act 1996, where the Planning Tribunal was renamed the Environment Court. RMA ss 247 and 248 state the position.

> **247 Planning Tribunal re-named Environment Court**
>
> There shall continue to be a court of record called the Environment Court which shall be the same court as the court called the Planning Tribunal immediately before the commencement of this section and which, in addition to the jurisdiction and powers conferred on it by or pursuant to this Act or any other Act, shall continue to have all the powers inherent in a court of record.
>
> **248 Membership of Environment Court**
>
> The Environment Court shall consist of the following members:
>
> **(a)** Environment Judges appointed in accordance with section 250:
> **(b)** Environment Commissioners appointed in accordance with section 254.

The change of the title of the Plannng Tribunal to the Environment Court, was generally endorsed by the relevant professions, in particular the legal profession, as recognising the appropriate status of the Environment Court, including the judge and commissioners, and acknowledging their expertise in applying and promoting principles under the RMA.

The RMA presently provides for up to 10 Environment Court judges to be appointed and a number of alternate environment judges. Appointments are by the Governor-General on recommendation of the Attorney-General, after consultation with the Minister for the Environment and the Minister of Maori Affairs. The Judges have security of tenure, and will

[20] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, at 94.
[21] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

also be appointed District Court Judges at the same time, to ensure that they are available to preside singly over prosecutions under the RMA.[22]

The constitution of the Court is set out in s 265:

> **265 Environment Court sittings**
>
> (1) The quorum for the Environment Court is—
>
> **(**a) 1 Environment Judge and 1 Environment Commissioner sitting together; or
> (b**)** 1 Environment Judge sitting alone for the purposes of section 279 or proceedings under Part 12; or
> **(c)** 1 Environment Commissioner sitting alone in accordance with a direction of the Principal Environment Judge under section 280.
> (2) When an Environment Judge sits with an Environment Commissioner or special advisor, the Environment Judge shall preside at the sitting.
> (3) A decision of a majority of the members of the Environment Court present at a sitting is the decision of the court but, if there is no majority, the decision of the presiding member is the decision of the court.

The Court has specific powers to conduct conferences which may require the parties to attend, and the Court can make directions on all procedural matters. Particular emphasis is included on alternative dispute resolution, as provided for in s 268.

> **268 Alternative dispute resolution**
>
> (1) At any time after lodgment of any proceedings, for the purpose of encouraging settlement, the Environment Court, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing.
>
> (2) A member of the Environment Court is not disqualified from resuming his or her role to decide a matter by reason of the mediation, conciliation, or other procedure under subsection (1) if—
> **(a)** the parties agree that the member should resume his or her role and decide the matter; and
> **(b)** the member concerned and the court are satisfied that it is appropriate for him or her to do so.

The provision for alternative dispute resolution is likely to be amended under the Resource Legislation Amendment Bill 2015, with provision for compulsory mediation, unless the parties obtain an order that this is not required.

In practice the mediation procedure has been substantially successful, with a majority of appeals being settled under this process.

In the civil area, the Court hears appeals in respect of proposed plans, including plan variations, changes, and reviews. It has general jurisdiction to hear appeals in respect of resource consent applications from the applicant, and other parties where the application is notified. Following full public notification any person may make a submission and thereby obtain the status to lodge an appeal. With limited notification, only the parties served with the application, who put in submissions, have standing to commence an appeal. As earlier noted, the appeals are on the merits, and the scope of that jurisdiction encompasses appeals on questions of law, which may be argued as part of the case. The Court has the broad powers stated in s 290:

> **290 Powers of court in regard to appeals and inquiries**

[22] RMA s 309.

> (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.
> (3) The Environment Court may recommend the confirmation, amendment, or cancellation of a decision to which an inquiry relates.
> (4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.

The constitution and quorum of the Court on plan and consent appeals is one Environment Judge, and one Environment Commissioner, but in practice the Court generally comprises the Environment Judge and two Commissioners. The decision of the Court is a majority of members, and if there is no majority the decision of the judge will prevail. A small number of appeal decisions, have involved the judge being in the minority, and the two commissioners making the decision. This is not a common outcome but does confirm the reality that the culture of the Court comprises persons with independent judgment and expertise, which may affect the decisions arrived at. The decisions must be in writing, and this is an important safeguard to principles of fairness and natural justice. The decisions generally will set out the facts in brief, the law applicable, including all relevant national documents, plan rules, and determinations as to the outcome.[23] At the council level, guidelines are prescribed for specifically the content of decisions to be given by consent or hearing authorities.

At the appeal level, the Court has all the responsibilities and discretions of the body below, normally being the council or possibly a requiring authority in respect of a public work or utility. The Court must have regard to the council decision, but it is likely to state in its own judgment any differences of outcome, especially where the Court allows an appeal and comes to a different conclusion.[24] The procedures before the Court follow a Practice Notice 2014, which sets out concisely the essential guidelines to be followed by parties accessing the jurisdiction of the Court by way of appeal, or original application.

Regarding party costs, the Court has a discretion to awards costs.[25] An unsuccessful party may be ordered to pay costs to another party or to the Crown or the council. The discretion is exercised having regard to the Practice Notice 2014, and higher court decisions which set out the principles to be followed. Generally costs are not awarded against parties in plan making procedures to encourage public participation. In resource consent procedures, costs are more commony awarded against unsuccessful parties. The risk of an award of costs is an important element of legal advice in regard to taking appeals or joining in appeals to the Court. Commonly, community groups will form incorporated societies to protect against any personal award of costs.

To prevent misuse of the appeal privilege, a party may seek an order for security of costs where an appeal lacks any merit, or the appellant has no assets to pay any later award of

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[23] Derek Nolan ed, *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015), 2.21, 3.17, 3.108 (Environment Court role). Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012), 17.9.
[24] RMA, s 290A
[25] RMA, s 285.

costs.[26] Local interest groups and environmental groups are not immune from costs liability which provides a necessary discipline in the management of appeals.[27]

1.6 Consent orders

Related to the mediation procedures followed by the Court, which involve the supervision by an Environment Commissioner, the outcome of a settlement or consensus reached, may be the lodging of a consent order for approval by the Court. In this context, a recent decision of the High Court in *Hurunui Water Project Ltd v Canterbury Regional Council*, is relevant.[28] In this case, an earlier decision of the Environment Court in *Amuri Irrigation Co Ltd v Canterbury Regional Council*[29] was the subject of further appeal on a question of law. The *Hurunui* company had applied to the Canterbury Regional Council to take water for irrigation purposes and had been refused. The company appealed to the Environment Court, but before the hearing commenced entered negotiations and came to an agreed outcome under which the consents would be allowed with conditions. The parties lodged a memorandum seeking approval of the consent order, but the Environment Court raised certain questions as to the content and conditions relating to control of nitrogen loads. At this point, the parties decided to withdraw the appeal, and the consent order. The Environment Court declined to allow these actions to be taken, on the basis that there appeared to be a possible abuse of process, and the Court had a function to consider the public interest.

The parties then took the matter to the High Court, claiming there was no abuse of process, and they were entitled to withdraw the appeal documents and the consent order. In the High Court, Justice Mander ruled that the Environment Court had jurisdiction only as long as an appeal document remained before it, and the parties had a general right and freedom to withdraw the appeal documents. On that basis, the Environment Court had no jurisdiction to give any further consideration to the terms of the proposed consent order, and the application for approval could also be withdrawn. Mander J also stated that the Environment Court had no power to require the settlement agreement to provide a "better outcome" under the RMA, than could have arisen under the earlier decision. The parties were generally free to come to their own agreement. If the Court did not wish to approve the order, that was a right that it had. The parties could then consider other options or perhaps apply afresh to the council for a consent. If no appeal was then taken, as would probably be the situation following the agreement amongst the parties, the Court would have no jurisdiction to intervene.

1.7 Overview of Environment Court jurisdiction

This recent decision highlights the fact that the Environment Court jurisdiction is dependent upon councils or other parties lodging appeals or referrals to the Court. The Environment Court has no originating jurisdiction to investigate issues, without a party applying for that type of determination, possibly by way of a declaratory procedure.

A conclusion can be drawn, that the ability of the Court to influence or fashion planning rules, is largely dependent upon the nature and quality of cases that are appealed or referred to the Court by other parties. In reality, the Court only deals with a small proportion of

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[26] RMA, s 284A.
[27] *Peninsula Watchdog Group Inc v Coeur Gold NZ Ltd* [1997] NZRMA 501 HC (costs award against environmental group).
[28] *Hurunui Water Project Ltd v Canterbury Regional Council [2015] NZHC 71, [2016] NZRMA 71.*
[29] *Amuri Irrigation Co Ltd v Canterbury Regional Council [2015] NZEnvC 164, [2016] NZRMA 1.*

planning issues. In many local authority districts, the level of appeals is significantly below that of other areas, indicating that the councils are able through their methods of consultation, and resolution or mediation, to come to outcomes which do not require any appeal consequences and delays.

Accepting this overview, the influence of the Court in the resource management system could be uneven and subject to decisions in the market place, and in relation to property rights and expectations, as to whether the issues ever come before the Court. An example of this situation is in respect of motorway and highway planning. If NZTA or a council does not put forward in a plan change or a requirement for a road, the desirability of the highway will never come before the public, and no opportunity will arise for submissions on those matters. Major roading proposals may however receive separate input under the LTMA.[30]

In relation to plan reviews, in theory, all issues of planning in a regional district are open for submissions, which may address or advocate for things not included in the respective plans. To that extent, issues can be introduced by the community which are not part of the council proposals or those of a utility provider. One weakness about this situation, is that the Environment Court has no power to order the expenditure of funds, at least not in a direct manner, but at best may indicate through confirmation of zoning or rezoning, that certain areas should be developed in a particular way. This situation is particularly relevant to expansion of urban areas into the countryside, in which instance, the Court if it is involved through the appeal process, does not have any executive powers to plan the areas, or to require expenditure of public or private funding on infrastructure. The Court is mainly reactive, and not proactive as to scope.[31]

1.8 Role of the High Court

The High Court has specific jurisdiction under RMA s 299, to hear appeals on questions of law. Otherwise, under s 295, a decision of the Environment Court is final unless a re-hearing is sought or an appeal lodged.

