Decision following the hearing of a Proposed Plan Change under the Resource Management Act 1991

Auckland Council
Te Kaunihera o Tāmaki Makaurau

Proposed change to the part operative Auckland Unitary Plan (2016) (**AUP**) to amend Chapters D18 and E38 to:

(a) Ensure that the AUP appropriately specifies the relationship between the Special Character Areas Overlay and the underlying zone provisions; and

(b) Ensure that the development standards that apply to sites in the SCA overlay are most appropriately targeted to managing the special character values of the areas to which they relate.

The plan change is **APPROVED IN PART WITH MODIFICATIONS**. The reasons of the Commissioners are set out below.

Plan Change No:	26
Site address:	N/A – applies extensively
Type of Plan Change:	Auckland Council initiated
Hearing:	24 and 28 July 2020
Hearing panel:	Kitt Littlejohn (Chair) Ian Munro Trevor Mackie
Appearances:	<u>For the Auckland Council:</u> Tony Reidy, Principal Planner Ciaran Power, Reporting Officer Teuila Young, Planner Rebecca Fogel, Planner Eryn Sheilds, Team Leader <u>Submitters:</u> David Wren, Planner representing C & J Weatherall, J Dillon, P & S Wren and P Ng. Philip Brown, Planner representing Michael Snowden and the Roman Catholic Bishop of Diocese of Auckland Michael Snowden Tane Snowden Margot McRae representing Devonport Heritage Trish Deans representing Devonport Heritage and Lyndsay Brock. A R Bellamy representing South Epsom Planning Group

	Tania Mace and Graeme Burgess representing Grey Lynn Residents Association Craig Moriarty, Planner representing Somersby Trust David Haines, Planner representing Somersby Trust John Childs David Abbott representing St Mary's Bay Association Dirk Hudig representing Herne Bay residents Association Brian Putt representing St Mary's Bay Association and Herne Bay residents Association Anthony Blomfield representing Ascot Hospital Dr Claire Kirman, legal Counsel representing Kainga Ora Brendan Liggett, Planning Manager representing Kainga Ora Amelia Linzey, Planner representing Kainga Ora Brendan Kell Jeff Brown representing Samson Corporation, Galatea trust, R & M Donaldson Janet Dickson Matthew Braikovich <u>Other:</u> Sidra Khan (hearings advisor)
Hearing adjourned:	28 July 2020
Hearing closed:	24 August 2020

INTRODUCTION

1. Proposed Plan Change 26 (**PC26**) is an Auckland Council-initiated change to the operative in part Auckland Unitary Plan (2016) (**AUP**) under cl 2 of Part 1 of Schedule 1 of the Resource Management Act 1991 (**Act**).[1] Its primary purpose is stated to be to clarify the interrelationship between the Special Character Area (**SCA**) overlay and its underlying zones.[2]

2. The plan change was approved for notification by the Auckland Council's Planning Committee on 6 November 2018 and subsequently notified on 30 May 2019. The closing date for submissions was extended to 12 July 2019, by which time 274 submissions had been received. A summary of submissions was notified on 5 September 2019 and further submissions sought. 23 were received.

3. As required by cl 8B, a hearing into PC26 and the submissions and further submissions received on it was held on 24 and 28 July 2020. The hearing was conducted by

[1] All references to sections, subsections, clauses, parts and schedules in this decision are references to sections, subsections, clauses, parts and schedules of the Resource Management Act 1991, unless otherwise stated.
[2] Section 32 Evaluation Report (**s32 Report**), p12.

Independent Commissioners Kitt Littlejohn (Chair), Ian Munro and Trevor Mackie by authority delegated to them for that purpose by the Council under s34A.

4. This decision is also made pursuant to the delegation given to the Independent Commissioners by the Council.

SUBMISSIONS

5. A detailed summary of the 274 submissions and 23 further submissions made on PC26 was provided to us (as Appendices 4 and 5) with the s42A Hearing Report (**s42A Report**). Helpfully, Council officers analysed the issues and topics raised in the submissions into 34 specific themes.[3]

6. Council officers described themes 1 to 4 as comprising submissions addressing PC26 as a whole (i.e., accept; accept with amendment; decline if not amended; and decline). The other 30 themes were described as "more specific".[4]

7. Fourteen submitters appeared and presented evidence to us at the hearing.

SITE VISIT

8. We were invited by several submitters to undertake site specific visits to assist us in our deliberations on PC26. Council officers also recommended various locations around Auckland that we may wish to visit to understand the role of the SCA overlay and the potential effects of PC26.

9. During deliberations, the Commissioners determined that the issues raised by PC26 for consideration and determination would not be assisted by undertaking site visits, either generally or of specific sites. We were satisfied that our experience of and familiarity with the various special character areas across Auckland, gained from both our private professional practices and our commissioner delegations, provided a more than adequate information base and context to inform our assessment of PC26.

STATUTORY FRAMEWORK

10. Sections 72 to 77D set out the matters that we (as the delegate of the Council) must have regard to when considering PC26. In combination, these provisions create a complex statutory framework for evaluation of a plan change, which in turn, invariably lead to the exercise of a "planning judgement" after hearing and considering all the evidence.[5]

11. In summary, PC26 must be in accordance with:

    (a) the Council's functions under s31 (s74(1)(a));

[3] S42A Report, Table 1, p27.
[4] s42A Report, paras 1.5 – 1.6.
[5] *Gock v Auckland Council* [2019] NZHC 1603, at [29].

(b) the provisions of Part 2 (s74(1)(b));

(c) the obligation to prepare and have particular regard to an evaluation report prepared under s32 (s74(1)(d) & (e));

(d) any relevant national policy statement, the NZCPS and any national planning standard (s74(1)(ea));

12. In addition, with respect to PC26, regard must be had to:

(e) the Auckland Plan (as a management plan or strategy prepared under another act whose content potentially has a bearing on PC26) (s74(2)(b)(i));

(f) The regional policy statement for Auckland (Chapter B of the AUP) (**RPS**), being the 'highest-order' document of relevance to proposed changes to the AUP;

(g) The requirement that a district plan must give effect to the NPS:UDC and RPS (s75(3)(a) and (c)) and not be inconsistent with a regional plan (s75(4)(b)); and

(h) The actual or potential effects on the environment, including adverse effects, arising from any rules (s76(3)).

13. As the overall scope and purpose of PC26 is relatively confined, a number of these statutory requirements are not relevant to PC26 or, on the evidence, are not in contention. We discuss these below at the outset so that our assessment of PC26 can be focussed on the key statutory matters to be considered.

Statutory requirements not in issue

Part 2

14. Consideration of Part 2 in a plan change process is only appropriate where there is invalidity, incompleteness or uncertainty in relation to the statutory planning instrument being applied.[6] Absent those features, the only "higher order" principles, objectives and policies that have to be considered on a plan change are those in the operative plan being changed.[7] We would add to this list any "higher order" principles etc set out in a relevant national policy statement, because of the requirements of s75(3)(a)).

National Policy Statements

15. When PC26 was notified five national policy statements were in effect, but the only one of potential relevance to PC26 was the NPS on Urban Development Capacity 2016 (**NPS-UDC**). The s32 Report considers that PC26 has limited implications for the NPS-UDC as neither the underlying zones nor the extent of the SCA overlay were being altered by the plan change. The report went on to note that the amendment proposed by PC26 to E38 Subdivision – Urban, Table E38.8.2.6.1 would result in a marginal

[6] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, [2014] NZLR 593, at [85] and [88]; *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51, at [34] and [35].
[7] *Appealing Wanaka Inc v Queenstown Lakes DC* [2015] NZEnvC 139.

increase in development capacity by confirming the smaller SCA overlay lot sizes as the sole minimum lot size. This outcome, again, was considered not to conflict with the directions of the NPS-UDC. We agree with this analysis.

16. On 20 August 2020, during the processing of PC26, the NPS-UDC was replaced with a new NPS, simply entitled "Development Capacity" (**NPS-UD**). Although the theme of the NPS-UDC and the NPS-UD is similar, there are some significant differences between them in terms of the nature and scale of the directions they give to local authorities and consent authorities dealing with Tier 1 urban environments such as Auckland. In their Closing Statement,[8] Council officers advised that the NPS-UD contained objectives and policies considered to be particularly relevant to our decision-making[9], but provided no further assistance or advice as to whether or not PC26 gave effect to the NPS-UD.

17. PC26 was developed and notified well before the gazetting of the NPS-UD. Accordingly, none of the far-reaching directions to the Council as to the management of the urban land resource of Auckland (which in time will require the Council to establish whether the features protected by the SCA overlay are a qualifying matter exempting urban land from intensification), have been incorporated within it. This makes it difficult for us to reasonably evaluate PC26 alongside this NPS. Furthermore, the 'reach' of PC26 is fairly limited to the approach to be taken to the consenting of specific land use activities on existing sites in certain areas of Auckland, and has no significant implications for urban land intensification. Put another way, we have no scope at this stage of PC26 to modify it to achieve the intensification directions of the NPS-UD.

18. Despite those limitations, we confirm that we have undertaken our analysis of PC26 keeping in mind the NPS-UD requirement that our decision contribute to a well-functioning urban environment (Policy 1).

NZCPS (and Hauraki Gulf Marine Park Act 2000)

19. We find that neither the NZCPS nor those sections of the Hauraki Gulf Marine Park Act 2000 to be treated as a coastal policy statement are engaged for consideration by PC26.

National Planning Standards

20. The National Planning Standards (**Standards**) adopted[10] earlier this year set mandatory requirements for district plans including standardised zones and zone descriptions. The obligation to implement the Standards rests on the Council, and to do so within 10 years. The purpose of the Standards is to achieve national consistency for the structure, format, and content of plans. As far as we can tell, there is no duty on us to implement the Standards while determining PC26.

