IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1294
[2019] NZHC 1892

UNDER	the Resource Management Act 1991 (RMA) and the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA)
IN THE MATTER	of an appeal against a decision of the Environment Court under section 299 of the RMA and section 156(4) of the LGATPA
BETWEEN	AUCKLAND COUNCIL Appellant
AND	CABRA RURAL DEVELOPMENTS LIMITED

…/cont

Hearing: 24-25 June 2019

Appearances: D K Hartley and A F Buchanan for the Appellant
J M Savage for Cabra Rural Developments Ltd, Rahopara Farms Ltd, SH 16 Ltd, Forest Habitats Ltd, Rauhori Forests Ltd, Monowai Properties Ltd and Karepiro Investments Ltd
KRM Littlejohn and W D McKenzie for Cato Bolam Consultants Ltd and Terra Nova Planning Ltd
No appearance on behalf of David Mason, Better Living Landscapes Ltd, Parallax Consultants Ltd, Fluker Surveying Ltd, Sayes In Trust Ltd and Smithies Family Trust
N M De Wit for Zakara Investments Ltd
A Webb for Radiata Properaties Ltd

Judgment: 6 August 2019

JUDGMENT OF GORDON J

This judgment was delivered by me on 6 August 2019 at 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

RAHOPARA FARMS LIMITED
SH 16 LIMITED
FOREST HABITATS LIMITED
RAUHORI FORESTS LIMITED
MONOWAI PROPERTIES LIMITED
KAREPIRO INVESTMENTS LIMITED
CATO BOLAM CONSULTANTS LIMITED
DAVID MASON
BETTER LIVING LANDSCAPES LIMITED
PARALLAX CONSULTANTS LIMITED (also known as PARALLAX SURVEYORS LIMITED)
FLUKER SURVEYING LIMITED (also known as FLUKER SURVEYORS LIMITED)
SAYES IN TRUST LIMITED
SMITHIES FAMILY TRUST
ZAKARA INVESTMENTS LIMITED
RADIATA PROPERTIES LIMITED
TERRA NOVA PLANNING LIMITED
Respondents

Solicitors:	DLA Piper, Auckland North Harbour Law, Orewa Smith & Partners, Auckland Chapman Tripp, Auckland Cook Morris Quinn
Counsel:	M Savage, Auckland KRM Littlejohn, Auckland W D McKenzie, Auckland A Webb, Auckland

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Introduction

[1] This is an appeal by the Auckland Council (the Council) on questions of law against a decision of the Environment Court dated 12 June 2018 (the decision),[1] in respect of provisions to be included in the Auckland Unitary Plan (AUP) regarding subdivision in the rural areas of Auckland. The provisions involved mainly concern regulatory incentive subdivision.[2]

[2] The respondents, Cabra Rural Developments Ltd (Cabra),[3] Cato Bolam Consultants Ltd (Cato Bolam), Radiata Properties Ltd (Radiata) and Terra Nova Ltd (Terra Nova), who were the appellants or s 274 parties in the Environment Court, all sought to uphold the decision.

[3] Zakara Investment Ltd's (Zakara) interest in the AUP was addressed through provisions agreed with the Council prior to the hearing in the Environment Court and confirmed in the decision. Zakara maintained its interest in this proceeding to the extent that the drafting of any other amendments to the AUP would need to be compatible with the agreed provisions.

[4] Only the five respondents referred to above (and the other respondents represented by Mr Savage referred to in footnote 3) sought to be heard on the appeal.

Background

[5] The Auckland Council was established on 1 November 2010.[4]

[6] Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) sets out the process for the preparation of a first combined plan for the Auckland Council. As the first step in the process, the Council is required to prepare a proposed Combined Plan for Auckland that meets the requirements for a regional

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1 *Cabra Rural Developments Ltd v Auckland Council* [2018] NZEnvC 90.

2 Regulatory incentive subdivision as provided for in the AUP is when a subdivision opportunity is obtained in exchange for the protection and/or enhancement of indigenous biodiversity.

3 I abbreviate by referring only to Cabra Rural Developments Ltd. Cabra was represented by Mr Savage who also appeared for Rahopara Farms Ltd, SH 16 Ltd, Forest Habitats Ltd, Rauhori Forests Ltd, Monowai Properties Ltd and Karepiro Investments Ltd.

4 Local Government (Auckland Council) Act 2009, ss 2 and 6.

policy statement (RPS), a regional plan, including a regional coastal plan, and a district plan.[5] Under the LGATPA process, the combined plan known as the Proposed Auckland Unitary Plan (PAUP) was publicly notified for submissions.[6] A report evaluating the PAUP was published at the same time as the PAUP, in accordance with s 32 of the Resource Management Act 1991 (RMA).

[7] The rural subdivision provisions as originally proposed by the Council in the PAUP have been described as "relatively conservative and, to some extent, were a retraction of provisions in legacy Plans, including particularly the Rodney District Plan and the Franklin District Plan".[7] To use the words of Ms Hartley for the Council, this approach was taken in order to address issues associated with the continued fragmentation of Auckland's rural land, especially for rural lifestyle purposes.

[8] The next step was for an Independent Hearings Panel (IHP), constituted under the LGATPA, to consider submissions and make recommendations to the Council as to the final form of the AUP.[8] After the hearing by the IHP on the rural subdivision provisions in the RPS part of the PAUP, the IHP issued an interim guidance.[9] In that document, the IHP expressed its interim view that:

> Subdivision in rural zones should be provided for to a greater extent. It may be discouraged or constrained but should not be effectively prevented. There should be no requirement to use existing rural sites rather than create new ones.

[9] In response, the Council revised the rural subdivision provisions for the IHP hearings that were to follow in relation to the district plan level. The revised provisions were more enabling than those in the PAUP (as notified). In its recommendations to the Council, the IHP supported the majority of the Council's proposed revised provisions, but on the issue of the rural lifestyle subdivision opportunities that could

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5 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(a). For a concise discussion on the procedure under the LGATPA see *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175 at [5]–[14].

6 Section 127(1)(a).

7 *Cabra Developments Ltd v Auckland Council* [2017] NZEnvC 184 [Decision on preliminary issue] at [3].

8 LGATPA, ss 128 and 144.

9 Updated interim guidance text for RPS Topic 11 (PAUP section B8.3 — rural subdivision) which was an updated document following a letter on behalf of the Environmental Defence Society.

be obtained in exchange for the protection or enhancement of indigenous biodiversity, the IHP said:[10]

> In summary, the Panel has recommended greater opportunity for rural subdivision in relation to enablement for the protection, rehabilitation and enhancement of significant indigenous biodiversity, i.e. indigenous vegetation, wetland and native re-vegetative planting. These lots may be either created in-situ or transferred.

[10] In broad terms, the IHP's recommendations were:[11]

(a) Subdivision should be provided for in rural zones to a greater extent than in the notified Plan;

(b) Subdivision should be more enabled where it is for the protection, rehabilitation or enhancement of significant indigenous biodiversity;

(c) Subdivision relating to indigenous vegetation, wetland protection and native re-vegetative planting should be provided for:

(i) as a restricted discretionary activity to create additional lots by protecting:

1. scheduled significant ecological areas (SEAs): one lot for two hectares and one extra for every additional 10 hectares;

2. indigenous vegetation meeting SEA criteria: one lot for two hectares and one additional lot for every 10 hectares;

3. wetland meeting SEA criteria: one lot for 5000 m^2; and

4. for native re-vegetative planting meeting standards: one lot for every five hectares.

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10 Report to Auckland Council: hearing topic 064 subdivision — rural (dated July 2016).

11 I have adopted the summary from the submissions of Mr Webb for Radiata Properties Ltd, accepting that summary as accurate.

(d) The lots may be created in-situ or transferred to identified receiver sites in the Rural-Countryside Living Zone; and

(e) Transferrable rural site subdivision should also be enabled from donor lots in the identified "Land Amalgamation Incentivised Areas".

[11] Under the statutory process, the Council then considered and made decisions on the recommendations.[12] In its Decisions Report,[13] the Council set out the IHP recommendations which it accepted[14] and then stated:

> **Panel Recommendations rejected:**
>
> 42.2 The Council has rejected the Panel recommendations in relation to Hearing Topic 064 (Subdivision – rural) as listed below, with accompanying reasons, alternative solutions and s 32AA evaluation (where necessary):
>
> (a) **The inclusion of objectives, policies and rules that enable sporadic and rural subdivision**
>
> **Reasons**
>
> (i) The Panel's recommended provisions will enable inappropriate subdivision of the rural area through a proliferation of rural-residential lots across production-focused rural zones …
>
> (ii) The provisions undermine the Auckland Planned strategic direction for the rural areas.
>
> (iii) The provisions do not support the concept of the compact city that inherently has as a benefit the retention and protection of rural areas …
>
> (iv) The provisions do not make it clear that the focus of rural lifestyle living is the Countryside Living Zone.
>
> (b) **The inclusion of provisions that allow for minimal environmental benefits to be accepted in exchange for rural-residential subdivision**
>
> **Reasons**

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12 LGATPA, s 115(1)(k).

13 Decisions of the Auckland Council on recommendations by the Auckland Unitary Plan Independent Hearings Panel on submissions and further submissions to the proposed Auckland Unitary Plan (19 August 2016) [Decisions Report].

14 The Council accepted the majority of the IHP's recommended rural subdivision provisions as well as certain recommended structural changes to the PAUP.

(i) The provisions would enable potentially inappropriate subdivision of the rural area with the minimal environmental gains.

(ii) The provisions enable subdivision of [unmapped] sites with Significant Ecological Area (SEA) factors as opposed to identified SEAs [that is, mapped sites]. The SEA factors are not suitable to be used for rural subdivision assessment as they:

- Were made for a different purpose (assessing significance for vegetation protection – not for assessing whether the ecological value of an area would mitigate rural subdivision).

- Were designed to be applied in a single comprehensive manner across the region, not in isolation on a case by case basis. Site by site assessment in isolation will result in over-estimation of the significance of sites.

[12] As is required under the LGATPA, the Council's Decisions Report contained an alternative solution set out in Attachment A to its Decisions Report.[15]

[13] The LGATPA provides for a right of appeal from the Council decision to the Environment Court.[16] Ten appeals were filed, and a number of individuals/entities gave notice under s 274 of the RMA seeking to be heard on the appeals. In the end seven appellants took part in the hearing before the Environment Court.

[14] That Court was required to treat an appeal as if it were a hearing under cl 15 of sch 1 of the RMA and, except as otherwise provided in s 156, cls 14 and 15 and pts 11 and 11A of the RMA applied to the appeals.

[15] Some of the appellants in the Environment Court raised a preliminary issue about the provisions that the Council indicated it intended to support at the substantive hearing of the appeals following mediation, on the basis that the Council's replacement text did not fall within the Council's discretion under s 148(1) of LGATPA.[17] The Environment Court held a hearing on this issue on 3 November 2017. It concluded

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15 LGATPA, s 148.

16 Section 156.

17 Under s 148(1), any alternative solution for each IHP recommendation that the Council rejects may or may not include elements of both the proposed plan as notified and the IHP's recommendation but must be within the scope of the submissions. The appellants in the Environment Court raised issues as to "scope".

that it was not able to reach a decision on these issues until it had heard the substantive appeals. It therefore adjourned the hearing on this preliminary issue to be heard as part of the substantive appeals.[18]

AUP provisions in dispute in Environment Court

[16] As the AUP is a combined plan, there were two interrelated levels of rural subdivision provisions in issue: the higher order RPS provisions and the lower order district plan provisions (together with one policy that was both a regional and district plan policy). Although the Council's alternative solutions made changes at all levels, those changes were all aimed at addressing one specific issue: subdivision in the rural areas of Auckland for lifestyle purposes.

[17] The AUP provisions that were in dispute involved:

(a) RPS objectives, policies and principal reasons for adoption in Chapter B9 Rural Environment;

(b) A combined regional and district plan policy in Chapter E15 Vegetation Management and Biodiversity;

(c) District plan objectives, policies and methods in Chapter E39 Subdivision — Rural;

(d) A district plan zone description (in respect of the Countryside Living Zone description) in Chapter H19 Rural Zones; and

(e) District plan provisions concerning subdivision, information and process in Appendix A15.

[18] At the district plan level in Chapter E39 Auckland-wide rural subdivision provision, there were two types of regulatory incentive subdivision provisions at issue.

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[18] As the Environment Court noted in its Decision on preliminary issue, above n 7, at [17], the issue would only become relevant if the Court was minded to adopt the Council's provisions that were in dispute. As the Court reinstated the IHP recommendations in its substantive decision, this issue fell away.

They were “in-situ” and “transferrable rural site subdivision” (TRSS) opportunities. The key differences between the parties’ proposed in-situ and TRSS rules related to:

(a) The type of features eligible for in-situ or TRSS subdivision opportunities through protection (wetlands, indigenous vegetation and fauna habitat) and whether they needed to be scheduled in the AUP SEA Overlay;

(b) The type of indigenous vegetation planting eligible for subdivision opportunities. The Council’s position: re-vegetation planting contiguous with existing indigenous vegetation scheduled in the SEA Overlay. The Environment Court appellants’ position: re-vegetation planting not contiguous with any existing feature. One appellant’s position: conservation planting;

(c) The minimum qualifying size thresholds of, for example, a wetland that needed to be planted so as to obtain initial and subsequent subdivision opportunities; and

(d) The caps or limits (if any) to be placed on the number of in-situ and TRSS subdivision opportunities. The Council’s position: a maximum of 3 in-situ and the rest then need to be transferred to the Countrywide Living Zone. The IHP’s position: a maximum of 12 in-situ and no limit on the amount to be planted to obtain subdivision opportunities.

Options before Environment Court

[19] There were four main options for rural subdivision before the Environment Court. In addition to the Council’s provisions and the IHP-recommended provisions, there were two other options which were referred to in the Environment Court as Terra Nova Planning Ltd’s provisions and second, Cato Bolam and Mason and others’ provisions. However, in this Court, Mr Littlejohn, counsel for Cato Bolam and Terra Nova, submitted that the task that the Environment Court was faced with was essentially a binary task between the Council’s approach and the IHP’s approach. Mr Littlejohn accepted that some of the appellants proposed refinements and alternations

to the IHP's provisions. But, Mr Littlejohn submitted, the fundamental approach to rural growth management fell into two camps only: the Council on one hand and the IHP and everyone else on the other.

[20] Those in the "everyone else" group proposed, what Mr Littlejohn described as, slight changes or tweaks intended to address some of the issues the Council had raised through the pre-hearing process. Essentially the "two camps", as Mr Littlejohn described them, were the (Council's) capped regime and the (everyone else) approach which prioritised protection and enhancement of indigenous biodiversity, with the management and effects of subdivision being dealt with on a case-by-case basis.

[21] In this Court, Cabra, Cato Bolam, Radiata and Terra Nova supported the Environment Court's decision reinstating the IHP's recommendations.