In setting up the structure of the RMA, the structure first set up in 1953 has been maintained. From that date, the decision of the appeal body, being the Planning Tribunal and now the Environment Court, was always envisaged as being a final appeal on matters of fact and the merit of those facts. The intention of limiting the right of appeal to the High Court to a question of law, was to avoid any full scale re-hearing of factual matters before the High Court, or attempts to introduce new evidence on the facts at that level.

The legal issue as to what constitutes a question of law, has been determined in a number of case decisions. A question of law has been held to cover the following matters, as to whether the Environment Court:[32]

(a) applied a wrong legal test
(b) came to a conclusion without evidence or was one which on the evidence could not reasonably have been reached, or
(c) had taken into account matters that should not have been taken into account, or

[30] Land Transport Management Act 2003.
[31] RMA, s 293 allows for limited in scope direction by the Court.
[32] Derek Nolan ed, *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015), 3.111 (case references). Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012), 17.10.

(d) failed to take into account matters that should have been taken into account.

Although questions of law may also relate to interpretation of specific sections in the RMA or in regional and district plans, and higher level documents, those pure questions of law, can be embellished by other matters regarding the decisions reached. The ground that a question of law includes consideration as to whether a conclusion could have been properly reached on evidence before the lower body, allows questions to assess the strength of evidence, and whether the conclusion was a reasonable conclusion on the evidence given. This in effect is a re-examination of the merits, limited only to the existing evidence, without a power to introduce new evidence.

Judges in the High Court are aware of these limitations, but usually do not shy away from determining a matter which on the merits appears to be incorrect as to process or substance.

Examples of this situation are found in:

- the *Friends and Community of Ngawha* case, involving the approval of a designation for a corrections facility;[33]
- the *Arrigato* decision, involving an issue whether an undeveloped area of natural landscape and coastal headland adjacent to Pakiri Beach could be subdivided into 14 lots;[34]
- the case in *Dye v Auckland Regional Council*, as to whether a six lot subdivision could be approved in a rural area next to the Kumeu township;[35]
- and more recently the two cases before the Supreme Court in *EDS v King Salmon,*[36] and *Sustain our Sounds v King Salmon*.[37]

The latter two cases involved, as well known, whether four salmon farms could be properly approved in the Marlborough Sounds. The farm adjacent to an area of outstanding landscape was disallowed due to non-compliance with the NZCPA. In each of the Court cases outlined, the Courts examined the factual evidence and merits of that evidence, and considered whether the conclusions reached at the board of inquiry or Environment Court level were reasonable outcomes which could have been found. In the *SOS* case in particular, the Court assessed in detail the credibility of the evidence relating to water quality measurement, and concluded on the expert evidence that conditions providing for adaptive management would be effective. This exercise is in reality an investigation into the merits, rather than a limited question of legal interpretation of a section in the Act or rules in a plan.

This appreciation of a question of law has relevance on the issue as to whether the jurisdiction of the Environment Court should be changed from that of appeal on the merits which includes questions of law, or reduced to appeals on questions of law alone.

1.9 Judicial review

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[33] *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401.
[34] *Arrigato Investments Ltd v Auckland Regional Council* [2001] NZRMA 481.
[35] *Dye v Auckand Regional Council* [2001] NZRMA 513.
[36] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.
[37] *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, [2014] NZRMA 421

Under the RMA, the High Court retains its traditional right to consider any application for judicial review. The only qualification is that where a right of appeal applies to the Environment Court, that right of appeal should first be undertaken before judicial review is sought.[38]

The right to take judicial review can be exercised by persons who are not necessarily parties to the determination that is being challenged, and this could occur in respect of a decision by the consent authority not to notify a resource consent application. A significant number of applications by way of judicial review have been made to the High Court against these determinations by local authorities. Where there is no notification, other parties who claim to be affected, do not have the standing to make a submission or to appeal to the Environment Court. The only remedy for these parties is to seek judicial review.

The recent cases include the *Coromandel Mainstreet* decision involving the Coromandel District Council not giving public notice of an application to erect a supermarket in Coromandel Township, which was approved.[39] The judicial review case failed on the ground that the council had exercised its discretion on notification correctly, and delegation of this function to a planning officer, and delegation to make the consent decision on the merits, was found to be lawful and a reasonable outcome. In the *Sutton* case in South Canterbury, a council failed to give limited notice of an application for a water right, which could affect another farmer in the same catchment area.[40] In this instance, the Court found that notification should have been given and quashed the council decision. Another example is that of *Urban Auckland v Auckland Council*, in which a non-notified consent granted to Ports of Auckland to extend the Bledisloe Wharf into the Waitemata Harbour, was found to be faulty.[41] Special reasons existed requiring the application to be notified, and this provision had not been properly examined.

It is of interest, that a former amendment to the RMA to give jurisdiction to the Environment Court in respect of decisions on non-notification, by way of a declaration on the point, was enacted, but has not been brought into effect.[42] The reasons for this are not known, but it could be assumed that the Court did not want the extra jurisdiction, on the assumption that it might be inundated by applications on the matter. In more recent times, the workload of the Environment Court has reduced, and it could be logical for the Court to have that jurisdiction. Another view is that, persons should be discouraged from challenging council decisions, and by leaving the jurisdiction solely with the High Court, the cost factor will deter applications at that level.

2 High Court as the primary source of binding judgments on planning matters

2.1 The Courts heirarchy

[38] RMA s 296.
[39] *Coromandel Mainstreet Inc v Thames-Coromandel District Council* [2014] NZRMA 73 CA (proposed supermarket – heritage and design issues – non –notification upeld).
[40] *Sutton v Canterbury Regional Council* [2015] NZHC 313, [2015] NZRMA 93.
[41] *Urban Auckland, Society for the Protection of Auckland City and Waterfront Inc v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235
[42] Resource Management Amendment Act 2005, s 115(3) which would have inserted s 310(ga) into the RMA (whether consent deicion was unauthorised or otherwise invalid).

Under the conventional legal hierarchy, as accepted to be applicable throughout the court jurisdictions in New Zealand, the structure and constitutional operation of the hierarchy may be governed partly by statute, and partly by convention or inherent powers under the common law. In instances relating to appeals from councils and consent authorities to the Environment Court, the Court is given specific powers to make orders which include substituting matters on the merits and having all the powers of the lower body to make determinations. This gives the Environment Court the ability to stand in the shoes of the council, and to alter all things, including matters which would appear to be pure policy determinations by a council.[43]

In this area, the Environment Court is conscious of the distinction between the constitutional function of an elected local authority with a function to govern and make decisions by or on behalf of the community, and to be accountable at triennial elections. The Court will be aware that it does not have this level of accountability, and should not necessarily override or substitute its own opinions on matters of policy where the policies are ones that could reasonably be held by the elected body. This attitude and question of degree of intervention, is reinforced by a huge range of decisions under the common law on administrative law, and the Court will be aware that it can be the subject of appeals on questions of law to the High Court, or possibly judicial review, and should be cautious in entering into policy matters. That stated, where there is a policy vacuum, the Court may by necessity need to take a leadership role. This is discussed subsequently in relation to decisions concerning the identification of areas of outstanding natural landscape, and protection of those areas, and on the question of policy regarding protection of rural land.

In conventional legal principle, the Environment Judges, at the same level, being that of the District Court, do not regard themselves as bound by decisions of other divisions of the Environment Court. It is therefore open for one court to disagree with a step taken by another court. The convention in this matter is that courts will have respect for decisions taken at the same level by other courts, and will not ignore those decisions without giving the matter some appropriate consideration. Conventional legal process and systems state that relevant decisions at the same level may be adopted, or distinguished, or simply disagreed with between the judges as to the correctness of the legal conclusions. In New Zealand, to the extent that appeals in different parts of the country will involve different resource management documents, and a multitude of factual considerations, the conclusion has been reached that no binding precedent exists between decisions at the same level.

2.2 Precedent issues in decisions

Regarding decisions at a higher level, it is clear that an appeal to the High Court on a question of law can result in a determination which may direct the Environment Court to reconsider its decision in light of findings made by the High Court. That is the usual outcome when the court finds the Environment Court decision to be wanting or incorrect in some aspect. Occasionally the High Court will come to a final decision on the outcome of the case, but normally the case will be remitted for reconsideration by the Environment Court being at the lower level of the hierarchy. In the *Dye* case, the Court of Appeal stated that decisions on planning applications do not in themselves establish a precedent, in respect of other

[43] RMA s 290.

applicants who are considering similar outcomes. The Court expressed an authoritative view on precedent as set out below:[44]

> [32] The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities. The present application had a number of particular features which have already been noted. The most significant of them for present purposes are the lack of any need for extension of the public infrastructure, the poor productive quality of much of the relevant land, the largely rural residential character of the locality, and the existence of the two nearby restaurants. The Environment Court's view on the question of precedent effect was:
> "In this instance we do not consider that a precedent will be set by granting the application. As we have said, the proposal:
> - • does not detract from the rural character;
> - • does not exclude land of high productive capacity from primary production;
> - • makes detailed provision for substantial restoration of land that has suffered from the debilitating effects of past development."

The Court emphasised that every factual situation is likely to be different and that is sufficient to hold that no strict legal precedent arises from one decision which may be insisted upon must bind the council in relation to a similar application. On the other hand the Court does acknowledge that there may be similar features between decisions, and this has particular relevance to applications to sub-divide rural land for housing purposes. In the particular case the Court did not consider a precedent would be set.