[8] Closing Statement from Council officers, 7 August 2020.
[9] NPS-UD Objectives 1, 2, 4 and 5, Policies 1, 2, 3(d), 4, 6 and 9. Our attention was also drawn to sub-parts 3-11, 3-31, 3-32 and 3-33.
[10] The National Planning Standards were gazetted on the 5th of April 2019.

Auckland Plan

21. Prepared under s79 of the Local Government (Auckland Council) Act 2009, the Auckland Plan is potentially a relevant strategy document. However, we agree with the s32 report that the amendments proposed to the AUP are generally technical in nature and do not change the way in which the AUP implements the strategic direction of the Auckland Plan (2012 or 2050). We consider it no further.

Regional Plan

22. PC26 does not propose any changes to the regional plan provisions in the AUP and nor did we receive any evidence that the regional plan provisions of the AUP were incomplete or inadequate with respect to the control of the actual and potential effects of development that would be enabled by PC26 (if approved), which might have raised a concern for us with respect to s75(4)(b). We have therefore not considered PC26 in relation to any regional plan provisions.

Decision requirements

23. A decision on the provisions of a plan change and the matters raised in submissions must be prepared in accordance with cl10. In considering PC26 we have taken into account:

    (a) the plan change request and supporting s32 Report;

    (b) the s42A Report;

    (c) the submissions and further submissions made on PC26; and

    (d) the submissions, statements and evidence presented by Auckland Council officers and the submitters who appeared at the hearing.

24. Our decision includes our findings about PC26 and its provisions, and on the submissions made on the proposed change.

SUBMISSION JURISDICTION AND RELIEF-SCOPE ISSUES

25. Unsurprisingly for a proposed change to an operative plan, issues of submission jurisdiction and relief-scope arose with PC26. Our findings on these issues are set out below.

26. Under schedule 1 the potential outcomes from the submission and appeal process in relation to a plan change are limited by two important constraints.

Submissions must be "on" the plan change

27. Under cl6(1) any submission lodged by a person must be "on" the plan change, with the effect that submissions made in breach of this requirement are not able to be

considered.[11] In *Motor Machinists* the High Court confirmed that a two-limbed test must be satisfied:

(a) for a submission to be on a plan change it must address the proposed plan change itself, that is it must address the alteration of the status quo brought about by that change; and

(b) the submission must also be considered from the perspective of whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.

28. In *Motor Machinists* the High Court described the first limb as the "dominant consideration", involving consideration of both "*the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.*" The Court noted two potential ways of analysing this. One way is to ask whether the submission raises matters that should have been addressed in the s32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another way is to ask whether the management regime for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change.

29. In relation to the second limb, the Court noted that overriding the reasonable interests of people and communities "*by a submissional side-wind would not be robust, sustainable management*". Given the other options available, which include seeking resource consent, seeking a further public plan change, or seeking a private plan change, the Court determined that "a precautionary approach to jurisdiction imposes no unreasonable hardship." However, the Court noted that there is less risk of offending the second limb if a change is merely consequential or incidental, and adequately assessed in the existing s32 report.

30. The s42A Report set out Council officers' assessment of the submissions made to PC26 in relation to this primary jurisdictional threshold. Officers considered that submissions seeking:

- Alterations to the extent of the SCA overlay (including submissions seeking application of the SCA overlay to areas not presently subject to it (e.g., Howick));
- Modifications to the thresholds of the standards;
- Creation of a new zone;
- Rezoning of land; and

[11] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 and *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519.

- Amendments to resource consent processes, including notification,

were not 'on' PC26 and were therefore beyond scope.

31. We have reviewed the submissions identified by Council as falling into these categories and considered them by reference to the specific changes sought (and not sought) by PC26. We do not agree that submissions seeking modification to the upper or lower thresholds of the development standards proposed to be "refined" by PC26 are not "on" the plan change. To the extent that each of the standards in this category represent the 'status quo' for that development control, PC26's proposal to amend them (by way of "refinement") creates sufficient scope for submissions seeking alternative amendments to them to be legitimately "on" the plan change and within scope.

32. However, in all other respects we agree that submissions to PC26 seeking relief of the kind described in paragraph 28 above are not "on" PC 26 and we have no jurisdiction to consider them. This is because PC26 does not propose any amendments to the provisions of any underlying zone subject to the SCA overlay, or to the mapped extent of the SCA overlay in the AUP planning maps.[12] Nor does it propose any amendments to the following provisions of Chapter D18:

- D18.2 Objectives.
- D18.3 Policies.
- Table D18.4.2 Activity table – Special Character Areas Overlay – Business.
- D18.5 Notification.
- D18.6.2 Standards for buildings in the Special Character Areas Overlay – Business.
- D18.7 Assessment – controlled activities.
- D18.9 Special Information Requirements.

Relief must be fairly and reasonably raised

33. A submission having been determined as "on" a plan change, the second 'scope' threshold that arises for assessment is whether relief sought by a submitter is raised by, and within, the ambit of what was reasonably and fairly raised in submissions.[13] It is trite that this assessment should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[14] This "*will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions*".[15]

[12] Attachment 2 to the s32 Report identified 11 sites to be removed from the SCA overlay, but this proposal was not carried forward to notification and is therefore not an aspect of PC26 to be considered.
[13] *Vernon v Thames-Coromandel District Council* [2017] NZEnvC 2, at [11].
[14] Ibid.
[15] Ibid.

34. The limitations on the scope to modify a plan change after it has been notified are also designed to ensure that, procedurally, there is an opportunity for the matter to be addressed in a further s 32 evaluation, and that there has been an opportunity for those potentially affected by the change to participate.[16]

35. It is not necessary for the submission "matter" in question to be identified as a form of relief in the submission for it to be able to provide scope to amend the planning document on which the submission was made. Provided a submission, read as a whole, effectively raises the issue in substance,[17] and the proposed modification in response does not go beyond what was fairly and reasonably raised in the submissions,[18] then the decision maker will have scope to entertain it, subject to the further obligation to comply with s 32AA.

36. We will apply these principles later in this decision to:

    (a) any specific relief sought by submitters since the making of their submissions, but not explicitly sought in their written submission; and

    (b) any further amendments proposed to PC26 by Council officers following the consideration of the submitters' presentations,

    where we are persuaded that the relief or further amendment is appropriate for inclusion in PC26, to determine whether accepting it is a lawful exercise of our decision-making powers.

PROPOSED PLAN CHANGE 26

Background

37. PC26 has been initiated by Auckland Council (**Council**) following a declaration made by the Environment Court in 2018 in the following terms:[19]

> *Where a proposed activity:*
>
> *(a) is on a site located within both the Residential - Single House zone ("SHZ") and the Special Character Areas Overlay - Residential ("SCAR") of the partly operative [AUP]; and*
>
> *(b) is classed as a restricted discretionary activity either under Activity Table D18.4.1 or, due to its non-compliance with a SHZ or SCAR development standard, under Rule C1.9(2)-*
>
> *then the relevant SHZ, SCAR and General Rules (and any relevant objectives and policies) apply, in the processing and determination of any resource consent application for the proposed activity, without the SCAR rules prevailing over or cancelling out other rules.*

[16] Ibid.
[17] See *Johnston v Bay of Plenty RC* EnvC A106/03.
[18] Eg *Atkinson v Wellington RC EnvC* W013/99.
[19] *Auckland Council v Budden* [2018] NZEnvC 30, at [53].

(our emphasis)

38. Prior to the *Budden* proceedings, Council consents' processing officers had treated the development standards in the SCA overlay as effectively replacing the equivalent standards in the underlying zone, even where the former standards were more enabling than the latter (e.g., height in relation to boundary).

39. The Council's rationale for this was its view that the relationship between the provisions was unclear and as it had sought precedence for the SCA overlay provisions during the AUP IHP hearings, that was the approach it would take. As emphasised in the quote above, the *Budden* declaration rejected this practice, finding instead that properly interpreted, the AUP was clear in how the SCA overlay and underlying zone provisions were to be applied.

40. Although Council officers preferred to describe PC26 as 'clarifying' the position following the *Budden* declaration, the effect of PC26 is to amend the consenting and assessment approach to be taken under the AUP for certain activities on sites where the SCA overlay applies. Broadly, it does this by amending the provisions of Chapters D18 and E39 to ensure that the development standards for certain activities in the SCA Overlay – Residential and SCA Overlay – General (with a residential zoning) prevail over the equivalent standards for those activities in the underlying zones.

41. Council officers maintain the view that the 'SCA overlay has precedence' approach was always intended. They consider that the current 'equal relevance' approach results in unnecessary complexities and time costs for plan users, particularly with respect to the processing of resource consent applications. This, it is said, is because there is no clarity over which metric or activity status should take precedence for certain development applications on land within the SCA overlay.

Purpose of PC26

42. Understanding the purpose of any proposed plan change that does not contain or state objectives is an important first step to considering it under the Act. This is because the s32 evaluation of such a plan change requires examination of the extent to which that purpose[20] is the most appropriate way to achieve the purpose of the Act (s32(1)(a)); and whether the provisions of the plan change are the most appropriate way to achieve that purpose (by identifying other reasonably practicable options and assessing the efficiency and effectiveness of the provisions (s32(1)(b)).

43. The purpose of PC26 for the purposes of s32 is:[21]

> *… to amend Chapters D18 and E38 in order to:*
>
> *(a) ensure that the AUP appropriately specifies the relationship between the Special Character Areas Overlay and the underlying zone provisions; and*

[20] s32(6).
[21] s32 Report, p15.

(b) ensure that the development standards that apply to sites in the SCA overlay are most appropriately targeted to managing the special character values of the areas to which they relate.