The decision

[22] The Environment Court set out what it considered to be the differences in approach between the parties in general terms as follows:

> [5] The Council's provisions are accepted to be more constraining than those of the IHP. In large part, the concern of the Council is that the adoption of the IHP provisions would lead to an untoward and uncontemplated level of subdivision within the Rural Area. Most importantly, they are concerned at the potential for continued subdivision development in the Rural Areas other than the Countryside Living Zone, and the consequential adverse impact on the rural productive land resource.
>
> [6] The appellants, supported by s 274 parties, argue that estimates of take-up for these incentivised subdivision opportunities are significantly overestimated. In particular, they argue that the IHP provisions provide for significant areas of additional protection of significant ecological areas (including vegetation and wetlands) than those recognised in the Council provisions. In part, this is due to a greater ability to convert inchoate subdivision rights into development on the basis of identifying further significant ecological areas in accordance with the Plan, which may lead to further areas of SEA not currently identified in the Plan.
>
> [7] In part, the significant distinction between the approach of the parties can be explained by a concern by all of the Council witnesses to limit rural growth (particularly in areas other than Countryside Living), on the basis that the SEA revegetation subdivision incentive was part of the subdivision rules, rather than part of the objective to protect indigenous vegetation. In the end, we did not understand any party to say that none of these matters were irrelevant. It was simply a question of emphasis on either growth controls or increasing the significant indigenous vegetation protection and revegetation.

[23] There was evidence from 25 expert witnesses, including joint witness statements in the areas of ecology, economics, planning and landscape.

[24] The Court allowed the appeals, substituting the IHP recommendations for the decisions of the Council, with two exceptions:

(a) Changes to the AUP made by the Council that were not appealed; and

(b) Changes to the AUP made by agreement of the parties, including Zakara.

Appeal to High Court

[25] The Council has appealed the decision in its entirety. Under s 299 of the RMA, the appeal is confined to questions of law.[19] It was common ground that this Court will only intervene where the Environment Court:[20]

(a) applied a wrong legal test;

(b) came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come;

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

[26] The parties further agreed that the weight to be afforded to relevant considerations is a question for the Environment Court[21] and that any error of law must materially affect the result of the decision before the High Court will grant relief.[22]

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19 The appeal is governed by s 156(4) of the LGATPA which provides that s 299 of the RMA applies.
20 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
21 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).
22 *BP Oil New Zealand Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[27] In its Notice of Appeal, the Council alleges seven errors of law, two of them having a number of sub-parts.[23]

First alleged error of law — failure to take into account and properly apply mandatory considerations under the RMA.

[28] The Council submits that the Environment Court failed to take into account and properly apply mandatory considerations under the RMA as follows:

(a) By limiting its consideration of policies in the New Zealand Coastal Policy Statement (NZCPS) to Policy 11, it failed to consider whether the IHP provisions would give effect to other policies in the NZCPS, in particular Policy 13 and Policy 15, as required by ss 62(3) and 75(3)(b) of the RMA;

(b) By misinterpreting and misapplying Policy 11, it found that the IHP provisions would better meet Policy 11 within the coastal environment;

(c) By erring in its interpretation of the AUP and failing to give effect to various provisions of the RPS as required by s 75(3)(c) of the RMA;

(d) By failing to have regard to or sufficiently consider relevant provisions of pt 2 of the RMA as required by ss 61(1)(b) and 74(1)(b) of the RMA; and

(e) By failing to have regard or sufficient regard to the actual and potential effects of rural subdivision on the environment, including any adverse cumulative effects, as required by s 76(3) of the RMA.

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[23] Not all seven errors of law alleged in the Notice of Appeal were pursued: see below n 93. The Auckland Council only pursued six of the seven errors of law — these are the alleged errors I address.

New Zealand Coastal Policy Statement — Policies 13 and 15 (Issue one)

[29] Ms Hartley first refers to the way in which the Court characterised the central issue of the case as being protection and enhancement of indigenous biodiversity. The Court stated:

> [9] … At the core of the case is the question of indigenous biodiversity objectives, policies and rules, including those arising within the coastal environment and therefore affected by the New Zealand Coastal Policy Statement.

[30] Ms Hartley notes that the decision focuses on Policy 11, but she submits there were other provisions in the NZCPS that were relevant to the issues before the Court and therefore needed to be considered. These included Objective 2, concerning preservation of the natural character of the coastal environment and protection of natural features and landscape values, and the related Policies 13 and 15, concerning the preservation of natural character and natural features and natural landscapes. Ms Hartley's submissions focussed on Policies 13 and 15 (rather than Objective 2).

[31] Ms Hartley submits that, given their directive nature, Policies 11, 13 and 15 all provide something in the nature of an "environmental bottom line".[24]

[32] Ms Hartley submits that the only references in the decision to NZCPS Policies 13 and 15 are where the Environment Court noted that Policies 13, 14 and 15 were of particular concern to the hearing.[25] (But the policies were not discussed at this point). Second, when the Court was discussing the RPS chapter concerning the coastal environment (Chapter B8) the Court's discussion of the policies was only in relation to biodiversity issues and was, in any event, brief and incomplete. As far as the Environment Court's actual findings in relation to the NZCPS, the sole NZCPS policy referred to is Policy 11.[26]

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24 As recognised by the Supreme Court in relation to Policies 13(1)(a), (b) and 15(a), (b) in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [132]; and by the High Court in relation to Policy 11 in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [101].

25 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [95].

26 At [300]–[303].

[33] Ms Hartley continues that the Court's findings as to why the IHP's provisions gave better effect to the NZCPS turned only on Policy 11 and the increased enhancement and protection of indigenous biodiversity that it considered could be obtained from the IHP's more enabling subdivision opportunities.

[34] Ms Hartley notes that there was evidence before the Environment Court, both in a joint witness statement and from a Council witness, of the potential adverse effects of subdivision on landscape values and natural character values in the coastal environment (which are Policy 13 and 15 matters).

[35] She submits that in light of the directive nature of Policies 13 and 15, there was an absolute obligation to avoid adverse effects of in-situ subdivision on the values and characteristics of outstanding natural landscapes and features and areas of outstanding natural character.[27]

[36] There was also an obligation to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character and other natural features and natural landscapes in the coastal environment.[28]

[37] Ms Hartley therefore submits that these policies pulled in the direction of limiting subdivision in the coastal environment and were potentially in conflict with the Court's approach of enabling regulatory incentive subdivision to give effect to Policy 11. She says this error was material. In taking no account of NZCPS policies that pulled in the opposite direction to Policy 11, the Court approved rural subdivision provisions that cannot be said to give effect to the NZCPS.

[38] Mr Littlejohn submits, first, that the Environment Court did note the relevance of all the objectives and policies of the NZCPS saying, "those of particular concern to this hearing related to Policies 11, 13, 14 and 15".[29]

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27 Department of Conservation *New Zealand Coastal Policy Statement* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS], Policy 13(1)(a) and (b).

28 Policy 15(a) and (b).

29 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [95].

[39] Mr Littlejohn submits that Policy 13, relating to the preservation of natural character of the coastal environment, and Policy 15, directed at the need to protect natural features and landscapes of the coastal environment, are already given effect to in the AUP by cascade of provisions[30] none of which was the subject of any of the Council's alternative solutions. They were either operative or deemed approved. There was, therefore, no need for the Court to undertake a careful analysis of the "source" policies for the purpose of considering the appeals.

[40] Mr Littlejohn submits that, in this case, it was only Policy 11 that required further analysis because the Council's alternative solution relied on the mapped extent of the D9 SEA Overlay to effectively "cap" the number of new lots eligible for incentive subdivision in the rural areas (based on protection and enhancement of mapped SEA). However, the Court found that the Council's "mapped SEA only" approach did not give effect to Policy 11. This was based on the Court's understanding of the requirements of Policy 11 in relation to the protection of indigenous biological diversity in the coastal environment and evidence that the extent of the mapped SEA Overlay did not cover all such biodiversity in the coastal environment. By contrast, the IHP's recommended provisions, which incorporated an alternative eligibility incentive relying on SEAs that had not been mapped (but met certain criteria or factors) did give effect to Policy 11.

[41] In his oral submissions, Mr Littlejohn acknowledged that there was no analysis of Policies 13 and 15 but he says that the Environment Court did not need to conduct such an analysis and therefore it was not an error of law for it not to do so having regard to the relevant issues in the appeal.

[42] Mr Webb, for Radiata, makes two broad responses, namely that the Court only had to assess the NZCPS provisions that were relevant and second, that it did give proper consideration to the NZCPS. As to the first issue, Mr Webb refers to the matter the Environment Court had to decide, by reference to the decision:

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[30] See Auckland Unitary Plan, Chapter B7 Toitū te whenua, toitū te taiao — Natural resources; B8 Toitū te taiwhenua — Coastal environment; D10 Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay; D11 Outstanding Natural Character and High Natural Character Overlay; E18 Natural character of the coastal environment; and E19 Natural features and natural landscapes in the coastal environment.

> [1] Ostensibly, this case relates to the subdivision rules that might apply to promote the protection of significant ecological areas concerning indigenous vegetation and wetlands within the Auckland Rural Areas. We shall refer to this as incentivised protection, given it creates rights to subdivide land.

[43] Mr Webb then submits that the Environment Court directed itself on several occasions to consider the NZCPS, and not just parts of it. He further submitted that the matters in Policy 11 are a subset of the matters covered in Policy 13. If Policy 11 is given effect to, then so too are Policies 13 and 15. Further, Policy 11 arguably provides a higher level of protection than Policies 13 and 15 given that the protection in Policy 11 is absolute and the protection in Policies 13 and 15 is from "inappropriate subdivision, use and development". It therefore cannot be said that Policy 11 is pulling in a different direction to Policies 13 and 15 when subdivision applications are being considered in the coastal environment.

[44] Mr Webb also submits that in any event the Environment Court recognised that the power to decline applications ultimately rested with the Council and put little weight on the evidence about landscape effects that would occur if the IHP's provisions were adopted saying:[31]

> For example, while we acknowledge Mr Stephen Brown's [Council's planning witness] evidence in relation to outstanding natural character, landscapes, natural character and amenity and rural character, these are matters that may or may not be achieved depending on the nature of the consent granted.

[45] Mr Webb submits these are all Policy 13 and 15 matters. He says this extract shows it was implicit from its decision that the Environment Court considered other AUP provisions that gave effect to Policies 13 and 15.

[46] Mr Savage, for Cabra and other respondents,[32] submits that the references in the decision to the NZCPS identify not only Policy 11 but also Policies 13 and 15 and the interconnections between the various NZCPS policies. He also generally adopted the submissions of Mr Littlejohn and Mr Webb.

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31 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [305].
32 As set out at n 3 above.

Discussion

[47] I will first refer to relevant statutory provisions and authorities. I will then consider:

(a) Whether it was necessary for the Environment Court to consider Policies 13 and 15 as well as Policy 11;

(b) If so, did it do so; and

(c) If not, was the error material?

[48] Sections 62(3), 67(3) and 75(3) of the RMA require that a RPS, regional plan and district plan respectively must give effect to the NZCPS. The Environment Court was therefore required to consider and give effect to the relevant NZCPS objectives and policies as part of its assessment of the rural subdivision RPS and district plan provisions that were subject to appeal within the coastal environment.

[49] In *Environmental Defence Society v New Zealand King Salmon Co Ltd*,[33] the Supreme Court determined that the NZCPS gives substance to the provisions in pt 2 of the RMA in relation to the coastal environment.[34] Therefore, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance" with pt 2 and there is no need to refer back to that part when determining a plan change.[35]

[50] The Court also held that to "give effect to" means to implement. It is a strong directive creating a firm obligation on the part of those subject to it.[36]

[51] The Supreme Court considered that where more than one NZCPS policy might be relevant to a plan change, a decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed.[37] The Court rejected an "overall judgement" approach to balancing the requirements of

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33 *King Salmon*, above n 24.
34 At [85].
35 At [85].
36 At [77].
37 At [129].

different NZCPS policies. Policies expressed in more directive terms will carry greater weight than those expressed in less directive terms.

[52] The Court also accepted that there may be instances where particular NZCPS policies "pull in different directions". The Court considered that this is likely to occur infrequently, and it may be that an apparent conflict between policies will dissolve if close attention is paid to the way in which policies are expressed.[38]

[53] An example of a case where provisions of the NZCPS pulled in different directions is *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[39] In that case, the appeal related to the wording of various provisions of the respondent's proposed Regional Coastal Environment Plan. The relevant NZCPS policies in that case included Policies 6 and 7, which are described as policies "broadly about planning providing for growth, and the associated provision of infrastructure, in a sustainable and interpreted way. They are less prescriptive policies".[40] Policy 9 in relation to ports also applied. In addition, and by contrast, Policies 11, 13 and 15 were also seen as relevant. The Court noted that Policies 13(1)(a) and 15(a) were described by the majority in *King Salmon* as providing "something of a nature of a bottom line".[41]

[54] Wylie J further stated:

> [120] In *King Salmon*, the Supreme Court reconciled policies 8, 13 and 15 (policy 8 recognises the contribution of aquaculture and provides for it to be recognised in regional policy statements and plans in appropriate places). The majority considered that policies 13 and 15 are in more directive terms, and that they carry greater weight than policy 8 – which is in more prescriptive terms. The majority held that policy 8 does not permit aquaculture in areas where it would adversely affect an outstanding natural landscape.
>
> [121] It is difficult to see that policies 6 and 7, which provide for regionally significant infrastructure, are stronger or more directive than policy 8. There are differences in wording, but I doubt that those differences are sufficient to justify a decision-maker reaching an outcome different from that reached by the Supreme Court in relation to policy 8.

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38 At [129].
39 *Royal Forest and Bird Protection Society*, above n 24.
40 At [113].
41 At [118], referring to *King Salmon*, above n 24, at [62].

> [122] As I have noted, the Environment Court's consideration of the NZCPS policies was brief and incomplete. The Court concluded that policy 11(a) is "not absolute or binary" but it did not attempt to reconcile policy 11, or policies 13 and 15, with those policies which recognise regionally significant infrastructure and development in the coastal marine area.

[55] Wylie J held that the Environment Court in that case erred when it proceeded primarily by reference to the Regional Coastal Environment Plan's objective with only limited reference to the NZCPS (and RPS). The Court held that:[42]

> Its approach in effect ignored the statutory directive contained in s 67(3). That subsection is clear in its terms. It requires that decision-makers promulgating regional plans must "give effect to", inter alia, national policy statements and regional policy statements. The Environment Court failed to have regard to the majority of the Supreme Court's finding that the words "give effect to" mean to implement, and that this is a strong directive, creating a firm obligation on the part of those subject to it.

Was it necessary for the Environment Court to consider Policies 13 and 15?

[56] The landscape experts for the Council and Cabra agreed, in a joint witness statement, that the management of rural subdivision effects within the Auckland region should be consistent with the NZCPS Objective 2 and Policies 13, 14 and 15. The importance of Policies 13 and 15 was also addressed in the evidence of the Council's planning witness.

[57] The Environment Court itself identified Policies 13 and 15 as relevant.[43] Given the directive nature of Policies 13 and 15, it was necessary for the Court to consider the need to avoid adverse effects of in-situ subdivision on the values and characteristics of outstanding natural landscapes and features in areas of outstanding natural character.[44] The Court was also required to consider the obligation to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character, and other natural features and nature landscapes in the coastal environment.[45]

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42 *Royal Forest and Bird Protection Society*, above n 24, at [89].
43 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [95].
44 NZCPS, above n 27, Policy 13(1)(a) and (b).
45 Policy 15(a) and (b).