The *Dye* decision can be balanced against a later decision in *Murphy v Rodney District Council*, where an application to divide land into six house sites also, was refused. In this case, the High Court upheld the determination of the Environment Court that the consent should not be granted, and acknowledged that there was a precedent factor in the background to the decision. The Court stated in para 39:[45]

> "It does not follow from the fact that rigid precedent is unattainable that no regard may lawfully be had to broadly summon the decisions. To say that is not to import into environmental decision-making the rigid doctrine of precedent described….human experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which is the duty of the courts, as well as others who make decisions on behalf of the public, to avoid. It is only sensible for consent authorities to do so if they wish. The law does not say they may not; only that they are not obliged to.

2.3 Respect for Court decisions

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[44] *Dye v Auckland Regional Council* [2001] NZRMA 513 at [32].
[45] *Murphy v Rodney District Council* [2004] 3 NZLR 421, Baragwanath J.

The respect that may be shown by the legal profession, the planning profession for decisions of the High Court, the Court of Appeal, and the Supreme court, mirrors the expectation that the expertise in the upper hierarchy of courts is likely to be more authoritative than the expertise in the lower level which is the Environment Court. The assumption is made that the higher level decisions may be made in a more measured manner without the pressures of dealing with a multitude of appeals, which can be the daily experience at the Environment Court level. An expectation is that the Judges at the higher level should be more expert in their analysis and ability to determine principles and come to reasoned decisions, and possibly more objective in relation to prevailing matters before the Environment Court. Whether that expectation is justified or not, will be always a matter of debate and comment.

The author's view is that a number of the judges at the higher levels have had detailed experience in resource management matters. At the present time, officially there is no practice of specialisation in the allocation of the RMA cases at the High Court level. That stated, there appears to be an informal practice of assigning important resource management appeals to High Court judges who do have in depth experience in the area, and this will usually result in a decision of excellence which can be given significant weight by the practitioners who must then apply the decision. The decisions in the *King Salmon* cases come within this range, and are respected for their quality and finality. Decisions that may be questionable or debatable, may be subject to further appeal, and may become the subject of academic debate and article-writing. Another outcome could be consderation by the Ministry for the Environment, as to possible changes to the RMA or regulations on national standards or policy.

Secondly, as decisions of the higher court bind all lower courts, obviously a decision of the Supreme Court on questions of notification of resource consents (*Discount Brands* case[46]) and the interpretation of national policy in the *King Salmon* cases[47], will have the greatest respect as the determinations by that Court are by convention binding on the determinations of the Court of Appeal, the High Court, and the Environment Court in that order. The umbrella effect of the higher level decisions is self-evident, and must command respect. If ignored by local authorities, or even the Environment Court, further cases on appeal can be taken to clarify or rectify the situation.

At the Environment Court level, the Judges will all be familiar with the doctrine of precedent and the expectations to follow higher level determinations on relevant matters, unless those determinations can be distinguished on the facts, or in the context. In that event it will be expected that the decision at the Environment Court level will give reasons why the higher court level decision should not be followed.

An example of the precedent effect, and respect for higher level decisions, can be seen in the *Man of War Station Ltd v Auckland Council* case relating to the ability of Auckland Council to include in the regional policy provisions for recognition and protection of outstanding natural landscapes on Waiheke Island.[48] The Environment Court had taken into account the *EDS v NZ King Salmon* decision in coming to a view that it was competent for the Auckland

[46] *Discount Brands Ltd v Westfield* (NZ) Ltd [2005] 2 NZLR 597 (notification important for public participation).
[47] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.
[48] *Man O' War Station Ltd v Auckland Council* [2015] NZHC 767, [2015] NZRMA 329.

Council to find that parts of Waiheke Island, both as to the coastline and inland could qualify as areas of outstanding natural landscape. This was challenged by the property owner, and taken to the High Court. The High Court also considered the effect of the *King Salmon* decision, and confirmed the reasoning and findings of the Environment Court as being correct. It was competent to have areas assessed on a regional basis, rather than New Zealand-wide, and it was competent to find inland areas of the island could have the quality and status of outstanding natural landscapes. A consequence of the case was to respect the authority of the Supreme Court in the *King Salmon* decision, but also to determine that that decision did not prevent further recognition of outstanding natural landscapes, and the council was entitled to come to the reasonable resource management policy provisions that protected the landscapes.

Also, at the same time the Man *of War Station Ltd v Auckland Council* case involving an application to approve a dwelling within a special landscape area on the island, was able to be approved on the merits, after consideration of the *King Salmon* decision.[49] That decision did not rule out an activity in the landscape which had a minor or transitory adverse effect, and did not need to be prohibited to preserve overall a natural character of the coastal environment. The question of precedent can be shown to work pragmatically in most situations. Judicial decisions are a primary source of binding judgments to the extent that they are higher on the hierarchy, and above the Environment Court level. As initially stated, the Environment Court judges may come to differing decisions within themselves, although this is not a common situation.

Where there is a conflict of decisions at the Environment Court level, the matter is usually determined at some point in time by an appeal to the High Court, where the conflict can be resolved. That effectively was the situation in the *Hurunui* case, where there was a difference of approach at the Environment Court level as to whether or not parties were free to withdraw appeals, without having to justify the withdrawal. The Court found no evidence of abuse of process.

3 Environmental Court case law selection

3.1 Landscape protection

The protection of outstanding landscapes under RMA s 6(b) is a matter of national importance to be recognised and provided for: (b) "the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development."

The application of this matter has been largely implemented by decisions of the Environment Court, in relation to in Queenstown Lakes District Council area.

The most well-known case is the decision in *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council*, which considered references about the district wide plan recognition of landscapes.[50] The Court in its judgment commenced with a poetic reference to Dennis Glover in relation to the district: this "country crumpled like an unmade bed". The question was how it could be sustainably managed, and it was common ground that there were outstanding natural features and landscapes within the district. The Court referred to an

[49] *Man O' War Station Ltd v Auckland Council* [2014] NZEnvC 260, [2015] NZRMA 287.
[50] *Whakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59, Judge Jackson presiding.

earlier decision in a Pigeon Bay case relating to aquaculture in Banks Peninsular, that in making an assessment of the significance of the landscape, there were a number of features to be evaluated, including natural science factors, aesthetic values, expressiveness, transient values, shared values, value to *tangata whenua*, and historic associations. These matters could be applied in determining the question before the Court.

The Court initially considered the meaning of the word "landscape", and whether it required the landscape to be pristine or not. It referred to the *NZ Rail* case in relation to interpretation of Part 2 that enabled policy to be applied in a general and broad way; whether the landscapes contained outstanding natural landscapes required some analysis of the meaning of the word "outstanding", and the fact that this could be assessed within a regional or district context. The term "natural" should be interpreted to be not limited to ecologically natural, but could also include landscapes with some change and human imprint. The Court advanced a proposition that there could be broadly three types of landscapes. First the "outstanding natural landscapes" which would in the district be the romantic landscapes – the mountains and lakes. In a second category termed "visual amenity landscapes", the land could wear a cloak of human activity, and included pastoral or arcadian landscapes with more houses and trees, introduced grasses, tending to be on the downlands. These landscaes could be adjacent to the outstanding landscapes or onridges and hills. A third residual category would be all other landscapes, which may have various qualities pointing towards protection. The Court acknowledged that very often the best managers of landscapes were the landowners. "It is difficult to manage landscape by committee – and most positive, imaginative landscaping comes from individuals left to work in their ways and with their own landscape architects. However retention of existing "open space" qualities, especially those enjoyed passively by the public rather than landowners, are not so simply protected by the market, and hence the possible need for management by the RMA".[51]

The standard of evaluation stated in the *Wakatipu* case, has been consistently applied by all divisions of the Environment Court in many different circumstances. For example in *Gannet Beach Adventures Ltd v Hastings District Council* (2004), the question was whether a high-end tourist lodge development should be approved adjacent to Cape Kidnappers.[52] The Court evaluated the biodiversity purposes in retaining the wildlife area in a manner which would be unaffected by buildings and other activities, and was also a place enjoyed by some 25,000 people as visitors to the Cape gannet colony every year. The place was an outstanding natural feature, and as the consent required approval of a non-complying activity under the plan, it was almost self-evident that the protection of the area did not enable the consent to be granted. The Court further noted opposition from Iwi, which under the matter of national importance s 6(e), the relationship of Maori with their ancestral lands, was another consideration holding against approval of the resort.

In contrast to those decisions, the Environment Court was required to determine, as already noted, in *Arrigato Investments v Auckland Regional Council*, whether a proposed subdivision of 14 large lots above the cliff face behind Pakiri Beach, was an area of outstanding landscape.[53] The matter was not listed as such in the plan, but was recognised by the ARA as an impressive area in a coastal situation. The Court determined that it did not qualify as an outstanding natural landscape. Secondly it held the matter in s 6(a), concerning the protection of the natural character of the coastal environment from inappropriate subdivision,

[51] At [93], [95].
[52] *Gannet Beach Adventures Ltd v Hastings District Council* [2005] NZRMA 311, Judge Thomson presiding.
[53] *Arrigato Investments Ltd v Auckland Regional Council* [2001] NZRMA 481.

could be balanced against an offer by the developer of restorative planting of the land. The existing situation was a cliff area of open farmland, but not used for productive purposes, due to the steep terrain. The company offered a substantial replanting programme, which could potentially restore the land to its more historic state of bush-covered terrain. The Court agreed with that restoration programme, imposing a condition for deposit of a substantial bond to ensure compliance. Although the case was appealed through to the Court of Appeal, the Court of Appeal agreed that the decision to allow large lot subdivision was a reasonable decision that could have been arrived at by the Environment Court, recognising that its own jurisdiction was limited to appeals on question of law.