44. The first purpose - (a), is to 'appropriately specify' the relationship between the provisions in the SCA overlay and the equivalent provisions that apply in the underlying zone. By reference to PC26, the provisions in question appear to be confined to the rules and their associated standards that apply to the land use (development) activities set out in Table D18.4.1 and standard E38.8.2.6 Subdivision of sites identified in the Special Character Areas Overlay – Residential and Business.

45. On the face of the s32 report the relationship between this purpose and the second one – (b) - is unclear: are they linked, or stand-alone? That is, does the need for the second purpose - to ensure the development standards appropriately manage the special character values of the areas to which they relate - arise because they would become the only development standards for activities in the SCA overlay if the primary purpose of PC26 is accepted and, as the s32 Report notes, [22] they are "too general" for that purpose? Or is the second purpose intended as a separate review and refinement of the SCA overlay standards generally? Notably, the only SCA overlay standards that PC26 proposes substantive alterations to are those relating to height in relation to boundary, rear yards and fencing.

46. Some aspects of PC26 do not appear to have a link to either of its two expressed purposes. We refer here to the proposal to add 'purpose statements' to each of the SCA overlay development standards and to introduce a matter of discretion and assessment criterion referring back to the relevant matters of discretion/assessment criteria for the standard (or equivalent standard) in the underlying zone. We have assumed that the drafters of PC26 have considered the reference to 'development standards' in the second purpose as encompassing the matters of discretion and assessment criteria that would be engaged in considering an application which engaged those standards.

47. We will return to these issues later in this decision following our analysis of the s32 report and the evidence proffered in support of PC26 by Council officers.

48. The amendments proposed by PC26 to achieve the <u>first purpose</u> of PC26 are:

Chapter D18

1. Amend the introductory text preceding Activity Table D18.4.1 Special Character Areas Overlay – Residential to state:

a) That Activity Table D18.4.1 does not apply to land use activities;

b) That the activity status of activities in Activity Table D18.4.1 takes precedence over the activity status of that activity in the underlying zone;

c) That the activity status in the relevant zone applies to land use activities and to development activities that are not specified in Table D18.4.1; and

[22] S32 Report, p19.

d) That all other relevant overlay, precinct and Auckland-wide rules apply unless otherwise specified.

2. Amend D18.6.1 Standards for buildings in the Special Character Areas Overlay – Residential to:

a) Clarify that the development standards listed within D18.6.1 apply to all activities undertaken in the Special Character Areas Overlay – Residential, whether they are listed in Activity Table D18.4.1 or in the relevant zone; and

b) State that the following development standards in D18.6.1 prevail over the equivalent development standards in the underlying zone (except where otherwise specified):

- *building height*
- *height in relation to boundary*
- *yards*
- *building coverage*
- *maximum impervious area*
- *landscaped area*
- *fences and walls*

Chapter E38: Subdivision - Urban

3. Amend Standard E38.8.2.6 to state that the minimum net site area standards in Table E38.8.2.6.1 prevail over the zone-specific standards in Table E38.8.2.3.1.

49. The amendments proposed by PC26 to achieve the <u>second purpose</u> are:

Chapter D18

4. Amend Activity Table D18.4.1 Special Character Areas Overlay – Residential to:

a) Insert a new activity rule to provide for the construction of new fences and walls, and alterations to fences and walls that comply with Standard D18.6.1.7(1) as a permitted activity; and

b) Insert a new activity rule to state that the construction of new fences and walls, or alterations to fences and walls, that do not comply with Standard D18.6.1.7(1) is a restricted discretionary activity.

5. Include a purpose statement for the following development standards:

a) building height

b) height in relation to boundary

c) yards

d) building coverage

e) landscaped area

f) maximum impervious area

g) fences and walls

6. Amend Standard D18.6.1.2 Height in relation to boundary to specify that:

a) The control (3m + 45 degree recession plane) only applies to sites with a frontage length of less than 15m;

b) The underlying zone height in relation to boundary standard applies:

- *To sites that have a frontage length of 15m or greater; or*
- *Rear sites.*

c) Standard D18.6.1.2 only applies to side and rear boundaries (not front boundaries)

d) Standard D18.6.1.2 does not apply to site boundaries with an existing common wall between two buildings on adjacent sites or where a common wall is proposed;

e) Standard D18.6.1.2 applies from the farthest boundary of legal rights of way, entrance strips, access sites or pedestrian access ways; and

f) That gable ends, dormers or roofs may project beyond the recession plane in certain circumstances.

7. Delete the rear yard requirement from D18.6.1.3; and state that the underlying zone yard standards apply for all other yards.

8. Amend the reference to 'maximum paved area' in D18.6.1.6 to 'maximum impervious area'; along with associated amendments to the maximum levels in Table D18.6.1.6.1.

9. Amend the standard that relates to fences and walls in D18.6.1.7 to the effect that fences constructed between the front facades of houses and the street are limited to 1.2m in height, but can be up to 2m in height elsewhere on a site.

10. Amend D18.8 to require an assessment of resource consents against the matters of discretion and assessment criteria set out in D18.8 as well as the matters of discretion and assessment criteria in the underlying zone (for infringements to equivalent standards only).

50. We now turn to evaluate these purposes of PC26 in light of the materials and evidence we have been presented.

CONSIDERATION OF PC26 – PURPOSE 1 – APPROPRIATE SPECIFICATION OF RELATIONSHIP BETWEEN SCA OVERLAY AND UNDERLYING ZONE

Background

51. The background to this purpose of PC26 is helpfully set out in "*Auckland Unitary Plan Overlays Analysis Working Paper*" prepared by Kath Coombes and Miriam Williams published after the final decision in the *Budden* proceedings.[23] The authors note:

> *The SCAR overlay seeks to retain and manage the special character values of specific residential and business areas identified as having collective and cohesive*

[23] December 2018, ISBN 978-1-98-856471-5 (PDF), pp8-9.

values, importance, relevance and interest to the communities within the locality and wider Auckland region. The overlay applies to 50 different areas of Auckland. The SCAR provisions focus on external building works, not on the use of those buildings. The SCAR seeks to retain and manage the character of traditional town centres and residential neighbourhoods by enhancing existing traditional buildings, retaining intact groups of character buildings, and designing compatible new building infill and additions that do not replicate older styles and construction methods, but reinforce the predominant streetscape character.

The SHZ and SCAR have several provisions which overlap, including the activity status for various works relating to buildings (e.g. construction, alteration, demolition, relocation), and the related standards (e.g. building height, yards, height in relation to boundary, building coverage and fences). The SCAR requires resource consent for some activities (e.g. demolition or construction of a new dwelling) that would be a permitted activity in the SHZ if it complied with the relevant standards. Some standards in the SCAR are more permissive compared to the corresponding standard in the SHZ, while others are more restrictive. The SCAR provisions provide for a larger building envelope than the SHZ (through the height in relation to boundary and front yard standards), but also requires a wider rear and side yard than the SHZ, reflecting the historical built form in some of the older residential areas of Auckland. These areas often have small narrow sites with development closer to front boundaries than what generally occurs in more recent suburbs. Each special character area has a 'character statement' summarising the particular values and qualities of that area.

There are extensive areas of SHZ in the Auckland Region, including areas of more recent development. Only part of the SHZ is also subject to the SCAR overlay. A key difference between the SCAR and SHZ is that one of the matters of discretion for the SHZ relates to managing effects on the amenity values of neighbouring sites. There is no equivalent matter of discretion for the SCAR.

52. In *Budden* the Court examined the application of AUP General rules C1.6 and C1.8(1) and how they applied to the SCA overlay relationship with the underlying zone. The rules state:

C1.6. Overall activity status

(1) The overall activity status of a proposal will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules.

(2) Subject to Rule C1.6(4), the overall activity status of a proposal is that of the most restrictive rule which applies to the proposal.

(3) The activity status of an activity in an overlay takes precedence over the activity status of that activity in a precinct, unless otherwise specified by a rule in the precinct applying to the particular activity.

(4) Where an activity is subject to a precinct rule and the activity status of that activity in the precinct is different to the activity status in the zone or in the Auckland-wide rules, then the activity status in the precinct takes precedence over the activity status in the zone or Auckland-wide rules, whether that activity status is more or less restrictive.

C1.8 Assessment of restricted discretionary, discretionary and non-complying activities

(1) When considering an application for resource consent for an activity that is classed as a restricted discretionary, discretionary or non-complying activity, the Council will consider all relevant overlay, zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site or sites where that activity will occur.

53. In relation to these rules, the Working Paper notes:[24]

> *The general rule C1.6 refers to only 'activity status' and it is not explicit whether the same approach applies to standards where there are equivalent standards applying to a proposal (e.g. two 'height in relation to boundary' standards). The council had an internal practice notice that considered that the SCAR had a complete set of development standards which represent a 'replacement package' for the corresponding set of development standards in the SHZ. As a result, construction of new buildings and additions to existing buildings in the SCAR required consent as a restricted discretionary activity, with the larger building envelope provided for in the SCAR standards, and the consent assessment did not include an assessment of effects on the amenity values of neighbouring sites (which was in the SHZ provisions). The consent process considered the effects on the streetscape and character of the area, but not the full range of matters which would have been considered under the SHZ provisions if a zone standard had been infringed.*

54. A consequence of the *Budden* declaration (set out at paragraph 33 above) is that rules that provide for development within overlays, zones or Auckland-wide provisions do not prevail over (or cancel out) other rules applying to that activity in the underlying zone: all applicable rules must be considered. Furthermore, the most restrictive activity status arising from the rules must be applied to the proposal (unless a rule creates a relevant exception to other rules). As observed in the Working Paper:[25]

> *Applying all the relevant rules means that the activity status of an activity is taken from all the relevant activity tables, and that all the applicable standards apply to an activity. Where the activity status from two relevant provisions (under an overlay and a zone) is the same, all the standards relating to the relevant rules apply. The most constraining standard will limit the application of an equivalent standard from another provision. For example, a height limit of 10m in an overlay will restrict the height of a proposed building, even though the underlying zone provides for a 15m height limit, as all relevant rules must be applied.*
>
> *The result of the decisions is that consent applications must be considered against the provisions of both the SCAR and the SHZ. As a consequence, it appears that the SCAR provisions that are 'more enabling' than a zone provision may not function as they were intended. For example, the standard setting a relatively narrow front yard (where the adjacent dwellings are close to the street) may not be applied if the zone requires a wider front yard and is therefore a 'more restrictive' provision in determining the appropriate building envelope.*

[24] Ibid.
[25] Ibid.