[58] I do not accept the submission made by Mr Webb that the matters in Policy 11 are a subset of the matters in Policy 13 and therefore a consideration of Policy 11 necessarily includes a consideration of Policy 13. Although they are related, they address different matters. As was said by Wylie J in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty District Council*:[46]

> [114] … policy 11 seeks to protect indigenous biological diversity in parts of the coastal environment, by avoiding adverse effects on indigenous taxa, indigenous ecosystems, the habitats of indigenous species, areas containing nationally significant examples of indigenous community types, and areas set aside for full or partial protection of indigenous biological diversity. It also seeks to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on activities on areas of predominantly indigenous vegetation in the coastal environment.
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> …
>
> [116] Policy 13 is directed to the preservation of the natural character of the coastal environment, and the need to protect it from inappropriate subdivision, use and development. It records the requirement to avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character.
>
> [117] Policy 15 is directed at the need to protect the natural features and natural landscapes of the coastal environment from inappropriate subdivision, use and development, and again, by avoiding adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] It can therefore be seen that Policy 11 addresses the requirements of s 6(c) of the RMA relating to the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Policy 13 then guides the planning approach needed to achieve the direction in s 6(a) of recognising the providing for the preservation of natural character and protecting it from inappropriate subdivision, use and development. Policy 15 addresses the requirements in s 6(b) of the RMA relating to the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development. Each policy is a directive "avoid" policy. For this reason, all should have been considered by the Environment Court in its analysis. They were all relevant to the Court's consideration of the parties' rural subdivision provisions.

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[46] *Royal Forest and Bird Protection Society*, above n 24.

[60] As to Mr Littlejohn's submission that Policies 13 and 15 were already given effect to by the parts of the AUP that were not under appeal and therefore settled, I respectfully adopt what Wylie J had to say, as follows:[47]

> [84] There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.

[61] I agree with Wylie J's comment that there is a distinct risk the intent and effect of high order plans can be diluted, even lost, in the provisions of plans lower in the planning hierarchy and that, put colloquially, the story can be lost in the re-telling.[48]

[62] In any event, the same submission could equally be made that Policy 11 had already been taken into account (see B7.2.2(1), (2) and (3)).

[63] I also do not accept the submission made by both Mr Littlejohn and Mr Webb that, having regard to the issues for the Environment Court, Policy 11 was in fact the only policy relevant to the issues before the Court. The Council had made its case clear in that Court that the rural subdivision provisions at issue incorporated a range of resource management matters, all of which had to be considered in accordance with the higher order planning framework and other statutory criteria. But more importantly, as I have already noted, the Court itself accepted that Policies 13 and 15 were relevant.[49]

Did the Environment Court in fact consider Policies 13 and 15?

[64] The only references to Policies 13 and 15 are in [95] and [114] of the decision. The Court, referring to the planning framework generally, stated:

> [19] It is our intention in this regard to identify the relevant Policy Statements, Regional Policy Statement, the Regional Coastal Plan and other Plan statements before moving on to the land use provisions of the AUP. In this regard, we must consider the interface between the NZCPS (Policy 11 in particular), the Regional Policy Statement and the RMA as it relates to the AUP. We should note at this stage that no party suggested to this Court that

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47 *Royal Forest and Bird Protection Society*, above n 24.
48 At [88].
49 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [95].

> the AUP was not consistent with or did not implement the NZCPS or other relevant documents, including the RMA. *Nevertheless, in light of recent decisions, we will need to examine in more detail the various policies of the NZCPS and the RMA to understand their relevance to the issues before the Court*.
>
> (emphasis added)

[65] At [95], the Court stated:

> [95] We were not given an exhaustive analysis of the NZCPSs, but it was acknowledged that all objectives and policies of that are brought into play, in part at least, through this unitary plan. Those of particular concern to this hearing related to Policies 11, 13, 14 and 15, although it must be acknowledged that the other provisions are identified in other objectives and policies in both the RPS and RP and DP.

[66] At [114], the Court referred to Policies 13 and 15 under the heading "Chapter B8" (the RPS chapter regarding the coastal environment), but there is no evaluative discussion:

> [114] This discussion of natural character does not seem to comprise any discussion of significant indigenous vegetation or fauna, or SEA either marine or terrestrial. We should note here that the Biodiversity aspect of natural character is not clearly identified here. While ecosystems (NZCPS Policy 11 (a)(iii)), habitats (Policy 11 (a)(iv)) and areas (Policy 11 (a)(v) and (vi)) all refer to the biophysical context, there seems to be no recognition that these are part of (and, in places, synonymous with) natural character under Policy 13. NZCPS Policy 13 refers to areas (Policy 13(1)(a), (b), (c) and (d) and 13(2)(f)). Further, biophysical and ecological (NZCPS Policy 13(2)(b)) must include flora and fauna, especially those under Policy 11. Similarly, Habitats and Areas must include the items under NZCPS Policy 13(2)(a) to (d) and (f) at least. The same can be said of interconnections with NZCPS Policies 14 and 15. For example, Restoration must include areas, ecosystems and habitats - Policy 14(a), (c)(i) - (v). Natural features and landscapes include 15(c)(v) vegetation native and exotic, and 15(c)(v9i) Transient values, including pressure of wildlife or other values at certain times of the day or year.

[67] When it comes to the Court's actual findings in relation to the NZCPS, the only policy referred to is Policy 11:

> [300] Given the failure of the Unitary Plan to identify the coastal environment beyond the HGMPA provisions, we are left to try and assess what area of the Auckland region would be covered by NZCPS Policy 11.
>
> [301] There are also difficulties as to whether or not s 6(c) would militate a different outcome in those areas not within the coastal environment. Whilst this plan adopts a proportionate response to Policy 11, it is clear that the active protection of significant ecological areas under Schedule 3, particularly by

> fencing, pest control and weed control, would represent enhancement under the policies of NZCPS, and better protect those areas under Policy 11.
>
> [302] In the end, it is difficult to see how other provisions within the Plan could provide an enhancement of ecological areas, particularly those meeting Schedule 3. Given the reference in a number of places to overlays, rather than Schedule 3, the protection under the Council's provisions appears to be relatively limited. For those areas that meet Schedule 3 but are not within the overlays, they are left to the general indigenous vegetation rules that may provide more limited protection than envisaged (especially within urban areas). Even in the rural area the ingress of stock is not prevented for at least five years, and possibly as long as 10 years depending on the interpretation of the relevant provisions.
>
> [303] On balance, we conclude that the IHP provisions would provide better protection by requiring active steps in relation to the protection of vegetation, and supporting these by registered covenants where subdivision is in prospect. Where it provides an opportunity for transferable rights, it appears that the Council has decided in its policy to utilise the Countryside Living zone to absorb future growth capacity by allowing significantly greater subdivision. Nevertheless, we recognise that there are potential adverse impacts involved in this if it provides an opportunity for in-situ development. For in-situ development, whether as non-comfplying or restricted discretionary, the exercise of the Council's discretions in regard to the objectives and policies would require controls (through consent conditions) to be imposed to ensure that the values of Schedule 3 areas are not compromised, and the outcomes anticipated by the plan for protection are achieved.

[68] I do not overlook the Court's statements at [274] and [298]. In the former, the Court states that "it must follow that such provisions [the IHP provisions] would better achieve NZCPS Policy 11(a) and the overall policies of the New Zealand Coastal Plan". In the latter, the Court observed that:

> … the issue turns upon whether the IHP provisions, while providing better maintenance of indigenous biological diversity by encouraging further areas, may have a countervailing adverse impact of allowing residential incursion into those areas.

[69] However, even if the above two statements are considered as recognising the relevant policies, they might be seen as employing "an overall judgment" approach, which was rejected by the Supreme Court in *King Salmon*.

[70] I therefore accept the Council's submission that the Court did not consider Policies 13 and 15.

[71] The issue then is whether Policies 13 and 15 pulled in the direction of limiting subdivision in the coastal environment and therefore were potentially in conflict with

the Court's approach of enabling regulatory incentive subdivision to give effect to Policy 11.

[72] All three policies provide something in the nature of a bottom line. In this respect, the position is somewhat different to the position before the Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* where Policies 6 and 7 were for consideration against Policies 11, 13 and 15.

[73] However, I consider there was a potential tension in this case between Policies 13 and 15 on the one hand and Policy 11 on the other because of the interpretation that the Court gave to Policy 11, which was that incentivised subdivision was required to protect indigenous biodiversity. The focus on Policy 11 provided the possibility of more subdivision in the coastal environment to give effect to that policy. Policies 13 and 15 pulled in a different direction of limiting inappropriate subdivision to protect natural features and landscapes and to preserve natural character in the coastal environment.

[74] The Court was therefore in error in not considering Policies 13 and 15.

Was the Court's error in not considering Policies 13 and 15 material?

[75] Was the error material? The test of materiality "is one of judgment rather than proof to a standard".[50] The Court of Appeal has stated:[51]

> … we do not consider Blanchard J proceeded on any wrong basis in determining that because the errors of law were not material to the Tribunal's decision the matter should not be remitted for hearing. We do not accept that some higher test, such as satisfaction as to immateriality beyond reasonable doubt to be required. The test of materiality is one of judgment rather than proof to a standard. The Judge determined that the errors were not material and so refused a rehearing. That involved no error of approach.

[76] The Court did not analyse the potential adverse effects of increased subdivision in light of the directive Policies 13 and 15. In my view, the error was material as there was evidence before the Court as to the potential adverse effects of subdivision for

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50 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA).
51 At 145.

rural lifestyle purposes on landscape values and natural character values in the coastal environment.

[77] To conclude on this issue, I uphold the Council's submission that the Environment Court erred in failing to take into account Policies 13 and 15 of the NZCPS and the error was material.

New Zealand Coastal Policy Statement — Policy 11 (Issue 2)

[78] Ms Hartley next submits that the Court erred in its interpretation of what Policy 11 requires, as expressed in [300]–[303] of the decision (set out at [67] above).

[79] Ms Hartley submits that the Court erred in interpreting and applying Policy 11 by equating "enhancement" with "protection". She submits that the error was material as it resulted in the Court's view that the IHP's more enabling regulatory incentive subdivision provisions, which could result in more biodiversity gains, were to be preferred in the coastal environment in order to give effect to Policy 11.

[80] Ms Hartley submits that the Environment Court's approach overlooked that the fundamental requirement of Policy 11 is to "protect" indigenous biodiversity in the coastal environment by *avoiding* adverse effects of activities on listed taxa, areas and habitats. It does not require undertaking an activity, in this case subdivision, with the view to protecting indigenous biodiversity when that activity might itself give rise to potential adverse effects.

[81] Ms Hartley submits that the AUP implements Policy 11 by identifying SEAs (using significance factors set out in the schedules of the AUP), including these areas in the AUP SEA Overlays and protecting them from the adverse effects of activities by way of the rules applying to the SEA Overlays. She says the Court appeared to consider that this approach was insufficient to give effect to Policy 11 and that additional active steps were required through regulatory incentive subdivision.[52]

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[52] Referring to [302] and [303] of the decision, above n 1.

[82] Mr Littlejohn submits that a plain reading of paragraphs [300]–[303] does not disclose an error as alleged. Mr Webb and Mr Savage did not make submissions on this issue.

[83] I accept the submission made by Mr Littlejohn. It is apparent from a reading of the relevant paragraphs that the Environment Court's view was that active protection of SEAs, by incentivising their fencing and pest and weed control, would enhance their biodiversity and therefore better *protect* them. This would thus give effect to Policy 11, as opposed to the Council's approach of limiting the range of that incentive by using maps to cap it and then relying on general vegetation clearance rules to protect the unmapped areas. While the Court uses the word "enhancement" its focus is on protection. I do not consider there is a discernible error in legal reasoning in [300]–[303]. It is not enough for the Council to simply assert error of evaluation which I consider is the reality of the submissions for the Council here.[53]

[84] There is no error of law in relation to this issue.

Regional Policy Statement (Issue 3)

[85] Ms Hartley submits that the Environment Court was required to consider and give effect to the relevant provisions of the RPS as part of its assessment of the lower order district and regional plan provisions. She says, however, the Court took a similar approach to the relevant provisions of the RPS as it did to the NZCPS. She again refers to the following statement in the decision under the heading "The issues" where the Court stated that it had approached the matter on the basis that:

> [9] … At the core of the case, the objectives and policies for indigenous biodiversity (Chapter B7 Natural Resources) and the overlay provisions, including objectives and policy for Significant Ecological Areas Overlay (Terrestrial and Marine) (D9) and relevant rules …

[86] In other words, Ms Hartley submits that again in relation to the RPS, the principal focus of the decision was on the RPS provisions and issues relating to the protection and enhancement of indigenous biodiversity. As a consequence, the Court failed to identify all of the relevant objectives and policies in the RPS. These included

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53 *Rodney District Council v Gould* [2006] NZRMA 217 at [25].

Objective B8.2.1(1), which requires areas of the coastal environment with outstanding and high natural character to be preserved and protected from inappropriate subdivision, use and development, and Policy B8.2.2(6), which provides for the use of transferrable development rights to avoid inappropriate subdivision, use and development in or on land adjoining to areas of outstanding natural character and high natural character.

[87] Ms Hartley notes that whilst Court attached the RPS Chapter B9 Rural Environment to the decision, it did not discuss some of the key provisions.[54] Ms Hartley observes that the Court acknowledged that a wide range of RPS provisions were relevant and could not be read in isolation, but she submits the Court did not undertake a careful analysis of them. Ms Hartley submits that, as a consequence, the Court failed to recognise the extent to which relevant RPS provisions pulled in different directions and subsequently reconcile any conflict (just as with the NZCPS). She says the error is therefore material.

[88] In response, Mr Littlejohn submits that the Court's analysis of the RPS is in the part of the decision where it discusses the planning framework and RMA context for the issues it must determine. He says the analysis is detailed and comprehensive. Mr Webb submits that the analysis and/or consideration of Policies B8.2.1(1) and B8.2.2(6) is implicitly subsumed in the analysis the Environment Court undertook. Mr Savage submits that it is plain that the Court considered all chapters of the RPS including that relating to the coastal environment, Chapter B8.

Discussion

[89] Sections 67(3) and 75(3) of the RMA require regional plans and district plans respectively to "give effect to" a RPS. In *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*,[55] Wylie J held that the Supreme Court's observations in *King Salmon* in relation to the NZCPS are equally applicable

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54 Including in relation to Chapter B9 Rural and provisions such as Objective B9.2.1(4) and (5), Policy B9.2.2(1) and (2), Objective B9.3.1(3), Policy B9.3.2(3), Objective B9.4.1(3) and Policy B9.4.2(4).

55 *Royal Forest and Bird Protection Society*, above n 24.

to documents lower in the planning hierarchy, which seek to implement higher order documents.[56] I respectfully agree.

[90] In the section of the decision discussing the planning framework under the heading "RPS", the Court mentions Chapter B8, including the following:

> [113] Chapter B8 discusses areas of outstanding and high natural character. It also identifies where coastal environmental areas with degraded natural character are to be restored or rehabilitated and areas of high and outstanding natural character are to be enhanced. Policy 4 seeks to "avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on natural character of the coastal environment not identified as outstanding ...".

[91] The Court also refers to the Chapter B9 provisions in the same part of the decision saying:

> [119] B9 contains the statement in relation to the rural environment, and this notes that the rural parts of Auckland also contain important natural resources, including native bush, significant ecological areas and outstanding natural landscapes. It goes on to state:
>
> > The outward expansion of urban areas and people's lifestyle choices in recreational activities place significant pressures on maintaining the amenity values and quality of the rural environment in rural areas. Specific issues in the Auckland region are:
> >
> > - protecting the finite resource of elite quality soils from urban expansion;
> > - managing subdivision to prevent undue fragmentation of large sites in ways that restrict rural production activities;
> > - addressing reverse sensitive effects which rural residential development can have on rural production activities; and
> > - managing the opportunities for countryside living in rural areas in ways that provide for rural residential development in close proximity to urban areas and the larger rural and coastal towns and villages, while minimizing the loss of rural production land.

[92] Chapter B9 is also annexed as Ms Hartley notes.