The recent Supreme Court decision in *Environmental Defence Society v New Zealand King Salmon Co Ltd*,[54] was an appeal from the findings of the Board of Inquiry. The Board was headed by a retired Environment Court judge, and could be regarded as a decision at that level of the Court. As noted, the Board was found to have acted incorrectly in allowing the plan change to facilitate a salmon farm in an area of outstanding natural landscape, recognised as such in the district plan, and therefore covered by a provision in the New Zealand coastal policy statement. That provision stated that development should be avoided in areas of a natural outstanding landscape, and to give effect to that policy, the plan change could not be approved. The overall broad judgment approach was not applicable in that situation involving a plan change, and may still be problematic on a resource consent application.[55]

A conclusion could be reached, that the methodology and standard of evaluation of landscapes laid down by the Environment Court, has been generally accepted and followed by local authorities throughout New Zealand. This has resulted in effective implementation of the objective in s 6(b) to protect outstanding natural features and landscapes from inappropriate subdivision, use, and development. The most recent *Man of War* decisions, involving an Environment Court decision approving a dwelling, and a High Court decision approving the application of those overlays, on Waiheke Island, confirms the pragmatic implementation of the guidelines laid down by the Court.[56]

3.2 Rural land subdivision and developments

In Deliverable 2, it was noted that under the Town and Country Planning Act 1977 the matters of national importance included the avoidance of encroachment of urban development, and the protection of, land having a high or actual value for the production of food; and the prevention of sporadic sub-division and urban development in rural areas, and (f) the avoidance of unnecessary expansion of urban areas into rural areas.[57]

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[54] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

[55] In *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 (9 May 2016) at [263], the Court expressed doubt as to whether the broad overall judgment approach can still be applied, when coastal plan and NZCPS policies emphasis protection of the coastal areas. By a majority (including Judge Jackson) the Court declined to grant a consent for a mussel and oyster farm where the habitat of the King Shag could be diminished. They declined to endorse adaptive management to overcome the precautionary approach.

[56] *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035, [2016] NZRMA 55, is a further decision upholding minimum 25 ha site areas for restricted activity subdivisions of productive land on Waiheke Island, rejecting a claim for 15ha size.

[57] Town and Country Planning Act 1977, s 3.

These matters were influential in both regional policy and district plans, maintaining relatively strict controls on subdivision of rural land. The model guidelines envisaged a 50 acre minimum lot size for farming subdivision. This arbitrary size was generally discontinued in later plans which often included an economic unit test for subdivision. These tests were upheld by the Planning Tribunal at the time. Under the RMA, s 6, matters of national importance, do not carry forward or include the earlier matters outlined. The RMA refers in s 6(a) to the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins from inappropriate subdivision; and (b) and protection of outstanding natural features and landscapes; and (c) the protection of areas of significant indigenous vegetation. Under other matters in s 7, regard must be had to (b) the efficient use and development of natural and physical resources; (c) maintenance and enhancement of amenity values;(d) intrinsic values of ecosystems, and (f) maintenance and enhancement of the quality of environment.

Cumulatively, these guidelines do not rule out urban expansion. The cases indicate a partial incremental change of focus. In *Todd v Queenstown Lakes District Council 1992*, the Tribunal held that financial hardship was not a sufficient justification to approve a sub-division of a smaller rural lot. Decisions should be made on objective grounds, not on personal circumstances.[58] In *Burnett v Tasman District Council*, the Tribunal found that the fact that rural land was unproductive and perhaps a wilderness area, did not mean that the land should be subdivided to make better use.[59] The Court considered that wilderness or unoccupied land had an intrinsic value in itself. Another decision, *Houchen v Waikato District Council*, the subdivision of a four hectare lot into two hectare lots in the Bay of Plenty was held not to be justifiable simply because the owner wanted a smaller amount of land to look after in his advancing years.[60] Other options were open to lease out the land. A sub-division would be permanent, and could also set a precedent.

Regarding utilisation of unused buildings in rural area, *Manos v Waitakere City Council* (1994) was a decision of the Tribunal declining to allow an unused fruit packing shed to be used for a commercial purpose of garment making. The Court was concerned about the precedent of allowing an unrelated commercial activity in a rural area. This decision was upheld by the Court of Appeal on the ground that the precedent could undermine the integrity or purposes of the rural zones.[61]

In 1997, two decisions in the Canterbury area, indicated a change of attitude of the Ministry for the Environment towards the protection of versatile soils. In *Becmead Investments*, the application was to rezone two smaller areas for housing on the fringe of Christchurch City.[62] Of 400 submissions lodged all but three opposed the development which was refused by commissioners. On appeal to the Environment Court, the Court refused to give the protection of soils recognised under s 5(2)(b) an absolute meaning that soils could not be developed. Considering the need for new housing, the rezoning application would be approved. Maintenance of the rural character or soils in proximity to the city was not an inflexible obligation under the RMA, and the interface between urban and rural land and versatile land

[58] *Todd v Queenstown Lakes District Council* (1992) 2 NZRMA 182, Judge Sheppard presiding.
[59] *Burnett v Tasman District Council* [1995] NZRMA 26, Judge Willy presiding.
[60] *Houchen v Waikato District Council* [1995] NZRMA 26, Judge Sheppard presiding (subdivision of land for chestnut farming as an economic use declined).
[61] *Manos v Waitakere City Council* [1994] NZRMA 353 CA.
[62] *Becmead Investments Ltd v Christchurch City Council* [1997] NZRMA 1, Judge Bollard presiding.

would not be undermined by the change. The Minister's submission, in support of the rezoning, that thousands of hectares of productive soils remained was upheld.

In another decision, *Canterbury Regional Council v Selwyn District Council*, the Court came to a similar decision in approving a subdivision of rural land adjacent to the Lincoln township.[63] The urban land was required for accommodation of the student university population, and no other zoned land was available. The Minister participated as a party and supported the rezoning and opposed the regional council. The Court stated that "the protection of versatile land is no longer recognised by the RMA as of national importance". It was desirable that the urban expansion should take place close to the area of activity of likely occupiers who would attend Lincoln University.

A further case of the Court upholding incremental development into rural areas, was *Dye v Auckland Regional Council*.[64] Here the Court approved, against the opposition of the regional council, a six lot sub-division adjacent to the Kumeu township. The decision was upheld at the Court of Appeal level, as not constituting a binding legal precedent as to other applications that might occur, and not in itself creating an adverse cumulative effect in the area. On the other hand, decisions such as *Murphy v Rodney District Council*, indicate that where the Environment Court declines an application on appeal for subdivision of a rural area, the merits of the decision are likely to be confirmed by the High Court on a question of law.[65]

A most recent decision of the Environment Court, *Harris v Central Otago District Council*, the Court was willing to approve a new dwelling in a rural landscape area, which had previously been refused by the Council on the grounds of undesirable precedent.[66] The Court considered the new dwelling would improve the visual amenity, or at least not detract from it, and there was no clear reason why the landscape should remain unoccupied. The dwelling would be adjacent to another existing dwelling. This decision indicates a possible change in approach by the Court, showing a willingness to accommodate more development in rural areas, rather than to maintain in the past a relatively strict approach supporting councils that did not wish to have any further rural housing.

As outlined, the influence of the Environment Court in the protection of the rural landscape is dependent upon cases coming to the Court by way of appeal. In a number of areas, consents are willingly granted by councils in accordance with their own policies for rural development. The track record of the Environment Court has not been to take a leading role in endeavouring to instruct regional councils on that type of policy, and the Court's function has been more reactive than proactive. The main area where the Court has been visibly proactive has been in the protection of areas of outstanding natural landscape, where councils have required some direction as to the identification of those landscapes and the methodology of categorisation.

3.3 Relationship of Maori and their culture with ancestral lands

The reference in s 6(e) to the matter of national importance concerning the relationship of Maori and their culture with their ancestral lands, was interpreted in the *Habgood* decision in

[63] *Canterbury Regional Council v Selwyn District Council* [1997] NZRMA 25, Judge Treadwell presiding.
[64] *Dye v Auckland Regional Council* [2001] NZRMA 513.
[65] *Murphy v Rodney District Council* [2004] 3 NZLR 421, Baragwanath J.
[66] *Harris v Central Otago District Council* (2016) NZEnvC 62, Judge Jackson presiding.

1987 by the High Court, to apply to not only Maori freehold land presently owned by Maori, but to all land throughout New Zealand which could be regarded as ancestral by Maori, and not necessarily owned by Maori at the present day.[67] That decision opened up immensely the scope of the matter of national importance, and has resulted in a substantial number of decisions which deal with the relevance of that ancestral relationship. The relevance can arise at a number of stages. First, in respect of preparation of plans, regarding recognition of the relationship of Maori, and the nature of rules that might be implemented to recognise that relationship. Traditionally, Maori heritage sites have been recognised in lists of heritage sites included in council plans.

Two decisions indicate an unsatisfactory state regarding consultation and involvement of Maori in planning processes prior to 2005. In the *Helmbright* case, iwi challenged in the High Court the failure of a plan to recognise a sacred battle site.[68] The Court found that the plan was operative and did not record the site. The Court had no power to intervene to negate the zoning entitlement which allowed a subdivision which did not recognise the site. In the *Kruithoff* decision, a similar situation occurred where a resource consent was approved to erect several dwellings on an area regarded by Maori as ancestral.[69] No notification existed in the district plan, and the Court found it had no powers of intervention.