55. The starting point for PC26 therefore is a desire ensure that more enabling SCA overlay provisions apply despite more restrictive underlying zone provisions, and that more restrictive SCA overlay provisions apply despite more enabling underlying zone provisions (such that the provisions in the SCA overlay always prevail). The issue for us to determine is whether this specification of the relationship[26] in the manner proposed by PC26 is appropriate. This requires an understanding of the reasons put forward by Council for its 'SCA overlay has precedence' approach.

The section 32 report

56. In formulating the approach to be taken to achieving its primary purpose the s32 Report for PC26 started with three 'high-level' options:

- Option 1: Retain the status quo.
- Option 2: Amend the AUP to stipulate that SCA overlay provisions take precedence (with four sub-options identified to achieve that).
- Option 3: Undertake a wider review of the entire SCA overlay and the management of the resources it applies to.[27]

57. In rejecting Option 1, the s32 Report cites three disadvantages with the current position under the AUP:

(a) It does not allow the SCA overlay to function as intended, because of "conflicts" between provisions;

(b) These conflicts create complexity in consent assessment;

(c) This complexity results in inefficiency.

58. As advantages of implementing its preferred Option 2, the s32 Report cites:

(a) The removal of the "conflicts" will allow the SCA overlay to function as intended;

(b) Greater clarity and certainty will be given to plan users, thus reducing consent requirements and assessment, and compliance costs.

59. The disadvantages of Option 1 and the advantages of Option 2 are relied on extensively in the s32 Report as the rationale for PC26. They also permeated the s42A Report and were the consistent answer given by Council officers to our questions about the basis for PC26 at the hearing. In a written response to the direct question: "Is there a problem that requires fixing?" they were again repeated. [28] In their Closing Statement, Council

[26] s32 Report, Purpose 1.
[27] This option is rejected in the s32 Report on the grounds of insufficient resources to complete, delay in providing a solution to the problem identified by Council, unnecessary to achieve a simple solution and cost.
[28] Closing Statement, 7 August 2020.

officers further advised that:[29] "*the Auckland Council's Regulatory Services team confirms that having two metrics for many standards (e.g. height in relation to boundary) is problematic. If one or more of the standards is encroached, applicants will require a restricted discretionary resource consent which may be subject to limited notification*."

60. As the rationale for PC26 is fundamentally based on the premises of unintended outcome and perceived problems, we have found it necessary to undertake a detailed assessment of each.

SCA overlay – what was intended?

61. The s 32 report advises that during the AUP IHP Hearings, Council's intention was that the SCA Residential overlay provisions would take precedence over the underlying zone provisions, in instances where both the SCA Residential overlay and the underlying zone contain a rule relating to the same issue (e.g. a height in relation to boundary control). This was because the standards differed for special character areas to reflect (and maintain) the character values that were evident in these areas. We were told that this was reflected in the Council's closing position through the IHP Hearings process.[30]

62. The s32 Report lays the blame for Council's intention not being manifested in the final recommended provisions of the AUP at the feet of the IHP. It notes that "*Council's tailored approach was amended through the IHP recommendations, and the standards were generalised across the SCA Residential; particularly the HIRB control for example. Ultimately, there was a lack of clarity about the status of the overlay and chapter C generally, and how the corresponding underlying zone standards should apply*."[31]

63. We were not directed to any report of the IHP that supported the s32 Report's assertion that the provisions of the SCA overlay were intended to prevail over the equivalent underlying zone provisions. On the face of the AUP, overlay provisions only take precedence over precinct provisions (unless a precinct rule says otherwise) (General rule C1.6(3)). Notwithstanding the view of the s32 Report as to what the Council intended, as far as we know, the current relationship between the SCA overlay and the underlying zones represents an implicit rejection of Council's preference and an approach, preferred by the IHP, that best integrates the objective of maintaining and enhancing special character while also maintaining and enhancing residential amenity. We note that the Council accepted the IHP's recommendations as to the relationship between overlays and underlying zone in its 2016 decision.

64. Nor were we presented with any detailed 'higher order' policy analysis that supported the 'SCA overlay takes precedence' approach. The s32 Report confined its assessment to a summary of the objective and policies in RPS B5.3 Special character and the statement that the "largely technical nature" of the changes proposed by PC26 will not change the policy direction of the AUP or result in any inconsistencies with the RPS.[32]

[29] Ibid, paragraph 11.
[30] s32 Report, pp8-9.
[31] Ibid.
[32] s32 Report, pp26-27.

While that may be true with respect to the SCA overlay provisions, the implications for the balance of the RPS or the environmental outcomes sought to be achieved in the underlying zones are not considered at all. In fact, from our review of the relevant provisions of the RPS there is no indication that the maintenance and enhancement of special character values[33] is to be given more weight than ensuring a high quality urban environment.[34] Rather, at B11.1, the RPS records:

> *The objectives and policies in each section of the regional policy statement, together with these environmental results anticipated, should be read as a whole. Where resource management issues in different sections are related and overlap, those sections should also be read together so that all relevant objectives, policies and environmental results anticipated are considered in respect of each issue. In this way, the complexity of the environment and its many parts (including people, communities and ecosystems) can be assessed in an integrated way.*

65. In the result, we do not accept the assertion that in failing to adopt Council's position at the IHP hearings the AUP is somehow in error in its approach to development on land within the SCA overlay and needs rectification. On the face of it, the AUP is operating entirely as intended – with the SCA overlay and the underlying zone provisions working together in an integrated manner to achieve multiple development outcomes and aspirations. Nor do we accept that in seeking to make the SCA overlay provisions prevail over the equivalent underlying zone provisions, PC26 is fixing a failing by the AUP to comply with the requirements of s75(3)(c).

66. These findings are sufficient in our view to lead to the rejection of PC26. However, because clarity and administrative efficiency are important features of integrated management, we have decided to investigate in further detail the other implementation issues identified by the s32 Report to ascertain whether amendments are reasonably required in order to ensure the AUP is user-friendly. It may be, as well, that changes could reasonably be made to ensure that the district plan gives better effect to the RPS, if we are satisfied that the current regime of provisions is resulting in outcomes that are in conflict with the relevant provisions of that policy statement.

Conflict, complexity, confusion, and cost?

67. Our analysis of these supporting reasons for PC26 focuses on the SCA overlay provisions and the SHZ (as the most extensive zone underlying the SCA overlay) and has involved looking in detail at the areas where the provisions in D18 intersect with equivalent and applicable provisions in the underlying zones and considering how the Act, the General rules in the AUP, and planning caselaw inform the approach to be taken to their interpretation and application.

Purpose, objectives and policies

68. The SCA overlay seeks to retain and manage the special character values of specific residential and business areas identified as having collective and cohesive values,

[33] See B5.3(2).
[34] See B2.2.1(1)(a).

importance, relevance and interest to the communities within the locality and wider Auckland region.[35] The purpose of the SHZ is to maintain and enhance the amenity values of established residential neighbourhoods in a number of locations. The amenity values of a neighbourhood may be based on special character informed by the past, spacious sites with some large trees, a coastal setting or other factors such as established neighbourhood character.[36]

69. The SCA overlay and SHZ objectives focus on these respective purposes and represent the 'statements of intent' for how development within the overlay area and SHZ will be managed. There is no obvious conflict between these provisions in our view: no objective in the SCA overlay expressly contradicts an SHZ objective, or vice versa. In fact, there is a significant degree of overlap.

70. However, as these provisions are expressed at a general level it is necessary to consider closely the resource management provisions that are tasked with achieving them: policies and methods (including rules).

71. Like their founding objectives, the SCA overlay and SHZ policies are also concerned with different tasks, albeit in relation to the same physical resources (land and buildings), and in areas that overlap.

72. Looking at the SCA overlay residential policies relating to development (D18.3(1), (2), (6) and (7)) alongside those of the SHZ (H3.3(1), (2), (3) and (4)), it is possible to imagine situations where development seeking to achieve the policies in the SCA overlay might conflict with an SHZ policy.

73. For example, where redevelopment of a site aims to achieve a streetscape focussed built form consistent with the special character values of the immediate locality, which happens to result in adverse privacy or visual dominance effects on adjoining sites. The risk of conflict arising in such scenarios would be high if the development activities in both the overlay and the zone were permitted, but subject to development standards that required different outcomes. However, the AUP avoids such potential conflict by requiring all development in the SCA overlay to obtain resource consent as a restricted discretionary (**RD**) activity,[37] regardless of the status of that activity in the underlying zone. This method ensures that no actual conflict can arise in practice and that the outcomes sought by the policies and objectives can be achieved on a case by case basis in the context of a resource consent application.

74. We acknowledge that such a case by case assessment approach within the framework of an RD consent application does not deliver the 'tick-box' type of certainty that users of the AUP might prefer. However, this is the approach universally adopted by the AUP

[35] D18.1 Background.
[36] H3.1 Zone description.
[37] Together, the effect of s87A(3)(a) and s104C, is that when considering whether to decline a 'restricted discretionary' resource consent, or to grant the consent and impose conditions, the consent authority must consider only the matters over which it has restricted the exercise of its discretion in its plan or proposed plan.

to manage competing resource management issues in an integrated way. The appropriate process to revisit that approach is the review of the AUP, not by way of plan changes seeking piecemeal revisions to specific provisions.