[93] However, I accept Ms Hartley's submission that the Court's discussion of the RPS in the planning frame work was mainly focussed on the protection and enhancement of indigenous biodiversity.

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[56] At [98].

[94] Turning to the section of the decision containing the Court's assessment of the requirement for the plan provisions to give effect to the RPS, the Court did state that a wide range of RPS provisions were relevant to the matters before it and could not be read in isolation:

> [307] We suspect part of the divergence of evidence between the parties is that the methodology adopted by the IHP for the AUP, and the integrated approach from top to bottom, is not fully understood. This is partially a problem of combining a Regional Planning Statement, Regional Plan and District Plan in the one document, and the need to apply a variety of chapters and overlays approach to that policy framework. Chapter B is the RPS. In summary, more related to these appeals, the B1 issues of regional significance, include urban growth (B2), infrastructure (B3), natural heritage (for example landscapes and natural features) (B4), natural resources (eg biodiversity) (B7), the coastal environment (B8) and the rural environment (B9).
>
> [308] While it is appropriate to focus on chapter (B9), all of the others have some relevance, and one cannot be read in isolation of the other. …

[95] I do however accept that there is no express reference in the analysis section to the interrelationship between the RPS provisions and a resolution of tensions (if any) between them.

[96] Mr Littlejohn submits that the fact the Court came to a different view on the overall structure and purpose of the RPS, ultimately finding that within the framework of the settled parts of the RPS the IHP's recommended provisions were better than the Council's alternative solution, was a matter of interpretation and judgement. But I am not certain that that submission is correct. It seems to me that it reflects the "overall judgement" approach which the Supreme Court in *King Salmon* expressly stated was incorrect.

[97] In failing to analyse all of the relevant objectives and policies in the RPS, the Court failed to recognise the extent to which relevant RPS provisions *potentially* pulled in different directions and therefore might limit subdivision in the rural environment. Having failed to undertake that exercise, it followed that the Court did not then reconcile any conflict with provisions relating to the protection and enhancement of indigenous biodiversity. In my view, the error was material given the existence of objectives and policies that pulled in the direction of limiting subdivision in the rural environment.

[98] I therefore accept the Council's submission that there was an error of law here.

Part 2 of the RMA (Issue 4)

[99] The Council submits that the Environment Court failed to have regard to or sufficiently consider pt 2 of the RMA.

[100] Ms Hartley submits that pt 2 considerations were particularly relevant in the rural areas outside of the coastal environment. That is because, in relation to the coastal environment, if the decision had given effect to the provisions of the NZCPS, this would necessarily have been acting "in accordance with Part 2 of the Act".[57] Ms Hartley submits that the principal focus of the Court's pt 2 discussion and assessment was on indigenous biodiversity issues and s 6(c). But there were other relevant pt 2 provisions that needed to be recognised and provided for, including s 6(a) and (b).[58] In that regard, the joint witness statement of the planning witnesses and the landscape witnesses agreed that s 6(a) and (b) were relevant.

[101] Ms Hartley further submits that the Court was also required to have particular regard to matters under s 7, including the maintenance and enhancement of amenity values and the quality of the environment (s 7(c) and (f)). However, she appeared to accept that the Court appropriately acknowledged that rural character and amenity were relevant pt 2 issues (being s 7(c) and (f) matters) when the it stated:

> [299] Either provision [the IHP version or the Council version] would accord with Part 2. The question in this case is which is more appropriate or better. Overall, the question turns upon whether or not the Council is able to refuse consent or impose conditions to ensure that protection and enhancement of indigenous vegetation occurs, and that rural character and amenity is also preserved. …

[102] Ms Hartley further submits that s 5(2)(b) concerning safeguarding of the life-supporting capacity of the soil was also of particular relevance to the subdivision of rural land. But her focus was on the alleged omission in relation to s 6(a) and (b).

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57 *King Salmon*, above n 24, at [50].

58 Resource Management Act 1991, s 6(a): the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development; and s 6(b): the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

[103] Mr Littlejohn submits that the matters to be recognised by s 6(a) and (b) were the same matters already addressed in the AUP relating to NZCPS Policies 13 and 15. They were not therefore directly "in play" in respect of the issues raised by the Council's alternative solutions. Mr Littlejohn also submits that the provisions relevant to the protection of elite and prime soils, which might be relevant under s 5(2)(b), were not in issue as all parties accepted that the avoidance of activities impacting on them was appropriate.

[104] Mr Webb and Mr Savage submit that the Court did not give precedence to s 6(c) to the exclusion of other matters.

Discussion

[105] Sections 61(1)(b), 66(1)(b) and 74(1)(b) require RPSs, regional plans and district plans to be prepared in accordance with the provisions of pt 2 of the RMA.

[106] I first address Mr Littlejohn's submission that the matters to be recognised by s 6(a) and (b) were already taken care of. This submission overlooks that not all of the rural environment is within the coastal environment, so there were areas where the NZCPS policies did not apply. But, in the end, that issue does not carry the day as I consider that the Court did not give precedence to s 6(c) matters to the *exclusion* of s 6(a) and (b) for reasons I refer to below.

[107] It is not for this Court to determine whether the Council *sufficiently* considered s 6(a) and (b) matters. The weight given to relevant considerations is a question for the Environment Court.[59]

[108] Turning then to the reasons for my conclusion, the Court, in a section headed "Coastal environment and Part 2 of the Act", identified that:

> [221] The purpose of the Rural Coastal Zone (H19.5) is to retain and enhance the rural character and amenity values, local coastal character and biodiversity values of rural areas along Auckland's harbours, estuaries and coastline. … It recognises that much of the zone has outstanding natural character, high natural character, outstanding natural landscape and Significant Ecological Areas overlays. … Here, the rural production activities

[59] *Moriarty v North Shore City Council*, above n 21.

> are enabled while "managing adverse effects on rural character and amenity values, landscape, biodiversity values and mana whenua cultural heritage values." … The Policies that follow at H19.5.3 recognise this move from rural production activities to more emphasis on rural character amenity values, landscape and biodiversity values. …
>
> [222] Policy H19.5.3 (6) has particular design features to avoid ridgelines, minimise building platforms and avoiding coastal yards and riparian margins. …

[109] The above are all s 6(a) and (b) matters. I acknowledge that this discussion was in the context of the rural coastal zone. However, later in the judgment when the Court was discussing the issue of yield within the rural area, it stated:

> [262] … Having regard to the many and various factors that we have already identified in some considerable length in this decision, we are in no doubt whatsoever that in-situ development generally, and larger developments in particular, will require a comprehensive approach to environmental issues, including natural character, outstanding natural landscapes and features, and significant ecological areas - irrespective of a specific master plan requirement. Whether required by the Plan or not, this is a practical outcome for assessment of a proposal to address all the relevant objectives and policies of the Plan.

[110] Next, when the Court was discussing transferrable rights to the Countryside Living Zone, it said:

> [266] … Overall, the issues as to whether rural character and amenity are maintained, and that the protection of the natural character, productive soils, landscape features and ecological areas can be maintained and enhanced through the application are the common thresholds.

[111] Although the Court had a focus on s 6(c), it clearly had in mind the overarching issue about whether there may be breaches of other equally important provisions saying:

> [298] … The issue turns upon whether the IHP provisions, while providing better maintenance of indigenous biological diversity by encouraging further areas, may have a countervailing adverse impact of allowing residential incursion into those areas.

[112] I therefore do not accept that the Court erred as alleged by the Council.

Cumulative effects (Issue 5)

[113] The Council says that the Environment Court erred when considering the rural subdivision rules in Chapter E39 by failing to have regard to the cumulative effects of rural subdivision on the environment as required by s 76(3) of the RMA.

[114] Ms Hartley also submits that NZCPS Policy 7(2) relating to strategic planning is also relevant to the issue of cumulative effects in the coastal environment.[60] Policy 7(2) anticipates that, where practicable, thresholds (including zones, standards or targets) will be set or limits specified in plans to manage adverse cumulative effects.

[115] Ms Hartley submits that the issue of cumulative effects of rural lifestyle subdivision across the Auckland region was an issue squarely before the Environment Court. Those cumulative effects included fragmentation of rural land, the impact on rural production activities and reverse sensitivity, and in relation to adverse cumulative effects on rural character, amenity, landscape and natural character values. Ms Hartley submits that despite this the decision makes no reference to cumulative effects. It instead focused on individual sites and determined that the assessment of potential adverse effects of subdivision should be deferred to the resource consent stage.

[116] She submits that the Environment Court should have had regard to the cumulative effects of rural subdivision on the environment across the region in determining which set of provisions (IHP or Council) should be preferred.

[117] Mr Littlejohn acknowledges that the Court did not use the word "cumulative" but submits that the Court nevertheless did engage with the issue of how the cumulative effects of rural subdivision would be managed. The Court observed that assessment in respect of restricted discretionary matters on a case by case basis was sufficient to manage adverse effects.

[118] Mr Littlejohn does not accept that the Court was required to address the cumulative effects at the plan stage. He submits that consent authorities (including the Environment Court) manage cumulative effects of rural subdivision on a case by

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60 *King Salmon*, above n 24, at [54].

case basis regularly. This is the time to do so[61] and it is not possible to take into account the effects (including cumulative effects) on the environment of activities that have not yet obtained consent.

[119] Mr Webb submits that it is highly unusual for the issue of cumulative effects to arise in the context of a plan change. A determination of cumulative effects simply cannot credibly be made at the time the AUP is drafted.

[120] Mr Savage makes a similar submission that cumulative effects are those that accrue over time on the basis of successive applications and cannot be assumed or presumed in advance.

Discussion

[121] I start by considering whether it is mandatory for a territorial authority to consider cumulative effects at the plan stage.

[122] Section 76(3) provides that:

> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

[123] That requirement extends to the Environment Court.[62]

[124] The definition of "effect" in s 3 is as follows:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term *effect* includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and

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61 Relying on *Blampied v Whangarei District Council* [2012] NZEnvC 54.

62 See *Kennedys Bush Developments Ltd v Christchurch City Council* HC Christchurch CIV-2004-485-1189, 2 September 2004 at [18].

> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[125] As is apparent, s 76 refers to "actual or potential" effects. There is no reference to "cumulative" effects. Does that mean that there is no requirement on the Court to consider cumulative effects at the plan stage?

[126] The Court of Appeal in *Dye v Auckland Reginal Council* commented on the meaning of "cumulative effect":[63]

> [38] … The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build-up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words "regardless of the scale, intensity, duration, or frequency of the effect".

[127] In *Dye*, the Court of Appeal was concerned with a resource consent and accordingly was focussed on s 104 of the RMA. Section 104(1)(a) requires the consent authority to have regard to "any actual or potential effects on the environment of allowing the activity". The words "actual or potential effects" similarly appear in s 76(3). The Court of Appeal in *Dye* held:

> [41] As noted, s104(1)(a) requires the consent authority to have regard to "any actual and potential effects on the environment of allowing the activity" in question. In this respect we consider Parliament has implicitly abandoned the s3 definition of effect which only applies unless the context otherwise requires. Had Parliament wished to adopt the definition, it would have used simply the word "effects" (as in s105(2A)) rather than the words "any actual or potential effects". Indeed if the definition is invoked it would have the

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63 *Dye v Auckland Regional Council* [2001] NZRMA 513, [2002] 1 NZLR 337 (CA).

> awkward consequence that s104(1)(a) would be dealing with actual potential effects and potential potential effects. Everything points to a deliberate intention here to address only effects which are "actual" and "potential"; albeit putting the matter that way is in any case inherently very wide and capable of capturing some, if not all, of the subtleties of the s3 definition. …
>
> …
>
> [49] … Cumulative effects properly understood should also be taken into account pursuant to s105(2A)(a) and s104(1)(a). …

[128] I adopt the same approach, in other words cumulative effects must be taken into account under s 76(3) of the NZCPS.

[129] That approach is supported by Policy 7(2) of the NZCPS:

> Identify in regional policy statements, plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects include provisions and plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[130] The word "plan" used in Policy 7(2) means "regional plan or district plan" unless the context provides otherwise.[64]

[131] It is also the case that s 74 of the RMA applies. Section 74(1)(a) provides that a territorial authority must prepare and change its district plan in accordance with its function under s 31 of the RMA.

[132] In *Kennedys Bush Developments Ltd v Christchurch City Council*, an appeal under s 299 of the RMA in relation to the Christchurch City Proposed Plan, Chisholm J stated:[65]

> [18] … That requirement extends to the Environment Court. Under s31(a) (as it stood at the relevant time) one of the functions of a territorial authority is to achieve integrated management of the *effects* of the use and development of land. Thus any effects which qualify under s3 should be taken into account by the territorial authority (and by the Environment Court) when preparing a Plan.

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64 RMA, s 43AA.

65 *Kennedys Bush Developments Ltd v Christchurch City Council*, above n 62.

[133] There is a further decision which discusses this issue. *Golden Bay Marine Farmers v Tasman District Council*,[66] was a decision of the Environment Court in relation to plan provisions for aquaculture. In that case, the Court appeared to accept that cumulative effects needed to be addressed at the plan stage, stating:

> [452] … It is submitted the *Dye* decision makes it clear that the opportunity to address such matters [whether the cumulative effects of a proposal are contrary to the objectives and policies of the plan] at the resource consent stage is limited. They need to be addressed at the plan stage. As the TDC submit, if whole block applications are filed at once and a large number of them are unable to be developed immediately, it becomes difficult to identify what adverse cumulative effects might be.

[134] I therefore accept the Council's submission that the Court was required to consider the issue of cumulative effects. The real question is whether it did so. The Court did not use the word "cumulative" but it does not necessarily follow that it failed to consider such effects.

[135] It is clear from the decision that the Court understood the different approaches of the IHP and the Council as regards managing effects. It observed that a "great deal of this decision has been trying to assess the particular effects of the various wording provisions".[67]

[136] It is also apparent that the Court understood that the Council's approach to managing effects was to place finite limits on the number of lots that might be created by capping the number of lots that could be sought for approval, with a non-complying consent requirement being triggered for a "breach". It also understood the IHP approach, which was not to cap the number of lots, but to require all lots to be assessed against specific criteria, including criteria relevant to effects on rural character and amenity on a case-by-case basis.

[137] In its analysis, the Court did engage with the issue of how the cumulative effects of rural subdivision would be managed.[68] It said:

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66 *Golden Bay Marine Farmers v Tasman District Council* EnvC Wellington, W19/2003, 27 March 2003.

67 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [310].

68 At [310]–[321].

> [310] … We also recognise that there is the potential for impacts upon landscapes, features, natural character, rural character and amenity. Those need to be assessed on a case-by-case basis and refused where those matters are not addressed. We do not consider that standards per se can properly achieve those outcomes. In every case, consideration to these issues needs to take place on a site by site basis, and an assessment made.

[138] The Court rejected the evidence of the Council witnesses as to potential lot numbers that might be approved and instead preferred evidence as to the actual consents that had been granted and found that the numbers were insignificant and nowhere near sufficient to breach what the Auckland Plan considered was the necessary number of new allotments in the relevant period. Accordingly, in rejecting the Council's growth analysis, the Court rejected the Council's proposition that it needed a cap mechanism to address cumulative effects.

[139] I do not discern an error of law in the Court's approach to this issue.

[140] What the Court was required to address in relation to cumulative effects at the plan stage was whether the Council's approach of capping the total potential number of lots (or more accurately putting in place standards that led to an effective cap) was the only appropriate response on the evidence to address cumulative effects.