The ability of Maori to participate early in the plan making process, has been substantially improved since amendments in 2005, requiring councils to be proactive in consulting Iwi. Further improvements are likely under the Bill before Parliament, which will require Iwi management agreements to be entered into regarding participation.[70]

Where iwi seek recognition of ancestral sites within district plans, or regional policy in plans, the Court, on any appeal, will be required to make an evaluation as to the significance of the site and the nature of recognition under the district plan. A recent example of this determination is *Te Tumu Landowners Group v Tauranga City Council*.[71] A dispute arose between the landowners and iwi as to the identification of a former pa site on an area, and the significance of the archaeological evidence. After consideration of the site, and history of usage, the Court accepted that the site was in fact an ancestral site, and approved overlay notations of a significant Maori area and an archaeological management area, on the land. This type of notation may restrict the ability of the landowner to develop the land. As a matter of current interest, the notation has caused a degree of controversy under the provisions set out in the proposed Auckland Unitary Plan. Those provisions have included over 3000 sites "of value to mana whenua", many affecting private land, that had not been initially investigated as to exact location or supporting evidence.

In relation to resource consent applications, iwi who may be affected, are likely to be notified where the application is given public notice. A number of cases have involved iwi participation.

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[67] *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 HC.
[68] *Helmbright v Environment Court (No 1)* [2005] NZRMA 118, Baragwanath J.
[69] *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1, Baragwanath J.
[70] RMA, s 35A (obligation on council to keep records of Iwi); sch 1, cl 3, 3B. Resource Legislation Amendment Bill 2015, cl 108, inserting sch 1, cl 1A, 4A (iwi participation and notification).
[71] *Te Tumu Landowners Group v Tauranga City Council* (2014) NZRMA 317.

In *TV3 Network Services v Waikato District Council*, a consent was declined at the Environment Court level for the installation of a transmitter station on a sensitive hilltop.[72] The Environment Court had taken the view that the importance of the site to Maori outweighed the necessity to use the particular site, and consent should be declined. That determination was upheld in the High Court as being appropriate. On the facts, it was apparent that alternative sites could have been considered, that would not have caused offence or opposition from Iwi. A similar decision was reached by the Environment Court in *Mason-Riseborough case*, where the Environment Court declined to approve a repeater station on another sacred area, even though the land was no longer owned by iwi.[73]

Regarding the location of wind farms, in *Outstanding Landscape Protection Society v Hastings District Council* (2008), a wind farm which included pylon installations along a ridge saddle was opposed by iwi.[74] The Environment Court applied the matter of national importance, and balanced it against the benefits to be obtained from renewable energy installations. The evidence supported a finding that the ridge feature in the form of a stern post of a waka, was a sacred ridge top for local iwi, who exercised kaitiakatanga functions as recognised in s 7(a). The Court, after considering carefully all the indicators in ss 5, 6 and 7, came to a conclusion that the proposal would not promote sustainable management of the resources, and the consent should be declined.

As indicated earlier, in the *Friends of Ngawha* case, involving a requirement of designation of land at Ngawha Springs for a new corrections facility, the Court was required to consider the spiritual qualities and relevance of a taniwha, which could be affected by the construction, and occupation of the land. The Court was required to choose between conflicting evidence on that matter, and in the end result approved the facility. The decision, and basis of assessment and evaluation, was upheld by the High Court and by the Court of Appeal.[75] The question of alternative sites was given passing consideration, as a relevant matter in assessing any approval of a requirement for a public work.

In the *Takamore Trustees* decision, earlier in 2003, involving approval of a requirement for an arterial road crossing Maori ancestral land, the Environment Court was cautioned about its failure to accept the relevance of oral evidence from kaumatua. The High Court considered that greater weight should have been given to this evidence, as consistent with Maori oral tradition. Since that decision, the Environment Court has fully recorded reasons in assessing quality and substance of evidence by iwi. That stated, the Court will still be required to make a judgment on the outcome.

Regarding discharges of waste into water, in *Te Runanga o Taumarere v Northland Regional Council*, the Environment Court disallowed a discharge consent from a proposed sewerage treatment plant in the Bay of Islands.[76] Although the plant would have complied with all matters of physical sustainability, the particular discharge point caused offence to Maori who would use the area for shellfish gathering. By contrast, in relation to taking of river water, in *Mangakahia Maori Komiti v Northland Regional Council* (1996), the Court allowed the extraction of water for the benefit of 17 farmers for irrigation, against opposition by iwi that

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[72] *TV3 Network Services Inc v Waikato District Council* [1997] NZRMA 539 HC, Hammond J.
[73] *Mason-Riseborough RM v Matamata-Piako DC* (1997) 4 ELRNZ 31.
[74] *The Outstanding Landscape Protection Society v Hastings District Council* [2008] NZRMA 8
[75] *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 HC; [2003] NZRMA 272 CA.
[76] *Te Runanga o Taumarere v Northland Regional Council* [1996] NZRMA 77, Judge Sheppard presiding.

the flow of water and its spirituality would be affected, and fishing opportunities diminished.[77] The Court was prepared to allow a shorter term consent, with minimum flow conditions, which would adequately protect the cultural relationship.

In summary, on matters of assessing the relationship of Maori with their ancestral lands, and incorporating this relevant matter of national importance into the context of plan policies and rules, and resource consent applications, the Court has been relatively successful in determining reasonable and acceptable outcomes. In 2001 the Privy Council in *McGuire v Hastings District Council*, a case involving a roading requirement affecting Maori land, declared that the RMA contained adequate safeguards of Maori rights.[78] Secondly the PC opined that the Environment Court should consider including on its composition, a Maori Land Court judge, or a Maori environment commissioner, where Maori issues were in issue. The RMA provides for this composition, and the practice of the Court has subsequently followed this lead on a more systematic basis.

The decision in *Marr v Bay of Plenty Regional Council* (2011) is an excellent example of an Environment Judge and a Maori Land Court Judge combining to evaluate iwi opposition to renewal of consents for discharges from the Tasman Mill into air, and into the Tarawera River.[79] The discharges had adverse effects on the relationship of iwi to their lands and the river, but the economics of the capital investment in the mill, employment opportunities, and social benefit to the Kawerau Township, were held to constitute special circumstances justifiying approval. That type of outcome confirms the pragmatic approach of the Court in these complex situations, and the decisions would generally be acceptable to persons in the community.

4 Conclusion

4.1 The Environment Court has a long history going back to the Town and Country Planning Act 1953, evolving from the Planning Appeal Board through the Planning Tribunal, with the Environment Court being constituted under that name in 1996. The Court has jurisdiction to hear appeals on plan matters, works and heritage requirements, and resource consents. It may make declarations on interpretation matters, and the Judges sitting alone may issue enforcement orders. It has added jurisdiction under certain other statutes. The composition of the Court, comprising an Environment Judge, and normally two Environment Commissioners, is relatively unique in the judicial system. In a similar manner, in land valuation matters, the Land Valuation Tribunal comprises a District Court Judge and a registered valuer. Almost all other courts sit with a judge alone. Regarding prosecutions for RMA offences, an Environment Judge will normally sit alone in the District Court, to ensure a level of expertise in the proceedings and in sentencing.

4.2 The High Court, by contrast, has jurisdiction limited to questions of law, and alternative jurisdiction in a similar area on an application for judicial review. That restriction to questions of law has not inhibited the High Court, Court of Appeal or Supreme Court, from examining evidence and findings of fact, to determine whether or not the evidence adduced supports the conclusion that has been reached by the Environment Court.

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[77] *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193, Judge Bollard presiding.
[78] *McGuire v Hastings District Council* [2000] 1 NZLR 679, [2001] NZRMA 557. Lord Cooke gave the judgment of the PC.
[79] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347, [2011] NZRMA 89, Judges Harland and Fox presiding.

4.3 If the Environment Court jurisdiction was to be limited to questions of law only, aspects of policy deriving, for example, under a regional policy statement, could be outside the scope of evaluation by the Court. Whether this would be an appropriate outcome, is open to significant debate. Where a matter of urban limits was included within the regional policy statement, an inability to examine that determination on the merits could be problematic. On the other hand the Court might take a view that provided evidence supported that determination, it would be one that the council could reasonably arrive at, and it would not be a function of the Court to set the determination aside or send it back for reconsideration. Any NPS on the matter could bind both the local authority and the Court.[80]

4.4 The quality of decision-making at a council level has been substantially improved since mandatory obligations for panel members to be accredited, having undergone basic training in the legal and practical aspects.[81] Many commissioners may be appointed from a panel of legally qualified practitioners or experienced planning consultants. Where the panel members are also elected councillors, the appearance of independence and objectivity in decision-making on submissions may be questionable. Proposals on reduction in the role of the Environment Court in plan content procedures have been raised in past ministry consultation papers and debate.

4.5 The amendments to the RMA to circumscribe the input of submitters with trade competition motivation have been reasonably effective at both the council and Court level (regard must not be had to trade competition or the effects of trade competition). The Court alone may exercise a salutary power to make a declaration of liability where this restriction is breached.[82]

4.6 The present jurisdiction of the Environment Court has been endorsed, in a report by Professor Sir Malcolm Grant, on behalf of the UK government. His report recommended the possible adoption of an Environment Court in the UK, although that recommendation was not implemented.[83] For a period after 2008, the UK planning law was amended to provide for an Infrastructure Planning Commission, to assess and determine major infrastructure projects.[84] However that Commission, established by a former Labour government, was discontinued by the successor Conservative government. In the UK questions of planning inquiries, following a call-in by the Minister, are allocated to senior legal persons or others in the Planning Inspectorate. The functions undertaken are equivalent to those of the Environment Court,

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[80] MFE and MBIE 2016, *Proposed National Policy Statement on Urban Development Capacity: Consultation Document*, Wellington, ME 1241, June 2016. This NPS once operative will require local authorities to provide business and residential land, and development capacity to satisfy 20% capacity above short and medium term demand. Development capacity is defined to include the provision of adequate infrastructure, and by implication will place an obligation on local authorities to finance or provide that infrastructure. Default on these targets could possibly result in ministerial intervention under RMA, s 25A directing action or under Part 10 of the LGA for non-performance.

[81] RMA, ss 39A, 39B, 39C.