Rules

75. In the SCA overlay, development that involves external alterations or additions to an existing building,[38] construction of a new building, or relocation of a building onto a site[39] require an RD resource consent under Table D18.4.1. For the most part, those same activities are classified as permitted in the underlying zones.[40] On the face of it therefore there is a difference of activity status for the same activity. However, s9 states that no person may use land in a manner that contravenes a district rule unless, *inter alia*, a resource consent is obtained. This means that the district rule specifying permitted activity status for external additions and alterations and new dwellings etc in the underlying zones is effectively 'overruled' by the district rule requiring resource consent for the same activities if the site is within the SCA overlay.

76. This position is confirmed by General rule C1.6 which states that "*the overall activity status of a proposal is that of the most restrictive rule which applies to the proposal*". This means that in the case of the development activities in question (RD in the SCA overlay and permitted in the underlying zone), the RD consent status applies. There is therefore no activity status 'conflict' between the SCA overlay and the underlying zone – the activities are all wholly RD; and the matters of discretion are confined to those in D18.8.1.1(2).

77. The need for the development activity to obtain resource consent also engages General rule C1.8(1) which confirms (for the purposes of s104(1)(b)), that all relevant zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site or sites where that activity will occur will be considered. In this way, the objectives and policies of the underlying zone become matters for consideration on an RD application under the SCA overlay, even though the activity would be permitted if the site in question was not within the SCA overlay.

78. RD development activities in the SCA overlay, as well as permitted development activities in the underlying zones, are required to achieve certain "standards". AUP A1.6.6 Standards notes that permitted, controlled or RD classified activities are "*normally subject to standards*". Standards "*set limits on the extent to which an activity is permitted or may be assessed as a controlled or restricted discretionary activity*" and exceedance of a standard "*normally results in the activity being considered as a more restrictive class of activity*". For the purpose of considering any conflict between rules, the 'rule' encompasses the activity, the activity status given to it in the activity table, and any standards that apply to the activity in order for it to rely on the listed activity status. These features can be distinguished from matters for control or discretion, and

[38] Table D18.4.1 Rule (A4).
[39] Table D18.4.1 Rule (A5).
[40] See for example Table H4.4.1 (A32) and (A34); Table H3.4.1 (A35) and (A36).

assessment criteria, which are provisions of the plan that are directed at the consideration of the activity upon lodgement of a resource consent application.

79. Together, Table D18.4.1 and D18.6.1 classify building works in the SCA overlay that comply with standards D18.6.1.1 to D18.6.1.7 as RD.

80. A similar method applies to activities in the SHZ. Together, Table H3.4.1 and H3.6.1 classify building works as permitted provided they "*comply with the standards listed in the column in Table H3.4.1 Activity table called Standards to be complied with*".

81. If a development proposal in the SCA overlay does not comply with one or more of the standards listed in D18.6.1, the status of the application does not become more restrictive (i.e., discretionary or non-complying). Rather, by operation of General rule C1.9(2) the non-compliance with the standard(s) simply requires an additional RD consent, and the matters for discretion in relation to that consent requirement listed at C1.9(3) apply in addition to those set out within the SCA overlay (D18.8.2.1(4)) and the SHZ (H3.8.1(2)). In this scenario, the overall (i.e., "bundled") activity status remains the same (RD), but the range of matters of discretion is enlarged.

82. A similar consenting framework applies when it comes to development in the underlying zones. The development activities covered by SCA overlay rules A4 and A5 are permitted provided they comply with the standards in H3.6, which cover the same building 'metrics' as in the SCA overlay (albeit expressed slightly differently). For a site in the SHZ not affected by the SCA overlay, where the proposed development works in this zone do not comply with one or more of the permitted activity standards, an RD consent requirement is triggered (per the operation of General rule C1.9(2)) and the matters for discretion in relation to that consent requirement listed at C1.9(3) apply in addition to those set out within the SHZ (H3.8.1(2)). In this scenario, again, the overall (i.e., "bundled") activity status remains the same (RD), but the range of matters of discretion is enlarged.

83. As an aside, we consider it relevant to note that in the case of development proposals in the SCA overlay (as opposed to RD applications in the SHZ not subject to the SCA overlay), there is no ability for an applicant to assert a permitted baseline of adverse effect in reliance on s104(2). This is because development withing the SCA overlay is not permitted and all relevant rules must be considered in determining whether the plan permits the activity for the purposes of s104(2).[41] If follows that the permitted activity development standards of the SHZ have no substantive effects assessment role to play for applications within the SCA overlay, although they can still be considered (if relevant) in the overall assessment of the application (s104(1)(b)(iv)).

84. The 'conflict' of concern described in the s32 Report is said to arise in situations where different standards in D18 and the underlying zone both apply to the same development activity. Using the SHZ as the underlying zone, we can envisage the following scenarios:

[41] See for example *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 024, at [70].

A New development achieving all SCA overlay and SHZ standards. This assumes that the development does not take advantage of the more permissive SCA overlay standards and complies with the more stringent ones (and thus complies with the SHZ equivalent standards).

B New development using all SCA overlay standards and in doing so infringing equivalent SHZ standards.

C New development infringing SCA overlay standards but complying with SHZ standards.

D New development infringing SCA overlay standards and equivalent SHZ standards.

85. The four possible situations are shown in the following table:

	STANDARDS INFRINGED		ACTIVITY STATUS		
	SCA OVERLAY	SHZ	SCA OVERLAY	SHZ	OVERALL
A	Nil	Nil	RD	P	RD (C1.6(1))
B	Nil	Yes – eg HIRB, Yard or Coverage	RD	RD (C1.9(2))	RD (C1.6(1))
C	Yes (eg fencing)	Nil	RD (C1.9(2))	P	RD (C1.6(1))
D	Yes	Yes	RD (C1.9(2))	RD (C1.9(2))	RD (C1.6(1))

86. In all of the possible development scenarios involving the SCA overlay and the SHZ, a number of RD consent applications will need to be made, with the overall application status being RD.

87. Notably, compliance or not with the standards in either the SCA overlay, or the SHZ, or both, makes no difference to activity status. The only provisions which change, depending on the scenario involved, are the matters for discretion and assessment criteria, as set out in the following table:

	RELEVANT OBS & POLS		MATTERS FOR DISCRETION		ASSESSMENT CRITERIA	
	SCA OVERLAY	SHZ	SCA OVERLAY	SHZ	SCA OVERLAY	SHZ
A	D18.2 D18.3	H3.2 H3.3 (Rule C1.8(1))	D18.8.1.1(2)	Nil	D18.8.2.1(2) & (3)	Nil
B	D18.2 D18.3	H3.2 H3.3	D18.8.1.1(2)	H3.8.1(2) & C1.9(3)	D18.8.2.1(2) & (3)	H3.8.2(3), (4), (6)
C	D18.2 D18.3	H3.2 H3.3 (Rule C1.8(1))	D18.8.1.1(2), (3) & C1.9(3)	Nil	D18.8.2.1(2) & (3)	Nil
D	D18.2 D18.3	H3.2 H3.3	D18.8.1.1(2), (3) & C1.9(3)	H3.8.1(2) & C1.9(3)	D18.8.2.1(2) & (3)	H3.8.2(3), (4), (6) etc

Summary of issue and assessment

88. Against this background it appears to us that the 'conflict' that PC26 is concerned with is the situation where, in the context of a wholly RD application, different standards for the same development activity in the SCA overlay and the underlying zone have to be considered. As noted, some of the applicable standards in the SCA overlay are more restrictive than their equivalent in the underlying zone, while others are more enabling. These differences are summarised in Attachment 4 to the s32 Report.

89. We accept that such a situation (different development standards for the same activity) is likely to be confusing to plan users because it is unclear which standard should be given the most weight. This in turn makes assessing the application against the building metrics comprising the standards difficult and open to debate. In this regard we acknowledge the general theme of much of the evidence we heard in support of PC26 was that clarifying the position to remove this confusion would be helpful to applicants. However, we have not been persuaded that the structural changes proposed to the AUP by PC26, specifically the "replace" and "do not apply" construct, are appropriate or necessary to address this issue. In our view, much of the confusion arises from a misunderstanding as to the role that the development standards play in the case of an activity that is classified, overall, as RD, and a failure to appreciate the role of s104C in the assessment and determination process.

90. As noted earlier, for development applications in the SCA overlay there is no "permitted baseline" under s104(2). Therefore, neither the SCA overlay nor underlying zone standards have any substantive role in the assessment of effects process; their role is limited to triggering which restrictions of discretion apply. Any difference between them therefore is inconsequential. It follows, assuming they are relevant, that for the purposes of the assessment of the application under the Act, the standards are simply "provisions of a plan" (s104(1)(b)(vi)), to which regard must be had, along with the other s104(1) matters. As the established caselaw is that the directive "must have regard to" simply requires decision-makers to give genuine attention and thought to the matters set out, but not "give effect to them", it means that the weight to be given to the standards will vary according to the circumstances of the case.

91. It is for this reason that we respectively disagree with the authors of the Working Paper where they say: *The most constraining standard will limit the application of an equivalent standard from another provision.*[42] We find there to be no legal or plan interpretation basis for this conclusion. In an RD application in which both sets of standards are engaged for consideration both are prima facie relevant (as the 'triggers' that gave rise to the need for an RD consent), with the circumstances of the application providing the context for an assessment of weight. The complexity of this situation is overstated in our view.

92. More relevantly, s104C creates the situation whereby it is the restricted matters of discretion that are the 'engine room' for RD applications. With a simple RD application

[42] fn 25.