[141] As I have noted, the Court rejected the evidence of the Council's modelling of the potential amount of future subdivision as being unrealistic. The Court was persuaded by and accepted the evidence of data which the respondents had obtained for incentive subdivision that had occurred in the Rodney and Franklin region for around 15 years prior to the Court hearing. That period was relevant because similar techniques had been operating in those regions. The number of actual consents was significantly smaller when compared to the Council's modelling numbers. Having rejected the Council's modelling evidence, the Court consequently rejected the Council's submission that it needed a cap on numbers (or standards which would lead to a cap) to control future lot numbers. This was, in effect, a consideration of how cumulative effects might be managed or addressed.

[142] The Council may disagree with the Court's assessment (and it clearly does) but this is an appeal on a question of law, and this particular question is as to whether the Court considered cumulative effects. For the reasons given, I consider it did so.

[143] I do not consider there was an error of law on this issue.

Second alleged error of law — misapplication of provisions of the RMA and failure to have regard to the AUP

[144] The Council submits that the Environment Court misapplied the sections of the RMA relating to activity classes by failing to distinguish between classes of activity in its determination of the rural subdivision rules. It submitted that the Court also failed to have regard to the provisions of Chapter A1.7 of the AUP concerning activity status. The second point is largely the same as the first, as the approach to activity status in Chapter A1.7 follows the classification of activities in the RMA.

[145] Ms Hartley submits that the Court did not see distinctions between the various activity statuses at issue. Ms Hartley refers to [266] of the decision where the Court said that "similar tests would apply whether the application was non-complying, discretionary or restricted discretionary".

[146] Ms Hartley submits that the Court considered the critical factors applying to a rural subdivision consent in relation to effects would be the same regardless of activity status, stating:

> [256] … Importantly, we do not consider that either set of provisions [IHP or Council] is more likely to achieve significantly greater levels of development in other rural areas for in-situ development subdivision than the other. This is because the critical criteria would still apply to restricted discretionary or non-complying activities.

[147] Ms Hartley submits that the Court erred by not recognising that different considerations would apply to the assessment of restricted discretionary, discretionary and non-complying activities, which would affect the Council's ability to turn down subdivision applications. This includes the relevance of plan integrity/precedent effect considerations.

[148] Mr Littlejohn, on the other hand, submits that the Court was correct to find that, as between activities classed as non-complying, discretionary and restricted discretionary, the consent authority's *powers* are the same, namely to refuse or approve

the application, and if approval is given, to impose conditions.[69] What varies for each class of activity are the matters relevant to their consideration and determination. For a restricted discretionary activity, the range of matters that can be considered are limited to what is specified in the plan, whereas for discretionary and non-complying activities, they are not. Non-complying activities also have a further hurdle in that they must satisfy s 104D in order to be approved.

[149] Mr Littlejohn submits that the Council's complaint that the IHP's provisions provide for more restricted discretionary activities and subdivision opportunities than the Council's provisions is fundamentally misconceived. This is because precisely the same discretion applies to restricted discretionary activities as to discretionary and non-complying activities under the RMA.

[150] Mr Webb submits that there are a number of background matters that must be considered in relation to the Court's decision about activity status. The first is that the matters over which the Council would retain discretion for a restricted discretionary activity subdivision application are the same as the Council would need to consider for a fully discretionary or non-complying activity in any event. Mr Webb submits that there are no other matters other than those already listed in the AUP that the Council would need to consider.

[151] Mr Savage starts with the position that both the Council and IHP subdivision rules apply identical activity statuses. Applications for subdivision consent are in each case restricted discretionary, where standards are complied with, or non-complying, where standards are not complied with. He submits that all the Court was doing in its decision was identifying that, regardless of activity status, issues as to rural character and amenity, natural character and features and significant ecological areas, etc. will all be relevant to the Council's assessment of any particular application.

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[69] RMA, ss 104B and 104C.

Discussion

[152] The various classes of activity are discussed by the Supreme Court in *King Salmon*:[70]

> [16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted. The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities, discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

[153] When considering an application for resource consent for a restricted discretionary activity, and in imposing any condition, a consent authority may only consider those matters over which:

(a) a discretion is restricted in national environmental standards or other regulations;

(b) it is restricted the exercise of its discretion in its plan or proposed plan.

[154] A discretionary activity may be declined or granted with or without conditions.[71] When considering whether to grant an application for a discretionary activity and whether to impose conditions, a consent authority may have regard to the full range of s 104 matters.[72]

[155] In the case of a non-complying activity, s 104D of the RMA sets out particular restrictions, referred to as the "gateway test", that must be met before a s 104 assessment is undertaken. Section 104D provides:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

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70 *King Salmon*, above n 24, at [16].
71 RMA, s 87A(4).
72 Sections 104 and 104B.

(a) *the adverse effects of the activity on the environment* (other than any effect to which section 104(3)(a)(ii) applies) *will be minor; or*

(b) *the application is for an activity that will not be contrary to the objectives and policies of—*

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

…

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(emphasis added)

[156] In *Mighty River Power v Porirua District Council*, the Environment Court referred to the attribution of non-complying activity status and said:[73]

> … [It is] intended to signal the proposals [in breach of the control] … will be subject to a higher degree of scrutiny, and have to meet a sterner test, because of the likelihood that at least one adverse effect – noise – will be more than minor. …
>
> We agree to [sic] that it is part of a Council's function under the Act to anticipate activities which are likely to require particular attention because of the effects and to make Plan provisions accordingly. That is a position envisioned by ss 31, 32, 72 and part 2 of the Act.

[157] The activity statuses in Chapter A1.7 of the AUP reflect the hierarchy of activities in the RMA. In relation to restricted discretionary, discretionary and non-complying activities, it provides:

> **A1.7.3. Restricted discretionary activity**
>
> …
>
> Activities are classed as restricted discretionary where they are generally anticipated in the existing environment and the range of potential adverse effects is able to be identified in the Plan, so that the restriction on the Council's discretion is appropriate.
>
> **A1.7.4. Discretionary activity**
>
> …
>
> Activities are classed as discretionary where they are not generally anticipated to occur in a particular environment, location or zone or where the character,

[73] *Mighty River Power Ltd v Porirua District Council* [2012] NZEnvC 213 at [32].

intensity and scale of their environmental effects are so variable that it is not possible to prescribe standards to control them in advance. A full assessment is required to determine whether the activity, subject to any conditions, would be appropriate in terms of the provisions of the Plan, the effects of the activity on the environment and the suitability of the proposed location.

A1.7.5. Non-complying activity

…

Activities are classed as non-complying where greater scrutiny is required for some reason. This may include:

- where they are not anticipated to occur; or
- where they are likely to have significant adverse effects on the existing environment; or
- where the existing environment is regarded as delicate or vulnerable; or
- otherwise where they are considered less likely to be appropriate.

[158] In both the Council's and the IHP's provisions, a breach of the relevant rule standards for regulatory incentive subdivision resulted in the activity status of applications for in-situ or TRSS regulatory incentive subdivision changing from restricted discretionary to non-complying activity status. The IHP's provisions, however, provided for more restricted discretionary activity subdivision opportunities than the Council's provisions.

[159] Due to the of the standards in the Council's provisions, non-complying activity status was triggered where a lower number of in-situ subdivision sites were proposed. The standards related to the type of indigenous vegetation and wetlands that can be protected and the type of indigenous revegetation planting that can occur to be eligible for restricted discretionary activity rural subdivision opportunities. Additionally, the Council's standards in some cases also apply more onerous minimum qualifying feature thresholds, such as the minimum size of the indigenous vegetation, wetland or revegetation planting required to obtain initial and subsequent subdivision opportunities. Further, the Council's standards place more restrictive caps or limits on the number of in-situ and TRSS subdivision opportunities that can be obtained from the protection of indigenous vegetation or wetlands and revegetation planting.

[160] Could it be said that the issue is simply where the threshold between restricted discretionary activity and non-complying activity was to be set and that this was no more than a matter of evaluation on the part of the Court which does not give rise to a question of law?

[161] I set out various statements by the Court on this issue:

> [253] Although we are unable to tell from the data that has been provided, it appears that these non-complying consents were all in-situ subdivisions. The question then turns upon whether or not restricted discretionary status would have a significantly different outcome. Given the range of matters that are included for assessment within restricted discretionary status, and the particular standards applying to achieve that status, we have reached the conclusion that the outcomes would be little different if the IHP provisions applied rather than the current district provisions. In reaching this conclusion we note:
>
> (a) that Auckland Council has granted many non-complying subdivision consents for in-situ development;
>
> (b) for non-complying applicants, the application of the standards and criteria are less certain. In the case of both non-complying or restricted discretionary, issues as to rural character and amenity, natural character and features and significant ecological areas are applicable;
>
> (c) that we must conclude that the Council have been able to grant consents on the basis that the effects on the environment are no more than minor, probably through the imposition of conditions and covenants to reach protection of the same items covered under restricted discretionary status. It is unclear to us as to whether the numerous standards and criteria have been considered and addressed.
>
> [254] For restricted discretionary, discretionary or non-complying activities the critical factors applying to the consent in relation to effects would be the same. Given the objectives and policies we have already outlined from the Regional Policy Statement through, it appears that there may be many cases where non-complying applications can also show that they are not contrary to such objectives and policies, particularly relying on:
>
> (a) protection of natural character or features;
>
> (b) the enhancement and protection of significant ecological features and other indigenous vegetation and/or habitats; and
>
> (c) maintaining the rural character and amenity anticipated in terms of the plan.
>
> [255] In our view, this would be achieved in both the case of a non-complying application or a restricted discretionary application for an in-situ development by demonstrating through a Master Plan process

> (as recommended by several witnesses) and a comprehensive approach to covenanting and separation, that the various objectives of the plan can be met.
>
> …
>
> [266] Overall, we have concluded that there should be a clear preference in the plan for transferable rights to the Countryside Living Zone, but that applications for in-situation development have occurred notwithstanding they are non-complying. Similar tests would apply whether the application was non-complying, discretionary or restricted discretionary. Overall, the issues as to whether rural character and amenity are maintained, and that the protection of the natural character, productive soils, landscape features and ecological areas can be maintained and enhanced through the application are the common thresholds.

[162] In the above paragraphs what the Court appears to be doing is identifying that, regardless of activity status, issues as to rural character and amenity, natural character and features in significant ecological areas will all be relevant to the Council's assessment of any particular proposal. Then the Court said:[74]

> … It is difficult to see the distinctions in relation to the assessment of the critical issues between restricted discretionary, discretionary and non-complying. In particular, those relating to landscapes, features, natural character, rural character and amenity are explicit within the restricted discretionary and discretionary criteria and would, in any event, be required under the objectives and policies of the plan as well as under the NZCPS and Part 2 of the RMA.

[163] However, at the same time the Court was of the view that applications for in-situ subdivision outside of the Countryside Living Zone needed to be scrutinised and would require detailed evidence addressing a number of issues, saying:[75]

> We do not consider that the IHP provisions would allow for fragmentation or inappropriate subdivision. Any application for in-situ development outside the Countryside Living zone must be scrutinised, and will require detailed evidence addressing a number of significant issues in terms of the various supporting documents. As we have noted, this is already occurring as non-complying activities, with the majority of those having been granted.

[164] The Court's approach was that this should occur at the resource consent stage on an application-by-application basis, relying on restricted discretionary activity assessment criteria.[76] The Court discounted the approach of managing the effects of

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74 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [311].
75 At [327].
76 At [310]–[311].

subdivision through plan provisions that could result in a more onerous activity status.[77]

[165] However, by adopting a restricted discretionary activity status for applications that might have warranted careful scrutiny and detailed evidence (as the Court itself anticipated), the Court applied an activity status that does not anticipate close scrutiny at the resource consent stage. If an application requires greater scrutiny, a more onerous activity status should apply.

[166] Related to this are the concepts of precedent effect and integrity. A decision on one resource consent will not create a legally binding precedent in respect of a similar application. However, the precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account under s 104(1)(c) of the RMA.[78] The issue of precedent effect has been found to be a proper consideration for both non-complying and discretionary activities. In *Norwood Lodge v Upper Hutt City Council*,[79] which involved a subdivision proposal classified as a discretionary activity by a Plan, the Court of Appeal held:

> [15] It is important to note the meaning of "precedent effect" in this context. Plainly individual applications must be considered on their merits. A decision on one application will not create a legally binding precedent in respect of a similar application. However, an earlier decision may be relevant to the determination of a later application. Consistency of treatment, in the absence of a reason justifying inconsistency, is generally regarded as an important aspect of good public administration. In that sense "precedent effect" may be relevant.
>
> [16] This Court held in *Manos v Waitakere City Council* [1996] NZRMA 145 that precedent effect was a legitimate consideration under s 104(1)(d) (now s 104(1)(b)(iv)) in respect of what was treated as a discretionary activity. In *Dye v Auckland Regional City Council* [2002] 1 NZLR 337 this Court held that the precedent effect of granting a resource consent (in the sense of like cases being treated alike) was a relevant consideration for a consent authority to take into account under s 104(1)(d) when considering an application for consent to a noncomplying activity. Those decisions have been applied subsequently by the High Court and the Environment Court. As *Manos* deals with a consent application for a discretionary activity it is directly on point.

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77 At [310]–[311].

78 *Dye v Auckland Regional Council*, above n 63, at [49].

79 *Norwood Lodge v Upper Hutt City Council* CA37/06, 4 July 2006. See also *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148–149; and *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798 (HC) at [87].

> We do not accept that *Manos* has been misunderstood, nor has any case been made out that it should be re-examined.

[167] The Council referred this Court to a number of Environment Court decisions where the Court on appeal, refused an application for rural subdivision on the basis of the assessment of the application against the relevant plan objectives and policies and the precedent that granting consent to the application may create.[80]

[168] The Council also referred to case law which indicates that issues of precedent effect are unlikely to be able to be taken into account in the assessment of restricted discretionary activity unless this is a matter in respect of which its discretion is restricted.[81] This issue of precedent effect indicates that different considerations may apply to the assessment of rural subdivision applications for restricted discretionary activities as opposed to applications for non-complying activities.

[169] Finally, I turn to Ms Hartley's submission that the Court appeared to be influenced by an irrelevant consideration in adopting a restricted discretionary status for applications that might have warranted careful scrutiny and detailed evidence. Here, Ms Hartley refers to the Court's statement that, due to recent RMA reform, there is now no right of appeal in respect of restricted discretionary activity subdivision applications, and so the Council's decision on such applications is final.[82] While I agree with Ms Hartley that this is an irrelevant consideration, it does not form a significant part of the Court's reasoning.

[170] However, having regard to my other findings on this question of law (at [165] to [168]), I consider the Court did err in its misapplication of provisions of the RMA and in its failure to have regard to the AUP as regards activity status. The Court's decision went beyond a mere evaluative exercise.

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80 *Rawlings v Timaru District Council* [2013] NZEnvC 67 at [71]–[72] and [79]–[80]; and *McKenna v Hastings District Council* EnvC Wellington, W016/08, 4 April 2008 confirmed by the High Court in *McKenna v Hastings District Council* (2009) 15 ELRNZ 41 (HC) at [67]–[70].

81 *Kirton v Napier City Council* [2013] NZEnvC 66 at [69]–[77]; and *Campbell v Napier City Council* EnvC Wellington, W67/05, 8 August 2005 at [65].

82 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [269] and [311].

Third alleged error of law — coming to a conclusion without evidence or one to which it could not reasonably have come to on the evidence

[171] The Council says that the Environment Court reached conclusions without evidence or those to which, on the evidence, it could not have come in relation to the Court's findings that:

(a) that the catchment of the Hauraki Gulf Marine Park (HGMP) is the coastal environment for the purposes of the AUP; and

(b) the Council's economic witness, Dr Fairgray, failed to acknowledge that Mr Balderston's (another Council witness) assessment of rural subdivision capacity was not either possible or an expected outcome, even over a 30-year period.