[82] RMA, ss 61(3) (regional policy), 66(3) (regional plans), 74(3) (district plans), 104(3) (resource consents). Also RMA, Part 11A, ss 308A-308I (Act not to be used to oppose trade competitors). *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* [2012] NZRMA 192 (costs award against trade competition party).

[83] Malcolm Grant, *Environment Court Project: Final Report* (DETR, UK, 2000). Sir Malcolm Grant is a former Professor of Law and Provost of University College, London; a former Local Government Commissioner (UK); and presently chair of the National Health Service (UK).

[84] Planning Act 2008 (UK). See Kenneth Palmer, *The environment court in New Zealand: UK application?* (2009) 21 Environmental Law & Management (ELM - UK) 241, 248.

and may involve examination of proposals on the merits, and recommendations to the minister.

4.7 Another issue is whether the Environment Court should have the final determination in all matters. Presently in respect of content of a coastal plan, the Court may hear appeals, but its recommendations, are subject to final approval of the plan by the Minister of Conservation.[85]

4.8 Under other special legislation, such as that applicable to the Greater Christchurch Regeneration Act 2016, the Minister has the responsibility of approving a regeneration plan, which could override any regional policy statement or regional plan.

4.9 To the same end, the government retains under the RMA the longstanding ability to issue national policy statements, national environmental standards and the NZ coastal policy statement. These high level documents can include specific matters, which must be given effect to at the lower level of regional and district policies and plans.[86] The Environment Court has no function in respect of the preparation of the national level documents.

4.10 The nature of the Court structure and convention provides that decisions within the Environment Court divisions are not binding on Judges at the same level. One judge may disagree with another judge, and that will usually be the subject of reasons in any judgment. The judgments of the Court must be in writing. Disagreements at the Environment Court level, can be resolved on an appeal to the High Court or higher courts. Under the court hierarchy, decisions at a higher level, are binding in the particular appeal on the lower court or council decision. The decisions may also form precedents on standards for the guidance of councils, planners and other professionals, in the implementation of the RMA.

4.11 A decision of the High Court may be overridden by the Court of Appeal, and the Court of Appeal is subject to decisions of the Supreme Court. This hierarchy by necessity gives rise to a greater respect for the top level decisions. Also, the quality of the judges as decision-makers, may vary, with certain decisions having a greater respect and weight than possibly other decisions. However, the quality of decision-making at the present time and in the past at the higher court level has been consistently of significant excellence.[87]

4.12 Reviews of Environment Court decisions establish that in a variety of areas which embrace the multitude of different plans, complex issues, different parties, iwi involvement, the judgments establish a credibility and respect which endorses the value of the Environment Court. The type of specialist court has been emulated in a number of countries, and within Australia, environment courts exist in a majority of States. In other countries such as Canada, a uniform court system is not established but different types of hearing panels and review bodies in the Provinces, effectively carry out the same function as the Environment Court under another name. In the UK, the Planning Inspectorate considers appeals or inquiries on behalf of the Minister and ministry.

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[85] RMA, ss 28, 57, sch 1, cls 18, 19 (Minister of Conservation approval functions).

[86] *Environmental Defence Society v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195.

[87] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [259] (refusal of mussel and oyster farm in Sounds). This case is a recent example of the Environment Court endeavouring to apply statements in *EDS v King Salmon* as to weight to be given to conservation factors and the application of the overall broad judgment approach, especially when a district or coastal plan may predate a NPS or the NZCPS.

4.13 The Environment Court has no original jurisdiction to investigate topics of concern or interest, and is reliant on appeals being brought to the Court to give it the jurisdiction to consider issues. Parties have the right to withdraw appeals, and any consent orders sought. A possible consideration is whether the Environment Court should have some original jurisdiction to investigate issues that may be referred to it or, that it takes upon itself to consider. The Minister may direct local authorities in certain circumstances to take steps to address a resource management issue.[88]

4.14 The Parliamentary Commissioner for the Environment, has functions that include the ability to investigate environmental issues as a "systems guardian", and possibly to participate in Court hearings.[89] The structure and funding has evolved to limit the role of the PCE to mainly auditing performance of selected local authorities, and the issue of reports and guidelines in selected areas. The PCE has a review function in respect of environmental domain reporting. Depending on government policy, the role of the Commissioner could be expanded to encompass any gaps in environmental management.

4.15 The Environmental Protection Authority established in 2011, has a mixed bag role in the environmental governance structure.[90] The Authority has substantial administrative reponsibilities managing the emissions trading scheme, ozone layer protection, hazardous substances and new organisms legislation, and regulation of mining activities in the exclusive economic zone and extended continental shelf. It advises the Minister on call-in procedures under the RMA in respect of major or important developments for direct referral to a board of inquiry or the Environment Court. The adjudicative function in respect of the assessment of marine consents is delegated to a hearings panel, with no right of appeal to the Environment Court. The EPA could not assume the functions and role of the Environment Court.

4.16 Overall, the Environment Court maintains a longstanding tradition of excellence and respect in decision-making.[91] It fulfills an important role in resource management planning and consent evaluation. The Court constitutes an efficient and effective judicial body with a substantial body of experience and expertise.[92]

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7 June 2016

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[88] RMA, s 25A.

[89] Environment Act 1986, ss 16, 17, 18, 21. Environmental Reporting Act 2015, s 18. See website www.pce.parliament.nz.

[90] Environmental Protection Authority Act 2011. The EPA has functions under the following environmental Acts:

environmental Act means—

- (a) the Climate Change Response Act 2002:
- (ab) the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012:
- (b) the Hazardous Substances and New Organisms Act 1996:
- (c) the Imports and Exports (Restrictions) Act 1988:
- (d) the Ozone Layer Protection Act 1996:
- (e) the Resource Management Act 1991.

[91] Derek Nolan ed, *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at 2.20, 2.21, 3.108.

[92] Kenneth Palmer, "*Reflections on the history and role of the Environment Court in New Zealand*" (2010) 27 EPLJ 1-11.

New Zealand Productivity Commission

Project: Legal issues in the New Zealand planning system

Supplementary clarification by Dr Kenneth Palmer (14.06.16)

Deliverable 3

Contents

Productivity Commission request for clarification

"Deliverable 3 is really useful, with some important insights for us. A couple of questions of clarification.

·1 The report discusses the Court's ability to award costs in the case of appeals and cites Practice Note 2014. Are we right in thinking that the court can only award costs related to legal expenses – or does it capture a wider set of costs?

· 2 Amendments to the RMA in 2009 created the ability for people to seek damages in the High Court from trade competitors who had inappropriately sought to use court action to block others' developments. Has that power been used? If so, what level of damages were awarded? If not, what principles does the High Court use in setting damages?"

1 Environment Court costs discretion

The report discusses the Court's ability to award costs in the cases of appeals and cites Practice Note 2014….

Environment Court costs discretion

The ability of the Environment Court to award costs is set out in RMA s 285. Section 285(1) states "The Environment Court may order any party to proceedings before it to pay to any

other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable."

Under guidance in the Practice Note 2014, para 6.6, costs are not normally awarded against a council in plan preparation and content matters. Costs may be awarded in resource consent cases against any party that fails in their position. The Court may order a party who fails to proceed with a hearing at the time the Court arranges, or who fails to give adequate notice of the abandonment of the proceedings, to pay to any other party or to the Crown any of the costs and expenses incurred by the other party or the Crown.

The Practice Note sets out in a comprehensive manner under para 6.6 the guidelines for consideration of costs applications. The application for costs is first submitted to the Court, and to other parties for their comment or reply. Costs may include accounts charged by the legal team or consultants, and witnesses or experts engaged in preparing the procedures at the Environment Court level. The application should include invoices or other proof of costs. Travel and accommodation costs may be claimed. Costs incurred in the prior hearing before the council, or in Court assisted mediation cannot be claimed. Under practice convention, the Court is likely to award 25-33% of the costs claimed, unless special circumstances justify another level of award (higher or lower) according to the merits of the claim.

Under s 284, Witness Allowances, a witness attending the Court is entitled in any event to be paid, by the party calling the witness, expenses for travelling and maintenance while absent from the person's place of residence, and attendant expenses. The payment should be made in accordance with the scale of allowances for witnesses in civil cases in the District Court. These expenses may form part of an award of costs against another party.

Overall, under ss 284 and 285, the costs claimed may cover expenses for legal advice and services, and also expenses for any witnesses who take part in the proceedings, and consultants who prepare reports or documents that are used in the proceedings. The costs may be based on an hourly or daily rate. There is no formal scale of costs for Environment Court procedures (a formal scale applies in the District Court). The level of costs awarded by the Environment Court Judge, is in the general discretion of the Court, and although it may use the District Court civil costs scale as a guide, it is not bound by that scale. In practice a number of substantial awards of costs for hearings have been made by the Court.[1] As noted, costs are not normally awarded in relation to appeals in the preparation and contesting of merits of plans, unless an appellant or possibly the council, has been neglectful or has taken an appeal without any merit.

In a recent case *Greymouth Petroleum Ltd v Heritage New Zealand Pouhere Taonga*,[2] the same costs principles were applied in the context of an appeal under the Heritage New Zealand Pouhere Taonga Act. Under the powers in that Act, Heritage New Zealand had refused a consent to allow Greymouth Petroleum to carry out a drilling operation in the Waitara Valley, Taranaki. The Environment Court upon appeal against the refusal, found that Heritage New Zealand had wrongly applied its powers to protect the area, without any adequate knowledge of a site claimed to be sacred, being the alleged burial site of an ancestor of Te Atiawa. Heritage New Zealand had rejected the application on a broad view that the area as a whole was of value to iwi and should be left undisturbed. The Court found that this

[1] *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 HC (award of $418,000 costs against unsuccessful applicant to establish marina upheld).
[2] *Greymouth Petroleum Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 84.

was incorrect and the consent should have been given, where the location of the burial site was not known, and clearly not directly affected by the proposed drilling.