(e.g., scenarios A or C above), the matters for discretion are set out in D18.8.1.1(2) and (3). No SHZ or general matters of discretion are engaged. But even when they are, (i.e., in scenarios B and D where multiple RD consents may be needed for the same proposal), there should be no cause for alarm. The matters from all relevant rules are to be read as a composite, conjunctive list of matters of discretion, including those within C1.9(3) of the AUP where one or more standards is infringed.[43] Any one of the matters can lawfully be used as a basis to refuse the consent, or to grant it and impose conditions. Situations could exist where, despite a proposal's compliance with the SCA overlay standards, its adverse effects on the residential amenity of a neighbouring site were significant enough to warrant refusal.

93. We have carefully reviewed the matters for discretion that would be engaged (as a composite list) in scenarios B and D, and cannot envisage a situation of conflict that would frustrate the completion of the processing of a resource consent application. We accept that there will be applications when the SCA overlay matters may seem to pull in different directions to the underlying zone matters,[44] but we consider that by paying "close attention" to the language, as suggested by the Supreme Court,[45] the solution to reconciling both will become obvious. Sustainable resource management requires effort, and the prospect of applications raising potentially competing considerations that require finely-balanced or otherwise nuanced decision-making is neither novel nor unusual.

94. Allegations of inefficiencies leading to excessive costs as a result of this complexity were another factor that Council officers relied on to support PC26, with one of the plan change's advantages stated to be the reduction in these inefficiencies and costs. However, we were provided with no probative evidence to support either proposition. No comparative cost study of "simple" non-SCA overlay, and "complex" SCA overlay applications was provided to us. We have no basis to find that the cost of obtaining a resource consent for additions or alterations, or a new building, in the SCA overlay would reduce if we amended the AUP as proposed by PC26. We accept that the Council incurred costs in the aftermath of the *Budden* decision and as a result of a 'squaring-up' process of the consents it had granted prior to that decision being released. But we do not regard those costs as relating to the stated purpose of PC26.

95. We are left therefore with only two possible reasons to amend the AUP to revisit the relationship between the SCA overlay and the underlying zone provisions: to provide clarity and make life easier for plan users; or because a change is needed to ensure the policy outcomes desired by the AUP for the SCA overlay are achieved.

96. The second of these two reasons does not provide a sound basis to change the AUP in our view. It is premised on an assumption that the current relationship is failing to maintain or enhance the special character values of special character areas. However,

[43] See *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 024, at [149].
[44] A similar observation was made by the Environment Court in *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 024, at [68].
[45] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [129].

we are not satisfied from the evidence presented to us by Council officers and submitters that this is a significant problem throughout the SCA overlay areas. While there will always be site specific examples of architectural forms that are not favoured by those who view the world through a heritage lens, we are not in a position to 'second-guess' the assessment and consenting process of those outcomes. In the absence of evidence of widespread diminution of special character values caused by the different standards that apply between the SCA overlay and its underlying zones, there is no logical basis to recraft the provisions of the AUP in the manner proposed by Purpose 1 of PC26. Indeed, our collective experience is that in any 'contest' between the SCA overlay provisions and those of the underlying zone, the former invariably attract the greatest weight in the assessment process, because they enjoy the most specific and directive wording compared to the more general zone ones.

97. We acknowledge the s32 Report's insistence that PC26 is necessary to ensure that the SCA overlay provisions function as intended. However, we consider this to be a statement that describes the Council's mindset, rather than the reality of the AUP.

98. By the narrowest of margins though, we have decided that providing some clarity to plan users in relation to the standards is appropriate and that we should use the opportunity provided by PC26 to do that. We are not satisfied that PC26's approach of, effectively, making the SCA overlay function as a zone is appropriate (i.e., the "replace" and "do not apply" construct). In this regard, we agree with the submissions presented by counsel for Kainga Ora. The issue that we have identified does not warrant the structural change to the relationship between the SCA overlay and the underlying zones proposed by PC26. We are also concerned that making this change would have a variety of other structural and practical implications across Auckland's 'newly minted' unitary plan.

99. The alternative that we consider to be suitable to assist plan users is a simple statement inserted in D18.6. as follows:

> *The following standards take precedence over the standards in the underlying zone for Building height, Height in relation to boundary, Yards, Building coverage, Maximum impervious area, Landscaped area or Landscaping, and Fences and walls*.

100. This insertion mirrors the structure and language of similar General rules in C1.6, albeit crafted to sit within D18, and acknowledges the fact that the standards in D18 are not expressed in precisely the same language as they are in the underlying zones. This statement would be relevant in all of the four consent scenarios set out above and would make it clear that in the course of considering all of the relevant standards relevant to an application under s104(1)(b)(iv), the plan is indicating that those within the SCA overlay are to be given precedence (or greater weight). But it does not go so far as to delete or set aside the underlying zone provisions (and the outcomes they envisage) and any need for consent that may be required as a result of responding to the SCA overlay on that land.

Conclusions on s32 report – Purpose 1

101. Under s74(1)(e) we are required to "have particular regard" to the s32 Report prepared for PC26. The direction to "have regard to" means to give "material consideration"[46], or "genuine attention and thought" to the matters set out.[47] The addition of the adjective "particular" has been said to indicate a difference in emphasis rather than one of substance (when compared to the phrase "have regard to"[48]), and in the case of s74(1), that the s32 evaluation report must be given a higher weighting than the other matters listed.[49]

102. We have undertaken a detailed review of the s32 Report prepared for PC26 (as supplemented by the additional evidence presented by Council officers at the hearing) and have concluded that the primary purpose of PC26 as proposed, to "appropriately clarify" the relationship between the SCA overlay and the underlying zones, is:

    (a) premised on a Council mindset that the AUP is not written the way sought by Council at the IHP hearings and ought to be changed to match its original intention, rather than on evidence that the relationship between the SCA overlay and the underlying zones conflicts with the IHPs recommendations;

    (b) based on a misunderstanding as to the role and relevance of the development standards in the situation of an RD application to undertake development activities in the SCA overlay;

    (c) is not based on any probative evidence of, inter alia, the current situation giving rise to concerns as to the integrity of the SCA overlay.

103. As drafted, we are also concerned that Purpose 1 of PC26 will result in more implementation and application issues than it claims it will solve.

104. However, we have determined that, for the benefit of plan users, a simple provision identifying that in cases of different development standards applying to the same activity, those in the SCA overlay take precedence over those in the underlying zone in terms of assessments under s104(1)(b), is appropriate.

CONSIDERATION OF PC26 – PURPOSE 2 – OTHER AND CONSEQUENTIAL AMMENDMENTS TO AUP

105. We have considered in detail the first purpose of PC26 (to 'appropriately specify' the relationship between the provisions in the SCA overlay and the equivalent provisions that apply in the underlying zone) and set out our conclusions and findings above. We now turn to the various other changes proposed by PC26 to D18 and E38 that we described as falling within the 'second purpose'.

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[46] *Winstone Aggregates Ltd v Papakura DC EnvC* A096/98.
[47] *Foodstuffs (South Island) Ltd v Christchurch CC* (1999) 5 ELRNZ 308; [1999] NZRMA 481 (HC).
[48] *Marlborough Ridge Ltd v Marlborough DC* [1998] NZRMA 73.
[49] Brookers Resource Management Commentary, A74.03.

106. Earlier we queried the relationship between the first purpose of PC26 and the second one – (b): are they linked, or stand-alone? After considering each of the changes in detail we have come to the view that some are proposed as a consequence of Council's proposed restructuring of D18 into a de-facto zone, some are a substantive stand-alone review of the SCA overlay provisions, and the balance are grammatical or cross referencing 'tidy-ups' with no substantive implications.

107. By way of summary, as we have decided not to accept the structural changes proposed by PC26 to achieve its first purpose, the consequential changes to D18 are generally no longer appropriate or necessary. In relation to the other two classes of proposed change (provisions review and tidy-up), we have decided to accept some of the former, and all of the latter. We set out our analysis and findings on these aspects below.

Consequential changes no longer required

Purpose statements

108. Unlike its underlying zones the D18 Standards do not include purpose statements. In the context of a resource consent application purpose statements operate as a further matter of discretion in situations where the standard they relate to is infringed, triggering an additional RD consent requirement under General rule C1.9(2). C1.9(3)(b) lists: "*the purpose (if stated) of the standard and whether that purpose will still be achieved if consent is granted*".

109. The purpose statements proposed by PC26 to the D18.6 Standards have been crafted to effectively provide a dual purpose for the standards: one relating to the purpose of the standard in the context of the SCA overlay generally; the other to state certain, non-SCA overlay, residential amenity purposes (e.g., "*maintain a reasonable level of sunlight access to minimise visual dominance effects*").

110. We find that there is no need for the proposed purpose statements. The matters for discretion identified for applications in the SCA overlay are myriad and we see little being gained by specifying more. Moreover, we find that the purpose statements are mostly designed as a consequential change to ensure appropriate residential amenity outcomes are still 'in the frame' within the Council's proposed 'de facto' SCA overlay zone. As we have rejected that re-structuring proposal, it follows that the purpose statements serve no useful purpose.

Matters of discretion and assessment criteria

111. The insertion of a cross reference to the matters of discretion and assessment criteria in the underlying zone were intended in our view to ensure that relevant underlying zone considerations that are currently engaged on applications for development in the SCA overlay would continue to be engaged despite the de-coupling of the SCA overlay provisions from those of the underlying zone. These changes are no longer necessary as we have decided not to accept that part of PC26.

Review of SCA overlay standards

Height in relation to boundary

112. PC26 proposes a number of amendments to D18.6.1.2 Height in relation to boundary (**HIRB**) as follows:

    (a) Addition of a purpose statement;

    (b) Remove its applicability to the front boundary of sites; and

    (c) Clarifications as to how the standard will be applied in relation to:

        - corner sites
        - sites with street frontages less than 15m in length
        - rear sites
        - common wall boundaries
        - access ways
        - rights of way
        - entrance strips
        - access sites
        - pedestrian accessways
        - gable ends, dormer and roof projections.