Coastal environment

[172] Ms Buchanan (who argued this issue and the remaining issues for the Council) submits that this is one of those rare cases which raises a question of law based on an insupportable factual finding.[83] She submits that:

(a) there is no definition of "coastal environment" in the RMA or the AUP;

(b) the AUP does not map the landward extent of the coastal environment on a region-wide or local basis;

(c) there is nothing in the NZCPS which requires that the coastal environment and the resources within it be mapped in the AUP;

(d) figure 1 in Chapter B8.6 headed "Extent of the coastal environment" is a high-level diagram and shows that the landward extend of the coastal environment is not fixed in the AUP;

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[83] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]–[26]; and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51]–[52].

(e) figure 8.5.3.1, included in Chapter 8, which shows the coastal boundary of the HGMP and the Hauraki Gulf Catchment area is derived from a schedule to the Hauraki Gulf Marine Park Act 2000 (HGMPA) which, in s 50, makes it clear that the catchment area and coastal marine area of the Hauraki Gulf are indicated only in general terms on the diagram;

(f) the extent of the coastal environment for the purposes of the AUP was not a matter that was directly addressed by any of the witnesses; and

(g) when the witness, David Serjeant (planning witness for Omaha Park Ltd), was asked by the Court whether he thought the HGMPA boundary should be the "coastal environment", Mr Serjeant was of the opinion that, in places, the extent of the catchment would be "more extensive than what a coastal environment would be struck".

[173] Accordingly, Ms Buchanan submits that the Court's finding that the HGMP catchment is the coastal environment for the purpose of the AUP was not one reasonably open to it on the basis of the evidence before it. Nor was this a case of the Court applying its own specialist knowledge.

[174] She says the error was material as it led to the Court's conclusion that there was "a clear requirement for most of the land within the Auckland region to meet Policy 11 of the NZCPS".[84]

[175] Mr Littlejohn submits that the following paragraphs need to be read together and, when this is done, it is clear that qualifying words have been omitted by the Court at [118] in which the Court makes the findings now challenged by the Council. The paragraphs relating to the coastal environment are as follows:

> [91] The Auckland Plan does include reference to the HGMPA, and attaches the map showing most of the Eastern catchment as Coastal environment. Arguably, the Council has adopted that area as the coastal environment in that part of Auckland.
>
> [92] In relation to areas such as the Kaipara there are wide areas, including estuarine flats, that might be considered part of the coastal environment given

[84] *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [129].

> their periodic seawater inundation in extreme events. The coastal environment is somewhat more readily identifiable in areas such as Awhitu peninsula and around Muriwai, but is problematic again within the Manukau harbour and in certain parts of the south-eastern region of the zone.
>
> …
>
> [116] There follows at figure 8.5.3.1 a diagram of the Hauraki Gulf Marine Park including the landward areas, both urban and rural, to the coastal boundary which represents something in the order of one third of the Auckland region. If that is the coastal environment for the purposes of the NZCPS, it will have significant impact given that the South Head, Aswhitu peninsula, Manukau harbour and Kaipara areas will involve further coastal areas, leaving the majority of the land as coastal environment. As noted, this matter is unresolved by the plan.
>
> [117] The reasons for adoption of the provisions of chapter B8 note that s 10 of the Hauraki Gulf Marine Park Act 2000 requires that the national significance and management directions in s 7 and 8 be treated as the NZCPS for the Hauraki Gulf. This elevates the interrelationship with the Hauraki Gulf, its islands, the catchments and the ability of the gulf to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands to matters of national significance.
>
> [118] For current purposes we consider that this, accompanied by Figure 1 to B8.6 as to the coastal environment, clarifies that, for the purposes of this plan, the catchment of the Hauraki Gulf Marine Park is the coastal environment …
>
> …

[176] Mr Littlejohn submits that the words "in that part of Auckland" should be understood to be included at the end of the sentence referred to in [118] above. He submits that the Court's statements clearly indicate that it concluded that the coastal environment includes the HGMP "in that part of Auckland" and other areas of land in other parts of Auckland. He submits that the Court detailed the evidence it relied on and its reasoning for reaching the conclusion it did.

[177] Mr Webb submits that the Council has mischaracterised the Court's findings on what the coastal environment is. He refers to the Court's statement,[85] when discussing the diagram at Chapter B8 where the Court stated: "*If* that is the coastal environment for the purposes of the NZCPS …". Mr Webb further submits that even if the Court was wrong to use the HGMPA map as defining the coastal environment, this could not enhance subdivision opportunity. The NZCPS provides an additional

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85 At [116].

layer of protection over land in the coastal environment. In other words, the error was not material.

[178] Mr Savage says, standing back, it was necessary for the Court to enquire as to the extent of the coastal environment as part of its inquiry as to whether the Council's or the IHP's provisions better achieved Policy 11 of the NZCPS. He refers to the Court's reference in its decision to its inquiries of the parties as to whether or not the catchment of the Hauraki Gulf area under the HGMPA was applicable and that "No definite answer was obtained from the parties".[86]

[179] Mr Savage submits that this is an expert court with a deep knowledge of the Auckland region, including its coastal areas. It was perfectly reasonable for the Court to identify the HGMPA and cross-references in the Auckland plan as factors that might give an indication as to the extent of the coastal environment in the region.

Discussion

[180] Sometimes an ultimate conclusion of a fact-finding body is so unsupported by the evidence as to amount to an error of law. Such cases are rare. This will only be the case where there is no evidence to support the determination; the evidence is inconsistent with or contradictory to the determination; or the true and only reasonable conclusion contradicts the determination.[87]

[181] I start with Policy 1 of the NZCPS. It recognises that the extent and characteristics of the coastal environment vary from region to region and locality to locality. Policy 1(2) sets out characteristics and factors relevant to assessing the extent of the coastal environment in any particular case.

[182] The Department of Conservation *NZCPS 2010 Guidance Note* includes the following:[88]

> Defining a landward boundary in RPSs and plans is more challenging. An important aspect of Policy 1 involves acknowledging that the extent of the

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86 At [90].

87 *Edwards v Bairstow* [1956] AC 14 (HL) as cited in *Bryson v Three Foot Six Ltd*, above n 83, at [26].

88 Department of Conservation *NZCPS 2010 Guidance Note: Policy 1* (May 2013) at 11.

> coastal environment varies from region to region and from locality to locality.
> …
>
> Any precise delineation of the landward extent of the coastal environment in RPSs and plans should be done with caution, including a careful consideration of how the information is to be used.
>
> At a minimum a combination of technical assessment and subjective judgement are required. The level of assessment is expected to vary depending on the issues that arise in relation to the matters to be assessed and the scale of relevant activities. People's relationship with the coast will also be a matter to consider.

[183] Turning to Chapter B8 of the AUP, which sets out the RPS provision specifically relating to the coastal environment, that chapter states:

> **B8.6. Explanation and principal reasons for adoption**
>
> The coastal environment includes the coastal marine area, islands within the coastal marine area and the area landward of the line of mean high water springs determined by the natural and physical elements, features and processes associated with the coast, including vegetation, landscape, land forms, coastal processes and the other matters included in Policy 1(2) of the New Zealand Coastal Policy Statement 2010. (Refer Figure 1).

[184] Figure 1 is entitled "Extent of the coastal environment". I accept Ms Buchanan's characterisation that this is a high-level diagram and shows that the landward extend of the coastal environment is not fixed by the AUP.

[185] As I have noted when referring to Ms Buchanan's submissions, Chapter 8 also includes figure 8.5.3.1. It is entitled "Hauraki Gulf Marine Park" and shows the coastal boundary of the HGMP and the Hauraki Gulf catchment area. Figure 8.5.3.1 is derived from the map in sch 3 of the HGMPA. However, when reference is made to that Act, s 50 makes it clear that the catchment area and coastal marine area of the Hauraki Gulf are indicated in general terms only on the relevant map.

[186] In its decision, the Court stated:

> [93] Given the lack of any identification within the plan, and the general unwillingness of any witnesses or counsel to identify the coastal environment, we are left in something of a quandary as to the spatial areas to which the NZCPS applies. It is likely to include all of such islands as Rangitoto, Kawau, and large parts of Waiheke.
>
> (citation omitted)

[187] However, notwithstanding that statement, the Court went on to make the finding that the catchment of the HGMP, as shown on figure 8.5.3.1 of the AUP, is the coastal environment for the purposes of the AUP.[89]

[188] In my view, there is nothing in Policy 1 of the NZCPS and Chapter B8 of the AUP that supports the Court's conclusion that the HGMP catchment is the coastal environment for the purposes of the AUP.

[189] I do not accept Mr Savage's submission that the Environment Court was relying on its own experience and knowledge in reaching its conclusion about the extent of the coastal environment in the Auckland region. It is clear from the reasoning of the Court that it relied on the provisions in Chapter B8 of the AUP and particularly the two diagrams, figure 1 and figure 8.5.3.1, to which it referred.

[190] Rather than those figures supporting the Court's conclusion, the provisions of the AUP anticipate that the coastal environment will be determined on a case-by-case basis in light of expert evidence.[90]

[191] Turning then to what was said by the witnesses, as noted at [186] above, the Court referred to "the general unwillingness of any witnesses or counsel to identify the coastal environment". The joint witness statement of the planning witnesses noted that the AUP did not adopt the approach of mapping the coastal environment. This was further acknowledged by the witness, David Serjeant, planner for Omaha Park Ltd, when he was questioned by the Court.

[192] Mr Serjeant was asked whether he thought the HGMP boundary should in effect be the "coastal environment". His response was that:

> I think there may be places where that's more extensive than what a coastal environment would be struck.

[193] Then there were the following questions and answers:

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89 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [118].

90 This was the approach of the Environment Court in *Pierau v Auckland Council* [2017] NZEnvC 90 at [28]–[32].

> Q So when we're coming to apply section 6(c) in policy 11, you would agree with me that there's probably significant areas on both coasts that are influenced (sic) or may be subject to policy 11?
>
> A Yes.
>
> Q You agree?
>
> A There are significant areas, yes.

[194] In my view, the high point of the evidence is Mr Serjeant's agreement with the Judge as referred to in [193] above.

[195] Does it then follow that the conclusion by the Court that the catchment of the HGMP is the coastal environment for the purposes of the AUP was so unsupportable and clearly untenable as to amount to an error of law? Was there evidence to support the determination? I have already discussed the relevant policies and diagrams. Adding Mr Serjeant's evidence does not provide the necessary support for the Court's finding. He agreed simply that there "are significant areas" (the Judge used the word "probably" but Mr Serjeant did not use that qualifier in his second answer) that are influenced by or may be subject to Policy 11. That does not provide a basis for the finding that "for the purposes of this plan, the catchment of the HGMP is the coastal environment". I consider that this is one of those rare cases where the conclusion is clearly unsupportable.

[196] The question then arises as to the materiality of the error. The Court stated:

> [129] … Given the clear requirement for most of the land within the Auckland region to meet Policy 11 of the NZCPS (given the application of the HGMPA and the wide areas associated with the Manukau harbour, Kaipara harbour, South Head and Awhitu peninsula), we would understand that significant ecological areas are to be protected, and that the values of those areas are to be protected within any subdivision. …
>
> …
>
> [274] It is clear from a consideration of all the objectives and policies and our earlier comments that the IHP provisions may have the effect of encouraging the protection of more SEAs under Schedule 3 of the Plan. Given that the majority of Auckland region is within the coastal environment, it must follow that such provisions would better achieve NZCPS policy 11(a) and the overall policies of the New Zealand Coastal Plan.

[197] Ms Buchanan submits that the Environment Court's determination that the majority of the Auckland region was within the coastal environment contributed to its findings that the IHP's provisions (which it considered would encourage the protection of more SEAs) better met the statutory criteria.

[198] Mr Littlejohn submits that the Court was required to determine provisions for the land in the region in its entirety. In that regard, it had to consider the requirement to protect indigenous vegetation in s 6(c) of the RMA in relation to land not in the coastal environment and under Policy 11 for land that was in the coastal environment. Therefore the exact placement of the line between coastal and non-coastal land did not matter. It was not material, he says.

[199] Mr Webb submitted that even if the Court was wrong to use the HGMPA map to define the coastal environment, this could not enhance subdivision opportunities and it is not clear in fact what effect any error had.

[200] In the end I have decided the error was not material. I reach that conclusion for two reasons. First, while the Court erred in concluding that the catchment of the HGMP is the coastal environment, there is nevertheless the evidence of Mr Serjeant that there are significant areas on both coasts that are influenced by or may be subject to Policy 11. Second, I accept Mr Littlejohn's submission that in any event the Court was required to consider the requirement in s 6(c) to protect indigenous vegetation in relation to land not in the coastal environment. The exact placement of the line between coastal and non-coastal land was not a matter that materially affected the Court's decision.

Dr Fairgray

[201] Ms Buchanan submits that the Court reached a conclusion on Dr Fairgray's evidence that it could not reasonably have come to and that this was an error of law which resulted in the Court putting little weight on his evidence.[91] To put Ms Hartley's submission in context, the statement by the Court was:

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91 At [239].

> [239] So far as the growth issues are concerned, we consider that the fundamental failure of the witnesses, Dr Fairgray and Ms Fuller, to acknowledge Mr Balderstone's clear statement, that his assessment of capacity was not either possible or expected outcome even over a 30-year period, leads us to put little weight on their evidence.

[202] For further context, the evidence related to growth issues. Mr Balderstone, a Council witness, gave evidence regarding modelling as to the plan-enabled capacity. In other words, his evidence was as to the maximum potential growth that had been enabled by the modelled AUP provisions. Mr Balderstone's evidence was that plan-enabled capacity modelled information could then be incorporated into other work including development feasibility analyses, which consider the development opportunities capable of being realised in a commercial sense. Dr Fairgray's evidence addressed how the plan-enabled capacity of the Council's provisions and the IHP's provisions in Mr Balderstone's data set might translate into feasible development capacity over the medium and long-term.

[203] Ms Buchanan submits that the Court mischaracterised Dr Fairgray's evidence and the interrelationship between his evidence and Mr Balderstone's evidence, and that led the Court to unreasonably reject Dr Fairgray's evidence on growth issues. She refers to the following evidence by Dr Fairgray:

(a) The likely uptake of development would likely be significantly lower than the feasible development at any point in time;

(b) In the joint witness statement of Dr Fairgray and Mr Thompson (Cabra's economic expert), the difference between plan-enabled capacity and commercially feasible capacity was recognised by both experts;

(c) Dr Fairgray's rebuttal evidence contained a feasibility assessment of both the IHP's and the Council's in-situ revegetation provisions based on modelling he had undertaken. In that evidence he stated that the figures do indicate that a substantial number of plan-enabled subdivisions are likely to be feasible within the planning horizon, and this potential for additional small rural holdings will increase over time.

He then commented on Mr Thompson's evidence and said that it was not appropriate to rely on assumed poor feasibility and an assumed very low growth rate when assessing the potential effects of the subdivision provisions under either Council or IHP versions; and

(d) Dr Fairgray explained that his evidence indicated that a "significant proportion of the plan-enabled capacity was likely to translate through as capacity which is feasible to develop, given sufficient demand". He also stated that the was not assuming that 100 per cent of the plan-enabled opportunities were feasible and, under questioning from the Court, he agreed that Mr Balderstone's plan-enabled capacity was not the same as likely uptake.