Greymouth Petroleum applied for costs against Heritage New Zealand, seeking 60% of its claimable costs of $216,613.89. The Court, acting under s 285, and the Practice Note found the case was one of the rare situations where the public body had acted unreasonably, and had not correctly administered its powers. In this event the Court could depart from its comfort zone of normally awarding between 25-33% of actual costs incurred. The Court ordered Heritage New Zealand to pay a sum of $118,000, in reimbursement, to Greymouth Petroleum.

As part of an earlier reply by Heritage New Zealand that the costs claim was not reasonable, reference was made to an hourly charge out rate of $250 by Mr B Mikaere, a witness for Greymouth, and an administrative fee of $75 on each invoice charged by Mr Mikaere. The Court did not disallow the rates as such. Approval of a costs claim is at the discretion of the Environment Court judge, and will be consistent with reasonable rates expected in charges by legal practitioners and consultants. In addition costs of attendance and accommodation will be claimable. The only time costs that generally are disallowed are those of an appellant or party appearing in person, who is not legally qualified or is self-represented. Overall, the discretion to award costs is a salutory control and discipline over any inappropriate use of the Court's time or lack of merit in any appeal.

One shortcoming with the costs restraint is the ability of parties, that take appeals or become involved in appeal procedures as a party under RMA s 274, to incorporate into a company or society. Liability of an incorporation is limited to the assets of the incorporation, and there is no personal liability for the shareholders or members of that body. A recent decision involving a refusal of a marina consent adjacent to the Matiatia ferry wharf at Waiheke Island, involved awards exceeding $1.16 million against the applicant. However the incorporated applicant had assets of less than $1,000, and was liquidated after the adverse decision of the Environment Court refusing the consent.[3] The Auckland Council and other parties involved, would remain out of pocket in being unable to recover the costs awarded. That type of risk is not particular to RM appeals alone, and is a general issue in any litigation taken before the courts.

Of further relevance, an increase in the filing fee for an appeal from $50 to $500 in 2009 (and to $511.11 in 2014) has had a desirable effect of limiting overuse of the court's jurisdiction. Where a case is to be set down for a hearing, a daily hearing fee may also be payable. In recent years the Court has overcome a back-log of appeals, and former delays have been largely eliminated.[4]

Security for costs before Environment Court

To prevent misuse of the appeal privilege, a party may seek an order for security of costs where alleged that an appeal lacks any merit, or the appellant has no assets to pay any likely award of costs.[5] The Court will not use the power to strike out an appeal which has merit or is in the public interest, against a party due to lack of resources. An environmental fund

[3] *Re Waiheke Marinas Ltd* [2016] NZEnvC 18 (direct call-in to Court under RMA ss 87C- 87G).
[4] "Report of the Registrar of the Environment Court for 12 months ended 30 June 2015". Environment Court, *Annual Review for the Calendar Year* 2015.
[5] RMA, s 284A.

administered by MfE may be accessed by groups for worthy appeals.[6] Local interest groups and environmental groups which do not succeed in appeals are not immune from costs liability, which provides a necessary discipline in the management of appeals.[7]

Council level proceedings

An applicant for a resource consent at the council level will be charged a lodgement fee for the application. The amount is fixed by the council under RMA s 36, and will vary substantially depending on whether the application is publicly notified, given limited notification, or not notified. If a hearing is required, a further daily hearing charge on a resource consent application may be payable. For this reason, developers have a strong incentive to avoid notification of resource consents, and to get affected persons (including local iwi) on side through consultation in advance. Where an affected person gives approval in advance, the effects on that person must not be taken into account on deciding on a notification decision, or under s 104(3) in assessing effects.[8]

Subject to one exception, a party who makes a submission on a notice of requirement (for a works and infrastructure designation), or a resource consent application, is not liable for any council charges. A submitter on a requirement or notified resource consent (or an applicant) has a right under s 100A to require the council to delegate the hearing and decision functions to an independent commissioner. In this instance the submitter (or applicant) making the request will be liable under s 36 for the hearing costs that arise had the request not been made.

Costs payable in respect of resource consent hearings, should be distinguished from costs incurred by the promoter of a private plan change. In the latter event, councils are able to recover all administrative costs in the plan preparation and submission procedures from the private applicant. In respect of a private plan change application, the council may assess a substantial charge which may include the full costs of processing and notification of the plan change.[9] That element of cost is a significant restraint on attempts by persons or companies, other than the council, to seek formal changes to plans.

2 Trade competition issues and damages

Amendments to the RMA in 2009 conferred a right on applicants for resource consents to seek damages in the High Court from trade competitors who have inappropriately sought to use submission processes to block developments.

In Deliverable 3, para 4.5, reference is made to the restrictions in the RMA to take into account any trade competition objections. Those restrictions had prior to 2009 been largely bypassed by trade competitors dressing up submissions under challenges focusing on traffic management, visual amenity effects, and broader issues concerning policy in relation to incremental development or policy supporting redevelopment of existing commercial or industrial areas. The scope of trade competition matters may extend to educational facilities.

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[6] See MfE website for details of the fund: www.mfe.govt.nz.

[7] *Peninsula Watchdog Group Inc v Coeur Gold NZ Ltd* [1997] NZRMA 501 HC ($20,000 costs award against environmental group unsuccessfully challenging renewal of discharge permit for gold mine).

[8] RMA, ss 95D(e), 95E(3)(a) (notification discretion), 104(3)(a), (4) (evaluation).

[9] RMA, s 35. *Hill Country Corp v Hastings District Council* [2010] NZRMA 331, affirmed [2010 NZRMA 539 HC (private plan change withdrawn – additional costs of $291,839 upheld).

In *Montessori Pre-School Charitable Trust v Waikato District Council*, the school challenged a decision of the Waikato Council to grant a consent to another person to establish a school some kilometres away.[10] The High Court on review of the non-notification decision, held that the challenge was brought by a trade competitor in the nature of each school competing for pupils, and disallowed the challenge.

More commonly the past "supermarket wars" cases such as *Progressive Enterprises Ltd v North Shore City Council*, have involved a challenge to grant of a supermarket consent, without public notification.[11] Several years after the application, the High Court determined that public notice should have been given and quashed the consent. The challenge was by a trade competitor, but focused on transport issues.

In *Discount Brands Ltd v Northcote Mainstreet*, judicial review procedures brought by commercial competitors successfully focused on non-notification of a consent for Discount Brands to establish a retail centre in a former garden centre.[12] On reconsideration after public notice, the consent applications were approved. The High Court dismissed a second judicial review application, finding that the motivation of Northcote Mainstreet, supported by Westfield, was essentially trade competition based, and had no environmental or plan policy merits.[13]

Those decisions led to the 2009 amendment to strengthen the restrictions on trade competition based submissions. In *General Distributors Ltd v Foodstuffs Properties Wellington Ltd*, Foodstuffs made a submission opposing a supermarket consent application by General Distributors.[14] The submission was challenged as breaching the provisions of Part 11A, that state the Act must not be used to oppose trade competition.

Under Part 11A, s 308B(2) states that a "person … may make a submission only if directly affected by an effect of the activity to which the application relates, that - (a) adversely affects the environment; and (b) does not relate to trade competition or the effects of trade competition". In the *General Distributors* case, the Environment Court made such a declaration against Foodstuffs, and ordered the payment of legal costs to General Distributors of $20,000. Following the 2009 amendment and this decision, companies or parties would clearly be well advised to base any submission on a genuine alleged adverse effect on the environment.

Where a declaration of contravention is made by the Environment Court under s 308H, which could arise out of submissions at the council level alone or on an appeal, proceedings for damages may be brought in the High Court.

Section 308I(4) states "The High Court *must* order the payment of damages for loss suffered by the plaintiff because of the conduct of the defendant that gave rise to the making of the declaration (by the Environment Court)."

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[10] *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 HC.
[11] *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72.
[12] *Discount Brands Ltd v Northcote Mainstreet Inc* [2005] 2 NZLR 597 SC (non-notification of application set aside).
[13] *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (trade objections later disallowed).
[14] *General Distributors Ltd v Foodstuffs Properties Wellington Ltd* [2012] NZRMA 192.

To the best of my knowledge, I am not aware of any case progressing from a declaration by the Environment Court that a person has contravened Part 11A. If a case was taken to the High Court, the only indication on the quantum of damages is the concise reference in s 308I(4) that the High Court must order the "payment of damages for loss suffered" by the plaintiff because of the conduct of the defendant. It would appear that the High Court has no discretion not to award damages, but the extent of the damages would of necessity need to be established by the party claiming for loss suffered.

The type of loss would presumably encompass all elements of direct and indirect economic loss, which might otherwise be claimable in a commercial civil claim (breach of contract or negligence). By analogy with claims for compensation under the Public Works Act, the costs for loss could include delay costs, financing costs, rates payments, loss of income from an inability to open or develop premises, loss of customers, and other provable losses. By nature, these claims would require expert evidence, and would be costly to maintain. As a general comment the existence of this risk of liability, appears to have been effective in recent times in reducing any blatant misuse of the submission and appeal procedures, to gain trading advantage, and deter business competition.

Addendum 1

UK planning law comparison

In Deliverable 3, at para 4.6, reference is made to the UK planning law, and also in other parts to the question of presumption on planning permission applications. Although not expressly requested in the description of the three Deliverable reports, a further brief comment is made on the differences between the UK and the NZ planning structures.

Separate National Planning Frameworks or Policies apply in England, Scotland, Wales, Northern Ireland, with a London Spatial Development Plan. Local Development frameworks and Development Plans are prepared by the Local Planning Authorities (LPAs) in the UK, generally being local borough or district councils or unitary authorities.[15] All development of any significance would be subject to planning permission. Various minor developments were exempted as permitted developments. Neighbourhood Plans may be prepared by neighbourhood forums if desired and are not subject to local authority approval but must be consistent with local development plans.