113. We have addressed the proposed addition of purpose statements generally earlier in this decision and do not repeat our reasons for rejecting such statements again here.

114. In relation to the other proposed amendments, the s32 Report focusses its assessment exclusively on the proposal to limit use of the SCA overlay HIRB standard (3m + 45^{o}) to sites that have a frontage of less than 15m. No assessment of any of the other proposed clarifications is provided. From the analysis of submissions in the s42A Report though, it can be discerned that the rationale for most of them is to ensure that the standard can apply as the sole applicable HIRB standard for sites in the SCA overlay, given the intention of PC26 to replace the underlying zone HIRB standard. This is why rules specifying the application of the HIRB standard for sites in the underlying zones, that are not included in D18.6.1.2, are 'imported' into the D18 standard by PC26.

115. Proposed new standards D18.6.1.2(3), (4), (5) and (6) are the simplest examples of imported provisions that fall into this category. However, it is unclear to us whether the inclusion of these additional application criteria in D18.6.1.2 is strictly necessary. This is because they already exist in the equivalent underlying zone standard and any application to rely on the SCA overlay HIRB would trigger an RD consent requirement

to infringe the equivalent underlying zone standard in any event, thereby bringing them into consideration. Equally, it might be argued that their absence from D18.6.1.2 means that they are not applicable to the application of the SCA overlay HIRB. For this reason, we find that their inclusion in D18.6.1.2 would clarify this issue and potentially avoid unnecessary disputes.

116. The three remaining qualifications to the application of the SCA overlay HIRB are potentially more substantive in their reach, however. We refer here to the exclusion of the HIRB standard from applying to rear sites, front boundaries, and sites with a frontage greater than 15m in length. Of these, the proposed change that was subjected to the most s32 assessment, raised the most submission points, and was the subject of significant evidence to us, was the last of the three.

117. In relation to the first of these three proposed additions to the standard, in response to various submissions, the s42A Report notes: "*Development on rear sites may only be partially visible to streetscapes by elevated height or through side yards of front sites so their contribution to streetscapes are minimal compared to that of development on front sites. The underlying zone version of the standard is more appropriate to rear sites as it manages the inter-site amenity effects. Furthermore, the coverage standards will be the same for front and rear sites therefore any additional bulk generated by the additional 500mm in height to the standard on front sites, would be commensurate with the Special character values of the area*."[50]

118. In relation to the second exclusion, we observe that excluding application of the HIRB standard from front boundaries would serve to bring the SCA overlay HIRB standard into line with its equivalent in the underlying zones, which apply solely to side and rear boundaries.

119. Beyond these observations, and a plethora of general submissions in support and opposition, we have been left to consider these two matters with limited evidence. Accordingly, we have taken guidance from the purposes of PC26 and our other statutory obligations to reach a view as to their appropriateness. Because:

    (a) they provide clarity to plan users as to the application of the specific SCA overlay HIRB standard;

    (b) do not threaten the objectives and policies of the SCA overlay; and

    (c) would operate in tandem with the HIRB standards in the underlying zones,

    we have decided to accept them as appropriate amendments to D18 via PC26.

120. We have reached a different outcome though with respect to the third exclusion – for sites with a frontage greater than 15m. From our review of the s32 Report and other materials provided in support, it is clear that this exclusion is considered necessary because PC26's notified purpose is to replace the underlying zone HIRB with a bespoke

[50] S42A report, p140; see also p130.

set of standards and the 3m + 45º standard is considered too general (or liberal) to apply throughout the entire SCA overlay. This concern implicitly acknowledges how the dual requirements of the underlying zone and SCA overlay HIRB standards play an important role in achieving an acceptable development outcome on a case by case basis. As we have decided not to accept the "replace" aspect of PC26, there is no need to address this concern by way of segregating sites into those that are able to rely on the 3m + 45º standard and those that are not. Both standards will continue to apply to all sites in the manner that we have discussed at length earlier in this decision.

121. Furthermore, the evidence presented by submitters persuaded us that a 15m site frontage threshold for application of the more permissive HIRB standard would be an arbitrary and blunt technique, given the range of site sizes throughout the SCA overlay. We accept that the current standard could be criticised on similar grounds; but we do not think that introducing further arbitrariness into it, revising a long-standing standard as a result, is a better or more appropriate outcome.

Yards

122. PC26 does not propose amending the minimum front and side yard depths set out in Table D18.6.1.3.1, only the rear yard standard. It also proposes two specific rules to clarify where the yards do not apply (i.e., where common boundary walls exist or are proposed), and when the underlying zone yard applies. Submitters sought amendments to the depths of the front and side yards (generally to align them with the underlying zone yards), as well as the retention of the rear yard. One submitter (The Somersby Trust) also sought an increase of the depth of the rear yard where the site affected by the SCA overlay was adjacent to Cornwall Park.

123. As we have rejected that aspect of PC26 that sought to recraft the SCA overlay as a de facto zone, we do not consider it necessary to revise the existing front or side yard depths within D18. We fully expect that there will be cases where, based on historic site circumstances, or adjacent site development, front and side yard depths that do not comply with the D18.6 standards may be appropriate and better serve the objectives and policies of the SCA overlay. We find that the current situation, whereby such issues are dealt with on a case by case basis, is to be preferred to a 'one size fits all' approach.

124. The issue with the rear yard is somewhat more vexed. There is no dispute that the core focus of the SCA overlay is streetscape character and we have found no reference to the role of rear yards in contributing to that streetscape character in any of the Special Character Area Statements in the AUP. However, we accept that, depending on topography, landscaped rear yards may occasionally contribute to streetscape character. It is also plausible that historically, rear yard requirements contributed to the streetscape by pushing the house closer to the street frontage and provided an opportunity for larger trees to develop and open space to be retained. As was depicted in the aerial photographic studies provided to us in evidence, this has undoubtedly led to areas in the city where, absent infill housing, adjacent rear yards combine to provide a passive space and setback area on either side of the rear boundary that is likely prized by residents for its neighbourhood amenity value.

125. The s32 Report considers that the yard control "*seeks to retain the relationship of built form to the street in special character areas*".[51] In response to submissions seeking retention of the 3m rear yard, the s42A Report notes that the SCA overlay: "*is concerned only with those features which contribute to the streetscape appearance of the area; or the relationship of a building with the streetscape*".[52] Based on these statements, it appears incongruous that the rear yard amenity that is evident in some special character areas is maintained by a standard the focus of which is only the streetscape. However, when questioned about this the author of the s42A Report agreed that relationship of built form to open space was a part of special character.

126. We have carefully reviewed the objectives, policies, matters of discretion and assessment criteria to ascertain whether this is a simple case of a standard remaining in the SCA overlay serving a purpose that is no longer a focus of that overlay, such that it is an anomaly that ought to be removed to avoid confusion. We are not satisfied that we can make that finding. This is because we are not persuaded that 'streetscape' is the singular focus of the SCA overlay. Although effects on streetscape character are a specific consideration for development activities in the SCA overlay, so is consideration of special character context, as described in the applicable Special Character Area Statements. Importantly, objective D18.2(2)(c) seeks retention of the "*physical attributes that define, contribute to, or support the special character of the area*" including "*the relationship of built form to landscape qualities and/or natural features including topography, vegetation, trees, and open spaces*". We find that the 3m rear yard setback provided for in the SCA overlay is more likely than not to play a role in achieving that objective.

127. We conclude therefore that the 3m rear yard standard in the SCA overlay is not an anomaly and should be retained. Where the circumstances of a specific proposal are such that a development outcome can be achieved that does not imperil the special character qualities of an area, despite not providing for a 3m rear yard, we expect it will be approved without demur.

128. Finally, we are satisfied that the proposed rules clarifying that the side yard does not apply where there is an existing or proposed common boundary wall, and that the underlying zone standards apply for yards not specified in the table, are appropriate and will provide clarity to plan users.

Building coverage, Landscaped and Maximum paved area

129. The s32 Report notes that standards D18.6.1.4 Building coverage, D18.6.1.5 Landscaped area and D18.6.1.6 Maximum paved area "*seek to retain the physical attributes that define, contribute and support the special character of areas, including the relationship of built form to landscape qualities and open space*".[53]

[51] S32 Report, p49.
[52] S42A Report, p163
[53] S32 report, p52.

130. Two substantive changes are proposed to these standards. First, for all three standards, it is proposed to include a qualification to the effect that for sites within the Rural and Coastal Settlement Zone (**RCSZ**), the SCA overlay building coverage, landscaped and maximum paved area standards do not apply. Sites in this zone would simply have to comply with standard H2.6.9 Building coverage. Second, for D18.6.1.6 it is proposed to change the standard to apply to "impervious area" (rather than "paved area"), consequentially to amend the percentages in the second column of Table D18.6.1.6.1, and to change the reference in that table from "net site area" to "site area".

131. The reasoning for the first proposed change is that the RCSZ "*is considered to be significantly different in character to the other residential zones and it has significantly lower coverage controls due to larger lot sizes*". Excluding application of the SCA overlay standards for these matters to the RCSZ is therefore argued as being "more appropriate".[54]

132. Neither the s32 Report nor the s42A Report provide any further analysis of the 'different character' basis relied on to support this change. Regardless, it appears that this aspect of the changes to these standards is consequential on the s32 Report's preferred changes being made to ensure that the D18 standards prevail over the underlying zone standards, and this is a case where the SCA standards would be more enabling than the underlying zone standards. As we have rejected that aspect of PC26, preferring to retain the current structural relationship between the SCA overlay and the underlying zones, we do not find it necessary to be concerned with this issue. It appears that an application in the RCSZ relying on the more generous SCA overlay standards for building coverage, landscaped and maximum paved area standards will require RD consent under the underlying zone for infringement of standard H2.6.9. In this way, the competing issues will be assessed in relation to the specific circumstances and context of that site. This addition to the standards in question is therefore unnecessary.