[204] Both Mr Littlejohn and Mr Webb refer to Dr Fairgray's evidence-in-chief that "this indicates that plan-enabled capacity is likely to translate through as capacity … feasible to develop, given sufficient demand". Mr Littlejohn then notes Dr Fairgray's response when questioned by the Court asking, "A significant proportion of the plan enabled capacity is likely to translate through? Would that be fair?" Dr Fairgray replied "Yes".

[205] Mr Littlejohn points by contrast to Mr Balderstone's acceptance under cross-examination that the likelihood of all plan-enabled capacity being taken up was less than that of 300 sixes in a row being hit in a one-day international cricket match, which Mr Balderstone agreed had a likelihood of 1 in 1 followed by 1,200 zeros. I am not certain that the cricketing analogy was a useful one. However, it is clear, in my view, on the evidence that Mr Balderstone did accept that all plan-enabled capacity being taken up was much less likely than Dr Fairgray thought.

[206] In those circumstances, it was open to the Court to prefer the evidence of Mr Thompson and to put little weight on the evidence of Dr Fairgray.

[207] In the end, even if there were an error, it did not have a material effect. The Court stated that while it preferred the evidence of Mr Thompson, it also said that in practical terms no witness had been able to properly assess the likely outputs of the

region over the life of the plan or over the following 30 years.[92] It was open to the Court to accept and rely on the data of actual subdivision applications and consents granted by the Council in the prior 18 month period following notification of the Decisions Version of the AUP.

[208] In conclusion, therefore, I do not consider the Council has made out that there was a mistake in the Court's characterisation of Dr Fairgray's evidence. But even if that was the case, this did not materially affect the outcome.

Fourth alleged error of law[93] — taking into account irrelevant considerations

[209] The Council submits that the Environment Court erred by taking into account the following irrelevant considerations:

(a) That the Court "should not travel far" from the provisions of the Council or IHP versions given it was not satisfied it had a fully accurate version of the AUP or that it had been referred to all of the various interrelated parts of the Plan, the changes made to it and appeals still outstanding;[94]

(b) A concern that the complexity of the AUP meant that minor changes in one part of the Plan may have "ripple changes" in other places (the butterfly effect);[95] and

(c) That the conclusions and reasons in the Council's decision were not supported either by reference to the IHP "decision" or by the factual matters underlying them.[96]

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92 At [239].

93 In the Notice of Appeal, the fourth alleged error of law is said to be a failure to have regard to relevant considerations relating to the evidence of Dr Curran-Cournane (soil scientist for the Council) and the Zakara agreement (which was based on the Council provisions). This was not pursued at the hearing. Although this ground was not formally abandoned, no submissions were made. I therefore do not consider this alleged error. What is entitled the fourth error in this judgment is the fifth alleged error in the notice of appeal and so on (following the headings used by the Council in its submissions).

94 *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [345].

95 At [345].

96 At [316] and [345].

[210] Ms Buchanan makes it clear that the Council is not suggesting that the Environment Court should not have discussed issues relating to the electronic nature of the AUP or the correct plan provisions that applied. Rather, she says, the Council's submission is that the Court took into account matters that do not form part of the statutory tests for plan changes. These (allegedly) irrelevant considerations led to the Court's view that it "should not travel" far from the provisions of either the IHP or Council.

[211] In response, Mr Littlejohn submits that the electronic nature of the AUP was a matter of fact and that the purpose of the Court's discussion in the first part of the decision was to make a finding as to what aspects of the AUP were operative or deemed approved. Mr Littlejohn also submits that the AUP was indeed complex, and it was entirely reasonable for the Court to be concerned with possible repercussions of the relief being sought by the other parties (and whether that relief was in fact within the scope of the appeals). Accordingly, he says that the Court did not err in "playing it safe" in reinstating the IHP provisions. In that regard, it was appropriate for the Court to acknowledge that the IHP had delivered a fully integrated and lawfully constructed unitary plan and that the best way not to disrupt that was to reinstate the IHP provisions rejected by the Council.

[212] Mr Littlejohn also says that the Council, in its submissions to the Environment Court, had (ironically) warned the Court against adopting provisions other than the sets provided by the IHP and the Council due to possible issues as to whether some of the provisions promoted by the other parties to the hearing were within the scope of the Court's jurisdiction.

[213] Mr Webb submits that the Environment Court needed to satisfy itself that it had an accurate Decisions Version of the AUP before it, so that it could understand what provisions the appellants wished to have changed. Mr Webb says that counsel agreed on a version of the AUP that was said to be the Decisions Version, except where it was noted there was a distinction. The Environment Court subsequently discovered that other changes had been made to the AUP pursuant to various Environment Court decisions and/or High Court appeals. That issue manifested itself because the Court

became aware that many of the witnesses had been using different versions of the AUP in preparing their evidence.

[214] Mr Savage also submits that it was imperative for the Court to be satisfied that it had before it the correct version of the Unitary Plan and there was considerable doubt as to which version was the correct one.

Discussion

[215] I do not consider the approach of the Environment Court warrants the criticism that the Council makes. First of all, the Court was required to be satisfied that it had the correct version of the AUP before it. As Mr Webb points out, some of the expert witnesses had been relying on an incorrect version of the Plan. Thus, the Court first needed to determine the existing planning framework within which it had to align provisions that were in contest in the proceedings before the Court. I do not consider it was an error of law for the Court to determine the existing planning framework for that purpose. The Court was rightly concerned to ensure that it had a fully accurate version of the Plan. It stated, for example:

> [41] The Court was concerned that this explanation did not enable us to know which provisions were the subject of appeal by the various appellants.
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> …
>
> [44] Within those indexes are a number of different plan versions and updates. The Court was unclear as to which one it was intended to refer to. The notified version (PAUP notified) is relevant only to the question of jurisdiction for submissions, while the recommendation version of the IHP is, of course, relevant for comparison purposes. However, it is difficult to find, within the versions given, the version decided by the Council. Mr Duguid's first affidavit does little to assist this, and the Court pointed out that it was still concerned as to whether or not the document met the purposes of the LGATPA and/or RMA legislation or the criteria of the Electronic Transactions Act 2002 referred to by Mr Duguid.
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> …
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> [47] As it turned out, that assertion [that the hard copy provided to the Court represented the Decisions Version] has proved to be incorrect. This is because certain changes to the decisions version have been made by the High Court and the Environment Court. It is only by chance that we became aware of some of the critical changes to the provisions made in the High Court by consent in the case of *Royal Forest & Bird Protection Society of NZ Incorporated v Auckland Council.*

…

> [61] Of critical importance to the current proceedings is the fact that the changes made in both those decisions are incorporated in the hard copy version of the plan we have been given as if they are part of the Council's decisions version. There is no indication that they have been inserted as a result of the appeals.
>
> [62] This is of critical importance given that it appears to us that many of the witnesses were using different versions of the plan in preparing their evidence. Witnesses such as Dr Bellingham, for example, advised us they had used the Decisions Version of the plan. Other witnesses apparently have relied upon the changes made after the appeals were filed and after July 2017, particularly to D9.3.
>
> …
>
> [78] For current purposes, we conclude that we will have reference to both sets to understand both the pleadings, the witnesses' evidence (which is based on various versions) and the outcomes that must be considered by the Court. To say that this is a most unsatisfactory state from the Court's perspective is an understatement.

[216] Having regard to those above concerns, I do not consider the Court erred when it said:

> [345] … Given that we are still not satisfied that we have a fully accurate version of the Plan, nor have we been referred to all of the various interrelated parts of that Plan, the changes made and the appeals still outstanding, we are reluctant to travel far from the provisions of the Council or the IHP.

[217] As to Ms Buchanan's second point, I accept that it was reasonable for the Environment Court to be concerned that minor changes in one part of the Plan may have a ripple effect in other parts. This was a plan where, to adopt Mr Littlejohn's expression, much of the paint was dry. The Court may well have fallen into error had it inserted into this picture provisions that were discordant with the overall outcome conceived of and made operative by the Council itself.

[218] Turning to Ms Buchanan's third point, I do not accept the Court was in fact saying that the Council's decision needed to be supported by the IHP's reasons and recommendations. In my view, the Court was simply saying that the Council's reasons were not supported by the evidence before it, which was also before (and relied on by) the IHP. The Court concluded its reference to the Council decision by saying:[97]

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[97] At [345].

> … we conclude that the Council failed to understand that the incentivisation of protection addressed a matter of significant importance in terms of the RMA, the NZCPS and in terms of the relevant Policy and Plan documents.

[219] That emphasises that the Court was not saying the Council's decision needed to be supported by the IHP's reasons.

[220] Finally, under this heading, the Council makes a complaint that the Environment Court erred by failing to consider in detail each of the sets of provisions before it. In my view it was within the Court's powers to find in favour of the IHP's provisions. Doing so obviated the need to consider the other permutations put forward by other parties. In any event, as a matter of record, none of the appellants who were putting forward those alternative provisions has complained about that.

[221] For all the above reasons, I do not uphold the Council on the fourth alleged error of law.

Fifth alleged error of law — failure to give reasons commensurate with importance of decision

[222] Ms Buchanan submits that the Court did not give reasons or sufficient reasons for its conclusions that the IHP' provisions better met the statutory tests and should be preferred. The Court, in its decision, failed to give reasons commensurate with the importance of the subject matter before it, including in relation to:

(a) The Court's conclusions that the Council's RPS Objective B9.4.1(1) and B9.4.1(4) and Policies B9.4.2(1), B9.4.2(3) and B9.4.2(5) should be deleted or amended;

(b) The Court's conclusions about the amendments that should be made to the objectives and policies in Chapter E39 Subdivision — Rural; and

(c) The parties' preferred regulatory incentive subdivision methods, including the standards.

[223] Ms Buchanan submits that the provisions to be decided upon by the Court were significant for a number of reasons, including that the rural areas comprise 70 per cent

of the land mass of the Auckland region. Further, the RPS also identifies that rural areas are facing significant pressures from the expansion of urban areas and people's lifestyle choices and recreational activities.

[224] Mr Littlejohn submits that the Court was not required to go into the minutiae of reasons for each paragraph. He says that, once the Court had reached the view that one set of provisions was a better fit with the Plan than other sets of provisions, it was open to the Court to adopt the reasoning of the IHP along with its provisions. He refers to the Court's statement that "Our reading of the policy framework from the top down as an integrated package helps us to comfortably agree with the IHP approach and reasoning".[98]

[225] Mr Littlejohn submits that it is not an error of law for a court on appeal to agree with and accept the reasoning of the body appealed from, especially where the reasoning and outcome complied with all relevant statutory provisions. Here, Mr Littlejohn is referring to s 145 of the LGATPA.

[226] Both Mr Webb and Mr Savage submit that the Court's overall reasoning and analysis of the Council and IHP provisions are self-evident. Mr Webb further submits that no further explanation was required as the Environment Court was not inserting fresh provisions, rather it was re-establishing the form of the AUP settled by the IHP.

Discussion

[227] In *Lewis v Wilson & Horton Ltd*,[99] the Court of Appeal discussed three main reasons why the provision of reasons by judges is desirable.[100] In summary, those reasons are:

(a) Provision of reasons is an important part of openness in the administration of justice.[101] Transparency in the operation of the

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98 At [309].
99 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).
100 At [76].
101 At [76]–[78].

judicial process is enhanced through the provision of adequate reasons for a decision.[102]

(b) Those who exercise judicial power must address the right questions and correctly apply the law.[103]

(c) The giving of reasons imposes a discipline on a judge to explain his or her decision "which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice".[104]

[228] No New Zealand Court has yet gone so far as to decide that there is an "inflexible rule of universal application" requiring judges to provide a reasoned decision.[105] That question was left open by the Court of Appeal in *Lewis* declining to consider whether to revisit what had been said in an earlier decision of the Court of Appeal in *R v Awatere*.[106] In that case, the Court referred to the need to provide reasoned decisions as "good judicial practice".[107]

[229] In *Lewis*, the Court of Appeal acknowledged that "reasons may be abbreviated" and, in some cases, "will be evident without express reference".[108]

[230] The obligation to give reasons is no less required in decisions of the Environment Court under the RMA. In *Murphy v Rodney District Council*, Baragwanath J held:[109]

> [25] The Privy Council in *R v Taito* [2003] 3 NZLR 577, 599 para [17] endorsed the observations of the Chief Justice in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565-567 paras [74-82] as to the duty of a decision-maker to give reasons. Of present relevance are the points that failure to give reasons means that the lawfulness of what is done cannot be assessed by an appellate Court; and that the duty to give reasons requires the decision-maker to outline the intellectual route taken, which provides some protection against error. The

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102 At [79].
103 At [80].
104 At [82].
105 *Potter v New Zealand Milk Board* [1983] NZLR 620 (HC) as cited in *Hollander v Auckland Council* [2017] NZHC 2487 at [50]; *R v Awatere* [1982] 1 NZLR 644 (CA) at 648–649; *R v MacPherson* [1982] 1 NZLR 650 (CA); and *R v Jefferies* [1999] 3 NZLR 211 (CA).
106 *Lewis v Wilson & Horton Ltd*, above n 99, at [85] referring to *R v Awatere*, above n 105.
107 *R v Awatere*, above n 105, at [648]–[649].
108 *Lewis v Wilson & Horton Ltd*, above n 99, at [81].
109 *Murphy v Rodney District Council* [2004] NZRMA 393, [2004] 3 NZLR 421 (HC) at [25]–[26].

> reasons may be succinct; in some cases they will be evident without express reference.

[231] More recently, the obligation to give reasons was considered by the Court of Appeal in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*.[110] That was a case where the appellant challenged recommendations by the IHP, and the Auckland Council's decision based on those recommendations, in relation to the AUP. The case for Mr Belgiorno-Nettis was that neither body gave reasons or adequate reasons for the recommendations and the decision respectively. The Court reiterated the principles from *Lewis*.

[232] In this case, the appeals concerned a number of Plan provisions at the RPS, regional and district levels. At the RPS level, two objectives and three policies in the Council's Decisions Version of RPS Chapter B9 were subject to challenge. These were: Objective B9.4.1(1), relating to fragmentation of rural land, and Objective B9.4.1(4), relating to land subdivision and indigenous biodiversity, and supporting Policies B9.4.2(1), B9.4.2(3) and B9.4.2(5) together with B9.5, Principal reasons for adoption.[111]

[233] In its decision, the Court did recognise that some of the RPS objectives and policies I have referred to above were subject to appeal. In the part of the decision where the Court sets out parts of the RPS, Chapter B9 is referred to as follows:

> [119] B9 contains the statement in relation to the rural environment, and this notes that the rural parts of Auckland also contain important natural resources, including native bush, significant ecological areas and outstanding natural landscapes. It goes on to state:
>
> > The outward expansion of urban areas and people's lifestyle choices in recreational activities place significant pressures on maintaining the amenity values and quality of the rural environment in rural areas. Specific issues in the Auckland region are:
> >
> > - protecting the finite resource of elite quality soils from urban expansion;
> > - managing subdivision to prevent undue fragmentation of large sites in ways that restrict rural production activities;

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110 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 5.

111 A comparison table of the parties' rural subdivision provision for B9 as well as other provisions as provided to the Environment Court is annexed to this judgment.

- addressing reverse sensitive effects which rural residential development can have on rural production activities; and

- managing the opportunities for countryside living in rural areas in ways that provide for rural residential development in close proximity to urban areas and the larger rural and coastal towns and villages, while minimizing the loss of rural production land.