[15] Town and Country Planning Act 1990 (England and Wales) (as amended). OECD, "The Governance of Land-Use UK report" (2015). There are now 433 'principal authorities' in the UK: 27 county councils, 55 unitary authorities, 32 London boroughs, 36 Metropolitan boroughs, 201 districts, 32 Scottish unitary authorities, 22 Welsh unitary authorities, and 26 Northern Ireland districts (the City of London, and the Isles of Scilly (off the south west England peninsula), also exist. The Localism Act 2011 which applies in England only, authorises the local plans which require a majority vote by the community for approval. Neighbourhood Forums cannot refuse development proposals, but can only say yes, since the principles of allowing development will have already been set by higher tier policies.

Local authorities collect taxation known as the Council Tax, but the rates are set by Central Government. Local taxation accounts for about 30% of local government revenue; the remainder is allocated in a block grant by Central Government annually, and this is decreasing. See also Wikipedia, (page modified 23 January 2013) refers to 421 Local Planning Authorities.

All applications for planning permission are submitted to the LPA unless constituting major developments, which could be the subject of a direct call-in by the Minister. The local development framework plans required from the councils, should indicate infrastructure planning proposals, and ensure an adequate supply of land for housing and other uses, and the protection of areas of the countryside and important landscapes. The form of local development framework plans would be similar to the regional and district plans in New Zealand.

Planning applications are accompanied by a "design and access" statement, which again would be similar to the assessment of environment effects under the RMA, but with a greater focus on design proposals and layout.

In considering the planning application, the LPAs have a duty to have regard to all relevant and material planning considerations. If the application is to be refused, the LPA must give reasons in writing to show demonstrable harm to relevant interests of acknowledged importance. Refusal of planning permission must be based on tangible harm brought about by the proposal as reflected in a relevant policy or other matter, or to protect the public interest.

Following the decision on a planning application, an important difference arises under the UK planning system. The right of appeal applies only to an applicant or the applicant developer who is aggrieved by the decision of an LPA. Third parties, who may be submitters to the application and council assessment, and who may disagree with the decision of the LPA to grant planning permission, do not have any right of appeal.[16]

The planning appeals in the UK are administered by the Planning Inspectorate, which is an executive agency of the UK government. A decision of the inspectorate is based on a fresh look at the representations made by each party, and at the LPA level. In England around 70% of planning appeals uphold the original decision of the LPA.

The fact that third parties are submitters and participants at the LPA level alone is a significant difference to the procedures applicable in New Zealand. The only remedy to third parties would be to seek judicial review in the circumstances. That is a procedure and application that is greatly limited by costs and time.

In respect of the procedure at the LPA level, the owners adjoining the application site are usually notified, with public notice posted on the property concerned. The public have 21 days to express views on planning applications, which may be viewed on the LPA website and comments submitted by email. This electronic web processing is efficient and readily accessible.

Decisions will be made by authorised officers of the LPA, under delegated powers. Only major or controversial applications are likely to be decided by the elected councillors, meeting as a planning committee. This type of processing is similar to that existing in New Zealand in respect of both non-notified and notified applications.

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[16] Carla Towns "The Right of Third Party Appeal in New Zealand Land-use Planning: An Outsider's Perspective" [2006] 10 NZJEL 329.

Of interest, comments on proposed reforms in 2013, relate to the presumption for approval of an application. Reference is made to the historic question whether the proposed development is "bad enough to warrant being refused planning permission". More recent recommendations are that the question should become "is the proposed development good enough to deserve planning permission". In practice the requirement of an applicant to prepare a design and access statement for significant developments places the developers and advisers under the requirement to justify the proposal in those terms. No formal change of presumption has been implemented.

Approximately half a million planning applications are submitted throughout the UK each year. Of those 60% relate to householder applications, relating to extensions or alterations to houses. Others have related to permitted development and do not require a planning application to be made.[17]

In the New Zealand context, consideration could be given to emulating the UK procedure relating to restrictions on appeals. In respect of plan preparation, appeals could be limited to questions of law, or instances where the local authority does not accept recommendations from the hearings panel on submissions made on plan changes and plan reviews. The latter situation is the model applied to the Auckland Unitary Plan preparation. Where no appeal rights are allowed, the quality of an independent hearings panel at the council level must be assured and this could be problematic in some local authority areas.

In relation to resource consent applications, the right of appeal to the Environment Court could be limited to the applicant, with no right of appeal given to third party submitters at the council level. In practice, the various appeals lodged by environmental groups, such as the Royal Forest and Bird Society, and the Environmental Defence Society, would be removed.[18] A halfway house would be to allow appeals on questions of law only, and having regard to the nature and scope of a question of law, applicants such as the groups outlined or well resourced parties would not be deterred from taking appeal cases.

The other residual right, which would remain in any event, would be the right to go to the High Court on judicial review. Having regard to the expense of that procedure, delay factors and risk of costs liability, a significant reduction in appeals could result. An advantage of the present system of access to the Environment Court is less expense, and access to an expert and experienced court.[19]

Of comparative interest, an academic article by Carla Towns commends the New Zealand system of allowing third party appeals as valuing democratic participation and recommending adoption of the broader rights of appeal in the UK.[20] That approach has not been accepted by successive UK governments. As Professor Sir Malcolm Grant has succinctly stated:

> "In taking decisions on planning applications, the primary relationship is still that between the applicant and the decision-maker. Third parties have the right to make

[17] Wikipedia above.
[18] From personal observation, appeals may be based on merits, or as a strategy to delay developments and possibly render the development uneconomic or give rise to modifications following mediation.
[19] The Environment Court follows the NZ tradition of expert courts, including the Employment Court, Family Court, Youth Court, and Land Valuation Tribunal.
[20] Carla Towns "The Right of Third Party Appeal in New Zealand Land-use Planning: An Outsider's Perspective" [2006] 10 NZJEL 329.

> representations, and local planning authorities have a correlative duty to take such representations, if properly made into account. But such third parties have no right of appeal against the grant of planning permission….They are restricted to making a claim for judicial review.[21]

Public participation at the appeal level in New Zealand tends to be limited to corporations, land owners and developers, or environmental or local groups that have a mission to develop or protect the quality of the environment. The groups in opposition do not necessarily represent the broader public interest, but may be acknowledged to be a desirable part of any democratic society, system of governance and economy.

Addendum 2

RMA s 104 revision

Under the RMA, part 2 (ss 5, 6, 7 and 8) are fundamental purposes, which define the scope to promote sustainable management of natural and physical resources. Section 32 is important as a check on the evaluation and appropriateness of policy and rules (national, regional, district). In relation to the estimated 80,000 annual applications for resource consents, s 104 is of pivotel importance. The latter section could be usefully revised to better express and reflect the basis of the discretion to approve applications. For example, a draft is set out below (taken primarily from the report on deliverable 2, with the addition of s 104(*2D*) noted in deliverable 1):

104 Consideration of applications *[amendments in italics]*

(1) When considering an application for a resource consent and any submissions received, the consent authority must … have regard to–

(*a) the purpose and principles in Part 2 of this Act as a primary or overriding matter; and*
(aa) any actual and potential effects on the environment of allowing the activity; and
(*ab) any measure proposed by the applicant for the purpose of ensuring positive effects on the environment to offset any adverse effects on the environment that will or may result from allowing the activity; and [insert by Resource Legislation Bill]*

(b) any relevant provisions of—
(i) a national environmental standard:
(ii) other regulations:
(iii) a national policy statement:
(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

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[21] Malcolm Grant "Human Rights and Due Process in Planning" [2000] Journal of Planning Law 1215 at 1216, quoted in Kenneth Palmer, "The environment court in New Zealand: UK application?" (2009) 21 Environmental Law & Management 241, at 246.

(2) When forming an opinion for the purposes of subsection (1)(*aa*), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

(2A) When considering an application, the consent authority must have regard to the value of the investment or proposed investment, and any past investment.

(2B) When considering an application, where relevant, the consent authority must have regard to the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated, including the opportunities for—
(i) economic growth that are anticipated to be provided; and
(ii) employment that are anticipated to be provided. [compare wording in s 32]

(2C) When considering an application, the consent authority must have regard to any development contribution, development agreement, monetary benefit or other benefit relating to the application.

(2D) When considering an application, the consent authority must have regard to promotion of positive and desirable development to meet expected long-term demands of the region or district.

(*2E*) When considering a resource consent application for an activity in an area within the scope of a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, a consent authority must have regard to any resource management matters set out in that planning document.

(*2F*) Subsection (2B) applies until such time as the regional council, in the case of a consent authority that is a regional council, has completed its obligations in relation to its regional planning documents under section 93 of the Marine and Coastal Area (Takutai Moana) Act 2011.

(3) A consent authority must not, —
(a) when considering an application, have regard to—
(i) trade competition or the effects of trade competition; or
(ii) any effect on a person who has given written approval to the application:
(b) [Repealed]

(c) grant a resource consent contrary to—
(i) sections 107, 107A, or 217:
(ii) an Order in Council in force under section 152:
(iii) any regulations:
(iv) wāhi tapu conditions included in a customary marine title order or agreement:
(v) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:
(d) grant a resource consent if the application should have been notified and was not.

(4) A consent authority considering an application must ignore subsection (3)(a)(ii) if the person withdraws the approval in a written notice received by the consent authority before the date of the hearing, if there is one, or, if there is not, before the application is determined.

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

***Other more radical reforms**:*

Abolish the non-complying activity classification under s 77A and s 87A(5), and discontinue the higher gateways for approval under s 104D. This will enable the more balanced default class of a discretionary activity under s 87B(1) to take full effect.

Include a presumption in favour of approval of all resource consent applications (subject to conditions) unless material considerations justify refusal, coupled with a broader obligation on the council to require applicants to first give limited notification to adjoining land owners (UK position).

14 June 2016