133. The reasoning in support of the other changes to standard D18.6.1.6 is also relatively lean. The s32 Report asserts that the changes will assist in either providing greater clarity or consistency with the underlying zone terminology. In analysing (and eventually rejecting) certain submissions, the s42A Report notes that all three of these standards: "*are intended to work together on individual sites to manage building bulk, impervious areas and pervious/landscaped areas. The coverage minimums and maximums in the special character overlay differ from the underlying zone versions because they need to be reflective of the traditional building bulk and locations of special character area developments. A key feature of the special character areas is that on smaller sites, there will be smaller areas of landscaping and impervious areas while buildings tend to be larger, relative to the size of site*."

134. This analysis tends to support retention of the existing "package" of the SCA overlay building coverage, landscaped and maximum building area standards as being crafted to the circumstances of historic built development in the SCA overlay areas. While making these aspects of the standards consistent with how they are expressed in the

[54] S32 report, p54.

underlying zones is no doubt a worthy objective, we are not persuaded on the evidence that these amendments are needed to ensure that the SCA overlay is functioning as intended. In the result, we prefer retaining the standards as currently drafted in the AUP with any site-specific issues to be addressed on a case by case basis.

Boundary fences and walls

135. The changes proposed for the rules applying to boundary fences and walls in the SCA overlay comprise, first, an addition to Table D18.4.1 Activity table – Special Character Areas Overlay – Residential, to include 'New fences and walls, and alterations to existing fences and walls' as a permitted activity and, second, a standard for such fences and walls to meet. Notably, the standard represents a substantive review of the current boundary fencing and wall standard in the SCA overlay, which limits such structures on all boundaries to 1.2m in height.

136. The rationale for this change is expressed in the s32 Report as follows:[55]

> *While inappropriate fencing can have adverse effects on the special character values of an area, the particular focus relates to walls and fences on the front boundary of a site, and side boundaries where they are adjacent to the street.*
>
> *The application of the 1.2m height limit on all fences and walls is triggering unnecessary consent requirements. Fencing of up to 2m in height on the rear and side boundary (where it is not adjacent to the street) is not considered to adversely affect special character values, in particular the streetscape values of an area*.

137. The evidence to us at the hearing supported this aspect of PC26.[56] Submitters considered that the 1.2m fencing standard on every boundary in the SCA overlay was unnecessary and frustrated the ability for landowners to provide for the security of occupants and their property, contrary to s5. With the focus of the SCA overlay said to be streetscape character, a standard for fences on boundaries that were generally not visible from the street, was submitted to be anomalous and inappropriate.

138. Of all of the non-consequential yet substantive standards reviewed by PC26, the boundary fencing standard appeared to us to be the worthiest of review. No doubt the SCA overlay fencing standard served a purpose in some earlier legacy rule from which it was derived, but in our view the standard is no longer appropriate for general application to every site in the SCA overlay. It needs to be reviewed to ensure it assists in achieving the objectives and policies of the SCA overlay as well as broader AUP policies in relation to quality urban environments that enable people and communities to provide for their health and well-being.

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[55] S32 report, p56

[56] See evidence from Jeanette Heilbronn 254.2 (lay presentation on security); Philip Brown for Roman Catholic Bishop of the Diocese of Auckland 220.3 and Michael Snowden 182.3; and David Wren for Colin and Jocelyn Weatherall 96.6, John Dillon 127.7, Peter and Sarah Wren 128.7, and Peter Ng 97.6.

139. We have considered in detail the Council's proposed revisions to D18.6.1.7 and have accepted most of them. However, based on the evidence we heard, we find that a different approach to that proposed is warranted for front fences for corner sites. This is because such sites have two front boundaries presenting two façades to the adjacent streets. One of these is generally a principal façade facing the more significant of the two streets and contains the front entrance door. It has a traditional fence to the street, low and/or visually permeable, to present the house features. The other, the secondary façade, generally faces the less significant of the two streets. Consequently, we consider that when not directly in front of the principal façade, the fence or hedge may be taller, to 2.0m or so, providing privacy and security to the 'back yard' without preventing presentation of the house to the street frontage.

140. Therefore, we are satisfied that the fencing standard should be further amended to allow that type and scale of fencing on the secondary frontage, along those parts of the front boundary that are not directly in front of the house.

141. Finally, we have not acceded to the request of the Herne Bay Residents Association and others, to reinstate reference to "other structures" into the standard. Rather, we have clarified that the standard applies to 'boundary' fences and walls. Any structure proposed to be erected on the boundary that does not solely serve that purpose will be caught by other rules in D18 that will require compliance with the various other building related standards.

Special Purpose – Healthcare Facility and Hospital Zone

142. This proposed change, to include a new rule in D18.6.1 specifying that the SCA overlay standards do not apply to land with an underlying Special Purpose – Healthcare Facility and Hospital Zone (**HFHZ**), was not part of PC26 when notified and nor was it evaluated in the s32 Report. Rather, the change arises from a submission by The Ascot Hospital and Clinics Limited, owner of Mercy Hospital in Epsom. The submitter sought exclusion from the SCA overlay standards on the grounds, generally, that the HFHZ was an important zone for an important purpose and thus ought not to be subject to the character and place based building standards of the SCA overlay. It appears that parts of the submitter's land is zoned HFHZ and subject to the SCA overlay, and this creates a conflict for future development of the hospital in those intersecting locations in its view.

143. Although the s42A Report for the hearing supported the relief sought in this submission (essentially adopting its reasoning), no further evaluation report as required by s32AA was included. Mr Blomfield, consultant planner representing the submitter at the hearing, provided a brief of evidence in support of the submission, but also omitted to assist us with a further evaluation report under s32AA.

144. The relief sought in the submission stops short of seeking that this specific HFHZ zone be relieved of the SCA overlay partially mapped over it. However, we are not entirely satisfied that in doing so, the submission avoids falling foul of the obligation that it must be 'on' the plan change. In effect, the submission seeks to exclude the application of the SCA overlay standards from development activities on all land zoned HFHZ

throughout Auckland, where that land is subject to the SCA overlay. PC26 as notified did not propose that the provisions of the SCA overlay be excluded from applying to any specific underlying zones: simply that the SCA overlay become a bespoke set of provisions for all of the underlying zones. No evaluation of such an exclusionary proposal was undertaken as part of the s32 evaluation of PC26, and none has been provided.

145. We have reflected on our earlier legal analysis in relation to submission scope and find that the relief sought by this submitter is not properly 'on' PC26. This is not to say that addressing the relationship between the SCA overlay and the HFHZ might not have planning merit, for all the reasons put forward by Mr Blomfield, and that this objective could be achieved in a number of ways. However, we do not consider that PC26 is the appropriate vehicle for this task, especially as it affects a zone that exists in other locations throughout the city and because we have had no evidence as to what the effects on the environment of such a proposal would be at each of these locations.

146. Even if we are wrong in that conclusion, and notwithstanding the evidence we heard, we would still not have acceded to the relief request. The premise of the submission is that there is a conflict between the SCA overlay provisions and the HFHZ provisions. We have undertaken a detailed analysis of this claim of conflict in the case of the SCA overlay and its underlying residential zones and consider that our reasoning and findings in that regard apply equally to the case of the SCA overlay and the HFHZ. In essence, a case by case assessment is required.

Subdivision

147. For the same reasons that we have set out above in relation to D18, we consider it appropriate, for the purpose of providing clarity to plan users, to include a similar rule within E38.8.2.6 Subdivision of sites identified in the Special Character Areas Overlay – Residential and Business, specifying that on an application to subdivide, the subdivision controls in Table E38.8.2.6.1 take precedence.

Drafting tidy-ups

148. We have highlighted in our PC26 Commissioners' Decision Version the D18 drafting tidy-ups that we find to be appropriate. These changes do not affect the substantive reach of D18 or alter its relationship with the underlying zones and will assist plan users to navigate through the provisions in D18 with better clarity.

OTHER STATUTORY MATTERS

Actual and potential effects of activities on the environment

149. We have had regard to the actual and potential effects on the environment of the changes we have proposed to the rules in D18 and E38 and consider them to be appropriate and in accordance with s5(2)(c).

Council's functions under s 31 of the RMA

150. We are satisfied that the changes we have proposed to PC26 accord with and will assist the Council to carry out its functions so as to achieve the purpose of the Act,[57] namely those set out in s 31(1)(a) and (b).

Section 75(3)

151. We are satisfied that the changes we have proposed to PC26 will ensure that the relevant provisions of the district plan (in the case, D18 and E38) will continue to "give effect to" the RPS. As the current relationship between the SCA overlay and underlying zones is assumed to "give effect to" the RPS, and we propose only to modify D18 to provide clarity for plan users without changing the current relationship in a substantive way (as was sought by PC26 as notified), we find this statutory obligation is met.

Scope

152. We consider that all of the changes we have proposed to PC26 as notified are within scope (by reference to our earlier analysis).

Section 32AA

153. Our detailed analysis of the s32 report and reasoning set out above comprises our s32AA assessment of the modifications we have proposed to PC26.

DECISION ON SUBMISSIONS

154. For the reasons set out above we have decided to approve PC26 with the modifications shown in Schedule 1.

155. The submissions on PC26 are accepted and rejected in part in accordance with the reasons set out above. Our decision on each of the submissions made on PC26 is included in Schedule 2.

Commissioner K Littlejohn (Chair) **Commissioner T Mackie**

Commissioner I Munro **Date: 17 December 2020**

[57] *Colonial Vineyards Ltd v Marlborough DC* [2014] NZEnvC 55.