[120] The Objectives in B9.2.1 and the associated Policies, and the provisions in respect of Rural subdivision are annexed hereto and marked "D". We have also included the principle reasons for adoption and we will not cite these in full. Nevertheless, they clearly relate to rural areas. Although there is a general avoid, remedy or mitigate provision to avoid significant adverse effects, the policies do not themselves address significant indigenous ecological areas. The Objective at B9.4.1 of the Council Decisions Version of the plan notes that "(4) Land subdivision protects and enhances significant indigenous biodiversity." The following Policies include:

> (1) Enable the permanent protection and enhancement of areas of significant indigenous biodiversity.

[121] Fragmentation is addressed in B9.4.2(3), allowing the transfer of residential potential from other rural areas to Countryside Living zones to reduce the impact of fragmentation of rural land from in-situ subdivision.

[122] These provisions, however, are subject to appeal, and form some of the key provisions in this case. Similarly, subsection (5) states:

> (5) Provide the amalgamation and transfer of rural sites to Countryside Living zones to remedy the impact of past fragmentation of rural land from in-situ subdivision.

and the following:

> **B9.5. Principal reasons for adoption**
>
> The purpose of sustainable management includes safeguarding the life-supporting capacity of natural resources now and in the future. This includes protecting the productive potential of the land to provide for present and future generations as well as significant indigenous biodiversity. It is also to maintain and enhance the character of rural areas for their contribution to regional amenity values, particularly the landscape and natural character.

are also subject to appeal.

[123] Finally, the last paragraph of the reasons is also subject to appeal, providing:

> The subdivision policies also enable and encourage the transfer of the residential potential from sites in production rural zones to Countryside Living zones and for title boundaries to be amalgamated and a residential development right to be realised in Countryside Living zones.

[234] However, while the decision refers to these provisions, it contains no substantive discussion of the differences between the parties' proposed RPS provisions and it does not assess their merits against the statutory tests. In the parts of the decision where the Court assesses which provisions were better, the reference is only to the sections of the RMA that relate to the assessment of district plan level provisions.[112]

[235] The Court did not expressly consider the implications of the deletion and/or amendment of the Council's RPS objectives and supporting policies, including whether the deletion or amendment of the provisions might result in a gap in the RPS or a disconnect in the cascade between the RPS and district plan provisions.

[236] For example, the decision does not substantively discuss the issue of subdivision protecting or enhancing "degraded land". This was relevant to the Court's assessment of the IHP's version of Objective B9.4.1(4) and supporting Policy B9.4.2(1); or why Objective B9.4.1(1), relating to the fragmentation of land, in the Council's version, by sporadic and scattered subdivision should be deleted.

[237] I accept Ms Buchanan's submission that the error is material given the importance of the higher order RPS provisions and their role in the RMA planning hierarchy.

[238] Turning to the district plan provisions, at the beginning of the decision, the Court referred to the fact that the parties differed significantly on how incentivised protection should be provided for, stating:

> [4] However, the parties differ significantly on how incentivised protection should be provided for, including in terms of standards and assessment criteria, and also in respect of any caps on the number of dwellings that can be inserted as part of those standards. We refer to Annexure A to this decision, which sets out in relatively brief terms the various positions of the parties before this hearing.

[239] Annexure A was a table setting out a high-level summary of the key differences between the parties' rural subdivision rules which had been part of the evidence of the

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112 See, for example, *Cabra Rural Developments Ltd v Auckland Council*, above n 1, at [279].

Council's planning witness. There is then only a brief reference to the differences at [234] and [235], but no analysis.

[240] The Court notes what it describes as the key Objectives the subject of the appeal, "being E39.2(9), (10), (12) and (14)".[113] However, the Court did not engage in a substantive discussion of those objectives. The Court merely set out the positions and did not apply any statutory tests. In terms of the rules, the decision did not set out why the IHP's rules, including standards, better met the statutory criteria.

[241] There was one rule-related issue which the Court did consider in detail, namely whether wetland or indigenous vegetation eligible for subdivision opportunities needed to be in the SEA Overlay. The Court's consideration, however, was only from an indigenous biodiversity perspective. It did not, for example, analyse whether revegetation planting should be contiguous to SEAs as sought by the Council in its provisions.

[242] Standing back and considering the rules in Chapter E39, they determined the amount of subdivision that would be enabled by the AUP as a restricted discretionary activity. The standards in the rules in dispute determined when a more onerous activity status would apply. I therefore accept the submission made by the Council that the rules were critical provisions at issue in the appeals.

[243] I accept the Council's submission that the decision does not outline the intellectual route taken by the Court for the RPS provisions and for the majority of the district plan rules.

[244] I return to Mr Littlejohn's submission that it is not an error of law for a Court on appeal to agree with the reasoning of the body appealed from and accept it, especially where that reasoning and outcome comply with the relevant statutory provisions. The hearing before the Environment Court was a hearing de novo which involved appeals from the decisions of the Council, not the IHP. It was the Council's decision that the Court was required to have regard,[114] and the statutory context under

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113 At [225]–[229].
114 RMA, s 290A.

the LGATPA in my view did not remove the obligation on the Court to give reasons for its decision.

[245] In conclusion, I consider that the Court did not give sufficient reasons for its decision. This error is material given the context and importance of the subject matter before the Court.

Sixth alleged error of law — failure to determine issues in the proceeding

[246] The Council submits that the Court's failure to adjudicate on all issues before it is an error of law. The Council says the Court was required to determine whether there was jurisdiction to include a proposed amendment to Rule E39.6.4.6(2) to provide for the staging of transfers of donor sites to receiver sites for TRSS. The Court did not do so and left it to the parties to determine.

[247] Some context is required. The Court, in its decision, said:

> [313] Both the Council or IHP provisions seek, as a preference, to encourage transferable rights of subdivision out of the rural area. The Council suggests that, at the current time, this is achieved by making in-situ development more difficult, thus encouraging people to try and utilise transferable rights. Unfortunately, it appears that the problem with transferable rights is a systemic one, relating to the time differences between developing the protected area and the requirement of the subdivider to proceed with the subdivision as soon as possible, and the fact that donors and recipients must unite. Making alternatives more difficult takes the focus away from encouraging transferable rights to encouraging in-situ subdivision and applications for non-complying consent.

[248] However, neither the IHP version nor the Council version of the Plan provided for staging. Cato Bolam had proposed an amendment by way of addition to Rule E39.6.4.6(2) as follows (the amendment is in italics):

> (2) A donor site (being the site with the indigenous vegetation, wetland or the revegetation planting to be protected) must not be the same site as a receiver site. *The application may provide for the staging of transfers of donor sites to receiver sites*.

[249] The Court appeared to consider that this proposal had merit, saying:

> [346] Accordingly, we have concluded that the purpose of the Act and policy statements and the superior documents are best met by reinstating the objectives, policies and methods of the IHP decision that were altered by the

> Council (with minor improvements agreed to drafting). The one exception to this is the alteration of the staging position to strengthen the position of the TRSS. In that regard, there was some argument as to whether or not this was within the scope of the appeal. In our view, it better meets the intent of the IHP and is consequential upon the other decisions we have made. Nevertheless, we are concerned as to whether or not this was actually the subject of appeal.

[250] The Court then said:

> [349] The Court annexes as "J" a general guide to amendments appropriate to the Plan. The Council is to circulate its proposed amended provisions, including:
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> (c) provisions similar to "J";
>
> (d) agreed changes as appropriate;
>
> (e) proposed wording for staging (based on Ms Pegrume's evidence)
>
> within 20 working days. Parties are to provide their comment within a further 15 working days. Council are to file and serve its preferred wording with the Court in a further 10 working days. Where there remains a difference, the Council memorandum shall set out the various wordings proposed, and its reasons for their preference.

[251] Rule E39.6.4.6(2) was set out in Annexure J in the terms as referred to at [248] above but with a footnote added which said:

> This is an amendment sought by appeal and we understand to be subject to an argument as to scope. It is included here as the court can see the benefit of such a provision if the parties conclude that it is within scope and can be accommodated.

[252] With that context, I return to Ms Buchanan's submissions. She submits that the Council's clearly stated position at the hearing was that there was no jurisdiction to provide for staging on two grounds. First, the Council's Decisions Version provisions and the IHP recommended provisions were the same in relation to staging and did not provide for staging. Consequently, there was no conflicting decision of the Council, and no right of appeal arose under s 156(2) of the LGATPA.

[253] The second reason was that the amendment proposed to Rule E39.6.4.6(2) was more enabling than the IHP recommended provisions and was outside the scope of the appellants' notices of appeal which sought to reinstate the IHP provisions.

[254] Ms Buchanan submits that the Court's failure to address this jurisdictional issue is a matter of substance because the Court found that the IHP provisions were more efficient than the other options on the basis that they included staging. This was therefore a determining factor in the outcome of the decision.

[255] Mr Littlejohn submits that the Court's decision in respect of this issue is properly to be treated as interim on the basis that the Court has left the issue of scope to the parties and, in the event they cannot agree, it will hold another hearing.

[256] Mr Webb submits that this issue was a potential one only and that the Court was simply giving the parties an opportunity to discuss and agree on what the final provisions should be. If, for example, the parties did want the particular provision included, then a scope determination would be required at that stage. If the parties did not want the provision, then the issue simply would fall away.

[257] Mr Savage notes that this is not a matter that directly affects his clients. He submits, however, that the Court has simply giving the parties the opportunity to potentially agree amendments to the TRSS regime. If those amendments cannot be agreed or if there is a jurisdiction issue raised, then the Court will no doubt rule.

[258] In my view, the Court should have made a decision on whether the amendment to include staging was within the scope of the appeal. The Council made its position clear to the Court and the Court was clearly alive to the issue, having regard to its comment at the end of [346] (as set out in [249] of this judgment). A question of jurisdiction is for the Court. It is not for the parties to agree to include a provision if it does not fall within the scope of the appeal.

[259] However, the decision, at least in respect of the provision under discussion is an interim one and the issue of whether the provision as to staging can be added is still one which the Court has the opportunity to determine. Any such determination will be susceptible to further appeal under s 299 of the RMA. It is not, however, ideal for there to be a potential further and separate appeal on this issue.

[260] I do not accept the Council's submission that the Court found that the IHP provisions were more efficient than the other options before it on the basis that they included staging. The addition of staging was not a determining or critical factor in the Court's decision preferring the IHP recommendations. I do not consider that [346] of the decision, referred to in [249] above, can be interpreted in the way submitted by Ms Buchanan. The Court's comment at [329] of the decision was cast in a similar way when the Court said, "Overall we have concluded that the IHP provisions, with a modification to staging, are more efficient in achieving the outcomes of the Plans". The Court favoured the IHP provisions for other reasons.

[261] I therefore find against the Council in relation to this alleged error of law.

Questions of law and answers[115]

[262] I set out the questions of law and my answers as follows:

1. Did the Environment Court fail to take into account and properly apply mandatory considerations under the RMA by:

(a) Failing to give effect to Policy 13 and Policy 15 of the NZCPS, as required by ss 62(3) and 75(3)(b) of the RMA?

Answer: Yes.

(b) Erring in its interpretation of and application of Policy 11 of the NZCPS within the coastal environment?

Answer: No

[115] The questions of law under each main heading are not all set out in the order in which they appear in the notice of appeal but rather they follow the order in which the Council addressed them in its submissions and consequently the order in which they are addressed in this judgment. There are also some questions in the notice of appeal which the Council did not pursue in its submissions. I have therefore not reproduced those questions here.

(c) Failing to consider or sufficiently consider whether the IHP provisions would give effect to relevant provisions of the RPS, as required by s 75(3)(c) of the RMA?

Answer: Yes.

(d) Failing to have regard to or sufficiently consider pt 2 of the RMA, as required by ss 61(1)(b) and 74(1)(b) of the RMA?

Answer: No

(e) Failing to have regard or sufficient regard to the actual and potential effects on the environment, including any adverse cumulative effects of rural subdivision, as required by s 76(3) of the RMA?

Answer: No

2. Did the Environment Court err in its interpretation of sections of the RMA and the AUP when it found that:

(a) Similar tests would apply whether a rural subdivision application was a non-complying, discretionary or restricted discretionary activity?

Answer: Yes

(b) A restricted discretionary activity is no less onerous than a discretionary activity?

Answer: Yes

(c) The critical factors applying to a rural subdivision consent in relation to effects would be the same regardless of activity status?

Answer: Yes

(d) The application of assessment criteria on a case-by-case basis was to be preferred for addressing potential significant adverse effects over standards determining activity status?

Answer: Yes

3. Did the Environment Court come to a conclusion without evidence or one to which it could not reasonably have come to on the evidence, in particular in relation to:

(a) The catchment of the HGMP as the coastal environment for the purposes of the AUP and the majority of the Auckland region being within the coastal environment?

Answer: Yes, but the error was not material.

(b) Its conclusions in relation to the evidence of Council witnesses regarding Mr Balderston's assessment of rural subdivision capacity?

Answer: No. (Although the question refers to "witnesses", submissions were advanced only in relation to one witness, Dr Fairgray).

4. Did the Environment Court err by having regard to the following irrelevant considerations:

(a) Its concern about the complexity of the AUP?

Answer: No

(b) Whether it had a fully accurate version of the AUP or had been referred to all of the various interrelated parts of the AUP, the changes made and appeals still outstanding?

Answer: No

(c) Whether the IHP's recommendations supported the Council's decision on the AUP rural subdivision provisions?

Answer: No

5. Did the Environment Court fail to give reasons or sufficient reasons commensurate with the importance of the decision, including in relation to:

(a) The Court's conclusions that the Council's RPS Objectives B9.4.1(1) and B9.4.1(4) and Policies B9.4.2(1), B9.4.2(3) and B9.4.2(5) should be deleted or amended?

Answer: Yes

(b) The Court's conclusions about the amendments that should be made to the objectives and policies in Chapter E39 Subdivision Rural?

Answer: Yes

(c) The parties' preferred regulatory incentive subdivision methods, including the standards relating to type of feature, minimum feature sizes and caps on the maximum number of sites that could be created and whether revegetation planting should be continuous to existing SEAs?

Answer: Yes

6. Did the Environment Court fail to determine whether a provision relating to the staging of donor sites to receiver sites for TRSS was within 'scope' and within the Court's jurisdiction?

Answer: Yes, but the decision as it relates to this issue is an interim decision. It is still open to the Court to determine it.

Relief

[263] I have found in favour of the Council on the first alleged error of law (issues one and three) and second and fifth alleged errors of law.

[264] The appeal is therefore allowed in part.

[265] The relief sought by the Council in its notice of appeal is as follows:

(a) That the appeal be allowed and the decision of the Environment Court be set aside;

(b) That the High Court substitute its own determination under r 21.14(a) of the High Court Rules 2016; and

(c) In the alternative, that the matter be remitted to the Environment Court under r 21.14(b) of the High Court Rules 2016.

[266] Having regard to the errors, I consider that the decision of the Environment Court should be set aside. As that Court is a specialist Court it is appropriate that it reconsider the issues rather than this Court doing so. I therefore make orders:

(a) setting aside the decision; and

(b) remitting the matter to the Environment Court.

Costs

[267] My preliminary view is that the Council as the (partially) successful party is entitled to costs. However, as I did not hear from the parties on costs, I reserve the question of costs. I encourage the parties to agree costs and file a joint memorandum. Any such joint memorandum should be filed within 15 working days of the date of this judgment.

[268] In the event costs cannot be agreed, the Council may file its costs memorandum within five working days from the date of the joint memorandum. The respondents may reply within a further five working days.

[269] Memoranda should not exceed five pages (excluding any attachments).

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Gordon J